UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

Ex parte Yorie Von Kahl, Petitioner,	No.: 18-1245 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS

Yorie Von Kahl, pro se, hereby submits this memorandom of points and authorities in support of his petition for writ of habeas corpus before this court. He challenges his current imprisonment and detention by the Bureau of Prisons (BOP) beyond his mandatory parole release (MPR) date established by the U.S. Parole Commission (USPC) as "2/12/2013" solely upon application of the BOP's Program Statement (PS) 5880.30 underwhich the BOP altered his MPR date to "2/12/2023" and now detains him under the added ten (10) years. Petitioner has alleged that such action violates 18 U.S.C. §4001(a)(1), Articles I, II and III of the U.S. Constitution, and substantive and procedural due process of law under the Fifth Amendment and the statutory requirements of the Parole Commission and Reorganization Act of 1976 (PCRA), 18 U.S.C. §§ 4201 et seq and 5 U.S.C. § 553 of the Administrative Procedures Act (APA), and that his current inprisonment is unlawful.

I. Insofar As Exhaustion of Administrative Remedies May Be Required Exhaustion Has Been More Than Satisfied

Congress expressly requires exhaustion for state habeas petitioners seeking relief in federal courts pursuant to 28 U.S.C. § 2254(b)(1) but has not required exhaustion for federal habeas petitioners seeking relief in federal courts

pursuant to 28 U.S.C. § 2241. Gonzalez v. O'Connell, 355 F.3d 1010, 1016 (7th Cir. 2004) (citing James v. Walsh, 308 F.3d 162, 167 (2nd Cir. 2002)). This Circuit has nonetheless impressed upon §2241 habeas petitioners a "common law exhaustion rule" (at least in some such cases), Richmond v. Scibana, 387 F.3d 602, 604 (7th Cir. 2004), a rule first drawn from "persuasive... reasoning" of decisions from other circuits involving mostly state prisoners and non-habeas cases. Ruviwat v. Smith, 701 F.2d 844, 845 (7th Cir. 1983). Exhaustion, like other procedural rules, depends upon the "textual basis" of the relevant statute, Jones v. Bock, 549 U.S. 199, _____, 166 L.Ed.2d 798, 814 (2007), and the Supreme Court has admonished that in determining exhaustion requirements courts '"must not read in by way of creation, 'but instead abide by the' duty of restraints, th[e] humility of function as merely the translator of another's command.'" id., (cites omitted).

While the Supreme Court has stated that '"[w]here Congress has not clearly required exhaustion, sound judicial discretion governs,'" Gonzalez v. O'Connell, supra, 355 F.3d at 1016 (quoting McCarthy v. Madigan, 503 U.S. 140, 144 (1992)), while admonishing courts to not "impose additional exhaustion requirements beyond those provided by Congress or the agency," Darby v. Cesnaros, 509 U.S. 137, 146-47 (1997) (construing § 10 of the APA), and that "when Congress mean[s] to depart from the usual procedural requirements, it [does] so expressly." Jones v. Bock, supra, at _____, 166 L.Ed.2d at 813.

In any case a court's '"discretion... is a mere legal discretion, a discretion in discerning the course prescribed by law; and when that is determined, it is the duty of the Court to follow it." Littleton v. Barbling, 468 U.S. 389, 412 (7th Cir. 1972) (quoting Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824)). The duty to '"apply the terms of the [relevant] statute'" is required when 'the common law exhaustion doctrine'" is involved as much so as when it is not, Gonzalez v. O'Connell, supra, 355 F.3d at 1015

(citing authorities), and, like all cases, judicial "discretion is limited to the duty to follow the law." Littleton, supra, 418 F.2d at 412. Notably, the exhaustion rule "has no application where the defect goes to the jurisdiction of the administrative agency," United States v. ex rel. De Lucia v. O'Donovan, 178 F.2d 876, 879 (7th Cir. 1949) (cite omitted), which is the case here, because where an agency has exceeded it's statutory authority, its resulting order is void. id., at 779-80 (citing cases).

Assuming arguendo an exhaustion requirement here, this Circuit recognizes exceptions where exhaustion may result in:

> "(1)... prejudice due to unreasonable delay or an indefinite time frame for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional questions are raised."

Gonzalez v. O'Connell, supra, 355 F.3d at 1016 (quoting Iddir v. INS, 301 F.3d 492, 498 (7th Cir. 2002)). Any one of such exceptions is sufficient, Iddir, supra, 301 F.3d at 498, and, here, each is self-evident.

Petitioner has presented his claims at all institutional levels, including the BOP's Regional Office, its specialized computation center, its General Counsel and the Director's Office over the course of more than two (2) decades - efforts clearly presenting his claims to "a sufficiently high level of review to satisfy the [BOP's] administrative needs, [and] further exhaustion would not merely be futile for [Petitioner], but would waste administrative resources unsupported by any administrative or judicial interest." Weinberger v. Salfi, 422 U.S. 749, 765-66 (1975).

Notably, BOP regulations require that staff at every level, including that of "General Counsel," must both "[a]cknowledge receipt of a Request or Appeal by returning a receipt to the inmate" and "respond in writing to all filed Requests or Appeals." 28 C.F.R. §§ 542.11 & 542.18. Past and current

policy contain the same requirements. See e.g., BOP PS 1330.18.5.1. 1 & 2. Congress has additionally mandated that an agency provide "[p]rompt notice" of any "denial... of a written application, petition, or other request of an interested person made in connection with any administrative proceeding." 5 U.S.C. § 555(e). The BOP's highest offices' refusal to acknowledge or respond (in writing or otherwise) to Petitioner's Appeal and later Request, see Petition ¶¶ 20 & 22, should thus be deemed a deliberate waiver or forfeiture of any (and certainly any further) exhaustion requirement in this case. The Supreme Court has held that "an administrative procedure is unavailable when (despite what regulations and guidance materials may promise) it operates as a simple dead end - with officers unable to consistently unwilling to provide any relief to aggreived inmates." Ross v. Blake, 578 U.S. _____, _____, 195 L.Ed.2d 117, 127 (2016). "[T]he modifier 'available' requires the possibility of relief. When... no such potential exists, the inmate has no obligation to exhaust the remedy." id. (cite omitted). This Circuit holds that "[a] remedy becomes 'unavailable' if prison employees do not respond to a properly field grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting." Dole v. Chandler, 438 F.3d 804, 809 (7th Cir. 2006)

Thus assuming any exhaustion requirement in this case, the clear record of administrative futility, claims of wholesale want of jurisdiction in the BOP, and multiple substantial constitutional questions being raised, requiring further exhaustion or delay in resolving these overripe issues will arguably, if not presumably violate the procedural requirements of 28 C.F.R. §2243, raise a further constitutional question as to the suspension of the writ, Art. I, §9, Cl. 3, and exascerbate the alleged violations of 18 U.S.C. §4001(a)(1), Articles I, II and III Constitutional separation of powers claims, and the alleged violations of substantive and procedural due process in violation

of the Fifth Amedment, 18 U.S.C. §§ 4201 et seq, and 5 U.S.C. § 553.

