Stephen R. Sady, OSB #81099
Chief Deputy Federal Defender
101 SW Main Street, Suite 1700
Portland, OR 97204
Tel: (503) 326-2123
Fax: (503) 326-5524
Email: steve_sady@fd.org

Attorney for Petitioners

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

DARREN BOTTINELLI, PAMELA MARIE MCGOWAN, TIMOTHY LASHAWN ALLEN, RICARDO CESAR RAMIREZ, JUAN JESUS BORREGO, MICHAEL EUGENE DAVIS, MARSHALL ALLEN STUCKY, YENI NIEBLAS-ESCARREGA, MARK NUTTER, and ALEX DURAND WILLIAMS-DAVIS,

Petitioners,

v.

JOSIAS SALAZAR, Warden, Federal Correctional Institution, Sheridan, and

WILLIAM BROWN, Bureau Of Prisons Community Corrections Manager,

Respondents.

Case No. 3:19-cv-00256-MO

MEMORANDUM IN SUPPORT OF RELIEF ON THE MERITS

Introduction

With a single exception to date, Oregon federal prisoners who expected immediate release based on the First Step Act's congressional clarification of the good time credit statute have been required to remain in custody beyond completion of their sentences, with many more scheduled to similarly serve unnecessary incarceration. The good time fix requires that prisoners showing exemplary compliance with institutional rules receive the full statutory 54 days of good time credits, rather than the 47 days presently provided, for each year of their term of imprisonment. The Bureau of Prisons has continued to provide only 47 days of credit, claiming that a delayed effective date prevents it from implementing the good time fix until it develops an unrelated risk and needs assessment system. This Court should follow the rules of statutory construction, as guided by the Constitution, to immediately put into effect the only congressionally-approved manner of calculating good time credits. This Court has the jurisdiction to correct the wasteful and inhumane over-incarceration of prisoners who have reached their lawful sentence expiration date.

Argument

A. The First Step Act Implemented Congress's Intent To Use The Term Of Imprisonment As The Proper Measure For Good Time Credit And, Separately, Created A New And Independent "Earned Time Credit" System.

Under federal statutes, a term of imprisonment is satisfied through actual time in custody plus good time credits. 18 U.S.C. § 3624(a) and (b). The Sentencing Reform Act of 1984 eliminated the parole system and sharply cut back on the rate at which federal prisoners could earn good time credit, providing in § 3624(b) that prisoners could receive "credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment." For years, the BOP has interpreted the good time credit statute to permit a maximum credit of only 47 days per year of the sentence imposed, despite the statutory

reference to 54 days of credit. The legislative history of the original bill is rife with references to providing a maximum 15 percent reduction for good time credits, which would require 54 days of credit per year of the sentence imposed. *See, e.g.*, 131 Cong. Rec. S4083-03 (1985) (statement of Sen. Kennedy) (under the Act, the "sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for 'good time.'"); 131 Cong. Rec. E37-02 (1985) (statement of Rep. Hamilton) ("Now sentences will be reduced only 15% for good behavior."); *see also* 141 Cong. Rec. S2348-01, S2349 (1995) (statement of Sen. Biden) (as co-author of § 3624(b), on a sentence of ten years, "you are going to go to prison for at least 85 percent of that time . . . . You can get up to 1.5 years in good time credits[.]").

However, the BOP follows a mathematical formula for counting the 54 days against time actually served, as opposed to the sentence imposed, resulting in prisoners receiving only 47 days of credit for each year of the term of imprisonment. The Ninth Circuit upheld this computation in *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1268 (9th Cir. 2001), and the Supreme Court approved the 47-day formula using time of actual custody in *Barber v. Thomas*, 560 U.S. 474 (2010). With the BOP's calculation based on actual time of custody, prisoners have received reductions of only 12.8 percent of the sentence imposed, not the 15 percent Congress contemplated.

Shortly after *Barber*, the Department of Justice and the BOP supported legislation that would shift the 54-day calculation from actual time served to the sentence imposed, thereby increasing the maximum available good time credits from 47 to 54 days per year. *See Hearing on the Oversight of the Federal Bureau of Prisons Before the Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary*, 113th Cong., at 23-24

(2013) (Statement of Charles E. Samuels, Jr. Director, Federal Bureau of Prisons).[1] By doing so, the statute would conform to the intent of the original legislation to grant a maximum 15 percent reduction. However, the provision was not enacted for many years until recently attached to the First Step Act.

