UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

Yorie Von Kahl, Petitioner, v. Steve Kallis, Warden F.C.I. Pekin Respondent.	Case No. 1:18-cv-01245-JES VERIFIED TRAVERSE TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

VERIFIED TRAVERSE TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

On September 10, 2018, Respondent Steve Kallis, by and through Assistant U.S. and U.S. Attorneys Kimberly A. Klien and John E. Childers (respectively), filed his answer to Petitioner's habeas petition, Doc. 9, purporting legal authority to imprison and detain Petitioner upon the Bureau of Prisons (BOP) Program Statement (PS) 5880.30 (as generated on August 16, 1993 and applied on April 12, 1994) to alter Petitioner's 30-year mandatory parole release (MPR) date (as established by the U.S. Parole Commission (USPC)) to February 12, 2013 - an addition of 10 years - under which he now detains Petitioner. DOC. 9, pp.5-7; Doc. 9-2, pp.34-41. With assistance and documentation provided by the BOP and ISPC, see Doc. 6, ¶¶ 3-4; Doc. 9-2, pp.1 et seq, Respondent purports continuous legal authority in the BOP and USPC for Petitioner's imprisonment since June 1983 subject only to USPC "review" his record on or before February 12, 2023.

Respondent's chain of authority begins with comments drawn from unsworn statements from the Presentence Report (PR) in Petitioner's criminal case, Doc. 9, p.1, as an unexplained preliminary to his sentence imposed by the Court as reflected on the face of the judgment form, id., p.2, to a Notice of Action (NOA) issued by the USPC on July 20, 1984 continuing Petitioner to a 10-year reconsideration in June 1994. id., Doc. 9-2, p.7.

From there it proceeds to the USPC's statutory interim parole hearing in June 1986 and resulting NOA on July 17, 1986 ordering Petitioner continued to a 15-year reconsideration hearing in June 2001, Doc. 9, p.3; Doc. 9-2, p.12, through USPC NOA's issued thereafter - i.e., 1988, 1990, 1993 (original and on appeal) and 1995, Doc. 9, p.2; Doc. 9-2, pp.17, 21, 25, 28 & 30, as a legal bridge to and through 18 U.S.C. § 3585(b), and ultimately to PS 5880.30, under which he asserts the BOP corrected his originally established 30-year MPR date (a parole release date) of February 12, 2013 by construing it as "not a release date, but a record review date" of "February 12, 2023" at which time the USPC will hold a record review hearing for Petitioner. Doc. 9, pp.5-7.

The Court has admonished Petitioner that he must traverse Respondent's allegations or risk their being accepted as true pursuant to habeas statutory requirements. Doc. 3, p.1 (citing 28 U.S.C. § 2248). Petitioner hereinafter denies express facts alleged by Respondent directly or indirectly and alleges such material facts as reflected upon the matters in issue, including those compelled by Respondent's answer. 28 U.S.C. § 2243 ¶6. This traverse together with the petition, Doc. 1, thus "constitut[es]" Petitioner's "application for the writ." Walker v. Johnston, 312 U.S. 275, 284 (1941).

A. Summary Of Respondent's Defects Of Cause

1. Respondent has provided a copy of a BOP Sentence Monitoring Independant Sentence Computation (SMISC) date July 19, 2018 certified as a true copy from Petitioner's parole file as personally reviewed by Bernard M. Desrosiers, Assistant General Counsel, U.S. Parole Commission shows on its face Petitioner's statutory release date - a statutorily mandated release date - of December 22, 2009, a date preceeding his alleged MPR date of February 12, 2013 by more than three years and thus, uncontested, shows he is and has been unlawfully imprisoned for just short of nine years and remains so now, disproving cause.

2. Respondent has provided no statutory grant of authority by Congress to the BOP to make parole determination decisions, set or upset MPR dates, or otherwise administer 18 U.S.C. § 4206(d) or any of subsection of § 4206 prosepctively or retroactively, precluding cause.

3. Respondent's admitted alteration by the BOP of his MPR date of February 12, 2013 and addition of ten years thereto by the retroactive application of 18 U.S.C. § 3585(b) and PS 5880.30 (neither of which existed at the time of his offense) violates the due process principles inherent in the presumption against retroactive lawmaking as made clear since Landgraf v. USI Film Products, 511 U.S. 244 (1994); see also INS v. St. Cyr, 533 U.S. 289 (2000), and cannot support cause.

4. Respondent's admitted alteration and extension of Petitioner's 30-year MPR date from February 12, 2013 to February 12, 2023 by retroactive application of § 3585(b) and PS 5880.30 is void for violating the constitutional prohibition against ex post facto laws, Art. I, § 9, Cl. 3, U.S. Constitution precluding cause.

5. Except for the USPC's NOA of July 20, 1984 ordering Petitioner continued to a 10-year reconsideration hearing in June 1994, each NOA issued thereafter (and cited by Respondent as justification for Petitioner's continuing imprisonment) rest upon amendments to 28 C.F.R. §§ 2.12 and 2.14 promulgated on August 29, 1984 - after Petitioner's offenses, imposition of his sentence, his 1984 parole hearing and NOA extending the maximum permissible continuance for reconsideration hearings from 10 to 15 years, 49 Fed. Reg. 34208, and retroactively applied to Petitioner to extend his reconsideration hearing from June 1994 by a full seven years to June 2001 render the regulations and NOA's void for violating the constitutional prohibition against ex post facto laws, Art. I, § 9, Cl. 3. U.S. Constitution, precluding cause.

Respondent's answer not only fails to show cause for not granting writ, but, establishes four additional grounds for issuing the writ and discharging Petitioner:

GROUND SIX

The certified copy of the BOP's Sentence Monitoring Independent Sentence Computation (SMISC) submitted by Respondent shows Petitioner's official and madatory statutory release date to be December 22, 2009 without any showing or argument to justify imprisoning Petitioner beyond that date conceding that his imprisonment continues to be unlawful requiring his release.

GROUND SEVEN

All USPC actions and Notices of Action (NOA's) beginning with Petitioner's 1986 statutory interim hearing and resulting NOA issued pursuant to 28 C.F.R. §§ 2.12 and 2.14 as amended on August 29, 1984, long after his purported offenses, applied retroactively to change his 10-year reconsideration hearing in June 1994 to a 15-year reconsideration hearing in June 2001 - impermissible under the former regulations existing at the time of his offense - violate the constitutional prohibition against ex post facto laws Art. I, § 9, Cl. 3, U.S. Constitution, and all such NOA's are void rendering Petitioner's imprisonment since then, and now, unlawful requiring his release.

GROUND EIGHT

Respondent admits to imprisoning Petitioner pursuant to the BOP's retroactive application of 18 U.S.C. § 3585(b) and PS 5880.30 (repectively enacted and promulgated after Petitoner's purported offenses) to upset and alter Petitioner's established 30-year MPR date of February 12, 2013 by the arbitrary addition of 10 years without notice or hearing, thus continuing constitutional due process violation otherwise protected by the presumption against retroactive legislation as the basis of Petitioner's imprisonment since February 12, 2013 and, accordingly, that his imprisonment has been and is now unlawful requiring his release.

GROUND NINE

Respondent's admission that his imprisonment of Petitioner rests upon the

BOP's retroactive application of § 3585(b) and PS 5880.30 (respectively enacted and promulgated after Petitioner's purported offenses) to extend his established 30-year MPR date of February 12, 2013 to February 12, 2023 admits that Petitoner is and has been unlawfully imprisoned since February 12, 2013 in violation of the constitutional prohibition against ex post facto laws requiring his release.

B. Corrected Relevant Factual And Procedural History Necessitated By Respondent's Answer

1. Facts Underlying The Sentencing Court's Judgment

While seemingly irrelevant to the facts alleged or issues raised, Respondent includes a preliminary paragraph as purported facts underlying the sentencing court's judgment:

> On February 13, 1983, Petitioner was involved in a shoot-out with law enforcement officers who confronted Petitioner, his father, and other companions at a road block. (App. 5, 46) Petitoner and others immediately took up positions with rifles. (App. 46) After U.S. Marshals directed them to lay down their weapons and announced their intent to arrest Petitioner's father, Petitioner fired a fatal shot at a U.S. Marshal. Id. 'A gun battle ensued, during which another U.S. Marshal was killed and several other law enforcement officers were wounded. Id.

Doc. 9, p.1. App. 5 and 46 are respectively the USPC's Initial Summary of Petitioner's initial parole hearing and the Presentence Report (PR) in his criminal case. Doc. 9-2, pp.5-6 & 45-83. While both are submitted as true copies from Petitioner's USPC parole file as personally reviewed by USPC Assistant General Counsel Bernard M. Desrosiers, Doc. 9-2, p.1, neither are certified as to their truth and the summary simply regurgitates unsworn comments from the PR.

The Summary on its face shows that Petitioner denied that the marshals identified themselves," Doc. 9-2, p.5, and, while Respondent has not provided Petitioner with a copy of the PR, any comment therein that Petitioner fired a "fatal shot" at a marshal or the implication that he fired such shot first are false and wholly misleading.

First, at trial the government's lead prosecutor Asst. USA Lynn Crooks told the jury the defendants took "defensive positions," (Tr. App.37), and the government

admonished the jury that no ballistics evidence existed to prove who shot any particular officer, that one could only guess, and ultimately it was irrelevant, (Tr. App. 3-4, 11, 35) and elsewhere in oral arguments in reference to Petitioner's case admitted that "we can't prove who shot those agents." Peltier v. Henman, 997 F.2d 461, 469-70 (8th Cir. 1993). Furthermore, the prosecution admonished the jury that whether the defendant's had knowledge of the officers' identity was irrelevant and the trial judge removed such knowledge factor by jury instruction, (Tr. App. 41), while removing all questions as to the legality or authority of the marshals relative to the alleged arrest warrant under which they acted directing the jury that the marshals has a "duty" to execute it. (Tr. App. 42). And, finally both in chambers and then in closing arguments, AUSA Crooks in light of the evidence, conceeded that U.S. Marshal Kenneth fired the first shot at Petitioner. (Tr. App. 36). Post-trial, AUSA Crooks admitted that Muir was his "friend" and acknowledged that the bullet Muir fired at Petitioner's heart, if successful, would have blown Petitioner's heart apart and killed him instantly and the fact that Muir's bullet had been stopped remained one of his "certain regrets." (Tr. App. 44).[1]

On February 19, 1983, Chief U.S. District Judge Paul Benson (then assigned to the Fargo, North Dakota U.S. District Court and who would later preside at Petitioner's trial) issued a secret "judicial order" to "disseminate" and IRS report about the Sheriff's Posse Comitatus (SPC) and purportedly related tax protest groups and persons on behalf of the Department of Justice (DOJ), (Tr. App. 103,106), and by February 21, 1983 Benson was a fully integrated partisan in "prosecutive strategy" conferences with personnel from the U.S. Attorney's Office, FBI, U.S. Marshals Service, and top-level DOJ Headquarter's Attorney

1 For a contextually accurate description of the events proceeding and during the incident/shoot-out Petitioner submits a highly detailed report submitted to the USPC on March 29, 1995 - a product by numerous "American police officers, attorneys, judges, public officials, and others" of a nearly 12-year investigation - as a criminal Justice Professionals Affidavit led by Officers Gerald J. McLamb, Ret., Executive Director, American Citizen & Lawmen Association. (Tr. App. 52-74).

Lawrence Lippe, (Tr. App. 111),[2] dispatched to North Dakota by then Deputy Attorney General Rudolph Giuliani to apply political "pressures" on the U.S. Attorney's Office to ensure the (then - unindicted) defendants were convicted and received nothing "less than the stiffest penalties." BITTER HARVEST: Gordon Kahl and the Posse Comitatus: Murder in the Hearland 126-27, James Corcoran (Viking Penguin 1990).

Without belaboring these matters beyond necessity, the propaganda "disseminated" by Judge Benson's secret "judicial order" was but part of a greater political campaign organized under auspices of the U.S. Attorney General's Office by and through FBI Headquarters employing the SPC/tax protest factor by falsely portraying the defendants as "members" attending SPC/tax protest meetings in North Dakota, (Tr. App. 81-116), following a nation-wide congregation of law enforcement at Salina, Kansas on February 9, 1983 expressly targeting the "'POSSE COMITATUS' Group." (Tr. App. 77-80). FBI HQ utilized Petitioner's case to surreptitiously use the SPC to initiate then Attorney General William French Smith III's Domestic Security/Terrorism Guidelines although not yet a approved,(Tr. App. 99-101), officially approved on March 7, 1983 and publically stated to take effect only

2 It has also been discovered that during trial Benson secretly participated in prosecutorial rehearsal of at least one crucial government witness - co-defendant Vernon Wegner then awaiting sentencing by Benson per a plea agreement - the night before he testified. (Tr. App. 45, 46,48-49), Petitioner and his court appointed counsel both filed motions for Benson to recuse himself prior to trial due to bias and an appearance of bias due to his close relationship with the deceased Marshals and his Masonic relationshops with the U.S. and Assistant U.S. Attorneys and other law enforcement officers involved in the case. Benson refused to recuse himself and on direct appeal the Eigth Circuit denied the issue. Petitioner finally succeeded in Compelling Benson's recusal during his post-conviction proceeding pursuant to 28 U.S.C. § 2255 for the verv reasons asserted pre-trial. (Tr. App 75-76). All of the District's judges were recused.(Id.). At that time Petitioner did not know of Judge Benson's secret "judicial order" to "disseminate" propaganda for the DOJ, his secret partisanship in "prosecutive strategy" conferences, or his secret rehearsal of government witnesses. The PR and USPC summaries (drawing thereupon) should be viewed in light of these facts as it is the product of the same political pressures brought to bear from DOJ Headquarters.

on March 21, 1983. (Tr. App.123, 124).[3]

2. Facts And Procedural History Relative To Petitioner's Sentence

Respondent's answer raises issues involving a series of ex post facto law and due process law questions. The actual state of the law under existing statutes at the time of the purported offenses are necessarily the "objective facts" upon which ex post facto analysis depends, together with which courts must consider "policy statements" and "actual practices" of the paroling process. Garner v. Jones, 529 U.S. 244, 252, 256 (2000). While somewhat lengthy, Petitioner has little choice but to produce the prior state of law.