II. The BOP's Alteration Of Petitioner's 30-Year Mandatory Parole Release (MPR) Date And Imprisoning Him Beyond The Lawful Date Of 2/12/2013 Pursuant To Its Self-Generated Program Statement (PS) 5880.30 Is Unauthorized By Statute, Forbidden By 18 U.S.C. §§ 4001(a)(1) And 4201 Et Seq, And Violates Separation Of Powers Principles Under Articles I, II and III Of The Constitution, As Well As Due Process Of Law

The issues in htis case turn upon the existence of clear statutory authority vested in the BOP to generate PS 5880.30 to alter Petitioner's sentence and MPR date of 2/12/2013 (as formaly established by the USPC) and to hold him imprisoned and detained beyond that date. The administrative record developed during Petitioner's attempts to administratively remedy such action shows that the BOP purports to ground its jurisdiction to generate PS 5880.30, and thereunder to alter his 30-year MPR date by adding ten (10) years thereto under which it now detains him, on 18 U.S.C. § 4206(d), which it claims is a:

> section of statute [that] authorizes the Bureau [of Prisons] to "stack" two-thirds dates of consecutive sentences to arrive at one two-thirds/30-year date for computation.

See Petition ¶ 19 (citing Exh. 2C, Attach. 2, p.74). See also id., ¶ 21 (citing Exh. 2C, Attach. 2, pp.40-42) ("The Bureau has correctly applied the statute [18 U.S.C. § 4206(d)], which requires that the two-thirds dates be stacked.") This is legally impossible.

"It is rudimentary administrative law that discretion as to the substance of [an agency's] ultimate decision does not confer jurisdiction to ignore the required procedure for decision making," Bennett v. Baer, 520 U.S. 154, 172 (1997) (quoting SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943)), and '"an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be substained.'" NLRB v. Pipefitters, 429 U.S. 507, 522 n. 9 (1977) (quoting SEC v. Chenery Corp., supra, 318 at 95). However, '"an agency literally has no power to act... unless and until Congress confers power upon it.'"

New York v. FEGC, 535 U.S. 1, 18 (2002) (quoting Louisiana Publ. Serv. Comm'n v FCC, 476 U.S. 355, 374 (1976)). Thus, "]a]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress," FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000), and its "power to promulgate legislative rules and regulations is limited to the authority delegated by Congress." Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988). "An agency cannot confer powers upon itself," Louisiana Publ. Serv. Comm'n, supra, 476 U.S. at 374, and '"[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction."'" Durable Mfg. Co. v. U.S. Dept. of Labor, 578 F.3d 447, 501 (7th Cir. 2009) (quoting Adams Fruit Co., Inc. v. Bennett, 494 U.S. 638, 650 (1990), quoting Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973)).

A. Section 4206 Provides No Authority For The BOP To Make Or Re-Make Parole Release Determinations Nor Does The Act Of Which Section 4206 And Subsection 4206(d) Are A Part

Petitioner's sentencing court ordered his cumulative life plus 15-year sentence to be executed "[p]ursuant to 18 U.S.C. Section 4205(b)(2), the defendant to be eligible for parole at such time as provided by law and as the Parole Commission may determine." Petition ¶ 7 (quoting J & C Order). Section 4205(b)(2) is one subsection of § 4205 of a multi-sectioned Parole Commission and Reorganization Act of 1976 (PCRA), which expressly authorized a sentencing court to:

> fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released at such time as the Commission may determine.

§ 4205(b)(2). Thus, the sentencing court's order and § 4205(b)(2) clearly lodged the parole release authority over Petitioner exclusively in the USPC.

The BOP, however, purports that another section of the PCRA "authorizes" the BOP to "stack" two-thirds dates of consecutive sentences to arrive at one two-thirds date for the computation," namely, "18 U.S.C. § 4206(d)." Petition ¶¶ 19 & 21.

"The starting point in every case involving construction of a statute is that language itself." Watt v. Alaska, 451 U.S. 259, 266 (1981). Section 4206(d) provided that:

> Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms or more than forty-five years including any life term, whichever is earlier: Provided however, that the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any federal, state, or local crime.

18 U.S.C. § 4206(d).

The face of § 4206(d), like that of § 4205(b)(2), relates to the "release[] on parole" of a federal "prisoner" contingent upon a "determin[ation]" of the "Commission." Neither subsection mentions the BOP or the Director of the BOP much less suggests any authorization for the BOP to "stack," "unstack," "re-stack" two-thirds dates of sentences or to modify sentences in any way or to make any parole release determinations at all. The BOP has provided no basis of reasoning as to why it reads "the Commission" - i.e., the only agency mentioned in § 4206(d) - to mean the BOP. However, as statutory construction is a "holistic endeavor" in which potentially ambiguous provisions may be "clarified by the remainder of the statutory scheme," United Savings Ass'n v. Timbers of Inwood Forest Assoc's, 484 U.S. 365, 371 (1988), the scheme and its purpose is crucial.

Section 4206(d) is the fourth and last subsection of § 4206, which is but one section of the highly comprehensive PCRA, 18 U.S.C. §§ 4201-18, enacted

to '"infus[e]... due process into federal parole procedure,'" Geraghty v. U.S. Parole Comm'n, 522 F.Supp. 276, 281 (M.D. Pa. 1982) (quoting H.Rep. No. 94-184, 94th Cong., 1st Sess., p.2)), and to end the "unstructured discretion" practiced by the former U.S. Board of Parole by replacing the former parole system with a comprehensive scheme providing mandatory standards and procedures. Warren v. U.S. Parole Comm'n, 659 F.2d 183, 191 (D.C. Cir. 1980).

1. The PCRA Vests All Parole Release Determination Jurisdiction And Discretion In The USPC, Including All Rulemaking Power, With Structural Safeguards Of A Quoram Of Presidential Appointees, All Of Which Are Violated By The BOP's Application of PS 5880.30 To Petitioner

While § 4206(d) facially vests no authority in the BOP, statutory construction requires courts to look "to provisions of the whole law," as well as to its "object and policy," "structure," and "subject matter." U.S. Nat'l Bank Of Oregon v. Independant Insur. Agents of America, Inc., 508 U.S. 439, 455 (1993).

The PCRA's preliminary structural provision:

> established, as an independant agency in the Department of Justice, a United States Parole Commission which shall be composed of nine members appointed by the President by and with the consent of the Senate.

18 U.S.C. § 4202. That Congress created the USPC as "an independant agency" in the DOJ and injected the Constitution's Appointment Clause requisites into the President, Article 2, § 2, Cl. 2, emphasizes the structural nature of the USPC and the extent of its separation of powers.

"Any person 'exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must, therefore, be appointed in a manner prescribed by § 2, Cl. 2 of... Article[II]."'" Lac Courte Breilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, 376 F.3d 650, 660 (7th Cir. 2004) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)). Under the Clause, all '"[p]rincipal officers are selected by the President with the advice and consent of the Senate,'" Morrison v. Olson, 487 U.S. 654,

670 (1988) (quoting Buckley, 424 U.S. at 132), and "the Clause controls the appointment of the [principle] members of a typical administrative agency." Buckley, 424 U.S. at 133. The Clause is not merely a matter of "etiquette or protocal," id., at 125, but a "principle of separation of powers" and not "simply an abstract generalization in the minds of the Framers." id., at 124. '"The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political,'" Lac Courte Breilles Band, supra, 367 F.2d at 662 (quoting Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 878 (1991)), and "[t]he Senate's advice and consent power is a critical 'structural safeguard[]' of the constitutional scheme." NLRB v. SW General, 580 U.S. _____, _____, 197 L.Ed. 2d 263, 270 (2017) (cite omitted).