Title I of the First Step Act, entitled "Recidivism Reduction," consists of seven sections. The bulk of the title is set out in Section 101, which provides instructions for the Attorney General to create and to implement a "risk and needs assessment system," referred to in the legislation as "the System," along with recidivism reduction programming. Pub. L. 115-391, § 101, 132 Stat. 5194, 5195-5208 (2018) (promulgating 18 U.S.C. §§ 3631-3635). The legislation instructs that the System must provide incentives for participation in programming, with the central incentive being the possibility of earning "earned time credit" to be "applied toward time in prerelease custody or supervised release." § 101, 132 Stat. at 5198 (promulgating 18 U.S.C. § 3632(d)(4)(C)). Section 101 explicitly provides that prisoners cannot earn time credits for the completion of any program prior to the date of enactment of the First Step Act. 132 Stat. at 5198.

As part of the earned time credit system, Section 102 of the law adds subsection (g) to 18 U.S.C. § 3624. § 102(b)(1)(B), 132 Stat. at 5210-13. Under that provision, the BOP can place an "eligible prisoner" who has earned time credits equal to the time remaining on his or her sentence in prerelease custody (home confinement or residential reentry center) or transfer the prisoner to supervised release up to 12 months early. *Id.* Section 3624(g)(1) starts with a reference to the eligible prisoners to whom "this subsection" applies. *Id.* at 5210. Nestled within Section 102(b) of

[1] Available at https://www.govinfo.gov/content/pkg/CHRG-113hhrg82847/pdf/CHRG-113hhrg82847.pdf, at 23-24.

the First Step Act is the two-paragraph "good time fix" amendment to 18 U.S.C. § 3624(b) that provides in full:

> Section 3624 of title 18, United States Code, is amended—
>
> (A) in subsection (b)(1)—
>
> (i) by striking ",beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term," and inserting "of up to 54 days for each year of the prisoner's sentence imposed by the court,"; and
>
> (ii) by striking "credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited with in the last six weeks of the sentence" and inserting "credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment[.]"

§ 102(b)(1)(A), 132 Stat. at 5210. The good time fix appears independent of the other provisions in Title I.

As stated in the summary of the Senate Report, the good time fix was intended "to clarify congressional intent:"

> 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).[2] The legislative history repeatedly references the good time amendment as a "fix" to conform the statute to the original intent:

- "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

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

calculates good time credit. *We made changes to clarify congressional intent on that section*."[3]

- "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."[4]

- "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."[5]

- "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].'"[6]

The First Step Act provides timelines for the implementation of the risk and needs assessment system. Specifically, it gives the Attorney General 210 days after enactment of the law within which to develop and publicly release the risk and needs assessment system. 132 Stat. at 5196 (promulgating 18 U.S.C. § 3632). Within 180 days after that, the Director of the BOP must assess each prisoner and begin to provide appropriate programming. 132 Stat. at 5208 (promulgating 18 U.S.C. § 3621(h)). There is a two-year "phase-in" for the BOP to make

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[3] 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).

[4] 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).

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

[6] 115 Cong. Rec. S7775 (daily ed. December 18, 2018) (statement of Rep. Dianne Feinstein) (emphasis added) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447203).

programming available to all prisoners. 132 Stat. at 5209. At the end of Section 102(b), the law provides a delayed effective date for "this subsection" contingent on the release of the risk and needs assessment system:

> (2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect beginning on the date that the Attorney General completes and releases the risk and needs assessment system under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act.

The correct reading of the statute is that the delayed effective date in § 102(b)(2) applies only to the earned time transfer provisions in § 102(b)(1)(B), despite the BOP's claim that it also delays implementation of the independent good time fix in § 102(b)(1)(A).

B. The Good Time Fix Should Be Construed To Be Effective Immediately Because The Delayed Effective Date Provision Is Rationally Connected Solely To The New Risk And Needs Assessment System.