3. The Law Governing Parole On February 13, 1983

On the date of Petitioner's purported offenses, February 13, 1983, parole was overned by the USPC pursuant to the Parole Commission and Reorganization Act of 1976 (PCRA), 18 U.S.C. §§ 4201-18 (Chapter 311 of Title 18, United States Code) and USPC regulations pursuant to 28 C.F.R. §§ 2.01 et seq. The PCRA authorized sentencing courts to impose a single "maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine." 18 U.S.C. § 4205(b)(2).

3. Judge Benson's secret role of "disseminat[or]" came 3 days after Smith's order to treat the case as the "highest priority" and the defendants were classified as "members" of the SPC which was then being processed by FBI HQ's Terrorist Research and Analytical Center (TRAC) (Tr. App. 90, 92),and 2 days after FBI HQ ecstatically applied Smith's yet unapproved guidelines to the case. (Tr. App. 106). Smith's guidelines authorized the FBI to "disseminate information" during domestic security/ terrorism investigations, (Tr.App. 106), which Assistant AG Jensen deemed to mean "maximum dissemination," (Tr.App.121), which of course explains Benson's secret order and his participation in "prosecutive strategy" conferences with DOJ HQ officials, FBI, U.S. Marshals and the U.S. Attorney's Office. After "dissemination to the U.S. Attorney in North Dakota" prepared "subsequent to the GORDON KAHL incident," a revised verson of the report was published by the IRS as Document 7072 (I-86), titled "Illegal Tax Protester Information Book" and distributed informing recipients that the "main goal of th[e] groups" identified therein, which included the SPC, was "to overthrow the government and their tax protest activities are only one way to achieve these goals." (Tr. App. 137). When the document/was later leaked to the press, the IRS ordered it "destroy[ed]...immediately." (Id.) The document was saturated with such potentially defamatory falsehoods that courts found it inherently chilling of First Amendment rights. See e.g., Kostyu v. United States, 742 F.Supp. 413, 416 (E.D.Mich. 1990); Kostyu v. United States, 1987 U.S. Dist. LEXIS 18401, Civ.No. 87-72065 (E.D.Mich. Oct. 27, 1989).

The USPC pursuant to the PCRA's mandate to promulgate rules and regulations establishing a national parole policy, 18 U.S.C. § 4203(a)(1), established a national presumptive parole release date policy, which it enhanced first in 1977 to mandate parole reconsideration dates no longer than four years, following a hearing, 42 Fed. Reg. 29934, June 10, 1977 (proposed); 42 Fed. Reg. 39809, Aug. 5, 1977 (final), amending 28 C.F.R. §§ 2.12(b)(3) and 2.14(a)(2)(ii), (c)(1) and (c)(2), and soon proposed amendments, 43 Fed. Reg. 41411-12, Sept. 18, 1977, to extend and limit the 4-year reconsideration hearing authority to a new limit of 10-years, id. See, 44 Fed. Reg. 3404-05, June 16, 1978. Thereunder, the USPC was limited to "continue the prisoner to a ten-year reconsideration hearing" following his "initial hearing," 28 C.F.R. § 2.12(b)(3) (1979), and following a statutory interim hearing was authorized to "[o]rder no change in previous decision; [a]dvance the date of a ten-year reconsideration hearing," or "[r]etard or recind a presumptive date for reasons of disciplinary infractions." 28 C.F.R. § 2.14(a)(2)(i)-(iii) (1979). The amended regulations mandated that "[a] ten-year reconsideration hearing shall be ordered following an initial hearing in any case in which a release date is not set," Id., § 2.14(c)(1), and following "a ten-year reconsideration hearing," the USPC was empowered to take one of the three actions authorized by [28 U.S.C.] § 2.12(b)," id., § 2.14(c)(2).

The national "presumptive" parole release date policy was "extend[ed]" by the amendments to 28 C.F.R. §§ 2.12 and 2.14 with the salutary purpose of "informing" "virtually all federal prisoners":

> at the outset of confinement of the actual duration of the prison term that they much serve...[to] facilitate long-range parole planning and to avoid the psychological stress associated with uncertainity as to the ultimate date of release [and eliminate] any prolongation of [that] certainty.

43 Fed. Reg., supra, 41411 (proposing rule). The "policy" was to "provid[e] a working measure of certainty for prisoners as to the date the Commission intends to release them, contigent upon [its] making an affirmative finding" relative

to the standards and criteria mandated by "18 U.S.C. 4206," 44 Fed. Reg., supra, 3404, and applied equally as to the most "serious cases" pursuant to an unchanged "initial guideline assessment." Id. Thereby the USPC effectively:

> "decided that all [parolable] inmates...shuold be subject to a determinate sentence. Accordingly, an inmate early in confinement is given a presumptive parole date indicating the expected time for release, assuming observance of the rules of the institution."

Watts v. Hadden, 651 F.2d 1354, 1377 (10th Cir. 1981) (cite omitted). See also e.g., United States v. Paskow, 11 F.3d 873, 878 (9th Cir. 1993) (In pre-1987 "cases, the date of eligibility for parole is tantamount to a presumptive release date.").

Unlike the former Board of Parole, the PCRA mandated the USPC to establish guidelines for its powers to grant or deny a prisoner parole, 18 U.S.C. § 4203 (a)(1), and mandated it make its determinations "pursuant to [those] guidelines," 18 U.S.C. § 4206(a), with exceptions above or below such guidelines only for "good cause," 18 U.S.C. § 4206(c); 28 C.F.R. § 2.20(c). These guidelines became part of the "standards and criteria to be used... in making parole determinations," House Conference Report (H.Conf.Rep.) No. 94-838, Feb. 23, 1976, p.25 (reprinted in 1976 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.), p.357), as the "fundamental gauge" for such id., p.26 [1976 U.S.C.C.A.N., p.359]; See Priore v. Nelson, 626 F.2d 211, 215 (2nd Cir. 1980), and the "standards and criteria [were] made the same for all federal prisoners." Senate Report (Sen. Rep.) No. 94-369, Committee on the Judiciary, Sept. 11, 1975, p.18 [1976 U.S.C.C.A.N., p.340]. See Farkas v. U.S. Parole Comm'n, 744 F.2d 37, 40 (6th Cir. 1984); Moore v. Nelson, 611 F.2d 434, 437 (2nd Cir. 1979).

While the USPC's national presumptive parole release date policy applied to all parole eligible prisoners, including those in the most severe offense catagory, See e.g., Richardson v. U.S. Parole Comm'n, 729 F.2d 1154, 1155 (8th Cir. 1983); Allen v. Hadden, 738 F.2d 1102, 1104 (10th Cir. 1984); Montoya v. U.S. Parole Comm'n, 908 F.2d 635, 637 (10th Cir. 1990), the USPC continued Board's

practice of not providing an upper guideline on the face of its Guidelines For Decisionmaking Chart published at 28 C.F.R. § 2.20 for the most severe offense catagory and "defended" the failure to provide the "narrow range" provided all other prisoners by analogizing prisoners in the most severe offense catagory to those in the next most severe catagory, "who because of aggravating circumstances, are continued beyond [their] guideline range." United States ex rel. Jacoby v. Arnold, 442 F.Supp. 144, 147 & n.6 (M.D.Pa. 1977) (citing Respondent's answer in United States ex rel. Brown v. Board of Parole, Civ. No. 76-605 (M.D.Pa. May 18, 1976). See also Garcia v. U.S. Board of Parole, 557 F.2d 100, 103 (7th Cir. 1977) (applying Board's pre-PCRA order & policy post-PCRA); Prater v. U.S. Parole Comm'n, 575 F.Supp. 284, 289 (S.D.Ind. 1983) (applying policy via USPC order of 3/29/1982); Benedict v. U.S. Parole Comm'n, 569 F.Supp. 483, 484 (E.D.Mich. 1983); Monks v. U.S. Parole Comm'n, 463 F.Supp. 859, 862 (M.D.Pa. 1978).

More importantly, the USPC effectuated a policy for prisoners placed in its most severe offense catagory, who "hav[ing] served a period of time in excess of guideline minimums" and ordered to continue beyond his minimum guideline to a future reconsideration hearing that:

> "any such prisoner who is [so] continued to an institutional review may expect parole at that time....[Such a continuance] represents the Commission's judgment as to when [such] prisoner will be suitable for parole absent new information or institutional misconduct."

United States ex rel. Brown v. U.S. Board of Parole, 443 F.Supp. 477, 479 (M.D.Pa. 1977)(quoting Affidavit of USPC Research Assistant James L. Beck's proffered official USPC policy and practice) (emphasis added). Thus, prisoners in the most severe offense catagory and ordered to be continued to a reconsideration hearing at a date "above their guideline minimums can ordainarily expect parole when next considered at their institutional hearing." Id., at 480.

On December 16, 1982, the USPC published a purported final ruling amending 28 C.F.R. § 2.20, which included a revised "Guidelines for Dicisionmaking" table within which it reclassified former severity offenses splitting the former most severe

offense catagory "Greatest II" into catagories 7 and 8 with catagory 8 the most severe. 47 Fed. Reg. 56334, 56335-36. For the new Catagory 8, the decision-making table respectively coordinated salint factor scores "Very Good," "Good," "Fair," and "Poor" with ranges of months indicated as "100+," "120+," "150+," and "180+." Id., p.56336. The table footnoted an an explaination of the plus "+" symbol:

> NOTE: For Cataagory Eight, no upper limits are specified due to the extreme variability of the cases within this catagory. For decisions exceeding the lower limit of the applicable guideline catagory by more than 48 months, the pertient aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

Id.[4]

The PCRA superseded all guidelines decision-making by mandating that any prisoner serving a sentence of 5 years or more and not "earlier released" under

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4. In 1994, the USPC reversed its presumptive parole release policy for a narrow class of Catagory 8 "first degree murder cases" for which it "create[d] a presumption against parole... that can be overcome by a showing of 'compelling circumstances in mitigation.'" 59 Fed. Reg. 25813, May 18, 1994. The new "rule" intended "to ensure" that such prisoners having served beyond their minimum guideline would not "automatically be paroled just because they are 'within the guidelines,'" Id., but should thereafter expect to never be paroled "at any time in the guideline range" unless the newly added ambiguous criteria was met. id. For such prisoners, under "Catagory Eight, the guideline range extend[ed] from the minimum specified to the full term of the sentence imposed," Id., and "'[f]or these cases, the expiration of the sentence is deemed the limit of the guideline range.'" id., at 25814 (quoting Note to 28 C.F.R. § 2.20 as amended). The new rule was to be "applied retroactively" to upset and reverse "presumptive grants of parole decided by the Commission in previous years," Id., at 25813, justified by an arbitrary post hoc presumption that the former presumptive grants of parole issued due to the USPC's "negligen[ce]" of determining "whether parole would 'promote disrespect for the law'" a criterion of 18 U.S.C. § 4206(a). id. In 1989, the USPC promulgated a rule defining the maximum upper limit for its guidelines decision-making authority relative to a "'U.S. Code sentence'" for which "'federal guidelines...shall not exceed the limit of the U.S. Code sentence, i.e., the number of months that would be required by...the two-thirds date if the U.S. Code sentence is five years or more.'" 54 Fed. Reg. 27842, June 30, 1989 (interim rule 28 C.F.R. § 2.66(d) since made permanent and later removed to 28 C.F.R. § 2.65(d)). The 1994 rule-change shows the national presumptive parole release date policy continuing except for the limited defined class. When read together with the 1989 rule, it demonstrates that, the maximum limit of the guideline range for even the most aggregious offenses exceed the number of months for mandatory parole release - nominally referenced as the "two-thirds date" - pursuant to 18 U.S.C. § 4206(d).

§§ 4206(a) or (b), to be released when he had served two-thirds of each consecutive term or terms, "or" upon having served 30 years of each term or terms of "more than" 45 years, "including any life term, whichever is earlier." id., § 4206(d).

"To facilitate [its] national policy" the USPC established an additional sub-range decision-making procedure for prisoners placed "within the guidelines" for which it "require[d] a separate statement of reasons for placing a prisoner at the top, middle, or bottom," Briggs v. U.S. Parole Comm'n, 736 F.2d 447, 450 (8th Cir. 1984) (citing 1983 U.S. Parole Commission, Rules and Procedures Manual, § 2.23-01(a)-(b)); (See Tr.App.160)(1984 USPC, Rules & Procedural Manual, § 2.23-01(a)-(b)), and while "not a mechanical rule," for within-guidelines decisions the USPC "inten[ded]... to use the least restrictive sanction required to fulfill purposes of 18 U.S.C. 4206 and 28 C.F.R. 2.20" by placing a case "in the lower half of the guideline range unless the offense behavior or prior record/salient factor score is among the more serious contained in the catagory...." (id., 159) (1984 USPC, Rules & Procedures Manual, § 2.20-07, Principle of Parsimony)).