Thus by making the USPC an "independant agency" in the DOJ and requiring Article II, §2, Cl. 2 Presidential appointments of each Commissioner, it could hardly be more plain that Congress intended the USPC to be '"entirely free from the control or coercive influence, direct or indirect,' of either the Executive or the Congress." Weiner v. United States, 357 U.S. 349, 355-56 (1958) (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935)).

In sharp contrast, the BOP is a "Bureau" within and an "[o]rganizational unit" of the DOJ. See 28 C.F.R. § 0.1; Obremski v. Office of Personnel Management & Merit Systems Board, 697 F.2d 1263, 1265 n. 1 (D. Cir. 1982). The DOJ is "an executive department in the United States at the seat of Government," 28 U.S.C. § 501, the "head" of which is the "Attorney General" (AG) appointed by the President by and with the advice and consent of the Senate. 28 U.S.C. § 503. The BOP "shall be in charge of a Director appointed by and serving directly under the Attorney General," 18 U.S.C. § 4041, and the BOP performs its duties and function's "under the direction of the Attorney General." 18 U.S.C. § 4042(a).

Under a section of the PCRA titled "Powers and duties of the Commission," Congress mandated that:

> (a) The Commission... by majority vote shall -
> (1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;....

18 U.S.C. § 4203(a)(1) ("this chapter" simply refers to the PCRA).

That section also provided that:

> (b) The Commission, by majority vote, and pursuant to the procedures of this chapter, shall have power to -
> (1) grant or deny... parole [release to] any eligible prisoner;...

18 U.S.C. § 4203(b)(1).

Clearly, Congress vested all jurisdiction both to promulgate rules and regulations for parole release determinations and to make those decisions "pursuant to the procedures" of the PCRA exclusively in the USPC and conditioned the exercise of that jurisdiction upon the "majority vote" of a 9-member Commission of which each member was a Presidential appointee under the Appointments Clause.

While the rule-making power (like the parole release determination power) was undisputably vested in "[t]he Commission," § 4203(a)(1), Congress specially provided under the title "Definitions":

> (6) "Rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 4203 and section 553 of title 5, United States Code.

18 U.S.C. § 4201(6).[1] And, as if anticipating attempts by the BOP to usurp that jurisdiction, Congress specially provided that:

> (1) "Commission" means United States Parole Commission;
> (2) "Commissioner" means any member of the United States Parole Commission;
> (3) "Director" means Director of the Bureau of Prisons;....

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1. Notably, for the USPC rule-making purposes, Congress omitted the general exception under 5 U.S.C. § 553(b)(3)(A) for "'general statements of policy.'" 18 U.S.C. § 4218(b).

18 U.S.C. § 4201(1)-(3).[2]

In 1993, when the BOP generated PS 5880.30, § 4202 continued to require a USPC "which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate," while §§ 4203(a)(1) and (b)(1) continued to require a "majority vote" of "[t]he Commission" for rule-making and parole release determinations under the PCRA.

"A quorum is the number of members... who must be present... to legally transact business," a "fixed number of members... whose presence is necessary for the proper or valid transaction of business," and the number to make the "body... legally competent to transact business." New Process Steel, LLP v. NLRB, _____ U.S. _____, _____, 177 L.Ed. 2d 162, 170 (2010) (citing dictionary definition's). While a "majority vote" of a mandatory nine-member USPC is of course five members, the common-law quoram rule permits a simple majority of a collective body "in the absence of a contrary statutory provision" and only when "the enabling statute is silent on the question," Fed. Trade Comm'n v. Flotill Products, Inc., 389 U.S. 179, 183-84 (1967), such rule is "clearly foreclose[d]" when the statute identifies a requisite number of members. id., at 186.

In 1994, §§ 4202 and 4203(a)(1) and (b)(1) remained unchanged, and the application of PS 5880.30 by BOP staff at USP Leavenworth, Kansas on April 12, 1994 to revise Petitioner's formerly set MPR date of 2/12/2013 to 2/12/2023 is "structurally implausible, as it would render [these] two... provisions void." New Process Steel, supra, at _____, 177 L.Ed. 2d at 171.

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2. The PCRA provided a very few functions for the BOP to perform none of which included making parole release determinations or rulemaking for such purposes. See e.g., 18 U.S.C. § 4205(c) (providing pre-sentence study and report of prisoner to sentencing court); id., § 4205(d) (providing similar study and report to USPC upon commitment of prisoner in BOP); id., § 4205(f) (providing discretion to BOP to motion sentencing court to reduce minimum term of sentence); id., § 4207(1) (BOP may provide USPC information to be considered); id., § 4208(c) (BOP may summarize documents provided USPC, rather than produce them, if specific circumstances exist).

Even assuming for the sake of argument that the common-law quorum rule somehow applied to §§ 4202 and 4203(a)(1) and (b)(1) in 1993 or 1994, or that the statutes could be read as permitting a majority to mean a majority of Commissioners actually appointed and filling their office's at the time, the simple and undisputable fact remains that the BOP is not the USPC, the Director of the BOP is not a Commissioner of the USPC, PS 5880.30 is not a rule or regulation of the USPC nor a legislative or substantive rule at all, and application of PS 5880.30 to alter and re-set Petitioner's 30-year MPR date from 2/12/2013 to 2/12/2023 is neither an action of the USPC or any action of even a single Commissioner.

The USPC's enabling statute, 18 U.S.C. §§ 4201-18 was positively repealed by Pub.L. 98-473, Tit. II, Ch. II, § 218(a)(5), Oct. 12, 1984, 98 Stat. 2027. However, it was retained by that same Act for 5 years. id., § 235(b)(1)(B), 98 Stat. 2032. Under that Act, the USPC was mandated to set release dates for parolable prisoners within their repective parole guideline ranges sufficiently prior to the expiration of the 5-year period. id., § 235(b)(3), 98 Stat. 2032. That section was amended to replace the mandate for a within guidelines date with a mandate to set such date "pursuant to section 4206." Pub.L. 100-182, § 2(b)(2), Dec. 7, 1987, 100 Stat. 1266. The 5-year period of § 235(b) was amended to a 10-year period, Pub.L. 101-650, Tit. III, § 316, Dec. 1, 1990, 104 Stat. 5115, and, thereafter, to a 15-year period, Pub.L. 104-232, § 2(a), Oct. 2, 1996, 110 Stat. 3055, and the original expiration date of November 1, 1992, was thereby extended to November 1, 1997, and, finally, to November 1, 2002 at which time the positive repeal of the PCRA was conclusive and the USPC in respect to Petitioner ceased to exist.[3] (See text of footnote to 3 on page 13, infra).

