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Using Administrative Law and Federal Habeas Corpus Remedies When the BOP Unlawfully Executes a Client's Sentence Under the First Step Act

People serving sentences in federal custody have recently been whipsawed by contradictory rules and policies created by the Bureau of Prisons (BOP) as it implements the First Step Act's new earned time credit program. The program's glitchy rollout has included missed statutory deadlines, disqualification of statutorily eligible individuals, and retroactive application of adverse rules. This disappointing debut, however, is not unexpected. It corresponds with the BOP's decades-long history of stinting implementation of programs Congress designed to reduce the time people spend behind federal prison walls.[1] In the course of prior litigation involving the BOP's residential drug abuse program (RDAP), we have learned that successful advocacy for our clients requires us to add two areas of law to our normal federal defense toolkit: First, we need to understand the administrative law principles that govern the BOP's implementation of statutes. Second, when advocacy and negotiation fail, we need to understand the litigation mechanism for obtaining relief through a federal petition for habeas corpus under 28 U.S.C. § 2241.

This article summarizes the administrative law theories that are likely to be useful in the context of the First Step Act's earned time credit program and offers practical guidance on how to litigate these issues under § 2241 so that defense attorneys can help clients receive the full benefits of available sentencing mitigation, either through earlier transfer to community corrections or through sentence reductions.

A. Earned Time Credit Overview — The First Step Act of 2018 and the BOP's Final Regulation of January 2022

Described by a co-sponsor as "once-in-a-generation criminal justice reform,"[2] the First Step Act of 2018 combined front-end sentencing reforms with back-end prison reforms to combat overincarceration, reduce recidivism, and enhance public safety. Chief among the prison reforms was an incentive structure intended to encourage participation in evidence-based recidivism reduction programming and productive activities assigned to each person in custody based on an individualized risk and needs assessment. Rewards for individuals who successfully participate in programming and activities include increased phone and visitation privileges and transfers to institutions closer to home.[3] But the most anticipated incentive was the newly created "time credits."[4]

Time credits can be earned at a rate of either 10 days or 15 days of credit for every 30 days of "successful participation in evidence-based recidivism reduction pro-

BY STEPHEN SADY AND ELIZABETH DAILY

gramming or productive activities," depending on the individual's recidivism risk level.[5] The only people who are ineligible to earn credits are those with a specifically listed offense of conviction.[6]

Earned time credits can be applied to allow one of two types of transfer out of the institution: (1) earlier transfer to prerelease custody, meaning placement in a residential reentry center or on home confinement as a BOP inmate; or (2) earlier supervised release, in effect, a sentence reduction.[7] The maximum sentence reduction benefit is one year, but there is no maximum prerelease custody benefit, and the two types of benefits can stack.[8]

Once a person has earned credits equal to the time remaining on his or her sentence, the application of credits is mandatory, subject only to the eligibility criteria in § 3624(g).[9] Those criteria, in essence, are as follows:

- Early supervised release is available only to individuals who are assessed as a minimum or low recidivism risk level and who have a supervised release term as part of their sentence.[10]
- Early prerelease custody is available only to individuals who are assessed as a minimum or low recidivism risk level "pursuant to the last 2 reassessments" or who have a warden's approval.[11]
- Prisoners who are "subject to a final order of removal" under the immigration laws are ineligible to receive time credits.[12]

Time credits are granted "in addition to any other rewards or incentives for which a prisoner may be eligible."[13] This means, for example, that individuals can receive the 12-month sentence reduction for completing RDAP under 18 U.S.C. § 3621(e) and an additional 12-month sentence reduction for earned time credits based on successful programming. With respect to timing, individuals can start earning credit on the earlier of the date the First Step Act went into effect (December 21, 2018) or the date their sentence commences under 18 U.S.C. § 3585(a).[14] The BOP has a statutory obligation to provide programming to all prisoners.[15]

For years after the First Step Act went into effect, the BOP had no formal regulations for the earned time credit program. Instead, it operated based on draft regulations that stringently defined a "day" of programming as eight full hours of participation.[16] In litigation, the BOP took the position that it was not required to award credits until 2022, after the program's statutory phase-in period was complete, despite several court rulings to the contrary.[17]

Finally, in January 2022, more than three years after the First Step Act went into effect, the BOP promulgated formal regulations describing the procedures for earning and applying time credits. Departing from the draft regulations, the final rules took an expansive approach to credit earning. Among their provisions, the regulations defined "successful participation" in programming to require only "a determination by Bureau staff that an eligible inmate has participated in the EBRR [evidence-based recidivism reduction] programs or PAs [productive activities] that the Bureau has recommended based on the inmate's individualized risk and needs assessment, and has complied with the requirements of each particular EBRR Program or PA."[18] This is now referred to as being in "earning status." When programming is unavailable or interrupted, such as due to the COVID-19 pandemic, that alone will not preclude an individual from being deemed as successfully participating in programming and thus in earning status.[19]

However, individuals are deemed *not* to be successfully participating in a variety of circumstances spelled out in the regulations, including when they are placed in the Special Housing Unit for disciplinary reasons, when they are designated outside of a BOP institution, or, importantly, when they "opt[] out" of programming by "choosing not to participate in the EBRR programs or PAs that the Bureau has recommended based on the inmate's individualized risk and needs assessment."[20] An inmate's choice to opt out "must be documented by staff."[21]

In practice, implementation of the BOP's regulations has meant that credit calculations are now premised not on how many programs each individual successfully completes or how many hours of classwork individuals have accrued, but on days in "earning status." Credit is accrued for every day the person is deemed to be "successfully participating" and not in one of the specifically excluded categories.

Although the regulation's expansive approach announced in January 2022 was a welcome change, the actual implementation of the regulations over the following year was marred by confusion. The BOP has informally imposed new and sometimes shifting restrictions on who could earn and apply credits that appeared nowhere in the statute or regulations. For example, on September 8, 2022, the BOP published an informal memorandum listing "items" that would be incorporated into the agency's earned time credit calculations, including a new policy categorically disqualifying all persons with detainers, unresolved pending charges, and unresolved immigration issues from eligibility to receive early transfer to prerelease custody or supervised release. The rule also prohibited people within 18 months from their release dates from applying any credits toward transfer to supervised release.

