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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	**Case No. 3:10-cr-00298-RRB-1**
Plaintiff,	**REPLY TO MOTION FOR HABEAS CORPUS RELIEF AND FOR INTERIM CONDITIONAL RELEASE PENDING DETERMINATION REGARDING THE APPLICABILITY OF THE FIRST STEP ACT AMENDMENT TO THE GOOD TIME CREDIT STATUTE**
v.	
MARK JOHN WALKER,	
Defendant.	

Introduction

The government's four-page response to Mr. Walker's motion for habeas corpus relief asserts that this Court lacks authority to determine the disputed issues, but declines to address the merits of Mr. Walker's claim that he is presently in custody in violation of the laws and Constitution of the United States. The government's jurisdictional claim is without merit. The Supreme Court has recognized that the place of filing a habeas corpus petition is a matter of venue,

not subject matter jurisdiction. Here, the District of Oregon is the most appropriate venue under both 28 U.S.C. §§ 2241 and 2251 and pursuant to the Court's ancillary jurisdiction. Additionally, the exhaustion doctrine that the government invokes is inapplicable here. Because the government knowingly chose to omit a merits argument from its response in this time-sensitive case, the Court should either grant immediate conditional release to avoid further irreparable injury, with leave for the government to answer on the merits, or grant immediate relief on the merits, deeming the government's failure to timely respond as a waiver.

Argument

A. This Court Has Jurisdiction To Determine Whether The Sentence Of Imprisonment Imposed By This Court Has Been Satisfied And Whether Mr. Walker's Continued Incarceration Is Unlawful.

Congress, through the First Step Act of 2018, has clarified its intent that prisoners receive 54 days of good conduct time per year under 18 U.S.C. § 3624(b). In his motion, Mr. Walker asserted that he completed serving his sentence on January 28, 2019, and he should be immediately released, because the Bureau of Prisons (BOP) has credited him with only 47 days of good conduct time per year instead of 54 days. Accordingly, the BOP's current projected release date of April 8, 2019, for Mr. Walker's 10-year sentence is 70 days too late.

In his motion, Mr. Walker invoked this Court's constitutional habeas corpus jurisdiction, its statutory habeas corpus jurisdiction under 28 U.S.C. §§ 2241 and 2255, and its ancillary jurisdiction to vindicate its authority and effectuate its decrees. The government's response solely addresses § 2241, claiming that all actions under § 2241 must be brought in the district of confinement, which in this case is Texas. Contrary to the government's position, the place of filing is not an unyielding jurisdictional requirement. Here, the District of Oregon is the proper forum

for litigation of these claims because the entire constellation of factual circumstances relevant to this case arise in Oregon or are based on the Department of Justice's national policy. The activity of the prison warden in Texas is not at issue. Alternatively, § 2255, which requires filing in the district of sentencing, provides a basis for this Court to ensure that Mr. Walker does not overserve his lawful sentence. And, in any event, the Court has ancillary jurisdiction to vindicate the lawful execution of the judgment.

1. The First Step Act Of 2018 Clarified Congressional Intent That Prisoners Are Eligible To Receive 54 Days Of Good Conduct Time Credit Per Year Of The Sentence Imposed.

The First Step Act's amendment to 18 U.S.C. § 3624(b) clarified what the statute has always meant but was not clearly articulated. The legislative history confirms that the good-time fix was intended "to clarify congressional intent" regarding the full scope of the good time credit statute:

> Amends Section 3624 of title 18 of the U.S. Code *to clarify congressional intent* behind good time credit, which is earned for "exemplary compliance with institutional disciplinary regulations," to ensure that a prisoner who is serving a term of imprisonment of more than 1 year may receive good time credit of 54 days per year toward the service of the prisoner's sentence.