3. In amending § 235(b)(3) on December 7, 1987, Congress expressly mandated that "[t]he amendments made by this Act shall apply with respect to offenses committed after the enactment of this Act." Pub.L. 100-182 supra, § 26, 100 Stat. 1272. That short Act's legislative history indicated concern with treaty transfers of prisoners from foreign countries, and, because the USPC "goes out of existence on November 1, 1992,... there will no longer be any [parole] system in effect" and such transfers "would violate treaty obligations." 133 Cong. Rec. H-31948 & 31950 n. 21 (Nov. 16, 1987). There was also concern expressed by the fact that the "bulk" of the SRA "took effect" on November 1, 1987 leaving "considerable confusion and administrative headaches," id., H-31946, and noted that the original § 235(b)(3) then in effect provided prisoners affected thereby with a "vested right" and, if so, "the ex post dacto clause of the Constitution nullifies the attempt of [the amendment] to enable the Parole Commission to go above the parole guidelines" "under the standard set forth in 18 U.S.C. § 4206." id., H-31947 & n. 8 at H-31949. A panel of a court for this Circuit, which acknowledging the mandate of § 26, supra, to apply the amendments prospectively to offenses committed after the Act's effective date, held "[d]espite that language" to apply the amendment to offenses committed prior to November 1, 1997. Norwood v. Brennan, 891 F.2d 179, 182 (7th Cir. 1989). The Supreme Court has since prohibited retroactively applying statutes unless Congress has explicitly so required. Landgraf v. USI Film Products, 511 U.S. 244 (1994) and INS v. St. Cyr, 533 U.S. 289 (2001). These rulings have wiped away contrary rulings, Zivkovic v. Holder, 724 F.3d 894, 899 (7th Cir. 2013), and decisions such as Norwood have been "fatally undermined." United States v. Hurlburt, 835 F.3d 715, 718 (7th Cir. 2016). Petitioner does not directly challenge Norwood, but simply directs the Court to § 235(b)(3)'s legislative history and the law (i.e., both Houses and The President's concurrance) as to its applicability should it arise.

For purposes of this Petition, the final repeal of the PCRA on November 1, 2002 is an undisputable historical, legislative and "operative fact," see e.g., Dobbert v. Florida, 432 U.S. 282, 297-98 (1977) (citing Chicot County Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)); United States v. United States Coin and Currency, 401 U.S. 715, 743 (1970), for which this Court must take judicial notice. Fed. R. Evid. 201(d).

Within the 6-month period prior to the final repeal of the PCRA, the USPC's last assessment of Petitioner acknowledged that his MPR date remained at "2/12/2013," Pet. ¶ 25 (citing Exh. 2C, Attach. 1, pp.1-3), and in light of the USPC's assurances that he would serve no more than 30 years with his MPR date established as "2/12/2013," Pet. ¶¶ 8-10, Petitioner had every expectation of release prior to and no later than 2/12/2013. It is of no small import that the USPC's legal counsel upon request by the USPC's Chairman provided a legal decision that a prisoner's established 30-year MPR date (as set by the USPC) cannot be upset by less than a majority vote of Commissioners expressly finding at least one of two statutorily defined reasons and in the absence of which the USPC "must grant [the prisoner] mandatory parole in order to comply with 18 U.S.C. 4206(d).'" Bowers v. Kelly, 651 F.3d 1277, 1286 (11th Cir. 2011) (quoting Memorandum of USPC Legal Counsel Rockne Chickinell, May 13, 2005).

On November 1, 2002 the PCRA's repeal was final. "Its life [had come] to an end." Greenwood v. Union Freight R.R. Co., 105 U.S. 13, 18 (1882). On November 2, 2002, the PCRA "no longer exist[ed]," id., and whether it simply "expired" or had "been repealed" is a distinction with no difference. Burke v. Burnes, 479 U.S. 361, 363 (1987). The "retroactive amendment of a law that has already expired" is virtually unheard of. Republic of Iraq v. Beaty, 556 U.S. _____, _____. 173 L.Ed. 2d 1193, 1204 (2009).

Having affirmed Petitioner's 30-year MPR date as 2/12/2013 prior to its

abolition on November 1, 2002, there remained no authority after that date to make any determination to prevent his release thereafter on that date. Insofar as the November 2, 2002 Act purported to extend extension the PCRA and functus officio USPC can be viewed as a constitutionally permissible legislative act, it must be construed as re-enacting the PCRA and not as an arbitrary unsetting of mandatory release dates.[4] As such, it must be construed as prospectively applying to prisoners who were not among those entitled to settled release dates prior to November 1, 2002. Whatever complications that may entail, it is not a part of the subject-matter in the instant petition.

As of November 1, 2002, any denial of Petitioner's release no later than his 30-year MPR date of 2/12/2013, depended on a hearing and express findings by a majority of Commissioners before this date. See 18 U.S.C. § 4206(d); 28 C.F.R. § 2.53(a)-(b). No such action occurred then or since.

2. Section 4206(a) And (d) Are Both Mandatory Release Provisions Subject To Limited Discretion Protected By Due Process Of Law

Section 4206(d)'s mandatory language that a "prisoner... shall be released" but that "the Commission shall not release" him "if it determines" the existence

4. Some courts have construed the period between the PCRA's final repeal on November 1, 2002 and the purported extension of the non-existent and defunct § 235(b) on November 2, 2002 as '"a one-day hiatus where the Parole Commission was apparently in suspension.'" United States v. Feist, 585 F.Supp. 2d 1107, 1111 (D.N.D. 2008) (quoting Feist v. Schultz, 2006 U.S. Dist. LEXIS 9907, 2006 WL 657003, at *5 (E.D. Cal., Mar. 13, 2006)). Undisputably, it was a positive present tense "repeal[]," Pub.L. 98-473, supra, § 218(a)(5), 98 Stat. 2027, delayed for 5 years, id., § 235(b)(1)(A), 2032, extended for an additional 5 years, Pub.L. 101-650, supra, § 316, 104 Stat. 5115, and for an additional 5 years, Pub.L. 104-232, supra, § 2(a), 110 Stat. 3055, becoming final on November 1, 2002. Their was neither a "hiatus" or "suspension" of the PCRA or the USPC. The PCRA was repealed and the USPC abolished as Congress intended. The original statutory scheme was completed. Petitioner's right to release no later than his settled MPR date of 2/12/2013 vested prior to the repeal. Construing the November 2, 2002 provision as re-enacting the PCRA cannot also be construed as upsetting his MPR date without raising serious and unsurmountable constitutional questions. However, as the USPC has not attempted to deny his release on his 30-year MPR date of 2/12/2013 with or without a hearing or findings to permit denial, the November 2, 2002 provision is not currently in issue.

of express statutory conditions is written much like § 4206(a), which mandates that an eligable prisoner "shall be released" if certain conditions "are met." Solomon v. Elsea, 676 F.2d 282, 284-85 (7th Cir. 1982) (per curiam). There, the Court following Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. (1979), held that "[u]nder the mandatory language of [§ 4206(a)], an inmate has an expectation of parole worth of due process protection." id. See Prater v. U.S. Parole Comm'n, 802 F.2d 948, 954-55 (7th Cir. 1986) (en banc) (holding that § 4206(a) "makes parole mandatory provided the statutory conditions are met" and "entitle[s] the prisoner to parole if certain conditions are met").