In November 2022, BOP released its program statement further outlining how it intended to implement earned time credits.[22] That program statement has already undergone two change notices. Luckily, the 18-month rule did not appear in the program statement and has been abandoned. Further, the change notices rolled back the categorical disqualification based on detainers.[23]

However, the constantly shifting landscape has left individuals in custody and their families at home uncertain and frustrated. Meanwhile, mistakes are occurring among BOP staff at the institutions due to insufficient training on the many changes. Significant questions remain regarding how and when assessments will be conducted, credits will be calculated, and transfers will be carried out. In practice, the existing earned time credit program still fails to fulfill the full statutory promise of the First Step Act.

B. Administrative Law Challenges to Restrictive Implementation of Earned Time Credits

Whatever potential issues may arise as the BOP continues to iron out the earned time credit program, a practitioner can approach the legal issues using the same basic framework. In BOP litigation, defenders generally brief from the narrowest ground to the broadest: from limiting new rules to prospective application, to raising substantive and procedural administrative law claims, to challenging a new rule's consistency

with the implementing statute, to potential constitutional violations. When defenders are analyzing a new rule that adversely affects clients, there are layers of expanding challenges:

- new rules presumptively apply prospectively only and should not retroactively disqualify any benefits already anticipated under the existing regime;
- new substantive rules, whether or not they are promulgated under the guise of an informal policy, must be implemented in conformance with sections 553 and 706 of the Administrative Procedure Act, meaning that the agency must comply with notice-and-comment procedures and offer a reasonably articulated rationale;
- new interpretive rules must be consistent with the BOP's properly promulgated regulations; and
- all new rules and regulations — formal and informal — must be consistent with the statutory language of the First Step Act or other authorizing statute.

This article details how these challenges might arise in the BOP context and then addresses how to successfully litigate administrative law claims under the federal habeas corpus statute.

1. New rules categorically disqualifying classes of prisoners should only apply prospectively.

When the first informal rules on earned time credit came out in mid-2022, sent via messages through the Trulinks system to everyone in custody, many of the recipients expressed shock, outrage, and frustration at being told that, after working toward earlier release or transfer to community corrections, the BOP revoked or diminished their anticipated benefits with no procedural protections. When an administrative rule change harms people who have already participated in programming, reasonably believing that they would be eligible for benefits, there are at least two relevant doctrines with arguable constitutional roots that provide legal channels to vindicate clients' feelings of having been wronged: retroactivity doctrine and estoppel. Although the BOP subsequently backed off its retroactive application of the informal 18-month rule and several other harmful interim policies, the arguments remain available for any future rule that risks retroactively affecting clients' settled expectations.

Retroactivity doctrine: By statute, the BOP has discretion to grant early release to individuals who successfully complete RDAP. However, 18 U.S.C. § 3621(e) limits the benefit to nonviolent offenders: "The period a prisoner *convicted of a nonviolent offense* remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve." Under the BOP's 1995 program statement for the RDAP early release incentive, unarmed bank robbers were initially considered nonviolent offenders who were statutorily eligible for the sentence reduction incentive. In 1996, the BOP attempted to revoke that eligibility in a Change Notice *after* many clients had already been deemed eligible and participated in the program. In *Cort v. Crabtree*, the Ninth Circuit held that, in the absence of an explicitly stated intention that the rule apply retroactively, "prospectivity remains the appropriate default rule."[24] Therefore, those convicted of unarmed bank robbery who participated in RDAP before the BOP rule change could still obtain early release if they successfully completed the program.

The Ninth Circuit placed primary reliance on *Bowen v. Georgetown University Hospital*,[25] where the Supreme Court rejected retroactive rulemaking to recoup Medicare payments because "[r]etroactivity is not favored in the law," and the underlying statute did not explicitly authorize retroactive rulemaking.[26] The court described the presumption against retroactivity as "deeply rooted in our jurisprudence" and "embod[ying] a legal doctrine centuries older than our Republic": "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[27]

Critically for the analogy to earned time credits, the interest protected by the court in *Cort* did not require statutory entitlement to a sentence reduction. It was enough that the individuals understood their participation in the program would make them eligible for early release consideration: "A prisoner's right to *consideration* for early release is a valuable one that we have not hesitated to protect."[28]

Further, the Ninth Circuit rejected the argument that the rule was not in fact retroactive because it applied only to those individuals who had not yet *completed* the program.[29] "It is clear that the Bureau could and did determine prospectively that appellants and others already in the program were eligible for sentence reduction subject only to their successful completion of the 500-hour program."[30] And prisoners had already "undergone numerous hours of treatment" based on those determinations of eligibility.[31] "Before an agency may disrupt 'settled expectations' in such a manner … the language of the relevant regulation must compel such a result."[32]

In *Bowen v. Hood*, the Ninth Circuit reaffirmed *Cort*'s retroactivity principles for a new Federal Register notice and program statement that purported to disqualify gun possessors from the RDAP sentence reduction benefit as a matter of discretion, after they had already been notified of their eligibility.[33] The same factors that prohibited retroactive application in *Cort* were all present and led to the same result.[34] The court also rejected the argument that the rule did not operate retroactively because people had only been told they were "provisionally" eligible.[35] The statutory program made clear that "the eligibility determination is contingent only upon completion of the program, and not on any changes in the law or regulations."[36]

In *Bowen*, the court clarified that even prisoners who had not entered RDAP were protected against retroactive application of the new rule, so long as they had been "notified of early release eligibility."[37] Noting the success and importance of RDAP, the court required that, once eligibility had been determined, the BOP could not retroactively implement rules that categorically barred consideration for the incentive:

> [T]his is not a game of Lucy and the football from the world of Charles Schulz. Rather, it is a serious administrative agency program to be administered in a consistent, coherent matter. An agency cannot provide participants

> with a determination of eligibility based on the purported examination of objective criteria, then subsequently deny them eligibility by exercise of whim. If we expect inmates to observe the rule of law, we must adhere to it ourselves.[38]

To the same extent, the earned time credit statutes and regulations, and now the program statement as well, establish the settled expectations of statutorily eligible individuals that they will be able to earn credits and use them as prescribed for earlier release to supervised release or prerelease custody. When the BOP attempts to alter those expectations by changing the framework for eligibility, as it did when it excluded individuals with detainers from using their credits or when it capped supervised release benefits at 18 months without notice, the presumption against retroactivity provides a first line of defense for practitioners. The BOP generally cannot apply new informal and formal rules to whip away the reasonable expectation of eligibility for program participation incentives for those categories of individuals who have successfully participated in programming, or otherwise relied on determinations of eligibility, under the existing statutes, regulations, and practices.