Staff of S. Comm. on the Judiciary, 115th Cong., S.3649, *The First Step Act Section-by-Section Summary*, at 3 (Nov. 15, 2018) (emphasis added).[1] The legislative history repeatedly references the good time amendment as a "fix" to conform the statute to the original intent:

[1] Available at https://www.judiciary.senate.gov/download/revised-first-step_-section-by-section

- "In fact, many of the provisions in this bill are there because they specifically asked for them. For example, Democrats asked for a fix to the way the Bureau of Prisons calculates good time credit. *We made changes to clarify congressional intent on that section*."[2]

- "Turning to the bill we are debating today, I recognize that the FIRST STEP Act includes *a fix to the calculation of good time credit*, which I have sought for many years. *Calculating good time credit as Congress had originally intended is a serious improvement* made by this bill."[3]

- "On the prison reform side, this legislation includes several positive reforms from the House-passed FIRST STEP Act. The bill makes a good time credit fix and revises the good-time credit law to accurately reflect congressional intent by allowing prisoners to earn 54 days of credit per year, rather than 47 days."[4]

- "The Leadership Conference wrote: 'Bringing fairness and dignity to our justice system is one of the most important civil and human rights issues of our time. This bipartisan bill offers some modest improvements to the current federal system—such as revising mandatory minimum sentences for certain drug offenses and fixing the 'good time' credit calculation. For this reason, we urge the Senate to vote yes on cloture and no on all amendments [to the FIRST STEP Act].'"[5]

The clarified statute means that Mr. Walker should have earned 70 more days of good time credit than the BOP is providing him. Therefore, Mr. Walker completed the Court's sentence on January 28, 2019. *See also* Steven Nelson, *Drafting error stalls inmate release under Trump plan*,

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[2] 115 Cong. Rec. H4318 (daily ed. May 22, 2018) (statement of Rep. Bob Goodlatte) (emphasis added) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447705).

[3] 115 Cong. Rec. H4319 (daily ed. May 22, 2018) (statement of Rep. Bobby Scott) (emphasis added) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447705).

[4] 115 Cong. Rec. S7314 (daily ed. Dec. 5, 2018) (statement of Sen. Ben Cardin) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447490).

[5] 115 Cong. Rec. S7775 (daily ed. December 18, 2018) (statement of Rep. Dianne Feinstein) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447203).

Washington Examiner (Jan. 25, 2019).[6] The government's response does not assert otherwise, nor does it provide any reason why the First Step Act's clarification of the good time credit statute should not be implemented right away.

2. The Government's Jurisdictional Argument Fails Because The Place Of Filing Is An Issue Of Venue Rather Than Subject Matter Jurisdiction.

Mr. Walker's motion involves a sentence imposed by the Oregon district court for a crime committed in Oregon, and it requests his immediate release to Oregon to commence supervised release under the supervision of the Oregon probation office. Yet the government claims that this Court is not the appropriate decider of the merits because Mr. Walker's claim involves "the manner, location, or conditions of a sentence's execution" and therefore "must" be filed in the district of confinement. Response at 3. Because the BOP at present has decided to house Mr. Walker at a facility in Texas, the government would have this case decided there.

The Ninth Circuit has never held the place of filing requirement to be a rigid jurisdictional mandate. The two cases the government cites in fact state the rule with the proviso, "generally." *Harrison v. Ollison*, 519 F.3d 952, 956 (9th Cir. 2008) ("'Generally, motions to contest the legality of a sentence must be filed under § 2255 in the sentencing court, while petitions that challenge the manner, location, or conditions of a sentence's execution must be brought pursuant to § 2241 in the custodial court.'" (quoting *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000))).