The Greenholtz rule and the Solomon and Prater constructions of § 4206(a) were bolstered by the Supreme Court's decision in Board of Pardons v. Allen, 482 U.S. 369 (1987). See also Kindred v. Spears, 894 F.2d 1477, 1481 (5th Cir. 1990) (finding § 4206(a)'s "mandatory language" creates a "constitutionally protectible liberty interest in parole" that "moors the Commission to certain due process standards.")(applying Allen).

Section 4206(d) is no less mandatory requiring the prisoner "shall be released" after serving the requisite period and permits prohibition of such release only "if the Commission... determines" the existence of specific statutory conditions. See e.g., La Magna v. U.S. BOP, 494 F.Supp. 189, 192 & nn. 10-11 (D. Conn. (1980) (construing § 4206(d) as establishing a "presumptive or mandatory parole at the expiration" of the relative period of incarceration viewed as "a very strong presumption" with a very "limited discretion" in the USPC to prevent release), aff'd, La Magna v. Carlson, 198 U.S. App. LEXIS 14009, No. 80-2283 (3rd Cor. Apr. 22, 1981). See also Mansfield v. Beeler, 238 Fed. Appx. 794, 798 (3rd Cir. 2007) ("For an inmate serving a life sentence or greater than 45 years, the mandatory parole date comes after serving two-thirds of

his sentence or 30 years, whichever comes earlier.") (construing § 4206(d)); United States v. Addonizio, 442 U.S. 178, 188 n. 13 (1979) ("Any prisoner sentenced to more than 5 years imprisonment is entitled to be released on parole after serving two-thirds of each consecutive term or terms or 30 years, whichever is first, unless the [USPC] determines that the prisoner 'has seriously or frequently violated institutionrules' or that there is a reasonable probability that he would commit further crimes.") (citing § 4206(d)).

Section 4207, like 4206, provides that "[i]n making a determination under this chapter (relating to release on parole) the Commission shall consider" statutory required information.

Section 4208(a) likewise provides that "[i]n making a determination under this chapter (relating to parole) the Commission shall conduct a parole determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole."

On its face, every substantive power and authority for parole release determinations in every relative section and subsection of the PCRA is expressly vested in the USPC and made subject to express procedures, qualified by a quoram and no such authority so much as arguablly exists as to the BOP, including § 4206(d), under which the BOP purports such authority.

3. The USPC's Regulations Under Which It Determined Petitioner's 30-Year MPR Date Pursuant To § 4206(d) Are Fully Consistant With The Requirements Of The PCRA

The PCRA mandated that the USPC shall promulgate rules and regulations relative to its parole release determinations and to carry out the provisions of the Act. § 4203(a)(1). Such rules were authorized only "by majority vote" of the USPC, id., by Commissioners appointed by the President by and with the consent and advice of the Senate. § 4202.

To effectuate § 4206(d), the USPC promulgated a regulation providing in

relevent part that:

> (a) A prisoner... serving a term or terms of 5 years or longer shall be released... after completion of 30 years of each term or terms of more than 45 years (including any life terms).., unless pursuant to a hearing under this section, the Commission determines that there is a reasonable probability that the prisoner will commit any Federal, State, or local crime or that the prisoner has frequently or seriously violated the rules of the institution in which he is confined....

28 C.F.R. § 2.53(a). The regulation continued:

> (b) Whenever feasible, at least 60 days prior to the scheduled two-thirds date, a review of the record shall be conducted by an examiner panel. If mandatory release is ordered following this review, no hearing shall be conducted.

28 C.F.R. § 2.53(b).

The rules' interpretation of § 4206(d)'s word "sentence," i.e., is the USPC's interpretation of the "a sentence of five years or longer," was construed to mean "a term or terms of 5 years or longer." § 2.53(a) (emphasis added).

Secondly, the proviso of § 4206(d) was interpreted to mean the "prisoner... shall be released" at the requisite time "unless" the USPC holds a "hearing" and "determines" one of the two statutory conditions exist to preclude release. id.

Third, a review "shall be conducted" at least 60 days prior to the set MPR date (whenever feasible), but if mandatory release is ordered no hearing is required.

Thus, if no hearing is held no prohibitive determination can nor will be made and, if the prisoner has "complet[ed]... 30 years of each term or terms of more than 45 years (including life terms)," he "shall be released."

The USPC simply construed sentences with multiple consecutive terms as a single aggregated sentence to which it applied the 30-year release date as its regulations and historical practice dictated. The USPC promulgated a regulation to ensure such treatment:

> When multiple sentences are aggregated by the [BOP] pursuant to 18 U.S.C. 4161 and 4205, such sentences are treated as a single aggregate sentence for the purpose of every action taken by the Commission pursuant to these rules, and the prisoner has a single parole eligibility date as determined by the [BOP].

28 C.F.R. §2.5. The USPC published the purpose of the rule:

> The [USPC] is amending its rules to reflect its longstanding interpretation of law that once multiple sentences are aggregated to produce a single eligibility date, all actions of the [BOP] are to be based upon the existence of a single aggregate sentence.

45 Fed. Reg. 44924, July 2, 1980. Under the rule, ""aggregated'... sentences are considered to have merged into a single sentence equal to the total length of time that the multiple sentences will require the prisoner to serve." id.

The USPC stressed both the fact that the rule reflected long settled practice of the courts and administrators, but also the necessity to apply the single aggregated sentence rule to all parole decision-making to conform practice to the purposes of the PCRA:

> The courts have historically regarded the extension of this merger doctrine to all parole decisions as a necessary and Congressionally intended consequence of [good-time credit and parole] laws. The selection of an eligibility date based on the assumption that the prisoner is serving a single, aggregate sentence could not be reconciled with any rule which required the [USPC] to consider the prisoner for parole on each sentence separately. See, e.g., Walker v. Taylor, 338 F.2d 445 (10th Cir. 1964) and Smalldone v. United States, 485 F.Supp. 1000 (D. Kan. 1978).
>
> * * *
>
> .... Case law also holds that component terms are merged for purposes of post-release supervision and revocation of parole. See United States v. Franklin, 440 F.2d 1210 (7th Cir. 1971).
>
> This body of statutory and case law adds up to a consistent Congressional and judicial perception that multiple sentences are appropriately regarded as merged into a single unified sentence for all parole-related decisions (parole release, supervision, and revocation).
>
> * * *
>
> Unwarranted disparity between similar offenders would also be an inevitable result if multiple sentences were not considered merged....
>
> Such anomalous results as described above would make the "national paroling policy" required by 18 U.S.C. § 4203 impossible to acheive and would prevent the [USPC] from fulfilling its Congressionally

> mandated role of reducing unwarranted sentencing disparity. See 2 U.S. Code Cong. and Admin. News at page 352 (1976).
>
> * * *
>
> .... The amendments adopted below reflect present practice without change of any kind, and should resolve recent misinterpretations concerning this matter that have been brought to the [USPC's] attention.

