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Delayed Implementation Of The First Step Act's Good Time Credit Fix Violates The Rules Of Statutory Construction And Due Process Of Law

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With a single exception to date, thousands of 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 over the next six months. 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. The Bureau should be following 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. The Executive Branch has the power – and in good conscience the obligation – to correct the wasteful and inhumane over-incarceration of prisoners who have reached their lawful sentence expiration date.

Rather than wait for the Executive Branch to do the right thing, prisoners' representatives should litigate for immediate relief on their clients' behalf from the Judicial Branch. This article provides the legal grounds for relief in several parts. In Section A, we describe the history of the Bureau's denial of the full good time credits intended by Congress and the First Step Act's fix, which clarifies the correct 54-day calculation. In Section B, we review the rules of statutory construction that call for immediate implementation of provisions, like the good time fix, that clarify congressional intent. The second half of Section B specifically addresses the serious due process and equal protection problems avoided by immediate implementation of the good time fix. In Section C, we outline the paths to expedited relief for the current federal prisoners suffering irreparable harm with each passing day. The last sections address the need for counsel and include a description of the release of Mark Walker 60 days prior to his projected release date, as the first federal prisoner to receive the full 54 days of good time credit he earned under the statute.

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 Bureau 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 Bureau's mathematical formula for counting the 54 days against time actually served, as opposed to the sentence imposed, resulted 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 Bureau'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 Bureau 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 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

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

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 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. 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 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

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

[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).

> 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 Bureau 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 Bureau to make 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 Bureau'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

[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).

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. 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 Bureau 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 that 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 Bureau 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 Bureau has been touting the need for this amendment for many years. The good time credit amendment is a simple calculation, subtracting seven days of good time credit for each year served for compliant prisoners' sentences. The Bureau'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 would already be 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.

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

[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

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)).

C. Federal Prisoners Facing Irreparable Harm From Delayed Implementation Of The Good Time Fix Should Litigate For Immediate Relief In The Absence Of Executive Branch Remediation.

The Executive Branch can prevent the inhumane and expensive over-incarceration that grows every day by simply interpreting the First Step Act to permit immediate implementation of the good time fix. There is no need for the Executive Branch to sit on its hands on good time credits while the unrelated and important earned time credits system is formulated. However, absent a rational and humane response to the spectacle of thousands of men and women sitting in prison at taxpayer expense after having completed their sentences, litigators should seek an immediate remedy in the courts.

The potential for relief exists in either the sentencing court under the original case number or in the district of confinement, based on the courts' constitutional and statutory habeas jurisdiction to review the lawfulness sentences and their 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 choice of venue will largely depend on where the litigators determine they are best able to bring a case without unnecessary delay. By statute, § 2255 motions must be brought before "the court which imposed the sentence[.]" By contrast, issues related to the execution of the sentence are generally brought in the district of confinement under § 2241. *Rumsfeld v. Padilla*, 542 U.S. 426, 436 (2004). However, with respect to § 2241, the filing in the district of confinement is a matter of venue, not subject matter jurisdiction. *Padilla*, 542 U.S. at 451 (Kennedy, J., concurring) ("[T]he question of the proper location for a habeas petition is best understood as a

question of personal jurisdiction or venue[.]"). Because good time credit issues are often considered to be related to the manner of execution of the sentence, filing under § 2241 in the district of confinement will result in fewer procedural issues. However, asking for implementation of the good time fix involves purely legal issues, and the relevant factual circumstances arise in the district of sentencing, where the court will be considering the prospect of imminent release to that district under supervision. Counsel should carefully consider the options.

Regardless of whether cases are brought in the sentencing court or the confinement court, the government may try to delay court involvement by arguing that prisoners must exhaust their administrative remedies before seeking judicial review. But exhaustion is not required 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. Our clients 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 Bureau 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."). And there is no realistic chance that the administrative remedy system is empowered to address this question.

The final litigation consideration is how to seek timely relief for an issue that will be extinct in a matter of months. For our clients suffering current or imminent irreparable harm, we should be requesting an interim remedy of immediate conditional release pending full litigation. *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). Different judges may well take different approaches to this litigation: we can hope that the absurdity of individuals lingering in prison after having completed their sentences would be sufficiently repugnant that relief will quickly follow. But in the absence of an expedited briefing schedule and disposition, release on supervised-release-like conditions would be appropriate.

D. Ardent Advocacy Has Its Greatest Role In Ensuring That Our Clients Serve No Longer Than The Judgment Lawfully Permits.