Equitable or promissory estoppel: Similarly, the doctrine of estoppel can be invoked as a defense when it is the government's own actions that have unfairly prevented the defendant from receiving an expected benefit. "'[W]here justice and fair play require it,' estoppel will be applied against the government, even when the government acts in its sovereign capacity if the effects of estoppel do not unduly damage the public interest."[39]

In *Dowling v. Crabtree*, the petitioner followed a series of changing BOP directives and policies, each of which he was told would satisfy the statutory standard for completing "residential" BOP treatment and aftercare.[40] In the end, the BOP decided that he had not satisfied the statutory residency requirement for early release, even though he had been repeatedly told that his programming would qualify.[41] The BOP argued that, even if its changing positions violated *Cort*'s retroactivity principles, the petitioner was still out of luck; he failed to meet the residency requirement and so was statutorily disqualified from the sentence reduction.[42] The court invoked estoppel to do justice in the case:

> Obviously, under these circumstances, an injustice would occur if petitioner were now denied early release on the basis of his residency when he followed the BOP's dictates to his own det[riment]. Moreover, there is no serious risk to the public because the BOP already determined petitioner is suitable for placement in a halfway house. Therefore, in accordance with *Johnson*, even though the statute itself arguably requires the residency to occur during the treatment itself rather than during aftercare, the government is estopped from denying petitioner early release on this basis.[43]

Estoppel has an analogy to the "doctrine of credit for time at liberty," in which a defendant receives credit against a sentence for time erroneously at liberty "provided that there is a showing of simple or mere negligence on behalf of the government and provided the delay in execution of [the] sentence was through no fault of his own."[44]

In the context of earned time credits, estoppel arguments may be a viable supplement or alternative to retroactivity doctrine, depending on individual facts.[45] Practitioners should develop an understanding of what BOP representations were made to and relied upon by clients.

2. New substantive rules must comply with the notice-and-comment and articulated rationale requirements of the Administrative Procedure Act.

All federal agencies, including the BOP, must comply with the Administrative Procedure Act (APA) before promulgating new substantive rules, also known as legislative rules, "that affect substantial individual rights and obligations[.]"[46] The APA requirements include giving notice of proposed rulemaking, providing an opportunity for public comment, and articulating a legitimate rationale for the new rule.[47]

Substantive versus interpretive rules: When the BOP changes how it implements programs like the First Step Act time credit program, it often does so with absolutely no formal process. For example, the mid-2022 changes that added the detainer disqualification and the 18-month cap on time credits were communicated to individuals in custody by a message sent out on the Trulinks email system. Similarly, the rule requiring that individuals complete all components of the SPARC-13 needs assessments process in order to be considered in earning status was incorporated into the BOP's auto-calculation algorithm before it was ever made part of the agency's written program statement.

In these instances, the initial question will be whether the rule change involves a new substantive rule or merely a change in policy. If the new rule is substantive, then it is invalid unless promulgated through APA-mandated procedures. Whether a rule is substantive or interpretive does not depend on form but on the rule's content and impact.[48] The mid-2022 changes, despite being announced through informal messages, had the hallmarks of new substantive rules because they categorically disqualified persons with detainers and less than 18 months remaining on their sentences from receiving their earned time credits. Such rules of general application leave BOP staff with no discretion to exercise for those classes of individuals.[49] The same can be said of the rule requiring that individuals complete all components of the SPARC-13 needs assessments to be considered in earning status. Because that rule change also modified the existing regulatory definition of "opting out,"[50] it should have been classified as a new substantive rule as well, requiring formal APA procedures.

"To defer to the agency's position [regarding whether a rule is substantive or interpretive] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[51] In a case involving a new BOP program statement, the Ninth Circuit concluded there was "no question" that a rule was legislative, not interpretive, where it "'effect[ed] a change in existing law or policy' by listing categories of inmates who would not be eligible for the early release program."[52]

> If a rule is inconsistent with or amends an existing legislative rule, then it cannot be interpretive. Such a rule would impose new rights or obligations by changing an existing law and must follow the applicable procedures of the APA.[53]

The categorical limitations constitute legislative rules triggering the rulemaking requirements of the APA.

Notice-and-comment under § 553 of the APA: The promulgation of a legislative rule without the opportunity for public comment violates basic protections of the Administrative Procedure Act: "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment."[54]

The BOP's failure to provide notice-and-comment prior to implementing a new substantive rule invalidates it under § 553 of the APA.[55] In *Bohner v. Daniels*, the district court invalidated an interim rule disqualifying otherwise eligible RDAP participants from the sentence reduction incentive based on the notice-and-comment requirement, elaborating on the inapplicability of exceptions to the requirement.[56] The need for proper promulgation with notice-and-comment is especially strong when a new rule excludes individuals in custody from an anticipated benefit, beyond any exclusions announced by statute and rule, and contrary to the reasonable reliance of prisoners, who may be eligible one minute under the written rules, then disqualified the next without any opportunity for them or the community to comment on the unfairness and irrationality of the new rule.

Arbitrary and capricious under § 706 of the APA: Section 706(2)(A) of the APA provides that a "reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." Importantly, both legislative and interpretive rules are subject to § 706.[57]

In *Arrington v. Daniels*, the court held that the BOP's final rule disqualifying firearms possessors from the RDAP early release incentive was arbitrary and capricious in violation of § 706(2)(A) because the BOP had "failed to set forth a rationale for" the categorical exclusion.[58] As with the rule invalidated in *Arrington*, another Ninth Circuit panel in *Crickon v. Thomas* held that the BOP provided little to no insight into its rationale for excluding statutorily eligible prisoners from the early release incentive based on prior convictions, which rendered the rule invalid for failure to meet the requirement that the agency must cogently explain why it promulgated the rule and articulate an adequate rationale.[59] The *Crickon* court found that the BOP's claim of compliance with congressional intent "is difficult to square with Congress's expressed intent to provide an incentive to encourage maximum participation in the BOP's substance abuse treatment programs."[60]

Under § 706, the BOP cannot provide the rationale for the new rule *after* its promulgation. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'"[61] This principle doomed the disqualifications considered in *Arrington* and *Crickon*.[62] The court "may not supply a reasoned basis for the agency's action that the agency itself has not given[,]" nor "infer an agency's reasoning from mere silence."[63] "*Post hoc* explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision."[64]

When an administrative agency sets policy, the requirement of a reasoned explanation for its action "is not a high bar, but it is an unwavering one."[65] In the context of the First Step Act time credit rules, the BOP did not provide any explanation for its unilateral and harmful actions in 2022 that disqualified eligible prisoners from the prerelease custody and sentence reduction benefits they had earned through rehabilitative activities, making the rules vulnerable to challenge.