[6] Reported at https://sentencing.typepad.com/sentencing_law_and_policy/2019/01/latest-discussion-of-fixing-timing-problems-with-expansion-of-good-time-credit-in-the-first-step-act.html

In general, the proper respondent for a challenge to an individual's physical confinement in the execution of a sentence is the "immediate custodian," that is, the "person with the power to produce the body of such party before the court or judge." *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)). Justice Kennedy, the deciding vote in *Padilla*, stated in his concurrence his view that "the question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue," subject to waiver and exceptions. 542 U.S. at 451-52 (Kennedy, J., concurring); *see also Armentero v. I.N.S.*, 412 F.3d 1088, 1098 (9th Cir. 2005) ("This historical context explains why the immediate custodian is not an inflexible, jurisdictional mandate, but instead is subject to exceptions based on practical considerations.") (citing *Padilla*, 542 U.S. at 451-42 (Kennedy, J., concurring)). The Ninth Circuit has recognized that, although the sentencing court may not always have personal jurisdiction, both the custodian and sentencing courts have subject matter jurisdiction, and lack of personal jurisdiction is waivable. *Smith v. Idaho*, 392 F.3d 350, 354-55 (9th Cir. 2004).

The government's reliance on *Padilla* is problematic because the Court addressed a petition filed for an individual outside the federal criminal justice system: a designated enemy combatant being held in a South Carolina military brig whose lawyers filed in New York against then-Secretary of Defense Donald Rumsfeld as the respondent. 542 U.S. at 431-32. The Court recognized that federal prisoners generally file for post-conviction relief in the sentencing courts. *Id.* at 443 (citing *United States v. Hayman*, 342 U.S. 205, 212-219 (1952)). The Court explained that the rationale behind the place of confinement rule was to prevent the "rampant forum shopping" that would occur if a prisoner could "name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction." *Padilla*,

542 U.S. at 447. Here, Mr. Walker is invoking the congressionally-favored forum for matters involving sentencing, and because this forum is where the facts relevant to the case arose, there is no concern of forum shopping by the petitioner. By contrast, the government would have the ability to preclude jurisdiction in the district most closely associated with the case simply by designating the prisoner to one of its 122 institutions scattered throughout the United States. Challenge to matters involving this Court's judgment should not be left in the hands of whatever random place of confinement the government chooses.

Even if the Court were to find that the motion should have been filed elsewhere, the remedy would not be outright dismissal, but transfer to a different venue. *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004) (exercising jurisdiction and transferring proceedings to different venue); *see also Hernandez*, 204 F.3d at 866 (holding that the sentencing court cannot "deprive[] [the petitioner] of a ruling on the merits of his claim" by simply dismissing it for lack of jurisdiction, but that the Court should "transfer the action back to the [custodial court]" when another venue is proper). Given the irreparable harm to Mr. Walker from his continued incarceration beyond the lawful expiration of his sentence, this Court should grant the requested interim relief before making any transfer decision.

3. In The Context Of Continued Detention After Completion Of The Criminal Sentence Imposed By This Court, 28 U.S.C. § 2255, Constitutional Habeas Corpus, And Ancillary Jurisdiction Empower This Court To Grant Relief.

Alternatively, if the Court determines that § 2241 is not available, the motion is properly filed under 28 U.S.C. § 2255(a), which provides:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was

> without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Under § 2255(a), a motion is properly filed in "the court which imposed the sentence[.]"

Section 2255(a) applies here because Mr. Walker is claiming the right to be released on the ground that his sentence, if calculated to require that he serve more than the 85% minimum that Congress intended, is unlawfully imposed and subject to collateral attack. The motion is timely because Mr. Walker filed within one year after the facts supporting his claim came into existence. 28 U.S.C. § 2255(f)(4).

More broadly, § 2255 establishes congressional intent that the sentencing court have control over all post-conviction challenges involving the sentence. Section 2255 was intended to incorporate the protections of constitutional habeas corpus for challenges to sentences in federal criminal proceedings. *See Sanders v. United States*, 373 U.S. 1, 8 (1963). The statutory remedy's "sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum[.]" *Id*. at 13 (quoting *Hayman*, 342 U.S. at 219). The full range of constitutional protection against unlawful confinement in the context of criminal prosecutions are afforded under § 2255. In keeping with habeas principles being decided in the "more convenient forum," this Court as the sentencing court should decide whether the term of imprisonment imposed by this Court's judgment has been served.