"[A]bsent *a clear direction by Congress to the contrary*, a law takes effect on the date of enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 403 (1991) (emphasis added); *accord United States v. Clizer*, 464 F.2d 121, 123 n. 2 (9th Cir. 1972); *United States v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991). Here, the only potentially relevant effective date provision in Title I of the First Step Act explicitly links the need for a delay to the risk and needs assessment system: "The amendments made by this *subsection shall take effect beginning on the date that the Attorney General completes and releases the risk and needs assessment system* under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act." § 102(b)(2), 132 Stat. at 5213 (emphasis added). Although that provision considered on its own could be read to encompass the good time fix, which is included within § 102(b), the full statutory context as well as potential constitutional infirmities militate in favor of construing "this subsection" narrowly to mean only the newly promulgated subsection (g) of § 3624, which governs the new

earned time credit transfer authority, leaving the good time fix to be effective immediately in the absence of "clear direction by Congress to the contrary" within the meaning of *Gozlon-Peretz*.

1. The Statutory Context Of "This Subsection" Favors Application Of The Delayed Effective Date Only To Transfer Based On Earned Time Credits As Opposed To Release Based On Good Time Credits.

"[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). On its face, the text of the delayed effective date clause provides good reason to construe "this subsection" as referencing solely the new earned time credit transfer provision because of its contingency on the "date that the Attorney General completes and releases the risk and needs assessment system." Only the earned time credit provision has any relation to the risk and needs assessment system. The good time fix merely adjusts a calculation that the BOP has been making for decades; it requires no new system to implement and, thus, requires no delay. Moreover, the amendments in § 102(b)(1)(B) repeatedly use the same phrase "this subsection" to mean subsection (g) of § 3624, which will govern earned-time transfer to prerelease custody. That phrase—"this subsection"—does not appear in the § 102(b)(1)(A) good time fix. Thus, context strongly favors the narrow reading of delay applying only to subsection (g).

Traditional tools of statutory construction support a narrow construction of § 102(b)(2) to solely include § 3624(g) within the delayed effective date. First and foremost, courts "do not construe statutes in a manner that would lead to absurd results," nor do courts "impute to Congress an intent to create a law that produces an unreasonable result." *United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012); *see also Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) (rejecting agency construction of statute that "makes scant sense" given the need to avoid "consequences

Congress could not have intended") (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013)). There is an obvious need to delay implementation of the earned time transfer provision. The entirely new risk and needs assessment system must be in place before the BOP can begin using time credits earned under that system to determine which prisoners should be transferred to prerelease custody or supervised release.

By contrast, the good time credit system is not new, and it operates on a separate plane from the earned time credit transfer and programming provisions of Title I. The BOP has been touting the need for this amendment for many years. The good time credit amendment is a simple calculation, subtracting an additional seven days of good time credit for each year of the term of imprisonment for compliant prisoners' sentences. The BOP's SENTRY computer system could implement the adjustment virtually overnight. The time involved for individuals is relatively small and needs no programming to implement. Unlike larger sentence reductions, such as those implemented by retroactive guideline amendments, prisoners impacted by the good time fix are already close to release and prepared for reentry. Delaying the good time fix makes scant sense and undermines rather than furthers coherent implementation of the First Step Act. *See United States v. Juvenile Male*, 900 F.3d 1036, 1040 (9th Cir. 2018) (statutory definition may yield to context where definition would "lead to 'obvious incongruities' or would 'destroy one of the major congressional purposes'" of the statute) (citing *United States v. Olson*, 856 F.3d 1216, 1223 (9th Cir. 2017) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)).

Second, courts construe legislation aimed at remedying prior drafting oversights to be immediately effective. In *Gozlon-Peretz v. United States*, the Supreme Court considered the effective date of a statutory amendment to correct an apparent mistake in the Controlled Substances Penalties Amendments Act of 1984, which inexplicably mandated post-confinement supervision

for many small-time drug offenders but exempted big-time narcotics offenders. 498 U.S. 395, 404-05 (1991). The new Act removed that disparity and mandated post-confinement supervision for all Schedule I and II drug offenders. *Id*. Despite the Sentencing Reform Act's delayed effective date, the Supreme Court held, "Given the apparent purpose of the legislation to rectify an earlier mistake, it seems unlikely that Congress intended the effective date to be any time other than the date of enactment." *Id*. at 404-05.