Interpretive rules must reasonably interpret a genuinely ambiguous regulation: A BOP interpretive rule that expands ineligibility to earn or apply earned time credits is invalid unless the BOP shows that the regulation being interpreted is ambiguous. The Supreme Court in *Kisor v. Wilkie* recently clarified that an agency's interpretation of its own regulation is entitled to judicial deference, known as *Auer* deference, but "only if a regulation is genuinely ambiguous."[66] Judges must conduct an exhaustive textual analysis "resort[ing] to all the standard tools of interpretation" before deeming a regulation ambiguous.[67]

Both *Kisor*, decided in 2019, and precedent following *Kisor* have confirmed the strict preconditions now in place for deference to an interpretive rule: "When faced with an agency's interpretation of its own regulation, [courts] must first determine whether the regulation is 'genuinely ambiguous.'"[68] To determine "genuine ambiguity," a court "must exhaust all the traditional tools of construction" and "cannot wave the ambiguity flag just because it found the regulation impenetrable on first read."[69] Instead, "a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on," as "[d]oing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference."[70]

Further, even if a regulation's language is genuinely ambiguous, "the agency's reading must still be reasonable," meaning "it must come within the zone of ambiguity the court has identified after employing all its interpretive tools."[71] "[N]ot every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference" because "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[72] Even if there were ambiguity, "traditional tools of construction," in our criminal context, should include constitutional avoidance and the rule of lenity to narrow the criminal sentencing statute in favor of the prisoner.[73]

New BOP policies limiting earned time credits will not satisfy the *Kisor* test for deference unless they interpret an ambiguous phrase in the earned time credit regulation. In the First Step Act context, that standard will be hard to meet because the regulations and statutes already exhaustively set out exactly who is eligible to earn credits and when those credits can be applied. Rarely will new categories of disqualified individuals and new rules for earning applying credits fall within any zone of genuine ambiguity within that comprehensive regulatory and statutory scheme.

3. BOP rules must be consistent with the underlying statute.

The statutory analysis should generally follow or be joined with arguments regarding retroactivity and compliance with the Administrative Procedure Act. "In reviewing an agency's interpretation of a statute it administers, a court must 'always' first determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter[.]'"[74]

In the initial RDAP litigation, the courts generally held, and the BOP eventually conceded, that the BOP's

program statement disqualifying gun possessors from the incentive was invalid because it incorrectly interpreted 18 U.S.C. § 3621(e).[75] Here, the BOP's rule changes under the First Step Act in mid-2022 — notably, the exclusion based on detainers — intruded on subjects that Congress had already conclusively resolved. The First Step Act decided the question of categorical eligibility to *earn* time credits toward sentence reductions in unequivocal fashion, listing out dozens of specific statutes that result in automatic disqualification from earning credits toward earlier return to the community.[76] The statute also speaks to eligibility to *apply* time credits by making the award of credits mandatory subject only to the criteria in § 3624(g) and excluding individuals subject to a "final order of removal."

Under the statute, both earning and applying time credits are expressed in mandatory terms: "A prisoner, except for an ineligible prisoner under subparagraph (D), who successfully completes evidence-based recidivism reduction programming or productive activities, *shall earn* time credits[.]"[77] "Time credits earned under this paragraph by prisoners who successfully participate in recidivism reduction programs or productive activities *shall be applied* toward time in prerelease custody or supervised release."[78] "The word 'shall' is ordinarily the language of command."[79]

By specifying the categorical exclusions, Congress occupied that aspect of the law, foreclosing the BOP from creating additional general disqualifications. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[80] Categorically excluding individuals with detainers from applying earned time credits fits nowhere within the statutory scheme.[81]

Several aspects of the First Step Act expressly contemplate agency discretion. For example, the authority to apply credits toward earlier transfer to supervised release as opposed to earlier transfer to prerelease custody uses the word "may" instead of "shall."[82] However, any ambiguity in such provisions must be resolved with reference to the recidivism-reducing goals of the statute.[83] Although defenders should not have to rely on the statutory argument, they should include the layer of analysis as supporting the retroactivity and Administrative Procedure Act arguments.

C. The Scope of Federal Habeas Corpus Remedies and Common BOP Procedural Defenses

Federal courts have authority under the federal habeas corpus statute, 28 U.S.C. § 2241, to provide a remedy for the Bureau of Prisons' unlawful execution of sentences. Unlike the habeas corpus statutes governing collateral challenges to prior convictions (28 U.S.C. §§ 2254 and 2255), which are covered by the Antiterrorism and Effective Death Penalty Act (AEDPA), § 2241 provides general jurisdiction where a person "is in custody in violation of the Constitution or laws or treaties of the United States[.]"[84] Section 2241 petitions are easy to draft and customize for the particular unlawful BOP action. However, even without the strictures of the AEDPA, the BOP does all it can to erect procedural obstacles to courts reaching the merits. By being aware of these tactics, defense attorneys can plan for them in advance and improve their chances of success.