Under 18 U.S.C. §§ 4161 et seq, the BOP was mandated to apply good time credits against a prisoner's sentence at a rate of 10 days per month for sentences of 10 years or more and, "[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." § 4161. A prisoner could also earn industrial or meritorious good time (MGT) credit in addition to § 4161's statutory good time credits of 3 days per month for the first 12 months and 5 days per month thereafter. 18 U.S.C. § 4162. The BOP was mandated to "release[ ]" a prisoner "at the expiration of his term of sentence less the time deducted for good conduct." 18 U.S.C. § 4163.

The USPC promulgated a rule providing that:

> 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 purposes of every action taken by the Commission pursuant to these rules, and the prisoner has a single parole eligibility date determined by the [BOP].

28 C.F.R. § 2.5. Cf. 1984 USPC, Rules and Procedures Manual, M-01 ("Aggregation of Sentences. Under federal law, adult sentences will be aggregated (combined to form a single term) for purposes of determining good time release and parole eligibility.").

4. Imposition And Implimentation Of Petitioner's Sentence

Petitioner's trial court sentenced him on June 24, 1983 to an effective life plus 10-year plus 5-year term of imprisonment and ordered it executed "[p]ursuant to 18 U.S.C. Section 4205(b)(2)" under which it expressed Petitioner "to be eligible for parole at such time as provided by law and as the Parole Commission may determine." See Doc. 1, p.3 ¶ 7 & p.13; Doc. 9, p.2 & Doc. 9-2, p.33.

Pursuant to § 4161, the BOP upon receiving him into its custody assessed his "[t]otal sentence" as a single aggregate sentence of "Life + 15 years" for purposes of determining his rate of good time credits, Doc. 1-1, p.2 (BOP Sentence Date Summary), and pursuant to 18 U.S.C. § 3568 credited "131" days of presentece jail time credit against his sentence. id. On 9/19/1983, a BOP BP5 Sentence Computation Data printout recorded Petitioner's "JAIL CREDIT" from "02-13-1983" through "06-23-1983" and the entirety of his cummulative single aggregate sentence as "A TOTAL OF LIFE + 15 YEARS UNDER 4205(B)(2)" with his "TWO-THIRDS OR THIRTY YEARS" mandatory parole release date as "02-12-2013" in light of his "131" days of "TOTAL JAIL CREDIT." (Tr. App. 173-74).

The USPC's Pre-Hearing Assessment prior to Petitioner's initial hearing of 6/6/84 shows the USPC's assessment of his "Two-Thirds" mandatory parole release date as "2-12-2013," Doc. 1-1, p.47, and following the initial parole hearing the examining panel "[r]ecommended release" at a "10 year reconsideration hearing" while noting that his "applicable guideline range is 100 plus months." Doc. 1-1, pp.45-46.

5. Changes In The Law

Between the date Petitioner's sentence was imposed (June 24, 1983) and the

dates of his initial parole hearing (6/19/1984), Congress published a Senate Report to accompany S. 1762, a proposed Comprehensive Crime Control Act of 1984 (CCCA) that was passed by the Senate on February 2, 1984 and was awaiting passage by the House proposing an entirely new and different sentencing system with the complete abolition of the USPC and parole. Senate Report No. 98-225, Senate Committee on the Judiciary, 98th Cong. 2d Sess., Oct. 4, 1983. (Reprinted in 1984 U.S.C.C.A.N. pp.3182 et seq). While Petitioner's sentence and convictions were pending appeal, the House passed the bill and on October 12, 1984, President Regan signed it into law, Pub.L. 98-473, Tit. II, 98 Stat. 1976 ("This title may be cited as the 'Comprehensive Crime Control Act of 1984'").

The report found existing law "divid[ed] the sentencing authority between the judge and the Parole Commission" thereby "promot[ing] disparity and uncertainity among prisoner's sentences," S.Rep. No. 98-225, p.46 [1984 U.S.C.C.A.N. 3229]; See also id., pp.49, 112 [1984 U.S.C.C.A.N. 3232, 3295], that "the factors routinely considered" by the USPC "in setting release dates related entirely of information known at the time of sentencing" with narrow exceptions, id., p.115 & nn. 273, 274 [1984 U.S.C.C.A.N. 3298 & nn. 273, 274], that the USPC was performing a "function...particularly judicial in nature,"p.54 [1984 U.S.C.C.A.N. 3237], and thus "arguab[ly]... usurped" an Article III constitutional judicial "function." id. [5]

It emphasized the USPC's inherent incompetence based upon findings that its initial parole decisions were erroneous more often than not and that "most of those errors were not corrected in [its] internal appeals process," Id., 55

5. The PCRA's legislative history recognized '"[p]arole [a]s an extension of the sentencing process.'" Rodriquez v. U.S. Parole Comm'n, 594 F.2d 170, 175 (7th Cir. 1979)(quoting Sen. Rep. No. 94-369, supra, pp.15-16 [1976 U.S.C.C.A.N. 337]), and parole was viewed as a "bifurated sentencing proceeding," Payton v. United States, 679 F.2d 475, 488 (5th Cir. 1982)(en banc)(Tjoflet, Roney, Hill, and Frank M. Johnson, Jr., C.J.'s concurring in part and dissenting in part), in which the USPC plays the "role of resentencer" and by "acting on essentially the same information presented to the sentencing judge,...resentence[s] the defendant for the purposes of punishment, general deterence and specific deterence." Dufresne v. Baer, 744 F.2d 1543, 1574 (11th Cir. 1984).

& nn. 77, 78 [1984 U.S.C.C.A.N. 3238 & nn 77, 78], and concluded that "parole boards are not able to predict with any degree of certainity which prisoners are likely to be 'good' parole risks and which are not," id., p.57 & 86 [1984 U.S.C.C.A.N. 3240 & n. 86], because it was "quite certain that no one can really detect whether or when a prisoner is rehabilitated." id., p.38 [1984 U.S.C.C.A.N. 3221]. It also concluded that "to retain the confidence of American Society," S.Rep. 98-225, pp.49-50 [1984 U.S.C.C.A.N. 3232-33], and to ensure that "[p]ublic respect for the law will grow" the public must "know" that "a particular case" was subject to "a real sentence, rather than one subject to constant adjustment by the USPC." id., p.56 [1984 U.S.C.C.A.N. 3239]. The existing "method of sentencing" was found inherently "arbitrary and capricious" and required "[c]orrecting." Id., p.65 [1984 U.S.C.C.A.N. 3248].

Crucially, as to prisoners trapped under the USPC's arbitrary powers, the pending bill manifestly intended to entirely abolish parole and eviscerate the USPC's discretion within a 5-year limitation period before final repeal with a singular purpose of "set[ting] release dates for prisoners sentenced before" the new system went into affect "consistent with the applicable parole guidelines," S.Rep. No. 98-225, pp.53 n. 74, 56 & n. 82, and 189 [1984 U.S.C.C.A.N. 3236 n. 74, 3239 & n. 82, and 3272], further intending that the date be set as low as possible by "giv[ing] the prisoner the benefit of the applicable new sentencing guideline if it is lower than the minimum parole guideline." id., p.189 n. 430 [1984 U.S.C.C.A.N. 3272 n. 430].

Under threat of abolition and loss of jobs, careers, and prestige, the USPC had fought hard to dissuade Congress from abolishing the agency and to retain it even if with a reduced discretion, an overture "strongly" rejected because it would continue numerous existing "dificiencies" including the "unfairness and undertainity" in fluctuating release dates, the USPC's "arguable...usurp[ation]"

of the Article III judicial "sentencing" function, errors made and uncorrected in the USPC's administrative appellate system, the "problem that actual terms of imprisonment are determined in private rather than public proceedings," and the fact that the USPC was both needlessly "expensive" and unduly "cumbersome." S.Rep. No. 98-225, pp.53-56, 164 [1984 U.S.C.C.A.N. 3236-39, 3347].

While continuing to lobby Congress to save itself from pending abolition and its personnel from unemployment, the USPC conducted Petitioner's initial parole hearing on June 19, 1984 following which the examining panel "[r]ecommended release" upon a "10 year reconsideration hearing," referred the case to the "Regional Commissioner for Original Jurisdiction consideration," and recommended that Petitioner "[c]ontinue to a reconsideration hearing." Doc. 1-1, pp.45-46; Doc. 9-2, pp.5-6.

Ultimately designed as an original jurisdiction case pursuant to 28 C.F.R. § 2.17, a quoram including the Regional Commissioner and three National Commissioners concurred to "continue" Petitioner "to a Ten Year Reconsideration Hearing," Doc. 9-2, p.9, and on July 20, 1984 the National Commissioners issued a Notice of Action (NOA) to "continue to a ten-year reconsideration hearing in June 1994." id., p.7. Consistent with the USPC's regulations, policy and practice at the time, immediately following the ordered action the NOA advised Petitioner in relevant part that :

> A presumptive parole date is conditioned upon your maintaining good institutional conduct and development of a suitable release plan. Prior to release your case will be subject to review to ascertain that these conditions have been fullfilled....

Id. (emphasis added). Under "Reasons/Conditions," the NOA explained:

> Your offense behavior has been rated as Catagory Eight because it involved murder. Your salient factor score (SFS-81) is 9 (see attached sheet). You have been in custody a total of 17 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 100+ months to be served before release for cases with good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision outside the guidelines range at this consideration is not found warranted.

Id. (emphasis added). The NOA concluded by providing that "[a]s required by law, you have been scheduled for a statutory interim hearing during June 1986." Id.

From the face of the NOA and the USPC's national parole release date policy, Petitioner understood that he, like all parole prisoners, could expect "release" within a guidelines "range of 100+ months," that in light of "all relevant factors and information presented" no reason existed to warrant any decision outside the "range of 100+ months" - i.e., beyond 148 months indicated by 28 C.F.R. §2.20, Catagory Eight & Note to Catagory Eight - or above either the lower half of his guideline range, 1984 USPC, Rules and Procedures Manual, § 2.20-07, or above the lowest third of the range, id., § 2.23-01(a)-(b), and that the ordered action to "continue [him] to a ten-year reconsiderationhearing in June 1994" was precisely what the NOA purported it to be - i.e., "[a] presumptive release date" contingent upon his continuing good conduct and a suitable release plan. June 1994 would be a total of 136 months of incarceration and plainly within the "range" of "100+ months" put forth in the NOA and reflected in § 2.20, supra, Note Catagory Eight. Accordingly, Petitioner had every reason and right to "expect" actual release at the time of the June 1994 hearing. Brown, supra, 443 F.Supp. at 479-80.

Unknown to Petitioner, following publication of Senate Report 98-225 and passage of the CCCA by the Senate, the USPC published in the Federal Register a proposed rule-change by amendments to 28 C.F.R. §§ 2.12 and 2.14 to authorize the USPC to continue prisoners to 15-year reconsideration hearings following an initial hearing. 49 Fed. Reg. 22834, June 1, 1984. Against public comments that the amendments were "politically motivated," "counter productive" and "would remove a prisoner's hope of early release," 49 Fed. Reg. 34208, Aug. 29, 1984, the USPC made the rule-change final with an effective date of "October 1, 1984." id., and with the intent for retroactive application to "[p]risoners previously given ten year reconsideration decisions... at the time of their next scheduled statutory interim hearing." id.

Eleven days after amended §§ 2.12 and 2.14 went into effect and following passage by the House as incorporated into an appropriation's bill and accordingly re-passed by the Senate on October 12, 1984, President Regan signed the CCCA into law. Publ. L. 98-473, Tit. II, Ch. II, 98 Stat. 1976, 1987 et seq (enacting CCCA and SRA). The PCRA was "repealed" in present tense, id., § 218(a)(5), 98 Stat. 2027, together with the existing good-time credit statute (18 U.S.C. §§ 4161 et seq), id., with both to "remain in effect for five years after the effective date and as to a term of imprisonment during the period described in subsection [235](a)(1)(B)." id., § 235(b)(1)(A) & (B), 98 Stat. 2032.[6]

Under § 235(b), a USPC "Commissioner['s]" "term of office," (otherwise limited by 18 U.S.C. § 4202), was extended for such Commissioners "who is in office on the effective date... to the end of the five-year period after the effective date of this Act," Id., § 235(b)(2), 98 Stat. 2032, and mandated the USPC "set a release date" for prisoners projected to "be in its jurisdiction the day before the expiration of five years after the effective date of this Act" that was "within the range that applies to the prisoner under the applicable parole guideline... set early enough to permit consideration of an appeal.., in accordance with [USPC] procedures, before the expiration of five years following the effective date of this Act." id., § 235(b)(3), 98 Stat. 2032, And, finally, the section mandated that the USPC Chairman "shall be...a nonvoting member of the United States Sentencing Commission [USSC] ex officio following the effective date of this Act" and thus "during the five-year period" the USSC "shall consist of nine members" notwithstanding newly enacted 28 U.S.C. § 991. Id., § 235(b)(5), 98 Stat. 2033.