Similarly, in this case, the purpose of the good time fix was to rectify the computation based on actual time served that provided seven days per year fewer than intended, as evidenced by the legislative history treating the amendment as a clarification of Congress's intent regarding good time credits. *See also* Steven Nelson, *Drafting error stalls inmate release under Trump plan*, Washington Examiner (Jan. 25, 2019).[7] As in *Gozlon-Peretz*, it is unlikely Congress intended the rectification of the good time credit calculation to be delayed. Accordingly, the provision should be construed to take effect immediately. In fact, the Senate Report specifically states that the delayed effective date concerns "amendments in this section *related to prerelease custody*," which "shall take effect on the date that the Attorney General completes and releases the new risk and needs assessment system." *The First Step Act Section-by-Section Summary*, *supra*, at 4 (emphasis added). Thus, the delayed effective date was not intended to delay the good time fix in § 3624(b). The amendment to the good time credit statute is independent of the prerelease custody provisions in Title I and, as a clarification of congressional intent, immediately effective.

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

Arguably, if "this subsection" in the effective date provision of § 102(b)(2) is interpreted to mean only subsection (g) of § 3624, then the same term in the applicability provision of § 102(b)(3) would have the same meaning. Section 102(b)(3) provides, "The amendments made by this subsection shall apply with respect to offenses committed before, on, or after the date of enactment of this Act, except that such amendments shall not apply with respect to offenses committed before November 1, 1987." 132 Stat. at 5213. Thus, Section 102(b)(3) makes the amendments applicable to all inmates going forward, regardless of when their crimes occurred. However, as the Supreme Court reminded in *Barber*, "the same phrase used in different parts of the same statute [can] mean[] different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion." 560 U.S. at 484. Here, "this subsection" can have a broader meaning in § 102(b)(3) to include both the good time fix and the new earned time system because that provision includes no reference to the "risks and needs assessment system," as does the delayed effective date provision.

Importantly, Congress had no need to include an express "applicability" provision for the clarifying good time fix to apply to all inmates both prospectively and retroactively. *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689 (9th Cir. 2000) ("[C]larifying legislation is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of its enactment."). As with Guidelines amendments, clarifications automatically apply retroactively. *Hernandez v. Campbell*, 204 F.3d 861, 863-64 (9th Cir. 2000) (clarifications to the Sentencing Guidelines apply retroactively) (citing *United States v. Felix*, 87 F.3d 1057, 1060 (9th Cir. 1996)). Just as an authoritative construction of a statute explains what the law has always meant, Congress's clarification of its intent says what the law has always meant. *See United States v. Aguilera-Rios*, 769 F.3d 626, 631 (9th Cir. 2014) (citing *Rivers v. Roadway Express Inc.*, 511 U.S.

298, 312-13 (1994)). The fact that Congress expressly prohibited prisoners from receiving earned time credits for programs completed before the date of enactment, 132 Stat. at 5198, but omitted any such restriction for good time credits, confirms Congress's intent for the good time fix to have both retroactive and prospective effect. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here 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.").

In the context of the overall legislation and purpose of the statute, "this subsection" in the effective date provision relates only to § 3624(g), thereby construing the good time fix to be retroactive and immediately effective to all current inmates.

2. If Not Construed To Be Immediately Effective, The Delayed Effective Date Of The Good Time Fix Would Be Arbitrary And Capricious In Violation Of The Due Process And Equal Protection Clauses Of The Constitution.

Irrational and arbitrary classifications violate the equal protection clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991). The equal protection clause applies to the federal government through the Fifth Amendment's due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Delaying the effective date of the good time fix to an uncertain time in the future would be arbitrary, capricious, and cruel because it would require prisoners who have shown "exemplary compliance with institutional disciplinary regulations" throughout their sentences to serve more incarceration than Congress has now clearly stated it intended.