45 Fed. Reg., supra, 44925.

Prior to enactment of the PCRA, the BOP and the former U.S. Board of Parole administratively treated consecutive sentences as a single aggregate sentence or term. The BOP did so pursuant to statutory mandate, 18 U.S.C. § 4161 et seq (formely 18 U.S.C. § 710 (1930)), which was repealed by Pub.L. 98-473, Tit. II, Ch. 2, § 218(a)(4), Oct. 12, 1984, 98 Stat. 2027, and retained by that Act for 5 years. id., § 235(B)(1)(B), 98 Stat. 2032. Courts long construed the requirement as settled law and virtually unexceptionable. See, e.g., McCray v. U.S. Bd. of Parole, 542 F.2d 558, 560 (10th Cir. 1976); Briest v. BOP, 459 F.2d 284, 285-86 & n. 3 (8th Cir. 1972); United States v. Klein, 327 F.2d 229, 229 (2nd Cir. 1964); Phillips v. United States, 212 F.2d 327, 330, 335 (8th Cir. 1954) (citing cases); Grant v. Hunter, 166 F.2d 673, 677 & n. 1 (10th Cir. 1948). Cf. United States v. Brown, 333 U.S. 18, 24-25 (1948) (construing "any sentences under which such person is held" to "mean something more than the narrowest possible construction of the sentence for which such person was originally confined" and "to include more than one sentence") (emphasis added by Court). Post-PCRA courts construe the practice as settled law. See e.g., Good v. Markley, 603 F.2d 973, 976 (D.C. Cir. 1979) ("[I]t is well settled that it is proper for the U.S. Parole Commission to aggregate consecutive sentences for the purposes of determining parole eligibility."); See also Quinjano v. Hufford, 2012 U.S. Dist. LEXIS 123016, Case No. 3:11-CV-2254 (M.D. Pa., Aug. 29, 2012); Corey v. Holt, 2008 U.S. Dist. LEXIS 82660, Case No. 08-CV-0760 (M.D. Pa., Oct. 16, 2008); Swicegood v. U.S. Parole Comm'n, 775 F.2d 880, 881 (11th Cir. 1985);

United States v. Lopez, 706 F.2d 108, 110 (2nd Cir. 1983); Mistrangelo v. U.S. Parole Comm'n, 682 F.2d 402, 404 (2nd Cir. 1982); Schoffner v. U.S. Bd. of Parole, 416 F.Supp. 759, 760 & n. 1 (N.D. Pa. 1976), aff'd, 547 F.2d 1164 (3rd Cir. 1977).

The USPC's predecessor, the U.S. Board of Parole also applied the aggregation rule pursuant to former 18 U.S.C. § 4202 (displaced by the PCRA), which included the all-inclusive and disjunctive "term or terms." see e.g., United States v. Franklin, supra, 313 F.Supp. 43, 45-46 (S.D. Ind. 1970), aff'd, 440 F.2d 1210 (7th Cir. 1971); Affronti v. United States, supra, 350 U.S. at 83 & n.12.

Indeed, since enactment of the first federal parole statute in 1910, courts have held that "the 'total of the term or terms' of sentence means the total of the time actually to be served," Thompson v. Duchay, 217 Fed. 484, 487 (W.D. Ark. 1914), and that "the words 'term or terms of the prisoner's sentence,'... mean maximum sentence (as fixed by the court)." United States ex rel. Anderson v. Anderson, 76 F.2d 375, 377 (8th Cir. 1935) (quoting pre-1948 title 18 U.S.C. § 717). "Consecutive sentences" were required to "be treated as a single sentence by prison authorities in administering [both] the parole and 'good time' status," Mann v. United States, 218 F.2d 936, 939 (4th Cir. 1955), and "consecutive sentences [were] considered to be one term" long before enactment of the PLRA. McCray v. U.S. Board of Parole, supra, 542 F.2d at 560 (cite omitted).

The long-used phrase "term or terms," well-understood by the courts, BOP and Parole Board, was used throughout the PCRA by Congress. See, e.g., 18 U.S.C. §§ 4205(a) & (f), 4206(d), 4210(a) & (b). Unsurprisingly, the USPC carried over the requirement of "treat[ing] all sentences as a single aggregate sentence for purposes of every [USPC] action," 28 C.F.R. § 2.5, and all such "sentences are aggregated, or 'combined to form a single term,' for purposes of determining release and parole eligibility dates." United States v. Lopez, 706 F.2d 108,

110 (2nd Cir. 1983) (citing USPC Procedures Manual (Jan. 21, 1983), at MO-1(a), p.121 and 28 C.F.R. §§ 2.1-2.60 (1982)).

Prior to enactment of the PCRA, Congress mandated that the BOP provide prisoners with varying rates of good-time credits and provided that "[w]hen two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed." 18 U.S.C. § 4161. While Congress repealed § 4161 on October 12, 1984, Pub.L. 98-473, Tit. II, Ch. II, § 218(a)(4), 98 Stat. 2027, it delayed the repeal for 5 years, id., § 235(b)(1)(B), 98 Stat. 2032, and replaced it with a new statute which stated:

> Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single aggregate term of imprisonment.

18 U.S.C. § 3584(c).

Thus, until the final repeal of § 4161, on October 31, 1992, (the date most courts construe the 5-year so-called savings clause of the SRA as going into effect), the BOP was required to treat multiple consecutive sentences as an aggregated single sentence for calculating good-time credits. And, after § 3584(c) went into effect on November 1, 1992, the BOP was under an affirmative mandate to "treat" "[m]ultiple terms of imprisonment ordered to run consecutively... for administrative purposes as a single aggregate term of imprisonment." The BOP never had statutory authority to treat Petitioner's sentence of life plus 15 years other than as a single aggregate sentence of life plus 15 years. Prior to the repeal of § 4161, the state of the law had been clear: "[o]nce having been aggregated.., consecutive sentences are not to subsequently de-aggregated." McCray v. U.S. Board of Parole, supra, 542 F.2d at 560 (citing cases). Thereafter, they '"cannot then be divided'" but remain '"a single sentence.'" Boone v. Menifee, 387 F.Supp. 2d 338, 347 (S.D.N.Y. 2005) (quoting Howard v. U.S. Parole

Comm'n, Case No. 88-CV-1769, 1988 WL 98140 (D.D.C. Aug. 31, 1988)). Indeed, if "de-aggregated the very purpose of aggregation has been defeated." Moss v. Clark, 886 F.2d 686, 692 (4th Cir. 1989).

4. The Legislative History Of § 4206 Offers No Support For Parole Release Determinations By The BOP

The most authoritive record of § 4206's legislative history begins with the statement that:

> This section provides the standards and criteria to be used by the Parole Commission in making release determination's for federal prisoners who are eligible for parole.

House Conference Report (H.C.R.) No. 94-838, Feb. 23, 1976, Joint Explanatory Statement of the Committee of Conference, Section-By-Section Analysis, "Section 4206. Parole determination criteria," p.25 (as printed in 1976 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.), p.357) (emphasis added). The Report continued:

> It is the intent of the Conferees that the Parole Commission make certain judgments pursuant to this section, and that the substance of those judgments is committed to the discretion of the Commission.

id., p.27 (as reprinted in 1976 U.S.C.C.A.N., p.360 (emphasis added).