Appointed counsel: District courts have discretion under the Criminal Justice Act to appoint counsel to represent individuals serving unlawfully executed sentences.[85] Appointment of counsel is critical in First Step Act cases given the complexity of administrative law and statutory construction and the importance of ensuring that this new statutory scheme is properly construed by the courts; pro se litigation is only rarely successful and frequently results in courts having less developed arguments to ensure coherent and consistent decisions. Depending on the district culture, appointment can be considered part of the original representation or result from an order from the court either before or after the § 2241 petition has been submitted. For courts that need persuading, BOP litigation can involve complex legal issues and the need for discovery and factual development.[86] The court can also be reminded of the disabilities that often impair clients' ability to litigate for themselves.[87]

Jurisdiction: As reflected in the precedent in the first three sections of this article, courts have subject matter jurisdiction under § 2241 to review adverse BOP actions that are contrary to federal law or the Constitution.[88] While some individualized discretionary decisions may be beyond the courts' power under 18 U.S.C. § 3625, judicial review is available for allegations that BOP's conduct — and especially a new BOP rule of general applicability — is contrary to regulations and statutes.[89] Jurisdiction can also be asserted under 28 U.S.C. §§ 1331 and 1343 for actions involving federal officials.[90] District courts also "have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[91]

The critical factor in articulating the defense's legal position is to look to categorical statutory or regulatory claims. Although the challenged action arises in an individual case, the defense attorney is disputing the broadly applicable rule, not the discretionary individualized decision.[92] The rulemaking provisions of the APA are federal statutes with which the BOP must comply.[93] Concomitant with the court's habeas jurisdiction is the power to avoid irreparable harm by providing interim relief in the form of conditional release.[94]

Venue: In general, BOP litigation under § 2241 occurs in the district where the prisoner is being held, with the respondent being the warden.[95] Because many times federal defendants are incarcerated outside of their home district, this means that there will often be a need for cooperation between federal defender offices in the sentencing district, where attorneys hear from their clients regarding their custody, and the offices where the sentence is being served. The location of the litigation should be a question of venue, not jurisdiction, so there may be cases where, depending on the type of allegations, it may be appropriate to file before the sentencing court.[96] The BOP considers individuals in prerelease community corrections to be in the custody of the supervising residential reentry manager's office.

Exhaustion: The requirement that administrative remedies must be exhausted raises several tactical and legal issues. First, although many courts think otherwise, exhaustion is not a jurisdictional requirement under § 2241; it is a waivable judicial rule.[97] The BOP often argues, incorrectly, that the Prison Litigation Reform Act's strict and inflexible exhaustion requirement applies to § 2241 — it does not.[98]

The Supreme Court has endorsed a practical approach to excusing exhaustion: "[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further."[99] The courts recognize excep-

tions to the need to exhaust administrative remedies in a number of situations, including where the petitioner may suffer irreparable harm from delay, where the agency procedure would be inadequate to provide relief, and where the agency's bias or predetermination of the issue renders the administrative procedure futile.[100] When a petition challenges "an official policy of the BOP," courts have excused exhaustion.[101]

Where there is no immediate prejudice to the prisoner, the general recommendation is that prisoners exhaust their administrative remedies, or at least attempt to do so, for three reasons: (1) the client might prevail, particularly in this period of uncertainty in implementation of First Step Act credits; (2) the BOP will be deprived of a procedural argument to obfuscate counsel's issue; and (3) the government attorney will have a BOP case number if there is any chance of negotiating a resolution. Even in the irreparable harm situation, which occurs frequently when issues arise close to the end of the sentence, pursuing an administrative remedy parallel with the § 2241 petition defangs the government's exhaustion arguments. In the situation where the client is facing irreparable harm and futility, courts should waive exhaustion of administrative remedies.[102]

Remedies: Under the habeas statute, courts provide equitable relief by resolving petitions "as law and justice require."[103] In addition to the remedy of release, courts are also empowered to grant injunctive and declaratory relief under the APA, the Mandamus Act, and the Declaratory Judgment Act.

- Under the APA, the court may enter a judgment against the United States provided that "any mandatory or injunctive decree shall specify the Federal officer … personally responsible for compliance." 5 U.S.C. § 702. Under section 706, the court may order the BOP to fulfill its statutory duty to administer a program or enjoin it from acting beyond its statutory authority or in an arbitrary and capricious manner.

- The Declaratory Judgment Act, 28 U.S.C. § 2202, provides broad authority to fashion an appropriate remedy: "Further necessary or proper relief based on a declaratory judgment or decree may be granted."[104]

- Under the Mandamus Act, 28 U.S.C. § 1361, the court may compel the BOP to perform its duty to administer a program or to exercise discretion where required by law (but the court may not tell the agency how to exercise that discretion).

Depending on the case, defense attorneys can invoke creative solutions based on the equitable roots of habeas corpus and its flexibility in adapting to the many settings in which petitions can be filed.[105] Habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose[.]"[106] "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."[107] In formulating proposed remedies, defenders should encourage courts to resolve the matter "as law and justice require," which might include, for example, an equitable reduction of supervised release time to balance BOP's failure to grant early release. In *Dyer v. Fulgam*, where the ruling on the petition came after the petitioner had already finished his sentence, the district court stated that it would "apply the unused FSA time credits toward Petitioner's term of supervised release."[108]

Mootness: One of the impediments to litigating against the BOP is timing. The BOP often delays making decisions regarding early release eligibility or halfway house transfers until very late in the term of imprisonment. Until the BOP makes a decision, the case is not ripe, and, by the time a decision is reached and the exhaustion of administrative remedies has begun, the original remedy is no longer possible.

However, a case does not become moot as long as some partial remedy remains available. In *Reynolds v. Thomas*, the Ninth Circuit reaffirmed a long line of cases holding that an allegation of "over-incarceration" presented in a § 2241 petition did not become moot upon the individual's release because a district court could consider the excess prison time under § 3583(e)(1) "as a factor weighing in favor of reducing the term of supervised release."[109] As the Supreme Court stated in *Johnson* regarding the remedy under § 3583(e)(1), which authorizes early termination of supervised release in "the interest of justice," "There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term."[110] And the district court's decision in *Dyer* demonstrates that district courts can exercise their broad equitable powers to reduce a term of supervised release to reflect unapplied credits.

Conclusion

The immediate impact and ongoing harm caused by the BOP's narrowing of First Step Act eligibility is subject to 28 U.S.C. § 2241 litigation raising layered challenges through an administrative, statutory, and constitutional lens. As seen through the last generation of Second Chance Act and RDAP litigation, the initial informal rules implemented and then abandoned or modified in 2022 will likely not be the last BOP attempts to restrict the ameliorative sentencing benefits Congress intended the First Step Act to provide. Keeping this analytical toolkit in mind will serve the defender community well for advocacy and negotiation as defenders attempt to push back on earned time credit restrictions and expand the benefit for clients in this arena and others to the greatest extent possible.

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Notes

1. *See generally* Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes That Reduce Prison Time*, 35 FED. SENT. RPTR. 12 (Oct. 2022).