Prisoners are going to need skilled representation from criminal defense lawyers to adequately protect their rights and end over-service of their sentences. The Supreme Court recognized that the right to counsel extends to post-sentencing proceedings related to the underlying judgment in *Mempa v. Rhay*, 389 U.S. 128, 135 (1967). Where a prisoner is still serving a sentence that, under the statutes as properly construed, has already expired, the proceedings seeking relief should be deemed a critical stage under the Sixth Amendment. *United States v. Wade*, 388 U.S. 218, 226 (1967) ("It is central to [the right to counsel] that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."). There should at least be a right to counsel in these circumstances under 18 U.S.C. § 3006(A) as an ancillary proceeding. The Criminal Justice Act specifically provides that a person who had counsel appointed under the CJA for a felony charge is entitled to be represented at every stage of the proceedings, "including ancillary matters appropriate to the proceedings." 18 U.S.C. § 3006A(c).

Every district and every case has its own characteristics. We can hope and advocate for all prisoners facing irreparable harm from being held in prison after their sentences are completed having counsel at their side.

E. What We Learn From The First Man Out Determines If More Will Follow.

The effective date litigation regarding the good time credit fix is by its nature evanescent: within 210 days of the December 21, 2018, date of enactment, the risk

and needs assessment system should be in place and all prisoners with sentences of greater than one year and less than life must receive the full 54 days for each year of the term of imprisonment. For this mayfly litigation season, we learn as we go. With that proviso, here is a brief description of our first litigation in *United States v. Walker*,[8] and a discussion of lessons to be learned to extend the relief granted in that case to the thousands of other individuals facing the same harm.

Mark Walker received a ten-year sentence that, with 70 more days of good time credit, would have been completed January 28, 2019. With the delayed effective date, the Bureau was requiring him to remain in prison until April 9, 2019, despite a spotless prison record. After we filed our habeas corpus motion and request for immediate release before the sentencing judge, asserting alternative bases for jurisdiction under § 2241, § 2255, and ancillary jurisdiction, the court recognized the urgency of the case and set a quick briefing schedule. However, when the government filed its response, it solely challenged jurisdiction under § 2241, arguing that Mr. Walker's motion should have been filed in Texas, where he was then in custody. The government in a footnote stated its intention to file an opposition on the merits if the court found jurisdiction. We replied, arguing that the court had jurisdiction and that the government's failure to respond on the merits should result in immediate conditional or unconditional release given the urgency of the claims.

In a brief order issued the following day, the court found jurisdiction "for the reasons set forth" in our reply. Then, the court, "given the Government's failure to address the merits of Defendant's request, and *the equities of the situation*," granted "the relief requested for this case only, without a final determination of the merits of the legal issues raised by Defendant" (emphasis added). The relevant documents are posted on the Oregon Federal Public Defender site.[9]

For those litigating good time credits, there are a few takeaways: 1) although filing under § 2241 in the district of confinement may be the preferable way to litigate good time credit issues, there are jurisdictional bases for the sentencing judge to handle the question; 2) the issues are substantial enough that the court took them very seriously; and 3) at least one judge recognizes "the equities of the situation,"

[8] Case No. 3:10-cr-298-RRB, Order Requiring Recalculation of Good Time Credit (D. Or. filed February 7, 2019).

[9] Motion, Response, Reply, Order Requiring Recalculation of Good Time Credit.

which may bode well for either rulings on the merits or interim relief during the litigation. But the judge did not reach the merits, limiting the grant of relief to the single case before him.

Following Mr. Walker's release, the unresolved question, at a minimum, is how to extend the remedy from this one man to the thousands who are waiting. Will the Executive Branch take the necessary actions to end this foolish waste of lives and money? Are class actions the best litigation vehicle for efficiently helping the many individuals who individually face relatively small times of over-service, but who, under the Freakonomic effects of scale, will collectively experience profound injustice at great expense? And given that the miscalculation of good time credits does not become moot with the beginning of the term of supervised release, what should we be asking for in modified terms of supervised release for over-incarceration? *See United States v. Johnson*, 529 U.S. 53, 60 (2000) ("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."); *Tablada v. Thomas*, 533 F.3d 800, 802 n.1 (9th Cir. 2008) (in good time case where prisoner began supervised release, "[t]he 'possibility' that the sentencing court would use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) was enough to prevent the petition from being moot") (quoting *Mujahid v. Daniels*, 413 F.3d 991, 994–995 (2005)).

Conclusion

For federal defenders and their clients, every day counts. The current delays in implementation of the good time credit amendment are magnified every day, at the expense of wasted liberty, prolonged and needless separation from families and loved ones, programming for reintegration into the community stalled, and taxpayer dollars spent for no conscionable return. We need to be there for our clients whose sentences to prison should be over, just as we were there for them when the sentence was imposed.