"Disparate treatment of similarly situated defendants triggers equal protection concerns when there is no rational basis for the distinction." *Juvenile Male*, 900 F.3d at 1043. Here, the disparate treatment of those whose sentences were calculated before versus after the uncertain future effective date of the risk and needs assessment system "might well trigger equal protection

concerns." *Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006) (construing pretrial credit statute to avoid disparate treatment of juveniles and adults); *Myers v. United States*, 446 F.2d 232, 234 (9th Cir. 1971) (holding that the Fifth Amendment requires that all similarly-situated federal prisoners receive credit under 18 U.S.C. § 3568); *Stapf v. United States*, 367 F.2d 326, 329 (D.C. Cir. 1966) ("Denial of credit . . . where others guilty of crimes of the same or greater magnitude automatically receive credit, would entail an arbitrary discrimination within the power and hence the duty of the court to avoid.").

Construing the good time fix statute to be effective immediately avoids serious constitutional problems. *Jonah R.*, 446 F.3d at 1008 ("We must interpret statutes to avoid such constitutional difficulties whenever possible."); *see Clark v. Martinez*, 543 U.S. 371 (2005) (describing the principle of constitutional avoidance); *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (same). Applying the delayed effective date to the good time fix would irrationally and unconstitutionally discriminate against prisoners who earned the requisite good time credits sufficient for immediate release. Those prisoners presently close to their release dates who have abided by all institutional rules during their incarceration would be held in custody to await the satisfaction of an unrelated condition precedent—the implementation of the risk and needs assessment system. Extending an individual's deprivation of liberty with no countervailing purpose would violate the Due Process Clause and its equal protection component in violation of the Fifth Amendment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

Although the amount of additional custody is relatively small, "'To a prisoner,' this prospect of additional 'time behind bars is not some theoretical or mathematical concept.'"

Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018) (quoting *Barber*, 560 U.S. at 504) (Kennedy, J., dissenting). "'[A]ny amount of actual jail time' is significant, and 'ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration[.]'" *Id*. (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001), and *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017)).

3. The Good Time Fix Clarifies Congressional Intent Regarding The Original Statute.

In any event, the First Step Act's good time fix constitutes a clarification of congressional intent regarding the BOP's original construction of the statutory provision that the Ninth Circuit previously found ambiguous and that the split Supreme Court found reasonable. Where Congress itself has designated its amendment as a clarification, which is also the material effect of the amendment itself, the original form of the good time statute should be subject to reinterpretation consistent with congressional intent and immediately applicable to the petitioners. *ABKCO Music*, 217 F.3d at 689-90 ("Given the extraordinary difficulty that the courts have found in divining the intent of the original Congress, a decision by the current Congress to intervene by expressly clarifying the meaning of [the statute] is worthy of real deference....We therefore honor Congress' 'clarification' label and accept [the new] provisions as a statement of what [the statute] has meant all along.") (quoting *Beverly Community Hosp. Ass'n. v. Belshe*, 132 F.3d 1259, 1265 (9th Cir.1997)). The petitioners should therefore prevail under the former statute as well as the amended statute. Even if the delayed effective date provision could be construed to delay clarification – which it could not – the provision injurious to the liberty interests of the petitioners would constitute an ex post facto law and, therefore, be invalid. *See Weaver v. Graham*, 450 U.S. 24, 30-31 (1981) (retrospective loss of statutory gain time would violate the Ex Post Facto Clause).

C. The Court Should Exercise Its Remedial Powers To Grant The Writ, Order Immediate Recalculation Of Good Time Credits, And Provide For Immediate Release Or Accelerated Transfer To Community Corrections, And Other Equitable Relief.

This Court has both constitutional and statutory jurisdiction to review the lawfulness of the sentences and its execution. *See* 28 U.S.C. §§ 2241 and 2255 (providing statutory habeas corpus jurisdiction to determine the lawfulness of a prisoner's detention); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379-80 (1994) (recognizing ancillary jurisdiction as available to enable the court to manage its proceedings, vindicate its authority, and effectuate its decrees). The District of Oregon provides the appropriate venue for prisoners sentenced in this District, those serving sentences in this District, and those meeting both criteria. Section 2255 motions must be brought before "the court which imposed the sentence[.]" Although issues related to the execution of the sentence are often brought in the district of confinement under § 2241, the filing in the district of origin is a matter of venue, not subject matter jurisdiction. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) ("[T]he question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue[.]").