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6. Subsection 235(a)(1)(B) determined the date the new sentencing guidelines to be created by the new U.S. Sentencing Commission (USSC) were to go into effect contingent upon a variety of condition's accomplished each pursuant to a structured time-table from the date of "enactment of this Act or October 1, 1983, whichever occurs later." Id., § 235(a)(1)(B)(i)-(ii), 98 Stat. 2031-32.

The USPC amended its Rules and Procedures Manual to ensure retroactive application of the newly amended §§ 2.12 and 2.14 to prisoners, like Petitioner, who had been continued to 10-year reconsideration hearings, and subject them to 15-year reconsideration hearings from their next scheduled interim hearing.

> Fifteen-Year Reconsideration Hearing. Case previously scheduled for ten-year reconsideration hearings will be given reconsideration at the time of the next scheduled statutory interim hearing. Following such hearing, a presumptive release date may be set up to fifteen years from such hearing or a fifteen year reconsideration hearing may be ordered.

1984 USPC Rules and Procedures Manual, Appendix 8 - Temporary/Special Rules, § (4) (Tr. App.201)

On June 18, 1986, the USPC held its first statutory interim hearing for Petitioner. Doc. 9, p.3. Other than Petitioner's exemplary institutional conduct, Doc. 9-2, p.11, no new information was presented or considered, and the panel informed Petitioner that under existing law he would be released no later than the point at which he had served 30years which the panel memorialized. Doc. 1, ¶9; Doc. 1-1, pp.20, 65; Doc. 9-2, p.11. The panel acknowledged that the 30-year release date was based on his single aggregate "life plus 15 year sentence," which the BOP also "compute[d]" as "his aggregate term." id. While the panel again referred the case "to the Regional Commissioner for original jurisdiction consideration," it applied the amended rules under which it purported that:

> the panel reach[ ] the ultimate recommendation to continue for a 15 year reconsideration hearing because in June 2001, Kahl will have served about 18 years 4 months and the panel does not feel that is an excessive sanction for the instant very serious and aggressive offense behavior.

Id. Thus, the panel, under "RECOMMENDATION" stated:

> Refer to Regional Commissioner for original jurisdiction consideration. Continue to a 15 year reconsideration hearing in June 2001.

Id.

On July 17, 1986, the National Commissioners applied the 1984 amendments

to 28 C.F.R. §§ 2.12 and 2.14 and the policy change in its Rules and Procedures Manual, supra, retroactivity to Petitioner and ordered that he "continue for a 15-year Reconsideration Hearing in June, 2001" followed by its formal advice that "[a] presumptive parole date is conditioned upon your maintaining good institutional conduct and the development of a suitable release plan." Doc. 9-2, p.12. Under "Reasons/Conditions," the NOA merely stated "SEE ATTACHED":

> REASONS:
>
> Retroactivity does not apply. Neither your recalculated severity rating (old catagory - Catagory Eight; new catagory - Catagory Eight) nor your recalculated salient factor score risk catagory (old catagory - Very Good. old score - 9; new catagory - Very Good, new score - 9) is more favorable.
>
> As required by law, you have been scheduled for a statutory interim hearing during June, 1988.

Id., pp.12-13. The NOA simply applied the amended regulations retroactively and with sheer arbitrariness and devoid of any statement of reasons.[7]

Little more than six months later, on February 6, 1987, USPC Chairman Benjamin F. Baer (through Commissioner Cameron M. Batjer) signed off on a purportedly final rule interpreting § 235(b)(3) of Public Law 98-473, supra, 98 Stat. 2032.[8]

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7. No "specificity" of "factors" for placement above the bottom end of the guidelines, middle, or at the top of the guidelines was made and neither the Regional Commissioner nor the National Commissioners "record[ed]" any such "specific factors in the case file" on review relative to its "modification of...[the] previous Commission action" as required by the USPC Manual, § 2.23-01(a)-(b), was made; no "specif[ication] [of] the pertinent case factors" to justify its "decision[] exceeding the lower limit of the applicable guideline catagory by more than 48 months" as required by 28 C.F.R. § 2.20, Note to Catagory 8, was provided; and the NOA was completely devoid of the mandatory "statem[ent] with particularity the reason for... den[ying]" Petitioner "parole" within or "notwithstanding the guidelines" required by 18 U.S.C. §§ 4206(a) and (c) and 28 C.F.R. § 2.13(d).

8. Neither § 235(b)(3) nor any other provision of § 235(b) as enacted (nor its legislative history) so much as suggested statutory authority vested in the USPC to interpret § 235(b)(3) or any other part of the SRA or CCCA. Thus, the final rule cited not to any such authority for the rule, but to 18 U.S.C. §§ 4203(a)(1) and 4204(a)(b) neither of which suggest such authroity.

U.S. Dept. of Justice, BOP Operations Memorandum, March 17, 1987 w/attached Final Rule, 28 C.F.R. § 2.64 (BOP Op. Mem.) (Tr. App. 170). USPC Chairman Baer was then and had been a nonvoting ex officio member of the USSC pursuant to § 235(b)(5)'s 5-year exception to 28 U.S.C. § 991. 98 Stat. 2033. However, the rule was construed so that the same 5-year period of § 235(b)(3) would "not begin until November 1, 1987" and that it would therefore expire on "November 1, 1992," and, thus, the USPC was not required to set the mandated release dates for prisoners "any earlier in the five year period than... three to six months necessary to permit an administrative appeal of the date before the end of the five year period," BOP Op. Mem., Final Rule, pp.3-4 (Tr. App. 173), i.e., "October 31, 1992"(the day before the fifth anniversary of the effective date of the Sentencing Reform Act). id., p.1 (Tr. App. 174).

Baer construed § 235(b) as continuing the USPC's authority to make parole "decisions outside of the guideline ranges... during the five-year period and the words 'within the range that applies to the prisoner under the applicable parole guidelines'" in § 235(b)(3) as subject to USPC "revis[ion] at any time until their final application" and, "[h]ence the applicable guideline ranges will not... be known" to the prisoners, their families, or the public "until the Commission sets final release dates in 1992." Id., pp.6-7 (Tr. App. 175). Baer noted that the 99th Congress had failed "to delete" § 235(b)(3)'s mandate to set prisoners release dates "within the parole guideline range" (referencing the failure to enact "S. 1236, Sec. 37"), while "anticipat[ing] that similar legislation will be introduced in the 100th Congress." Id., p.2 (Tr. App.172).

As mandated by §§ 235(a)(1)(B)(i) and 235(b)(5), 98 Stat. 2031-32, 2033, on April 13, 1987, the temporary 9-member USSC inclusive of USPC Chairman Baer's ex officio membership, submitted its initial set of sentencing guidelines to Congress and, on May 1, 1987, that same 9-membeer USSC submitted modifications and amendments thereto. Supplimentary Report on the Initial Sentencing Guidelines

and Policy Statements, USSC, June 18, 1987 (relevant pages) (Tr. App. 178 et seq).[9] As mandated by § 235(a)(1)(B)(ii)(II), 98 Stat. 2032, the General Accounting Office (GAO) proceeded to study the sentencing guidelines submitted by the temporary 9-members USSC "as required by law." Sentencing Guidelines, Potential Impact on the Federal Criminal Justice System, Report to Congress, GAO, Sept. 1987 (Tr. App. 178).

As Chairman Baer "anticipated," the 100th Congress introduced a bill (S. 1822) to eliminate § 235(b)(3)'s mandate for the USPC to set final release dates for prisoners "within the[ir] parole guideline range" and to restore to the USPC its formerly abused and abusive discretion under 18 U.S.C. § 4206. Signed by President Reagan on December 1, 1987 as the '"Sentencing Act of 1987,'" Pub.L. 100-182, § 1, 101 Stat. 1266, under subtitle "PROSPECTIVE APPLICATION OF SENTENCING REFORM ACT," it amended three subsections "of the Comprehensive Crime Control Act of 1984." id., §§ 2(a), (b)(1) and (b)(2), 101 Stat. 1266. Under the "PROSPECTIVE APPLICATION" subtitle and section, the Act first amended § 235(a)(1) "by inserting after 'date of enactment' the first place it appears the following: 'and shall apply only to offenses committed after taking effect of this chapter,'" Id., § 2(a), 101 Stat. 1266; secondly, it amended § 235(b)(1) "by striking out 'convicted of an offense or adjudicated to be a juvenile delinquent' and inserting in lieu thereof 'who committed an offense of juvenile deliquency,'" id., § 2(b)(1), 101 Stat. 1266; and third, it amended § 235(b)(3) "by striking out 'that is within the range that applies to the prisoner under the applicable parole guideline' and inserting in lieu thereof 'pursuant to section 4206 of title 18, United States Code.'" id., § 2(b)(2), 101 Stat. 1266.

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9. It is not irrelevant that the Supplimentary Report that the general comparability for USPC Catagory 8 offenses were correlated to the new sentencing guideline offense levels at "31-33" for other than first degree murder and "31-43" for "first degree murder," Cover to Appendix B (Tr. App. 182), topped at "43" for the latter and "33" for "second degree murder." Appx. B, p.1 (Tr. App.183) A "table" provided by the USPC "provid[ing] the upper bound for estimates of sentence length and projected time served" shows the "mean" for service of all "MURDERS" for prisoners with a very Good salient factor score as "94.7" months and the "MEDIAN" as "80.0" months. Appx. C, cover page & p.1 (Tr. App. 84-850).

To the USPC's dismay, however, the Act guarded against retroactive application of the amendment and others enacted thereby by expressly enacting a "General Effective Date" provision mandating that: "The amendments made by this Act shall apply with respect to offenses committed after the enactment of this Act." Id., § 26, 101 Stat. 1272.

On June 22, 1988, the USPC held its second statutory interim hearing for Petitioner and, on July 28, 1988, the National Commissioners acting (under the continuing original jurisdiction desigination) issued a NOA ordering: "No change in continuance for 15 year Reconsideration Hearing in June 2001." Doc. 9-2, p.17. While the examiner panel again memoralized that "[o]n his life plus 15 year sentence, subject will serve at most 30 years, the two-thirds point of the aggregate term, "Doc. 1 ¶ 10; Doc. 1-1, p.7, the NOA, unlike previous NOA's, issued under a new "Parole Form H-7(a) May 87" which omitted the "[a] presumptive parole date" notice assuming continuing good institutional conduct and a suitable release plan, Doc. 9-2, p.17, and purported as "REASONS" for continuing the previous decision altering Petitioner's reconsideration hearing set for June 1994 to a 15 year reconsideration hearing in June 2001 that:

> Your offense behavior has been rated as Catagory Eight severity because it involved murder. Your salient factor score is 9. You have been in federal confinement as a result of your behavior for a total of 64 months. Guidelines established by the Commission indicate a range of 100+ months to be served for cases with good institutional adjustment and program achievement. After review of relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted.

id.

Although USPC regulations purport to only consider "significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing" 28 C.F.R. § 2.14 (unchanged since the time of Petitioner's purported offense), the only new developments or information presented and considered at both the 1986 and 1988 hearings was Petitioner's "very good institutional

adjustment including clear conduct," Doc. 9-2, p.16, the National Commissioners purported to justify the arbitrary 1986 order to a reconsideration hearing far beyond the 48-month limit above the minimum guideline under 28 C.F.R. § 2.20, Note to Catagory Eight, with the post hoc rationalization that:

> A decision more than 48 months above the minimum guideline range is warranted because [the case] involved the murder of two government agents and crippling injuries to other government agents.

id. The purported factors are among the very factors considered at Petitioner's initial hearing, Doc. 9-2, p.6, and purported to then have been fully "review[ed]" and considered by the National Commissioner's when they determined to not justify a decision "outside the guidelines" or above the 48-month period when they ordered his original continuance for reconsiderationin June 1994 as his "presumptive release date." Doc. 9-2, p.7. The 1988 NOA concluded by stating that "[a]s required by law, you have also been scheduled for a statutory interim hearing during June 1990." Doc. 9-2, p.17.

On June 20, 1990, the USPC held its third statutory interim hearing for Petitioner where retired Phoenix, Arizona Training Officer Gerald Maxem McLamb appeared to provide the USPC with the details of his and his law enforcement professional associates discovered about the circumstances of the incident by their investigation. Doc. 9-2, p.19. The examiners were stunningly hostile toward McLamb interupting him so regularly that he was largely prevented from coherently and fully providing his very cruicial information. McLamb thus requested he be permitted to play a tape-recording of his findings (to prevent further interuptions), which the examiners refused. He then requested the examiners put the tape in the file so higher administrative authorities could review it. This, too, they refused. They informed him he could mail a copy to the USPC's Regional Office for inclusion in the record. Id.[10] The Review Summary reported

10. McLamb privately told Petitioner that he would send a copy both to Regional and National offices, but said in light of the obvious hostility he would be

that "the hearing tape" had been "inadvertently left in the recording machine" and was "used in the succeeding case on th[e] docket sheet" while noting the "very high probability that there will be a request made for the recording of this hearing." Id., p.20. There followed a highly emphasized warning that:

> **
> NO INFORMATION REGARDING THIS PRISONER SHALL BE DISCUSSED WITH ANY PERSON OTHER THAN THE AUTHORIZED REPRESENTATIVES OF THE DEPARTMENT OF JUSTICE

Id.