2. 164 Cong. Rec. S7838, 2018 WL 6693848 (daily ed. Dec. 19, 2018) (statement of Sen. Grassley).

3. 18 U.S.C. § 3632(d)(1)-(3).

4. 18 U.S.C. § 3632(d)(4).

5. 18 U.S.C. § 3632(d)(4)(A). The recidivism risk assessment tool developed by the Department of Justice in response to the First Step Act is known as PATTERN, the Prisoner Assessment Tool Targeting Estimated Risks and Needs. *See generally* https://www.bop.gov/inmates/fsa/pattern.jsp (last visited May 16, 2023). All federal prisoners are assessed under PATTERN and given a score of high, medium, low, or minimum recidivism risk based on a combination of static and dynamic factors including their age, criminal history, disciplinary violations, and program completions, among others.

6. 18 U.S.C. § 3632(d)(4)(D).

7. 18 U.S.C. § 3632(d)(4)(C).

8. 18 U.S.C. § 3624(g)(3).

9. *See* 18 U.S.C. § 3624(d)(4)(C) (earned time credits "*shall be applied* toward time in prerelease custody or supervised release") (emphasis added).

10. 18 U.S.C. § 3624(g)(1)(D)(ii).

11. 18 U.S.C. § 3624(g)(1)(D)(i). The BOP first created a policy for granting warden approval to individuals assessed as medium or high recidivism risk levels in November 2022. Fed. Bureau of Prisons, *First Step Act of 2018 — Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d)(4)*, Program Statement 5410.01 (Nov. 18, 2022). It is unclear whether that policy has resulted in any approvals to date.

12. 18 U.S.C. § 3632(d)(4)(E).

13. 18 U.S.C. § 3632(d)(6).

14. 18 U.S.C. § 3632(d)(4)(B).

15. 18 U.S.C. § 3621(h)(2).

16. *First Step Act Time Credits*, 85 Fed. Reg. 75268 (proposed Nov. 25, 2020).

17. *See, e.g.*, Cazares v. Hendrix, 575 F. Supp. 3d 1289, 1299-1302 (D. Or. 2021) (rejecting the BOP's phase-in argument).

18. 28 C.F.R. § 523.41(c)(2).

19. 28 C.F.R. § 523.41(c)(3).

20. 28 C.F.R. § 523.41(c)(4).

21. 28 C.F.R. § 523.41(c)(5).

22. Fed. Bureau of Prisons, *First Step Act of 2018 — Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d)(4)*, Program Statement 5410.01 (Nov. 18, 2022).

23. Fed. Bureau of Prisons, *Change Notice: First Step Act of 2018 — Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d)(4)*, Program Statement 5410.01-CN-01 (Feb. 6, 2023).

24. 113 F.3d 1081, 1084 (9th Cir. 1997) (quoting Landgraf v. USI Film Products, 511 U.S. 244, 272 (1994)).

25. 488 U.S. 204 (1988).

26. *Cort*, 113 F.3d at 1083-84.

27. *Cort*, 113 F.3d at 1084 (quoting *Landgraf*, 511 U.S. at 265, and citing Lynce v. Mathis, 519 U.S. 433, 439 (1997)).

28. *Cort*, 113 F.3d at 1085 (emphasis in original).

29. *Id.* at 1084-86.

30. *Id.* at 1085.

31. *Id.* at 1086.

32. *Id.* (citing *Landgraf* and *Bowen*).

33. 202 F.3d 1211, 1220-22 (9th Cir. 2000).

34. *Id.* at 1221.

35. *Id.* at 1221-22.

36. *Id.* at 1222.

37. *Id.* (citing Furguiel v. Benov, 155 F.3d 1046, 1048 (9th Cir. 1998)).

38. *Id*.

39. Johnson v. Williford, 682 F.2d 868, 871 (9th Cir. 1982) (quoting United States v. Lazy FC Ranch, 481 F.2d 985, 988-89 (9th Cir. 1973)).

40. 58 F. Supp. 2d 1172, 1173 (D. Or. 1999).

41. *Id*.

42. *Id.* at 1174.

43. *Id.* at 1174-75.

44. Ninete v. Thomas, 607 F. Supp. 2d 1201, 1203 (D. Or. 2009) (quoting United States v. Martinez, 837 F.2d 861, 865 (9th Cir. 1988)).

45. *Cort*, 113 F.3d at 1083 (no need to reach equitable estoppel where relief granted based on retroactivity doctrine).

46. Morton v. Ruiz, 415 U.S. 199, 232 (1974).

47. *Id*. at 232-33.

48. Gunderson v. Hood, 268 F.3d 1149, 1154 n.27 (9th Cir. 2001) ("The label an agency attaches to its pronouncement is clearly not dispositive."); *Perez* 575 U.S. at 96 (legislative rules "have the 'force and effect of law.'") (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 (1979)).

49. *See* Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987) ("The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is 'the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case.'") (quoting Jean v. Nelson, 711 F.2d 1455, 1481 (11th Cir. 1983)).

50. *See* 28 C.F.R. § 523.41(c)(4), (5).

51. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

52. *Gunderson*, 268 F.3d at 1154 (citation omitted).

53. *Id*. (citations omitted).

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54. Paulsen v. Daniels, 413 F.3d 999, 1004 (9th Cir. 2005) (quoting *Chrysler Corp.*, 441 U.S. at 316).

55. *Paulsen*, 413 F.3d at 1005-08; Bohner v. Daniels, 243 F. Supp. 2d 1171, 1175 (D. Or. 2003), *affirmed sub nom. Paulsen*, *supra*; *see also* Sacora v. Thomas, 628 F.3d 1059, 1065 (9th Cir. 2010) (district court granted class habeas corpus relief, "finding that the BOP's failure to use notice-and-comment provisions in promulgating [community corrections] regulations violated the APA, and enjoin[ing] the BOP from considering inmates for placement in [residential reentry centers] pursuant to those regulations.").

56. 243 F. Supp. 2d 1171, 1174-76 (D. Or. 2003), *affirmed sub nom. Paulsen*, *supra*.

57. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 105-06 (2015).

58. 516 F.3d 1106, 1114 (9th Cir. 2008) (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

59. Crickon v. Thomas, 579 F.3d 978, 982-86 (9th Cir. 2009).

60. *Id.* at 986.

61. Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1907 (2020) (quoting Michigan v. EPA, 576 U.S. 743, 758 (2015)).