In *United States v. Walker*, Judge Beistline granted relief under the good time fix of the First Step Act without reaching the merits. Order Requiring Recalculation Of Good Time Credit, No. 3:10-cr-00298-RRB (D. Or. February 7, 2019). In doing so, he adopted the defense arguments for exercising jurisdiction over the execution of the Oregon sentence in Texas. *Id*. This Court has jurisdiction over petitioners who are serving sentences in Oregon under § 2241 and for prisoners sentenced from this District under § 2241, as well as under § 2255 and ancillary jurisdiction.

Concomitant with the Court's habeas jurisdiction is the power to avoid unnecessary incarceration by providing conditional release. *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.).

There is no requirement that petitioners exhaust administrative remedies within the BOP before seeking relief from this Court. Exhaustion of administrative remedies is not at issue under § 2255 or the Court's ancillary jurisdiction. And, even under § 2241, exhaustion is only a prudential consideration, not a jurisdictional requirement. *United States v. Woods*, 888 F.2d 653, 654 (9th Cir. 1989); *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990). Under the Supreme Court standard in *Madigan v. McCarthy*, exhaustion is excused where 1) the prisoner faces irreparable harm from delay incident to pursuing administrative remedies; 2) there is some doubt whether the agency was empowered to render relief; or 3) the agency has indicated predetermination of the issue, rendering exhaustion futile. 503 U.S. 140, 146-49 (1992).

All three of the considerations in *Madigan* apply to good time credit litigation. Petitioners face imminent irreparable harm in the form of over-service of the sentence, given that the correct release date is either imminent or has passed. Futility is also at issue. The BOP is notifying prisoners in general that the retroactive amendment to the good time credit statute "is not effective immediately." Farah Stockman, *Shutdown Threatens to Delay Criminal Justice Reforms Signed into Law by Trump*, N.Y. Times (Jan. 16, 2019); *see also* Pat Nolan & David Safavian, *When bureaucrats undermine our laws*, The Hill (Jan. 19, 2019) ("rather than put the 54 days into effect immediately despite clear guidance by the First Step Act, the BOP continues to drag its feet.").

Accordingly, the Court should not require petitioners to make further efforts to seek an administrative remedy.

Here, petitioners are either serving terms of imprisonment imposed by this Court, or serving sentences within the District of Oregon, or both. The Court should now act to assure that the petitioners serve not a day longer than the law allows. After all, "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects. *Zadvydas*, 533 U.S. at 690. The Court has full authority to grant the requested relief, which falls within the core function of the constitutional writ of habeas corpus to free prisoners being held beyond the scope of any lawful authorization. *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (quoting Blackstone's description of habeas as "the great and efficacious writ, in all manner of illegal confinement").

Conclusion

For the foregoing reasons, this Court should:

1) certify the petitioners as representing the class consisting of all federal prisoners sentenced in the District of Oregon or serving sentences in the District of Oregon for whom the Bureau of Prisons has calculated a projected release date within 18 months of December 21, 2018, and who have been or are expected to be denied the benefit of the First Step Act's amendment of 18 U.S.C. § 3624(b);

2) require the Bureau of Prisons to provide a list of all class members with their contact information to petitioners' counsel;

3) grant interim relief in the form of a temporary restraining order providing conditional release on the terms provided in the supervised release conditions listed in the judgment and commitment order or accelerated transfer to community corrections;

4) grant the writ of habeas corpus;

5) require that the Bureau of Prisons recalculate the petitioners' good time credits forthwith based on the term of imprisonment as required by the amended good time credit statute;

6) declare that the new recalculated projected release date governs over the former computation for the purposes of determining the expiration of the term of imprisonment;

7) release the petitioners without delay if the recalculated release date demonstrates that the term of imprisonment has expired;

8) for those petitioners eligible for but not yet in community corrections, order recalculation of the transfer date based on the difference between the old and new projected release date;

9) for those whose sentences expired prior to release, modify the term of supervision to either begin on the correct date the sentence expired for those in community custody or adjust the date for release from the term of supervision to accomplish the same reduction in the interests of justice; and

10) grant such other and further relief, pursuant to 28 U.S.C.§ 2243, as law and justice require.

Respectfully submitted this February 20, 2019.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Petitioners