On August 16, 1990, the National Commissioners under the original jurisdiction referral simply ordered:

> No Change in continuance to a 15-year reconsideration hearing in June 2001.
>
> REASONS:
>
> Retroactivity does not apply; Neither your recalculated severity rating (old Catagory Eight; new Catagory Eight) nor your recalculated salient factor score risk catagory (old catagory Very Good; old score 9; new catagory Very Good; new score 9) is more favorable.
>
> As required by law, you have also been scheduled for a statutory release hearing in June 1992.

Id., p.21. [11]

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surprised if either made it into the record. He also told Petitioner that the natural tendency of law enforcement is to protect each other and becase the case was so politically sensitive at very high levels, no lower level personnel would likely be objective because of career incentives. He said he expected the tape-recording of the hearing would some how accidently "disappear" due to his exposure of the extreme unprofessional behavior of the marshals at the scene. He later told Petitioner that he had in fact sent copies of his tape to the Regional and National USPC offices.

11. Only after repeated attempts beginning in 1992 and persisting for a full decade to compell the USPC to provide him with all of the tape-recordings of all of his hearings along with all disclosable documents or other materials, (Tr. App.195 et seq), did Petitioner finally receive copies of his hearing summaries, discovered that McLamb's tape-recording was never put into the file, and the USPC Chairman inevitably informed him that irrespective of the PCRA's mandate to keep and provide copies of all parole hearings to the prisoner upon request, see 18 U.S.C. § 4208(f); see also 28 C.F.R. §§ 2.13(f) & 2.56(e), the USPC had established a secret "retention schedule" under which it deliberately "destroyed" all of his tape-recordings prior to his 1995 hearing. (Tr. App. 226-263).

On December 1, 1990, six years and 49 days after President Reagan signed Public Law 98-473, Congress purported to amend § 235(b) thereof by providing that:

> For the purposes of section 235(b) of Public Law 98-473 as it relates to chapter 311 of title 18, United States Code, and the United States Parole Commission, each reference to "five years" or a "five-year period" shall be deemed a reference to "ten years" or a "ten-year period," repectively.

Pub.L. 101-650, Tit. III, § 316, 104 Stat. 5115. While the terms "shall be deemed" denotes prospectivity, the terse amendment does not clearly specify retroactive application nor whether in respect to § 235(b)(3) it was amending the original subsection or the subsection amended by Public Law 100-182, § 2(b)(2), 101 Stat. 1266, and made applicable exclusively to offenses committed thereafter - i.e., after December 7, 1987. id., § 26, 101 Stat. 1272.

As promulgated in 1987, 28 C.F.R. § 2.64 interpreted § 235(b)(3) of Public Law 98-473 "as originally enacted." § 2.64(a); see also BOP Op. Mem. 3/17/1987, supra, (Tr. App. 176). However, that regulation was amended in 1991, 56 Fed. Reg. 16273, Apr. 22, 1991, purporting as "interpretation of section 235(b)(3)... as amended by the Sentencing Act of 1987 and the Federal Courts Study Committee Implimentation Act of 1990" to apply to "persons who will be incarcerated at the expiration of ten years after the effective date of the Sentencing Reform Act - November 1, 1987...." 28 C.F.R. § 2.64(a) (1991-1995). "[A]s amended by the Sentencing Act of 1987," that version of §235(b)(3) was expressly made applicable to "offenses committed after" its effective date - i.e., December 7, 1987, Pub.L. 100-182, §§ 2(b)(2), 26, 101 Stat. 1266, 1272.

On December 1, 1992, the USPC held its fourth statutory interim hearing for Petitioner. Doc. 1-1, p.9. At the hearing one of the examiners - a Mr. Essex - repeatedly commented that he had read a massive amount of material on the case and was fully aware that "the government's version of events is not necessarily the truth." Each time he made this comment the other examiner - a Mr. Tenney

would make facial contortions and Petitioner would glance at the tape-recorder to see if it was still recording. Neither examiner mentioned McLamb's representations at his previous hearing nor the tape-recording that McLamb had provided to both the Regional and National USPC offices for review and inclusion into the record.

On December 3, 1992, Petitioner sent a written request to the USPC's national office:

> requesting...any and all materials regarding [him] that may have been used, or may be used in your determination of my parole... includ[ing] all of the tape hearings... beginning with my first hearing held in 1984 through my latest hearing in December 1, 1992; any interdepartmental memos that may be released; any extra-departmental considerations; and any other material that may have been or may yet be utilized in any way in your possible determinations or considerations relating to my parole.

(Tr. App. 194).[12]

On January 4, 1993, the National Commissioners pursuant to their original jurisdiction referral issued an NOA again ordering: "No change in [the] 15-year reconsideration hearing (June 2001)," Doc. 9-2, p.25, and, although having served more than 18 months beyond the 100-month low-end of Petitioner's guidelines, id., p.23, under "REASONS", the NOA simply stated that:

> Retroactivity does not apply. Neither your recalculated severity rating (old Catagory Eight; now Catagory Eight) nor your recalculated salient factor risk catagory (old Catagory Very Good; old score 9; new Catagory; [sic] Very Good; new score 9) is more favorable. As required by law, you have been scheduled for a statutory interim hearing during December, 1994.

id., p.25. The order was not based upon the concurrence of four votes as USPC quoram regulations required at the time for original jurisidction case decisions. 28 C.F.R. § 2.17(a) (1983-1995).

Petitioner appealed the order to the National Appeals Board which ordered: "Affirmation of the previous decision." Doc. 9-2, p.28. Under "RESPONSE," The

12. An earlier FOIA request by Petitioner in 1985 to the USPC, (see Tr. App. 193) had not resulted in any material provided by the USPC to Petitioner.

Notice on Appeal (NOAA) stated:

> You are correct in pointing out that your original Notice of Action dated July 20, 1984, failed to include reasons to exceed your minimum Catagory Eight guidelines by in excess of 48 months and instead reported that reason to render a decision outside your guidelines were not warranted. That was an error on the part of the Commission which was corrected by Notice of Action dated July 28, 1988. It caused no prejudicial harm as the decision is both instances was continued for reconsideration hearings.
>
> In response to your claim that the Commission did not follow correct procedures in deciding your case, the record indicates the contrary.
>
> All relevant factors have been considered and no new or significant information is presented which would justify a more lenient decision.
>
> The Commission recognizes that a (b)(2) sentence provides for parole eligibility at any time. However, eligibility does not imply suitability for parole release.
>
> Guidelines in effect at the time of an intial hearing are utilized and not guidelines in effect at the time of an offense. It is the Commission's position that the ex post facto clause of the Constitution does not apply to paroling policy guidelines.
>
> Your institutional behavior and achievements have been considered by the Commission but are not deemed sufficient to warrant a more lenient decision.

id.[13]

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13. Per regulation an exception to regulatory quoram requirements had been created if a quoram is impossible or would require more votes than Commissioners holding office. 28 C.F.R. § 2.67(a). The NOA affirmed by the NNOA proceeded with the concurrence of three Commissioners votes violating quoram requirements for original jurisdiction cases. 28 C.F.R. § 2.17(a), without § 2.67(a)'s exception. Contrary to the NNOA, "the record indicates" that the Commission did not "follow correct procedures" in continuing the earlier decisions to continue Petitioner to a reconsideration hearing in June 2001. Nor did it "follow correct procedures" by purportedly correcting the 1984 NOA four years after the fact with the post-SIH 1988 NOA's post hoc statement of reasons (notably avoiding any mention of the facially void 1986 NOA). The PCRA mandates a contemporaneously written statement of reasons when parole is denied, 18 U.S.C. § 4206(a), and in respect to any decision notwithstanding the guidelines. id., § 4206(c); see also 28 C.F.R. § 2.13(d). Regulations also require contemporaneous specification of factors for decisions exceeding the 48-month rabge above Catagory 8 minimums, 28 C.F.R. § 2.20, Note to Catagory 8, while policy requires specificity of such reasons for decisions relative to placement in the bottom, middle, or top of a prisoner's guideline range. Finally, interim hearings, unlike initial hearings, only consider "significant developments or changes in the prisoner's status" since the "initial hearing." 28 C.F.R. § 2.14(a) not to apply retroactive changes in the law detrimental to prisoners, which is exactly what the USPC did with its 1986, 1988, 1990, and 1993 NOAs and National Appeals Board did with its 1993 NNOA's affirmance.

On April 16, 1993, the BOP generated BOP PS 5880.30 titled "Sentence Computation Manual, ('Old Law' - Pre-CCCA-1984) by which it purported to empower itself to redetermine parole release decisions and to upset and alter previously established MPR dates under 18 U.S.C. § 4206(d). Doc. 1 ¶¶ 11-12. On April 12, 1994, BOP personnel, without any notice to the Petitioner of the existence of PS 5880.30 or the BOP's purported empowerment thereby (or otherwise) to alter his 30-year MPR date of February 12, 2013, applied PS 5880.30 to him and arbritrarily re-set his 30-year MPR date at February 12, 2023, Id. ¶¶12-13, and has refused to correct it. id., 14-27.

In light of the difficulties with the USPC's acceptance of the crucial information possessed by former Officer Gerald McLamb, he prepared the findings of law enforcement professionals headed by himself in a Criminal Justice Professionals Affidavit (co-signed by numerous former and current public officers, attorneys, judges, and others) directly to USPC Chairman Edward Reilly on March 29, 1995, see Note 1, supra. (Tr. App. 52-74), prior to Petitioner's 1995 statutory interim hearing (postponed due to dilitory tactics of the USPC in disclosing his records). The Affidavit was among many crucial documents not provided to Petitioner (including his still outstanding requests for the tape-recordings of his hearings), (Tr. App. 75-76), and to avoid further delay he proceeded to his hearing represented by former Nebraska State Senator and his then-attorney John DeCamp.[14]

14. DeCamp had met with Petitioner's case manager both before and after the hearing who openly informed him of the extraordenary political pressures on the case by higher authorities in Washington, D.C. and the U.S. Marshals Service to prevent Petitioner from ever being released. The case manager told DeCamp that the "political appointees" responsible for making any such decision "were not dumb enough or presumptuous enough to be [granting] him parole -- no matter what the evidence -- unless the parole was also approved at the much higher levels of political process in Washington, D.C. and within the U.S. Marshall's [sic] Service itself." (Tr. App. 267-68).

On May 22, 1995, the National Commissioners pursuant to their original jurisdiction referral issued a NOA once again ordering: "No change in continue to 15-year reconsideration hearing in June 2001." Doc. 9-2, p.30. Under "REASONS," the NOA stated:

> Retroactivity does not apply. Neither your recalculated severity rating (old Catagory Eight; new Catagory Eight) nor your recalculated salient factor risk catagory (old Catagory Very Good, old score 9; new Catagory Very Good, new score 9) is more favorable. This statement means that a finding has been made by the Parole Commission at your hearing that no regulatory or precedural changes have been made by the Parole Commission since your last hearing which would positively affect your case in terms of Offense Severity or Salient Factor Scoring.

Id., The NOA concluded by stating that, "[a]s required by law, you have also been scheduled for a statutory interim hearing during April 1997." Id.[15]

On October 2, 1996, Congress purported to amend § "235(b) of the Sentencing Reform Act of 1984 (98 Stat. 2032) as it related to" the PCRA and the USPC by requiring "each reference in such section to 'ten years' or 'ten-year period' [to] be deemed to be a reference to 'fifteen years' or 'fifteen-year period,' respectively." Pub.L 104-232, § 2(a), 110 Stat. 3055. As § 235(b) as enacted at "98 Stat. 2032" contained no "reference" whatsever to '"ten years"' or any "ten-year period[s],'" see 98 Stat. 2032, the amendment almost certainly intended

15. Regional Commissioner Carol Pavilack Getty was part of the quoram continuing the previous decisions. At the hearing, the examiner never mentioned Officer McLamb's Affidavit nor the plethora of letters received by the Commission urging Petitioner's immediate release. Getty, however, apparently reviewed McLamb's Affidavit and the many letters supporting his parole. In a Memorandum of May 10, 1995, Getty demonstrating the same derisive attitude toward McLamb's findings as the examiners did at the 1990 hearing. (Tr. App.264-65). Noting the "many letters of support for [Petitioner] from the Community," she voiced her "reaction" to McLamb's Affidavit by saying that "if they have this kind of information, it should be made available to the prosecutor and the court." (Id.) She clearly viewed the information as mitigating as it could possibly be by adding "[w]e do not rule on questions of innocence or guilt." (Id.) As far as she was concerned, there was a "[s]hooting... and we know the results." (Id.) Getty's hostility to the facts was later reflected in greater detail at co-defendant Scott Faul's 2002 initial hearing in which it was frankly admitted that "no one" in the USPC was concerned as to the role of the marshals causing the tragic incident, (Tr. App. 125 et seq), which is more throughly detailed hereafter.

to amend the December 1, 1990 amendment to § 235(b) enacted by Pub.L. 100-182, § 2(b)(2), 101 Stat. 1266, which was positively made to apply only to offenses committed after December 7, 1987. id., § 26, 101 Stat. 1272. In any case, like the 1990 amendment to "be deemed" indicated prospectivity and the terse amendment did not clearly specify any retroactive application.