62. *Arrington*, 516 F.3d at 1112 ("In conducting our review, we may look only to the administrative record to determine whether the agency has articulated a rational basis for its decision."); *accord Crickon*, 579 F.3d at 982.

63. *Id*. (internal quotation marks omitted).

64. *Arrington*, 516 F.3d at 1113 (citing Fed. Power Comm'n v. Texaco, Inc., 417 U.S. 380, 397 (1974)).

65. Judulang v. Holder, 565 U.S. 42, 45 (2011).

66. Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019) ("And when we use that term, we mean it — genuinely ambiguous[.]"). In *Kisor*, the Court cabined the scope of *Auer* deference to ambiguous regulations. 139 S. Ct. at 2408 (citing Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)).

67. *Id.*

68. United States v. Castillo, 69 F.4th 648, 658 (9th Cir. 2023) (following *Kisor* as invalidating commentary that is inconsistent with its guideline); Attias v. Crandall, 968 F.3d 931, 937 (9th Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2414).

69. *Kisor*, 139 S. Ct at 2415.

70. *Id*.; *accord Castillo*, 69 F.4th at 653; United States v. Nasir, 17 F.4th 459, 471 (3d Cir. 2021) (en banc).

71. *Kisor*, 139 S. Ct. at 2415-16.

72. *Id*. at 2416.

73. *See* Bifulco v. United States, 447 U.S. 381, 387 (1980) (the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."); *accord* Davis v. Crabtree, 109 F.3d 566, 570 (9th Cir. 1997). Deference to the administrative construction of an ambiguous penal statute "would turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with the doctrine of severity." Crandon v. United States, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

74. *Sacora*, 628 F.3d at 1065-66 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

75. Downey v. Crabtree, 100 F.3d 662, 663 (9th Cir. 1996); Davis v. Crabtree, 109 F.3d 566, 569 (9th Cir. 1997); *see* Jacks v. Crabtree, 114 F.3d 983, 985 n.2 (9th Cir. 1997). The circuits split with the majority following *Downey* and *Davis*. *Compare* Martin v. Gerlinski, 133 F.3d 1076, 1079 (8th Cir. 1998), Fristoe v. Thompson, 144 F.3d 627, 631 (10th Cir. 1998), *and* Byrd v. Hasty, 142 F.3d 1395, 1398 (11th Cir. 1997), *with* Pelissero v. Thompson, 170 F.3d 442, 447 (4th Cir. 1999), *and* Venegas v. Henman, 126 F.3d 760, 763 (5th Cir. 1997). In subsequent litigation, the BOP conceded that gun possessors "are eligible under section 3621(e)(2)(B) but argue[d] that they are ineligible under the Bureau's regulation creating an additional eligibility requirement." *Jacks*, 114 F.3d at 985 n.2.

76. 18 U.S.C. § 3632(d)(4)(D) & (E).

77. 18 U.S.C. § 3632(d)(4)(A) (emphasis added).

78. 18 U.S.C. § 3632(d)(4)(C); *see* McLoughlin v. Thompson, No. 4:22-CV-00993, 2022 WL 3702008, at *3 (M.D. Pa. Aug. 26, 2022) (dismissing for lack of administrative exhaustion but noting "the FSA's mandatory language regarding application of time credits to eligible inmates"); Jones v. Engleman, No. 2:22-cv-05292-MCS (GJS), 2022 WL 6563744, at *9 (C.D. Cal. Sept. 7, 2022), *report and recommendation adopted in part, rejected in part sub nom.* Jones v. Engleman, 2022 WL 6445565 (C.D. Cal. Oct. 7, 2022) ("[T]he statute does not say that the BOP may transfer prisoners in its discretion; the language once again is a mandatory directive."). Note that the district court in *Jones* did not adopt this portion of the magistrate judge's opinion, concluding that it was impermissibly advisory.

79. United States v. Kowalczyk, 805 F.3d 847, 857 (9th Cir. 2015) (quoting Alabama v. Bozeman, 533 U.S. 146, 153 (2001)).

80. Russello v. United States, 464 U.S. 16, 23 (1983); *see also* TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001) (citing Leatherman v. Tarrant County, 507 U.S. 163, 168 (1993) ("*expressio unius est exclusio alterius*")).

81. *Jones, supra,* 2022 WL 6563744, at *9; Komando v. Luna, No. 22-cv-425-SE, 2023 WL 310580, at *5-6 (D.N.H. Jan. 13, 2023) (finding unpersuasive BOP's arguments that it has discretion to deny people with detainers time credits); Sierra v. Jacquez, No. 2:22-CV-01509-RSL-BAT, 2022 WL 18046701, at *2 (W.D. Wash. Dec. 27, 2022) *report and recommendation adopted*, No. C22-1509-RSL-BAT, 2023 WL 184225 (W.D. Wash. Jan. 13, 2023) (finding that the only plausible reading of the statute is that it only applies to individuals with a final order of removal).

82. 18 U.S.C. § 3624(g)(3) ("[T]he Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on application of time credits under section 3632.").

83. *Kisor*, 139 S. Ct. at 2416 ("The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.").

84. 28 U.S.C. § 2241(c)(3).

85. 18 U.S.C. § 3006A(2)(B) ("Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who … is seeking relief under section 2241[.]").

86. *See, e.g.*, Cazares v. Hendrix, 575 F. Supp. 3d 1289, 1299-1302 (D. Or. 2021) (granting partial habeas corpus relief based on the BOP's failure to implement First Step Act statutory language in a timely manner).

87. *See* Halbert v. Michigan, 545 U.S. 605, 621 (2005) (noting the obstacles to self-advocacy by people who may have "little education, learning disabilities, and mental impairments.").

88. Jones v. Hendrix, 599 U.S. 465, 475 (2023) (noting that § 2241 allows a federal prisoner to challenge the legality of detention, including "that he is being detained in a place or manner not authorized by the sentence [or] that he has unlawfully been denied parole or good-time credits"); *see also* Rodriguez v. Copenhaver, 823 F.3d 1238, 1242 (9th Cir. 2016) (the district court has "jurisdiction to decide whether the Bureau of Prisons acted contrary to established federal law, violated the Constitution, or exceeded its statutory authority[.]").