Third, the Court has ancillary jurisdiction to effectuate its decrees and vindicate its authority. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379-80 (1994). The government is holding Mr. Walker past the completion date for the sentence this Court imposed.

The judgment signed by this Court provides the only authority for Mr. Walker's continued detention. 18 U.S.C. § 3621(a) and (c). This Court's supervised release is being retarded by the government's failure to put the congressional clarification into immediate effect. Those circumstances establish precisely the situation in which this Court has the authority—and is the most proper authority—for determining whether Mr. Walker should be released because he has served more time than the judgment allows.

B. Controlling Precedent Forecloses The Government's Claim That Exhaustion Of Administrative Remedies Must Precede Filing While The Defendant Is Suffering Irreparable Injury From Unlawful Incarceration, Especially Where Any Such Resort Would Be Futile.

Without providing any argument, the government makes a blanket assertion that a petitioner must exhaust his administrative remedies before seeking habeas corpus relief under 28 U.S.C. § 2241. Response at 3 (citing *Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004)). The government makes no attempt to rebut the circumstances that excuse exhaustion, as set out in Mr. Walker's motion. Motion at 12-13 (citing *Madigan v. McCarthy*, 503 U.S. 140, 146-49 (1992)). In this case, exhaustion should be excused because Mr. Walker faces imminent irreparable harm in the form of over-service of his lawful sentence. And exhaustion is futile because the Department of Justice has stated its position that the good time credit statute is not effective immediately. In any event, the exhaustion doctrine does not apply to § 2255 and ancillary jurisdiction.

C. The Court Should Enter An Order Of Immediate Conditional Release Or, In The Alternative, Enter An Order Of Immediate Release On The Merits.

Although Mr. Walker's motion made clear that his claim is time-sensitive and that he faces imminent irreparable harm from overincarceration, the government opted without the Court's leave to solely address the question of whether Mr. Walker has filed his motion in the right place.

In a footnote, the government asserted that it would "seek[] leave to file a substantive response to defendant's motion if the Court chooses to exercise jurisdiction and reach the merits." Response at 4 n.2. The government's choice to mount a two-part defense delays the litigation in this case unnecessarily and, importantly, provides no rebuttal to Mr. Walker's claim that he is being held past his sentence's lawful expiration.

Under similar circumstances, where the government unilaterally delayed time-sensitive litigation, the Seventh Circuit granted interim relief, as the defendant has requested in the present case. *Valona v. U.S. Parole Comm'n*, 165 F.3d 508, 510 (7th Cir. 1998) (Easterbrook, C.J.). In *Valona* the court granted interim relief in the form of cessation of parole supervision after the parolee petitioned for writ of habeas corpus seeking an order terminating parole. 165 F.3d 508, 510 (7th Cir. 1998). The court explained that interim relief was necessary to preserve the parolee's rights when, among other things, the brief filed by the United States Attorney did not attempt to justify or explain the Parole Commission's failure to hold a hearing and make necessary findings within five years of the parolee's release from prison. *Id*. The court of appeals stated the government's attorney's "brief (and it *is* brief, less than two pages of argument)" was "a brushoff rather than a serious response to his contentions." *Id*. (emphasis in original).

Similarly, in this case, the government's four-page response does not try to argue that Mr. Walker's continued incarceration is lawful; it simply wants to leave that problem for another court to solve. This Court should not brook any delay in determining the lawfulness of Mr. Walker's incarceration and providing an appropriate remedy. As the Supreme Court has reminded, "It is crucial in maintaining public perception of fairness and integrity in the justice system that courts exhibit regard for fundamental rights and respect for prisoners 'as people.'" *Rosales-Mireles v.*

United States, 138 S. Ct. 1897, 1907 (2018) (quoting T. Tyler, *Why People Obey the Law* 164 (2006)).

Conclusion

For the foregoing reasons, the defense respectfully requests that, on an expedited basis, the Court enter the proposed order of interim conditional release or, in the alternative, enter the proposed order granting relief on the merits.

Respectfully submitted this 6th day of February, 2019.

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