The USPC amended 28 C.F.R. § 2.64 to extend the period for setting prisoners' final release dates to include the addition 5 years and thus to include prisoners "incarcerated at the expiration of fifteen years after the effective date of the Sentencing Reform Act"- November 1, 1987 and, like the regulation it amended, it applied to § "235(b)(3)... as amended by the Sentencing Act of 1987." 28 C.F.R. § 2.64(a)(1997). Under the new rule, the date was required to be set "three to six months before the end of that period," id., § 2.64(b) - i.e., before November 1, 2002.

Petitioner persisted in seeking his records many of which and the most important had not been provided and the USPC's refusal (not mere failure) to produce them forced him into the 1997 "waiver" cited by Respondent. Doc. 9, p.3. Respondent's assertion that Petitioner has "continued to waive" his statutory interim "hearings through the present," Id., is both false for the same reasons and unsupported by documentation. See (Tr. App.207-11) (Records of Petitioner's attempts to obtain records and tape-recordings into 2003).

On November 2, 2002, Congress pretended to enact an extension of the USPC. Pub.L. 107-273, Div. C, Tit. I, § 11017(a), 116 Stat. 1824, providing that:

> For purposes of/section 235(b) of the Sentencing Reform Act of 1984 (98 Stta. 2032) as such section relates to chapter 311 of title 18, United States Code, and the Parole Commission, each reference in such section to "fifteen years" or "fifteen-year period" shall be deemed to be a reference to "eighteen years" or "eighteen-year period," respectively.

Like the similar 1996 amendment, § 235(b) at "98 Stat. 2032" contained no "reference" whatsoever to '"fifteen years'" or any '"fifteen-year period[s],'"

see 98 Stat. 2032, and the amendment could only have intended to amend the 1996 amendment itself, which first created the "fifteen" - year periods. Pub.L. 104-232, supra, § 2(a), 110 Stat. 3055. Except for the fact that presuming the original 5-year period to final repeal of the PCRA began on November 1, 1992 (as the USPC has claimed), extended by ten years in 1990, Pub.L. 101-650, supra, § 316, 104 Stat. 5115, then to fifteen years in 1996, § 2(a), supra, 110 Stat. 3055, the PCRA and the Parole Commission had disappeared from the law by no later than November 1, 2002 and on November 2, 2002 there simply was no § 235(b) of any existing statute that "relates" (present tense)to "chapter 311 of title 18, United States Code, and [or] the Parole Commission. "[S]hall be deemed" clearly indicates future tense and while "as it relates" is present tense, no clearly stated retroactive intent is evident and by the words is impossible.

On December 30, 2002, the USPC held its initial hearing for co-defendant Scott Faul. (Tr. App. 276). The examiner breifly summarized the case from the Presentence Report, (Id., 276-78), and commented that it was not apparent what his "involvement in the shooting was" although he had "turned [himself] in" and was later "convicted of a serious offense." (id., p. 278). The examiner agreed that the circumstances were beyond Scott's control and he was trapped and as to "whether [he] intended to do anything or not," he "[p]robably" could have done "nothing" differnt." (id., p. 279). The bottom line, he said to Scott, was the fact that "you're there. And you're on the wrong side when the shooting occurs." (id., p. 279). The examiner emphasized that Scott was:

> "probably [not] any kind of threat to the community or any of those kind of things [and] the chances of [him] doing anything illegal if [he] was released today is virtually nil [and he was]" sure[ly]... not a risk. That's not the issue. Risk is not the issue with you. It's accountability. (id., p. 285)

(id., p. 285). He then proceeding to explain his meaning of "accountibility" as to Scott:

> Even though there's nothing to indicate that you were specifically convicted of shooting anybody or killing anybody, that you were not involved in some overt act that led to the death of somebody.... the fact of the matter is you were there, and there meaning something ensued where at least two marshals ended up dead, and a couple of deputies on the ground with bullet holes in them.

(Id., 285-86). Finding that Scott was "probably.... the least culpable" defendant, he was being made to:

> pay[] for the fact that [he] was there, and some decisions [he] made that led to the point of you being there, and some things probably beyond your control. Maybe some decisions by cops made to block the road at that particular date in time to precipitate a confrontation... perhaps it was all unnecessary, it could have been resolved in some other manner. But,... none of that makes any difference after the shots are fired and the bodies are lying there. They [obviously meaning federal officials], they don't, really, nobody's really concerned about how this happened, how it could have been avoided, who really contributed to this, what your culpability was....

(Id., 286-87). Earlier, the examiner noted the external factors influencing the case, when he said:

> this shootout, we all know there was a lot of dead bodies and most of them police officers and marshals, and they take a dim view of that... a REAL dim view.

(id., 279). He then connected the resulting official attitude to purported "underlying issues" [sic] as being "tax protests" and emphasized that "the greatest threat to the country is not people with guns, it's people who refuse to pay taxes.... and they are really viewed as a serious threat." (Id., 279).

The examiner in summarizing his conclusions made it very clear that "Waco" and "the Randy Weaver thing" somehow directly stemmed from "North Dakota" and that this case "has become an institutionalized thing," which like the [Leonard] "Petitioner" case "it's become institutionalized among law enforcement... that there is no tolerence for people who whoot federal officer's or cops or those kinds of things.... Either you're on the right side or you're on the wrong side, and your on the wrong side." (Id., 285). In sum, the examiner told Scott:

> [T]he fact of the matter is that you were there... with a couple of other guys with weapons in opposition to law enforcement, and shots were exchanged, and law enforcement lost that day in a sense. They

> lost that day, and then the next day after and, for the rest of your life you lost, because you're now paying the price.

(id., p. 287). He emphasized the point that "there's still a lot of opposition out there to paroling any of you guys [by] prosecutor kinds... and law enforcement and those kind of people," (Id., 287), and "recommend[ed] a 15 year Reconsideration hearing" in "December of 2017," (id., 287),[16] which he said "the Commission is going to go along with [as] they would pretty much would expect you to get a 15 year set off at this point," (id., 287), and, although he had already served over 20 years, he should "expect realistically" not to be provided any "serious consideration for parole for another at least 5 years." (id., p. 286).

C. Argument

The BOP and USPC have conjoined with Respondent in filing an answer to Petitioner's habeas petition. Doc. 6 ¶¶ 3-4; Docs. 9 & 9-2, pp.1 et seq. Respondent purports to justify imprisonment of Petitioner pursuant to a chain of jurisdiction from his sentencing court judgment relating inexplicitly to comments from a probation officer's Presentence Report (PR), Doc. 9, pp.1-2, through a series of USPC NOAs (including an appellate NNOA) through 1995, id., pp.2-3, a purportedly perpetual waiver by Petitioner of all statutory interim hearing (SIH) beginning in 1997 and continuing "through the present," id., p.3, to a purportedly "delegated authority" of the BOP "to calculate federal sentences," id., p.4 (citing United States v. Wilson, 503 U.S. 329, 335 (1992) & 28 C.F.R. § 0.96), through which it "establishes the date the sentence commenses" following which the BOP "uses 18 U.S.C. § 3585(b), and BOP Program Statement [PS] 5880.30... to determine prior custody credit on a federal sentence." id., p.5.

Without providing a statutory grant of power to administer 18 U.S.C. § 4206(d) - a statute mandating the point in a prisoner's sentence at which he "shall be

16. The only authority for which are the 1984 ex posto facto amendments to 28 C.F.R. §§ 2.12 and 2.14, supra.

released"' with limited criteria and that the "'Parole Commission shall not release him,'" Doc. 9, p.4 (quoting § 4206(d)) - or to in any way make parole decisions or to set or alter parole dates, including the mandatory release date (MPR) required by § 4206(d), asserts that BOP PS 5880.30 "establish[es]" the "process" for the "two-thirds date" required by § 4206(d). id., p.5.

While acknowledging that Petitioner's sentence was ordered to be executed "pursuant to 18 U.S.C. § 4205(b)(2), which provides for release on parole '... at such time as the [Parole] Commission may determine,'" Doc. 9, p.2 (citing judgment), and conceeding that his sentence is "parolable" "[p]ursuant to 18 U.S.C. § 4206(d)" and that as imposed "yeilds an aggregate term of Life plus 15-years," id., p.5, Respondent exemplifies how the BOP de-aggregated his "aggregate term" then re-aggregated it to alter his formerly established two-thirds/30-year MPR date per § 4206(d) of February 12, 2013 to a 40-year "record review date" of "February 12, 2023" through application of PS 5880.30. id., pp. 5-7.

Respondent purports that the BOP's "corrected calculation" of his sentence by such action has produced a new "aggregate two thirds date [of] 40 years from the date computation begins, minus presentence time," id., p.5, citing a recent Sentence Monitoring Independent Sentence Computation Data (SMISC) printout of 7/19/2018 as the current and correct computation of his sentence, id.; see Doc. 9-2, as certified by USPC Assistant General Counsel Bernard M. Desrosiers as personally reviewed by him from Petitioner's profile. Doc. 9-2, p.1.

1. The BOP's 7/19/2018 Sentence Monitoring Independent Computation Monitoring Data Printout Shows Petitioner's Statutory Release Date As December 22, 2009 And His Imprisonment Unlawful

There is no dispute that the BOP possesses, as Respondent asserts, statutorily granted authority to "calculate federal sentences" which includes determining "the date the sentence commenses" and to apply "prior custody credit" to such sentences. Doc. 9, pp.4-5. However, contrary to Respondent's cited authority,

Petitioner's sentence was imposed and is governed for prior custody purposes not by 18 U.S.C. § 3585(b), but former 18 U.S.C. § 3568, the governing statute at the time of Petitioner's purported offenses which § 3585(b) replaced. Section 3585(b) was enacted as part of the SRA of 1984, Reno v. Koray, 515 U.S. 50, 56-57 (1995), and, like most of the SRA, became effective in 1987. Wilson, supra, 503 U.S. at 332. While the BOP's 7/19/2018 Sentence Monitoring Independent Computation Monitoring data printout (SMICM) correctly shows Petitioner credited with "131" days of jail time credit, Doc. 9-2, p.42, those days were credited when Petitioner was placed in BOP custody in 1983, see Doc. 1-1, p.2 (original BOP Sentence Data Summary 1983); (see also Tr. App. 274) (9/19/1983 BOP BP5 Sentence Good Time data printout), pursuant to § 3586 long before § 3585(b) was enacted. Respondent's citation to § 3585(b) in respect to Petitioner's prior custody credit is irrelevant and at best misleading.

Insofar as Respondent cites Wilson, supra, 503 U.S. at 335 and 28 C.F.R. § 0.96 as a broad "delegated authority to calculate federal sentences," there again is no dispute. Wilson at 335 uncontroversally holds that "the Attorney General [AG] through BOP, has the responsibility for administering the [court-imposed] sentence" and "[t]o fulfill this duty, BOP must know how much of a sentence the offender has left to serve" because '"[a] person who has been sentenced to a term of imprisonment... shall be committed to the [BOP] until the expiration of the term imposed'" id., at 335 (quoting 18 U.S.C. § 3621(a)). 28 C.F.R. 0.96 expressly authorizes the BOP to exercise or perform any authority, function or duty of the AG relating to "commitment" of federally charged or convicted prisoners, including application of good-time credits, 18 U.S.C. §§ 4161-66, as those sections existed prior to the enactment of the CCCA/SRA of 1984. id., § 0.96(g).

Under the law governing Petitioner's sentence, the BOP remains under a statutory mandate requiring that he "shall be released at the expiration of

his term of sentence less the time deducted from good conduct," 18 U.S.C. § 4163, which for sentences of 10 years or more required credit of 10 days per month based upon an "aggregate of [consecutive] sentences," id., § 4161, with availability of an accumulation of extra good time earned by employment in prison industries or for other meritorious considerations. id., § 4162.

Petitioner was committed into the custody of the AG pursuant to former 18 U.S.C. § 4082(a) and the AG then had authority to house him with broad discretion pursuant to 18 U.S.C. § 4082(b) both of which were "repealed" by Public Law 98-473, supra, § 218(a)(3), 98 Stat. 2027, and replaced with 18 U.S.C. §§ 3621(a) and (b) respectively, see Sen. Rep. 98-225, supra, pp.141, 184 [1984 U.S.C.C.A.N. 3324, 3367].[17] Sections 3621(a) and (b) together with 18 U.S.C. §§ 4161, 4162 and 4163 unquestionably authorize the BOP to "administer" Petitioner's "sentence" and to determine "how much" time he has"left to serve," Wilson, supra, 503 U.S. at 335, so it may fulfill the statutory mandates that he "shall be committed... until the expiration of the term imposed,'" id., (quoting § 3621(a)), and that he "shall be released at the expiration... less the time deducted for good conduct." § 4163.

Respondent acknowledges that as imposed Petitioner's sentence "yields an aggregate term of Life plus 15 years," Doc. 9, p.5, and pursuant to its authority to "calculate" his sentence, id., p.4, citing Wilson, supra, at 335 and 28 C.F.R. § 0.96, id., which concededly includes the BOP's "duty" to determine the amount of time he "has left to serve," Wilson, supra, the BOP has "converted" his single "aggregate term of Life plus 15 years" to a "40"-year "TERM IN EFFECT" with an Effective Final Term Date ("EFT") of "02-12-2023," as shown on the

17. Of which the only material change was to § 3621(b) which included a "new requirement that the [confinement] facility meet minimum [BOP] standards of health and habitability." Id., p.141 [1984 U.S.C.C.A.N. 3324].

face of its 7/19/2018 SMIMC data printout. Doc. 9-2, p.42.[18]

The SMIMC printout shows a deduction from Petitioner's EFT date of "180" days, which is a mandatory deduction from the end of Petitioner's sentence as required by 18 U.S.C. § 4164. (Tr. App.271). It also shows a statutory release date ("STAT REL DT") of "12-22-2009 TUE[SDAY] based upon a deduction of an accreditation of his statutory good time total days ("SGT TOTAL DAYS") of "4800" such days based upon the statutorily mandated good time rate pursuant to § 4161 at "10" days per month. (id.).