89. *Compare* Abbott v. Fed. Bureau of Prisons, 771 F.3d 512, 514 (9th Cir. 2014), *and* Close v. Thomas, 653 F.3d 970, 974 (9th Cir. 2011), *with* Reeb v. Thomas, 636 F.3d 1224, 1228 (9th Cir. 2011).

90. Hong Wang v. Chertoff, 550 F. Supp. 2d 1253, 1255 (W.D. Wash. 2008) (holding that the general grant of federal question jurisdiction under § 1331 confers jurisdiction to bring an APA challenge to federal agency action).

91. 28 U.S.C. § 1361.

92. S. Rep. 98-225 at 149 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3332 ("The APA continues to apply to regulation-making authority of the Bureau of Prisons.").

93. Some courts have held that the requirement that agency actions be lawful can also provide bases for relief where BOP actions against an individual are arbitrary, capricious, and an abuse of discretion. *See, e.g.*, Salvador-Orta v. Daniels, 531 F. Supp. 2d 1249, 1253 (D. Or. 2008) ("The BOP's decision to deny petitioner eligibility for RDAP [because he complied with court-ordered conditions of release] is an abuse of the discretion."); Barq v. Daniels, 428 F. Supp. 2d. 1147, 1151 (D. Or. 2006) (prisoner's expulsion from RDAP arbitrary where grounds not found in rules); Kuna v. Daniels, 234 F. Supp. 2d 1168, 1169 (D. Or. 2002) ("[T]he BOP has acted arbitrarily in imposing additional eligibility requirements that go beyond its program statements."); Seehausen v. Van Buren, 243 F. Supp. 2d 1165, 1170 (D. Or. 2002) (prisoner's due process right to notice violated when he was sanctioned for conduct that was not expressly prohibited).

94. *See* Hensley v. Municipal Court, 411

U.S. 345, 352 (1973) (habeas authority includes the power to "order [a] petitioner's release pending consideration of his habeas corpus claim") (citing In re Shuttlesworth, 369 U.S. 35 (1962)); Marino v. Vasquez, 812 F.2d 499, 507 (9th Cir. 1987) (the authority of the court to conditionally release a prisoner pending habeas proceedings derives from the power to issue the writ itself).

95. Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004) ("[T]he default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.").

96. *See Padilla*, 542 U.S. at 451 (Kennedy, J., concurring) ("In my view, the question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue.").

97. McCarthy v. Madigan, 503 U.S. 140, 144 (1992); Woodall v. Fed. Bureau of Prisons, 452 F.3d 235, 239 n.2 (3d Cir. 2005); Brown v. Rison, 895 F.2d 533, 535 (9th Cir. 1990); United States v. Woods, 888 F.2d 653, 654 (9th Cir. 1989).

98. Jones v. Bock, 549 U.S. 199, 202 (2007); Casanova v. Dubois, 304 F.3d 75, 78 n.3 (1st Cir. 2002) (citing cases); Skinner v. Wiley, 355 F.3d 1293 (11th Cir. 2004); Grier v. Hood, 46 F. App'x 433, 440 (9th Cir. 2002), *on remand*, *Bohner*, *supra*, *affirmed*, *Paulsen*, 413 F.3d at 1008.

99. *McCarthy*, 503 U.S. at 146.

100. *Id.* at 147-49.

101. Ward v. Chavez, 678 F.3d 1042, 1046-47 (9th Cir. 2012).

102. *Cazares*, 575 F. Supp. 3d at 1294 (excusing exhaustion of an earned time credit challenge where the dispute centered on statutory construction, the petitioners faced irreparable harm due to approaching release dates, and the petitioners risked agency retaliation for pursuing a remedy); *see also* Garza v. Davis, 596 F.3d 1198, 1203-1204 (10th Cir. 2010) (recognizing futility exception in context of § 2241 petition); Arrington v. Daniels, 465 F. Supp. 2d 1104, 1107 (D. Or. 2006), *rev'd on other grounds*, 516 F.3d 1106 (9th Cir. 2008); *Woodall*, 432 F.3d at 239 n.2 ("[E]xhaustion would be futile, given that Woodall is not challenging the application of the BOP regulations, but their validity."); Elwood v. Jeter, 386 F.3d 842, 844 n.1 (8th Cir. 2004).

103. 28 U.S.C. § 2243.

104. *See also* Colton v. Ashcroft, 299 F.Supp.2d 681 (E.D. Ky. 2004) (granting declaratory and injunctive relief against the BOP's cancellation of halfway house program).

105. *See* Boumediene v. Bush, 553 U.S. 723, 780 (2008) ("[H]abeas corpus is, at its core, an equitable remedy.") (quoting Schlup v. Delo, 513 U.S. 298, 319 (1995)).

106. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

107. Harris v. Nelson, 394 U.S. 286, 291 (1969).

108. No. 1:21-CV-299-CLC-CHS, 2022 WL 1598249, at *3 (E.D. Tenn. May 20, 2022).

109. 603 F.3d 1144, 1148 (9th Cir. 2010) (citing United States v. Johnson, 529 U.S. 53, 59 (2000)); *accord Arrington*, 516 F.3d at 1112 n.4; Serrato v. Clark, 486 F.3d 560, 565 (9th Cir. 2007); Mujahid v. Daniels, 413 F.3d 991, 994-95 (9th Cir. 2005); Paulsen v. Daniels, 413 F.3d 999, 1005 n.3 (9th Cir. 2005); *Gunderson*, 268 F.3d at 1153; Johnson v. Pettiford, 442 F.3d 917, 918 (5th Cir. 2006); Cleckler v. United States, 410 F. App'x 279, 283 (11th Cir. 2011); *but see* Rhodes v. Judiscak, 653 F.3d 1146, 1149 (10th Cir. 2011); Burkey v. Marberry, 556 F.3d 142, 144-45 (3d Cir. 2009).

110. 529 U.S. at 60. ■

About the Authors

Stephen R. Sady is the Chief Deputy Federal Public Defender for the District of Oregon.

NACDL MEMBER

Stephen R. Sady
Office of the Federal Public Defender
Portland, Oregon
503-326-2123
EMAIL Steve_Sady@fd.org
WEBSITE https://or.fd.org

Elizabeth Daily is the Appellate Chief at the Federal Public Defender for the District of Oregon.

Elizabeth Daily
Office of the Federal Public Defender
Portland, Oregon
503-326-2123
EMAIL Liz_Daily@fd.org
WEBSITE https://or.fd.org

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