After detailing the Conferee's intent as to the purpose and procedure requisites of the USPC as to each of §§ 4206 (a)-(c), Id., pp.25-27 (as reprinted in 1976 U.S.C.C.A.N., pp.358-60), the Report succinctly described the purpose and procedural requisites of § 4206(d):

> Lastly, this section provides more liberal criteria for release on parole for prisoners with long sentences after they have completed two-thirds of any sentence or thirty years, whichever occurs first. In calculating two-thirds of a term, all sentences imposed consecutively should be considered separately and the time for each sentence added together. The purpose of this provision is to insure at least some minimum period of parole supervision for all except those offenders who have the greatest probability of committing violent offenses following their release sothat parole supervision is part of their transition from the institutional life of imprisonment to living in the community. For any prisoner whose parole, once granted pursuant to subsection (d), has been revoked any future parole consideration should be based on subsections (a), (b) and (c) of this section,

> and he would not be considered under subsection (d) until two-thirds of his remaining term had been served.

Id., pp.27-28 (as reprinted in 1976 U.S.C.C.A.N., p.360).

The Conferees emphasized the "purpose" of the PCRA was to provide:

> the newly constituted Parole Commission with the tools required for the burgeoning caseload of required [parole] decisions and to assure the public and imprisoned inmates that parole decisions are openly reached by a fair and reasonable process after due consideration has been given the sailent information.

H.C.R. No. 94-838, p.20 (as reprinted in 1976 U.S.C.C.A.N., p.353). Moreover,

> To achieve this purpose.... [t]he bill also makes the Parole Commission, the agency succeeding the Parole Board, independant of the Department of Justice for decision-making purposes.

id. The Conferees "intend[ed]... that parole decision making be independant of, and not governed by, the investigative and prosecutorial functions of the Department of Justice." id., p.21 (as reprinted in 1976 U.S.C.C.A.N., p.353). The Senate Judiciary Committee had earlier stated its view as to the "independen[ce]" requirement of § 4202 that:

> The Commission is attached to the Department [of Justice] for administrative reasons, but its decision-making machinery is independant so far as to guard against influence in case decisions.

Senate Report (S.R.) 94-369, Sept. 11, 1975, p.20 (as reprinted in 1976 U.S.C.C.A.N., p.342).

Like the enacted bill, the Conferees intended the Commission alone to possess authority to "establish guidelines and procedural rules for parole determinations" and "by majority vote and pursuant to procedures set out [in the proposed Act] to: (1) grant or deny parole to any federal prisoner who is eligible for parole." H.C.R. No. 94-838, p.21 (as printed in 1976 U.S.C.C.A.N., p.354)(Section-by-section analysis of § 4203(a)(1) and (b)(1)).

Thus, the test of the PCRA and § 4206(d) read together with every section and subsection of the Act and the USPC regulations and their legislative history are conclusive that: (1) § 4206(d) and every other section and subsection of the Act involving parole release determinations, procedures to such ends, and

rule-making for such purposes is vested exclusively into the jurisdiction of the USPC to be administered by USPC Commissioners appointed by the President by and with the advice and consent of the Senate and contingent upon the "majority vote" of such Commissioners, and (2) not a shred of such jurisdiction is vested under § 4206(d) or any other section or subsection of the PCRA in the BOP, its non-presidentially appointed Director or any other personnel of the BOP.

Like other courts, the Supreme Court citing the PCRA has expressly held that:

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate....

Addonizio, supra, 442 U.S. at 188-89. See United States v. Seascott, 15 F.3d 1380, 1385 (7th Cir. 1994) (under PCRA parole release determination "remained in the exclusive 'discretion of the [Parole Commission]'") (bracket language by Court) (citing Prater, supra, 802 F.2d at 954).

Whether Petitioner's life plus 15-year sentence is viewed as a single aggregate sentence composed of consecutive terms by the sentencing court itself, which it ordered to be executed by the USPC pursuant to § 4205(b)(2) via the PCRA and USPC regulations, or, if viewed as aggregated after sentencing into a single life plus 15-year sentence by the BOP pursuant to § 4161 and by the USPC pursuant to 28 C.F.R. §§ 2.5 and 2.53(a), is a distinction without a difference insofar as there exists no statutory de-aggregation authority or parole release determination authority granted by Congress to the BOP. Both the repealed § 4161 and its replacement, § 3584(c), both mandate aggregation and neither authorized de-aggregation.

As for § 4206(d) it never authorized the BOP to do anything. It mandates

the USPC to release parolable prisoners upon service of the statutorily-provided period of time relative to their qualified sentences. It is administered by the USPC through 28 C.F.R. §§ 2.5 and 2.53 (a)-(b). The USPC set Petitioner's MPR date at 2/12/2013 pursuant to its authority to do so and has since made no effort to hold a hearing to alter that date or make any other effort to do so prior to the final repeal of the PCRA on November 1, 2002. The USPC's decision is not subject to question by the courts, see e.g., Storm v. U.S. Parole Comm'n, 667 Fed. Appx. 156, 157 (7th Cir. 2016) ("Because Congress committed parole decisions to the Commission's discretion, see 18 U.S.C. § 4203(b), we cannot disturb those decisions unless they are arbitrary or contravene applicable constitutional, statutory, or regulatory provisions....") (citing cases), much less to the arbitrary and statutorily-unauthorized actions of the BOP.

5. The Generation And Application Of PS 5880.30 To Alter Petitioner's 30-Year MPR Date From 2/12/2013 To 2/12/2023 Effectively Resentenced Him To A Greater And Different Punishment Than Ordered By His Article III Sentencing Court As Authorized By Congress

In enacting the PCRA, Congress authorized sentencing courts discretion to impose sentences upon parole eligible prisoners which provided a scheme for determining when the prisoner is eligible for parole release. For prisoners serving a:

> definite term or terms of more than one year, the prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

18 U.S.C. § 4205(a). The Act further provided that:

> Upon entering a judgment of conviction, the court having jurisdiction to impose sentence.., (1) may designate in the sentence of imprisonment the minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but still not be more than one-third of the maximum sentenced imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the prisoner may be released at such time as the Commission may determine.

18 U.S.C. § 4205(b)(1) and (2).

Petitioner's sentencing court, and for purposes of § 4205(b) "the court having jurisdiction to impose sentence," upon entering its "judgment" under which it ordered the life plus 15-year cumulative sentence imposed upon Petitioner executed:

> Pursuant to 18 U.S.C. Section 4205(b)(2), the defendant to be eligible for parole at such time as provided by law and as the Parole Commission may determine.

Pet. ¶ 7 & Exh. 1 (J & C Order).