The BOP's Sentencing Manual provides in part:

> Calculating dates and computation rules. After the length of sentence and EFT date have been determined, the next step is to apply the proper number of days SGT [Statutory Good Time], if any to arrive at the SRD [Statutory Release Date]. Calculating the [18 U.S.C. § 4164] 180 date (if necessary) is next....

PS 5880.30, Chap. VII, § 3 (Tr. App.292). In calculating Petitioner's SRD and 180 day date, it appears (and Petitioner does not dispute) that with a single exception the BOP followed the requirements of §§ 4161 and 4164 and its procedural computation methods of its Sentencing Manual correctly. That exception is the failure to credit Petitioner with his Extra Good Time ("EGT") earned by his prison industries employment - i.e., Industrial Good Time ("IGT") - and Meritorious Good Time ("MGT"). See 28 C.F.R. § 523.1(a)-(c) (distinguishing SGT from EGT and defining "[s]eniority" as the "automatic[]... increase from three days per month to five days per month" at which point "seniority is then vested"). See also PS 5880.30, Ch. XIII, § 1 & 2 (Tr. App.297-98).

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18. BOP PS 5880.30 defines the "EFT" date and how it is calculated: "Expires full term date. The EFT date, also known as the 'full term date' of the sentence, is the maximum date of the sentence. This date is determined by adding the total length of sentence to the beginning date of sentence, minus presentence time credit (Chapter IV.), plus inoperative time (Chapter V.). PS 5880.30, Chap. VII, § 3.a." (Tr. App. 292).

As of 8/29/2011, Petitioner had earned no less than 884 days of EGT in the form of IGT and MGT as shown by a BOP Sentence Monitoring Good Time Data (SMGTD) printout on that date. (Tr.App.269). A more recent SMGTD printout of 9/20/2018 shows his earned EGT as only 871 days, but for unknown reasons omits the restart of his MGT on March 15, 2010 (at USP Terre Haute) and its duration thereafter (as reflected on the 8/29/2011 SMGTD printout), (see Tr. App. 270), but by policy and regulations MGT "continues uninterrupted regardless of work assignment changes" unless by express action it is terminated, PS 5880.30, Ch. XIII, § 4 (citing 28 C.F.R. § 523.11(c) (Tr.App. 300), and continues as well upon transfer of the prisoner to another institution unless the reason for the transfer does not require removal from MGT earning status. PS 5880.30, Ch. XIII, § 10 (citing 28 C.F.R. § 523.17(e)) (Tr. App. 306). As Petitioner was transferred form USP Terre Haute to USP McCreary in February 2014 without any action terminating his MGT earning status, pursuant to BOP regulations he continued to earn MGT after the SMGTD printout of 8/29/2011 at least to his transfer, if not thereafter at USP McCreary. In any case, once EGT is awarded it is not subject to forfeiture, witholding, or retroactive termination or disallowance, PS 5880.30, Ch. XIII, § 10 (citing 28 C.F.R. § 523.17(g)), and thus at least 884 EGT days credit is missing from Respondent's 7/19/2018 SMIMC data printout.

The "generic phrase of 'statutory release date' (SDR)" defines three "different kinds of release" other than "parole," PS 5880.30, Ch. VII, 3.b., one of which is relevant :

> Mandatory Release (MR) under the provisions of 18 U.S.C. § 4164, any person who attains an SRD, based on any combination of good time (SGT and/or EGT), that equals more than 180 days, shall be mandatorily released as if on parole...

id., 3.b.(a)(Tr.App.293-94). See also 18 U.S.C. § 4161 (mandating that a prisoner "shall be released at the expiration of his sentence less the good time

deductions for good conduct"). The "good time credit to which the statute [18 U.S.C. § 4161] referes is SGT... and EGT...." PS 5880.30, Ch. VII, § 3.b. (Tr. App. 293).

Thus, Petitioner's true SRD is calculated by assessing the total "combination" of both the "SGT" and "EFT," id., deducted from the "EFT" date. id., § 3.a & b. (Tr.App. 292-93). When Petitioner's "884" days of EFT, see 8/29/2011 SMGTD (Tr. App. 269), is added to his "4800" days of "SGT," Doc. 9-2, p.42, his total from the face of the BOP's records shows at least (as of 8/29/2011) 5684 days that must be deducted from his EFT date, which, while undisclosed on the face of the BOP's recent SMIMC data printout of 7/19/2018, id., moves his SRD back at least to June 31, 2007.

In any case, the BOP has provided the USPC its official computation of Petitioner's SRD generated on 7/19/2018 (apparently in response to Respondent's request for assistance in this proceeding). See Doc. 6 (Respondent's motion for extension pending assistance and documentation requested from BOP and USMS). As placed into Petitioner's USPC parole file from which it has been taken, reviewed and certified by the USPC's Assistant General Counsel, it facially discloses his "SRD" date no later than "02-22-2009," Doc. 9-2, p.42, effectively conceding that Petitioner is and has been held by the BOP unlawfully since at least that date - a statutorily-mandated release date - and that Respondent currently holds him unlawfully at this time.

2. The USPC's August 1984 Amendments To 28 C.F.R. §§ 2.12 And 2.14 Violate The Constitution's Ex Post Facto Clause As Applied To Petitioner On And Since July 17, 1986 And All USPC NOAs Since Then Are Void And Petitioner's Imprisonment Is Unlawful

Respondent expressly relies upon a series of USPC actions and NOAs from 1984 through 1995 followed by a purportedly perpetual waiver by Petitioner of all statutory interim hearings since 1997 as an essential chain in his

alleged lawful custody, Doc. 9, pp.2-3, through which the BOP and Respondent now holds him in prison via the BOP's alteration of his former mandatory parole release date of February 12, 2013 to February 12, 2023. id., pp.4-7.

Respondent specifically asserts to the Court that following Petitioner's initial parole hearing on June 19, 1984 the USPC '"then issued a Notice of Action dated July 20, 1984, continuing him to a 10-year reconsideration hearing in June 1995 [sic]," Id., p.2 (misciting year and citing App.42), reproducing the 1984 NOA showing Petitioner "continue[d] to a ten-year reconsideration hearing in June 1994." Doc. 9-2, p.42. Respondent then, however, asserts that following Petitioner's first statutory interim hearing on June 18, 1986, "the hearing panel recommended that he be continued to a 15-year reconsideration hearing in June 2001; the Commission adopted the recommendation, and Petitioner was advised of the decision by Notice of Action dated July 17, 1986." Doc. 9, p.3.

Respondent provided a copy of the July 17, 1986 NOA, Doc. 9-2, p.12, and insinuates that a lawful chain of custody of Petitioner continued from the 1986 NOA through statutory interim hearings held by the USPC "in 1988, 1990, and 1992" each of which followed with NOAs ordering "no change in its [1986] decision to continue Petitioner to the 15-year reconsideration hearing in June 2001," Doc. 9, p.3; Doc. 9-2, pp.17, 21, 25 (copies of 1988, 1990 and 1993 NOAs), then through an appeal in 1993 followed by an NOA "dated July 28, 1993...affirming the previous decision," Doc. 9, p.3; Doc. 9-2, p.30 (May 22, 1995 NOA).

Respondent while relying on the 1986 NOAs drastic alteration from a ten-year reconsideration hearing in June 1994 to a 15-year reconsideration hearing in June 2001, omits any hint of the USPC's authority for such an aggregious set-off - a full seven years - during which time Petitioner would

effectively be denied any realistic opportunity for reconsideration. The basis of the set-off was the post-offense August 29, 1984 amendments to 28 C.F.R. §§ 2.12 and 2.14, see 49 Fed. Reg. 34208, and every NOA since 1986 is grounded on those amendments.

The retroactive application of those amendments to Petitioner violates the constitutional prohibition against ex post facto laws and all NOA's issued on July 17, 1986 and thereafter are illegal and void and Petitioner's imprisonment since July 17, 1986 has been and remains unlawful. Moreover, the amendments promulgated with the express intent to apply them retroactively was a deliberate action by the USPC to knowingly violate the ex post facto clause.

It is settled that:

> Article I of the United States Constitution provides that neither Congress nor any state shall pass any "ex post facto Law." See Art. I, § 9, Cl. 3; Art. I, § 10, Cl. 1. An unconstitutional ex post facto law places the defendant at a substantial disadvantage compared to the law as it stood when he committed the crime, by either changing the definition of the crime, increasing the maximum penalty for it, or imposing a significant risk of enhanced punishment.

United States v. Robertson, 662 F.3d 871, 875 (7th Cir. 2011) (citing Garner v. Jones, 529 U.S. 244, 255-56 (2000); California Dept. of Corrections v. Morales, 514 U.S. 499, 506 n.3 (1995); Miller v. Florida, 482 U.S. 423, 432 (1987); Weaver v. Graham, 450 U.S. 24, 29 (1981); Lindsey v. Washington, 301 U.S. 397, 401-02 (1937)).

And, directly to the point, USPC regulations setting the frequency of parole reconsideration hearings are "legislative" rules subject to the ex post facto Clause. Rodriquez v. U.S. Parole Comm'n, 594 F.2d 170, 173-74 (7th Cir. 1979). See Prater v. U.S. Parole Comm'n, 802 F.2d 948, 951-52 (7th Cir. 1986) (en banc); United States ex rel. Graham v. Parole Comm'n, 629 F.2d 1040, 1042-43 & n.6 (5th Cir. 1980). And see Weaver v. Graham, supra, 450 U.S. at 32 (citing Rodriquez, supra, with approval). Rodriquez and Graham v. U.S.

Parole Comm'n, both involved amendments to 28 C.F.R. § 2.14 extending the frequency of parole reconsideration hearings otherwise required by the rule amended and applied retroactively to the prisoners. Neither extended the period as long as the seven-year period applied to Petitioner her, yet both Rodriquez (a mere few months) and **Graham** (a full 6 years) were found to violate the ex post facto Clause.

It is not disputable that the "[d]enial of any meaningful opportunity for parole by retroactive application of [a] Parole Commission's rule violates the ex post facto clause of the federal constitution," Rodriquez, supra, 594 F.2d at 176 (citing cases), and that for such purposes the "retroactive elimination" of an "opportunity for parole release" at a time prescribed by the law in effect at the time of the offense "is plainly to [the prisoner's] disadvantage" and effectively "denie[s] [him] any opportunity to be released or even be considered for release on parole" at the previously appointed time. id., at 175 & n. 7.

In Weaver v. Graham, supra, the Supreme Court made clear, if any doubt persisted, that for purposes of the ex post facto Clause analysis there is '"no distiction between depriving a prisoner of the right to earn good time conduct deductions and the right to qualify, and hence earn, parole,'" 450 U.S. at 34 (quoting Greenfield v. Scafati, 277 F.Supp. 644, 646 (D.Mass.) (three-Judge Court), quoting In re Medley, 134 U.S. 160, 171 (1890), summarily, aff'd, 390 U.S. 713 (1968)), and cited Rodriquez approvingly for its holding that "elimination of parole eligibility" constitutes "an ex post facto violation." 450 U.S. at 32. Notably, Rodriquez also recognized the pre-amendment's prescribed reconsideration hearing date as a "right." 594 F.2d at 175 n. 7.

In determining whether a particular post-offense enactment violates the Ex Post Facto Clause the court must "look to the challenged provision[s], and not to any special circumstances that may mitigate their affect on any

particular individual," Weaver v. Graham, supra, 450 U.S. at 33 (citing cases), considered in light of "the operation of the amendment[s] to [the prior] [r]ule within the whole context of [the relevant] parole system," Garner, supra, 529 U.S. at 252, "'compared... in toto,'" Weaver, supra, at 38 (Rehnquist, Ch. J., concurring in judgment) (citing Dobbert v. Florida, 432 U.S. 282, 294 (1977)), and "[a]t a minimum," the Court must "consider[] the [USPC's] internal policy statement[s]" as well as "actual practices," because "along with [such] actual practices, [they] provide important instruction as to how [it] interprets its enabling statute and regulations, and therefore, whether, as a matter of fact, the amendment[s]... created a significant risk of increased punishment." Garner, supra, 529 U.S. at 256.

Moreover a subjective legislative intent behind a post-offense change in early release provisions is "relevant" where "it is quite obvious that the retroactive change was intended to prevent early release" under prior law. Lynce v. Mathis, 519 U.S. 433, 445 (1997). And, like the Lynce "case,... the actual course of events makes it unnecessary to speculate about what might have happened," id., at 446, because it "prolonged [Petitioner's] imprisonment" by making "ineligible for early release" ten years from their initial hearing by reconsideration "a class of prisoners who were previously eligible [at such 10-year date] including some, like [P]etitioner, who had actually been" ordered to a 10-year reconisderation hearing in June 1994. id., (transposing instant facts to case). '"It is clearly to the substantial disadvantage of [a prisoner] to be deprived of all opportunity to receive... [his] freedom... prior to the expiration of [a newly mandated] 15-year term,'" Weaver, 450 U.S. at 33 (quoting Lindsey, supra, 301 U.S. at 401-02); Rodriquez, supra, 594 F.2d at 174 (same), even if the decision is made by a parole authority. id., at 175.