It is clear beyond dispute that § 4205(b) vested the power to choose the parole scheme by which the sentence was to be executed exclusively within "the court having jurisdiction to impose sentence" at the time such court "entered [the] judgment." It is equally undisputable that the court's "specif[ication] that the prisoner may be released on parole at such time as the Commission may determine," upon such specification, is part of the court's "judgment," § 4205 (b)(2). And, finally, of course, § 4205(b)(2) neither authorized the BOP to condition (or re-condition) a prisoner's sentence imposed thereunder to be executed for parole release purposes other than in the court and by expressly conditioning "release[] on parole at such time as the Commission may determine" expressly omitted any such power in the BOP. See 18 U.S.C. § 4201(1) ("'Commission' means the United States Parole Commission").

As demonstrated throughout this Memorandum, the PCRA as enacted by Congress and at all relevant times vested exclusive jurisdiction and discretion in the USPC to make every parole release determination, 18 U.S.C. §§ 4203(b)(1), 4206(a), (c) and (d), to make any rules and regulations for such purposes, id., § 4203(a)(1), and mandated release for guidelines purposes unless express finding's by the USPC are timely made, id., § 4206(a) and (c), and for long cumulative sentences like Petitioners after serving 30 years unless express

finding's by the USPC are made. id., § 4206(d).

The BOP clearly administers no part of § 4205(b). United States v. Fountain, 840 F.2d 509, 518 (7th Cir. 1988). Nor does it administer 18 U.S.C. §§ 4203(a)(1), 4203(b)(1), 4206(a), (b), (c), or (d), 4207, or 4208(a) - i.e., the PCRA's provisions governing parole release determinations, information considered at parole determination proceedings, and administration of parole proceedings.

Long before enactment of the PCRA, it was well-understood that in criminal cases "the sentence is the judgment," Bradley v. United States, 410 U.S. 605, 609 (1973); Corey v. United States, 375 U.S. 169, 174 (1963); Parr v. United States, 351 U.S. 513, 518 (1956); Berman v. United States, 302 U.S. 211, 212 (1937); Hill v. United States ex rel. Wampler, 298 U.S. 460, 464 (1936), and that statutory "parole eligibility" provisions are an inherent part of a judicially imposed sentence. Warden v. Marrero, 417 U.S. 653, 658 (1972). Thus, the sentencing court's order incorporated the USPC and the PCRA into Petitioner's sentence.

The USPC in fact determined that "[o]n his life plus 15 year sentence, [Petitioner] will serve at most 30 years, the two-thirds point of his aggregate sentence," Pet. ¶¶ 19-20 (& Exh. 2C, Attach. 2, pp.20-22), and determined that his two-thirds/30 year MPR date is "2/12/2013." Pet. ¶ 8 (& Exh.2C, Attach. 2, pp.18-24, 26, 60, 62, 64-69. Within the last 6 months prior to the final repeal of the PCRA abolishing the USPC and its Commissioners on November 1, 2002, the USPC conducted its final assessment of Petitioner and affirmed his MPR date as "2/12/2013." Pet. ¶ 5 (& Exh. 2C, Attach. 1, p.1).

Thus, pursuant to the sentencing judge's order and the USPC's determination that Petitioner's MPR date is 2/12/2013 and, as the USPC at no time prior to that date made any of the statutory findings statutorily mandated to preclude his release from physical imprisonment on that date, see 18 U.S.C. § 4206(d); 28 C.F.R. §2.53(a), the imprisonment part of his sentence ended on 2/12/2013.

Application of PS 5880.30 by the BOP on April 12, 1994 by which it undermined the determination of the USPC and vested in itself a jurisdiction to re-determine Petitioner's MPR date as 2/12/2023, in addition to the apparent violations of the PCRA as enacted by Congress and thereby usurping Article I legislative powers, effectively constituted a re-sentencing of Petitioner for parole release determinations by the BOP violating the sentencing court's Article III judicial powers as well.

IN CONCLUSION

At every relevant moment in respect to Petitioner's sentence he has been eligible for release on parole subject to the exclusive jurisdiction and discretion of the USPC pursuant to the limitations and procedures of the PCRA and, of course, the Constitution. Petitioner's sentence as imposed limited his punishment vis-a-vis physical imprisonment accordingly and neither the judgment nor the PCRA permitted his imprisonment beyond his two-thirds/30-year MPR date established by treating his single aggregate life plus 15-year sentence as a single sentence pursuant to 18 U.S.C. § 4206(d), 28 C.F.R. §§ 2.53(a), and 2.5 by the USPC by a majority of Presidentially-appointed Commissioners as authorized by 18 U.S.C. §§ 4202, 4203(a)(1) and (b)(1).

PS 5880.30 is not an act of Congress nor even a legislative or substantive rule promulgated under authority of an act of Congress insofar as it authorizes the BOP to de-aggregate previously aggregated sentences, to alter sentences imposed by courts to grant itself execution authority to make parole release determinations under the PCRA (or otherwise), or to otherwise act as any sort of alter ego of Presidentially-appointed USPC Commissioners acting under the highly structured provisions of the PCRA. It was never published in the Federal Register and public comment was never permitted nor did it so much as cite any statutory authority for making parole release determinations, which, of course, it could not and

cannot do so now.

Prior to generating PS 5880.30 and prior to applying it to Petitioner altering his two-thirds/30-year MPR date on 4/12/1994, the BOP provided him with no notice whatsoever and no opportunity to defend against its clearly lawless action. The alteration resulted in a preemptive denial of his mandatory release on his lawfully established MPR date of 2/12/2013 without written notice contemoraneous to the alteration and, when the lawful date passed and Petitioner was in fact denied release, the BOP (still usurping USPC jurisdiction) again failed to provide him with written notice of the reasons as mandated by Congress in § 4206(b) and failing entirely to provide due process of law required by the Fifth Amendment.

No later than November 1, 1987, positive law unexceptionally mandated that the BOP treat multiple terms of imprisonment judicially ordered to run consecutively to be treated as a single aggregate term of imprisonment, 18 U.S.C. § 3584(c), and since 2/12/2013, Petitioner's MPR date, with no pre-MPR date hearing or findings by the USPC by which he could be imprisoned or detained a single day thereafter, the BOP was under a positive statutory mandate not to imprison or detain him thereafter. 18 U.S.C. § 4001(a)(1); see also 18 U.S.C. § 4206(d) (absent findings prisoner "shall be released").

Petitioner's imprisonment and detention by the BOP since 2/12/2013 is without an act of Congress and in violation of Articles I, II, and III, and the Fifth Amendment of the Constitution, as well as the PCRA including §§ 4202, 4203 (a)(1) and (b)(1), 4206(b) and (d), 4207 and 4208(a), 18 U.S.C. § 3584(c), and 18 U.S.C. § 4001(a)(1).

The petitioned writ must issue and Petitioner is entitled to immediate release pursuant to 28 U.S.C. §§ 2241(c)(3) and 2243 ¶ 8. The court has the "'duty'" to declare the law, Sanchez-Llamas v. Oregon, 548 U.S. 331, 353 (2006) (citing

Marbury v. Madison, 1 Cranch. 137, 177 (1803)), "even on habeas" review. Williams v. Taylor, 529 U.S. 362, 384 (2000) (cite omitted). Pursuant to 28 U.S.C. §§ 2201-02, the court has authority to declare Petitioner's rights as well in respect to such law.

Respectfully Submitted,

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