The regulations prior to the amendments permitted the USPC to order reconsideration hearings at 10 years from the date of the initial hearing, 28 C.F.R. § 2.12(b)(3)(1983), and required such an order in any case in which a specific release date was not set. id., § 2.14(c)(1). As amended, however, the USPC empowered itself to order reconsideration hearings at 15 years from the date of the initial hearing, 28 C.F.R. § 2.12(b)(3)(1984), and required such an order in any case in which a specific release date was not set, id., § 2.14(c)(1), with a policy against the advancement of such date except for superior program achievement per 28 C.F.R. § 2.60 or for other "clearly exceptional circumstances," id., 2.14(a)(2)(ii).[19]

The USPC was a party - the losing party - in Rodriquez and United States ex rel. Graham and well knew that the retroactive application to prisoners of post-offense amendments to USPC regulations extending dates of parole reconsideration from dates existing under regulations existing at the time of their offenses squarely violated the constitutional prohibition against ex post facto laws. The Supreme Court's Weaver decision - of which the USPC was presumptively aware - certified Rodriquez as correct.

In face of this precedent, the USPC in promulgating final rule as to the amendments made its intent shockingly clear:

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19. Superior program achievement permits a discretionary and very "limited advancement," 28 C.F.R. § 2.60(a), of up to 13 months for a date of "91 months plus" and permitting up to an additional month for every 6 months exceeding 96 months, id., § 2.60(e), which by USPC calculations would not exceed "36 months," Doc. 1, p.23, which if granted would not have restored his original date and, in any case, he has never been provided such award and his opportunity for reconsideration in June 1994 has been lost forever. The regulation does not define "clearly exceptional circumstances." Regardless of the exceptional advancement permissible under the amended regulation's or their extent, being "discretionary" they cannot save the amendments from unconstitutionality. Weaver v. Graham, supra, 450 U.S. at 35-36.

> Prisoners previously given ten year reconsideration decisions will be brought under the [amended] procedure at the time of the next scheduled statutory interim hearing and that hearing will be treated as if an initial [hearing] for this purpose.

49 Fed. Reg. 34208.[20] See also 1984 USPC Rules and Procedures Manual, Appx. B, Temporary/Special Procedures A(4) (Alterring Manual to provide: "Cases previously scheduled for ten-year reconsideration hearings will be given reconsideration hearings at the time of the next scheduled statutory interim hearing and that hearing. Following such hearing, a fifteen-year reconsideration hearing may be ordered." (Tr. App. 169).

While the deliberate violation of the Ex Post Facto Clause would ordinarily not be presumed, see Garner, 529 U.S. at 257, the USPC was a party - a losing party in Rodriquez and United States ex rel. Graham both of which made clear that the retroactive application of the amendments in issue to prisoners whose offenses were committed prior to their promulgation for the purpose of off-setting there parole reconsideration dates but no less than 5 years leaves no doubt that the constitutional proscription was deliberately violated. The USPC must be charged with knowledge as well of the Supreme Court's approval of Rodriquez's holding that the "elimination of parole eligibility" is "an ex post facto violation." Weaver, 450 U.S. at 32.

An astute prisoner complained to the USPC that its amendments to extend reconsideration hearings from 10 to 15 years following an initial hearing "was politically motivated" and would destroy "a prisoner's hope of early release." 49 Fed. Reg. 34202. In fact, at the time the rule change was proposed the Senate had released its Report No. 98-225 and had passed the bill, which

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20. Purporting the change as a matter of "procedure" was simply disingenuous. Rodriquez made it clear that the retroactivity change enlarging the frequency of parole reconsideration hearings involves a "right" and is not merely "'procedural' as that term is used in ex post facto law." 594 F.2d at 175 n. 7. See also Lynce v. Mathis, 519 U.S. 433, 447 n. 17 (1997) (retroactively applied post-offense legislation making prisoners "ineligible for early release[] [is] not merely procedural.").

in face of the USPC's desperate attempts to dissuade Congress from repealing the PCRA and abolishing parole and the USPC, both made it clear that upon passage by the House the USPC was over and within a statutory time period USPC personnel would be out of their lucrative jobs. See pages 15-17, supra. The amendments became final on August 29, 1984 and went into affect on October 1, 19984, 49 Fed. Reg. 34202, only days before the House passed the bill and the President signed it into law.[21]

As applied to Petitioner, the 1984 amendments to 28 C.F.R. §§ 2.12 and 2.14 are unconstitutional amendments is "illegal and void and cannot be a legal cause of commitment." Ex parte Siebold, 100 U.S. 371, 376-77 (1880). See Weaver, 450 U.S. at 36; Bond v. United States, 564 U.S. 211, 277 (2011) (Ginsburg, J.W/Breyer, J. concurring).[22]

The USPC's 1988 NOA ordering "[n]o change" in the previous unconstitutional 1986 decision is exactly that - unconstitutional for continuing an ex post facto clause violation. The inclusion of purported "reasons" - the same reasons fully considered and rejected following Petitioner's 1984 initial hearing, see pages 24-25, supra, does not constitutionalize the 1986 NOA nor the 1988 for either the ex post facto clause violation nor the facially defective statement

21. It is not insignificant that after the bill was signed and became law mandating the USPC set final release dates for prisoners within their guidelines and sufficiently prior to the expiration of 5 years from the Act's effective date, Pub.L. 98-473, supra, § 235(b)(3), 98 Stat. 2032, that the USPC instructed its personnel to continue to order 15-year reconsideration hearings for prisoners and to treat the "within... guidelines" statutory mandate as meaningless gibberish because guidelines for such prisoners might be changed before the USPC ceased to exist. (Tr. App. 169).

22. The 1986 NOA facially violates substantive and procedural due process in that it is entirely barren of any statement of reasons for denying Petitioner parole, for extending his reconsideration hearing, for exceeding the 48-month period above his minimum guideline, or for placement in the bottom, middle, or top of his guidelines, Fifth Amendment, U.S. Const.; 18 U.S.C. § 4206(a) and (c); 28 C.F.R. § 2.20, Note to Catagory Eight; 1984 USPC manual, § 2.23-01(a)-(b) (Tr. App. 149), rendering it facially void. See e.g., Mahler v. Eby, 264 U.S. 32, 44-45 (1924) (administrative "finding[s] [] made a condition precedent" to validity of an order "is void for lack of express finding in the order").

of reasons. See Note 22, supra. See e.g., Marshall v. Lansing, 839 F.2d 933, 943-44, 948 n. 20 (3rd Cir. 1988) (Statement of reasons must be made in writing contemporaneous to parole decision and post hoc rationalizations are impermissible) (citiing cases). Cf. Robinson v. U.S. Board of Parole, 403 F.Supp. 638, 640, 643 (W.D.NY. 1975) (Pre-PCRA refusal to accept after-the-fact statements of reasons for parole decision).

The "[n]o change" orders in the 1990 NOA, the 1993 NOA, the 1993 NNOA, and the 1995 NOA all simply continue to apply the ex post facto amendments and all are, like the 1986 NOA, absolutely "illegal and void and cannot be a legal cause of commitment." Siebold, supra, 100 U.S. at 376-77.

Respondent's reliance upon more than a 30-year period of Petitioner's imprisonment upon a chain of unconstitutional NOAs beginning on July 17, 1986, Doc. 9, p.3, does not bear the weight of "legal cause" for Petitioner's "commitment" then or now. Having asserted the NOAs since July 17, 1986 as essential links for "cause," the NOAs being in fact constitutionally void leaves Respondent without cause. Petitioner has been and remeains now unlawfully imprisoned.[23]

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23. The amendments to § 235(b)(3) enacted on December 7, 1987, Pub.L. 100-182, supra, § 2(b)(2), 101 Stat. 1266, and the general amendments to § 235(b) enacted on December 1, 1990, Pub.L. 101-650, supra, Tit. III, § 316, 104 Stat. 5115, and again on October 2, 1996, Pub.L. 104-232, supra, § 2(a), 110 Stat. 3055, see pages 23-24,27, 31-32, supra, as well as USPC Chairman Baer's final rule prmulgating 28 C.F.R. § 2.64 construing § 235(b)(3), see pages 21-22, supra, (see also Tr. App. 170-77), are also relevant. The 1987 amendment to § 235(b)(3), replaced the mandate for the USPC to set prisoner's release dates within their applicable guidelines to set such dates pursuant to 18 U.S.C. § 4206. 101 Stat. 1266. However, Congress expressly mandated that "[t]he amendments made by this Act shall apply with respect to offenses committed after the enactment of this Act." 101 Stat. 1272. That amendment's legislative history indicates Congress' concern relative to treaty transferred prisoners in future. See Doc. 2, p.13 n. 3. In any case, both Houses of Congress and the President concurred that it applied only to "offenses committed after its enactment."

A panel of judges of the Seventh Circuit recognized the clear mandate as written to apply the amendment prospectively, but "[d]espite that language" applied it retroactively to offeses committed prior to November 1, 1987. Norwood v. Brennan, 891 F.2d 179, 182 (1989). Norwood's ruling defied both

3. Respondent's Purported Retroactive Application of 18 U.S.C. § 3585(b) And PS 5880.30 To Add Ten Years To Petitioner's Mandatory Release Date Of February 12, 2013 Under The Governing Rules Of Landgraf v. USI Film Products, 511 U.S. 244 (1994) And INS v. St. Cyr, 553 U.S. 289 (2000) Violate Due Process And Do Not Justify Petitioner's Imprisonment

Respondent has produced no statute that expressly grants power to the BOP to administer 18 U.S.C. § 4206(d) or that in any way empowers the BOP to make parole decisions or to set, unset, or reset parole release dates. Instead, Respondent cites to Wilson, supra, 503 U.S. at 335; 28 C.F.R. § 0.96 for the BOP's general "delegated authority to calculate federal sentences," Doc. 9, p.4, and then cites to 18 U.S.C. § 3585(b) and BOP PS 5880.30 as its source of authority "to determine prior custody credit." id., p.5. Respondent then - still without showing statutory authority for any parole-related decision-

23. Footnote (Cont.). Congress' plain command and settled law on the matter, see e.g., South East Chicago Comm'n v. Dept. of HUD, 488 F.2d 1119, 1123 (7th Cir.) (citing precedents), and the Supreme Court has "provided an unambiguous legal rule for retroactivity questions.... by classifying all statutes as prospective except those that Congress has clearly designated as retroactive." Zivkovic v. Holder, 724 F.3d 894, 899 (7th Cir. 2013) (relying on rule applied in Landgraf v. USI Film Products, 511 U.S. 244 (1994); INS v. St. Cyr, 533 U.S. 289 (2001); & Vartelas v. Holder, 566 U.S. _____, 182 L.Ed. 2d 473 (2012) (citing Circuit's conforming). See also Siddiqui v. Holder, 670 F.3d 736, 747 (7th Cir. 2012) (Courts in this Circuit "follow... Landgraf" and St. Cyr). Because Congress '"expressly prescribed'" the 1987 Amendment to § 235(b)(3)'s '"proper reach'" there was no occassion '"to resort to judicial default rules.'" Killingsworth v. HS BC Bank Nev., N.A., 507 F.3d 614, 620 (7th Cir. 2006) (quotes from Landgraf, 511 U.S. at 280). See Lockheed Corp. v. Spink, 517 U.S. 882, 896 (1996)("Where, as here, the temporal effect of a statute is manifest on its face, 'there is no need to resort to judicial default rules.'") (quoting Landgraf, supra). A "temporal effect... statut[ory]... provision trumps any [other] general inferences." Id., 517 U.S. at 897. Congress' plain command to apply the amendment prospectively to offenses committed after its enactment, 101 Stat. 1272, '"does nto even arguably suggest that it has any application to conduct that occurred at an earlier date.'" St. Cyr, supra, 533 U.S. at 317 (quoting Landgraf, supra, 511 U.S. at 257).

The Norwood decision - i.e., retroactive application of an amendment "[d]espite" statutory mandate for prospectivity - was not a rule of law when announced and is simply not '"stare decisis.'" Colby v. J.C. Penny Co., 811 F.2d 1119, 1122-23 (7th Cir. 1986). In any case, it would not stand for a second before the Seventh Circuit or the Supreme Court in light of the governing rules of Landgraf and St. Cyr, which have so "undermined" Norwood that, if it ever constituted '"stare decisis,'" it is entitled to no deference by any court. Colby, supra, at 1123. See Olson v. Paine, Webber, Jackson, & Curtis, Inc., 806 F.2d 731, 734 (7th Cir. 1986). The Seventh Circuit, as well as the District Court is not bound by Circuit precedent that is insonsistent with intervening Supreme Court or Circuit Court decision even if intervening ruling "did not explicitly overrule the [precedential] decision" but merely "alter[s]

making power - simply states that "[t]he process for establishing [18 U.S.C. § 4206(d)'s] two-thirds date for an aggregate of consecutive parolable sentences is described in... [BOP PS]5880.30, Sentence Computation Manual, Appendix IV, p.1, from which it then quotes. id.

Respondent then purports that by applying PS 5880.30, Petitioner's sentence "yields an aggregate term of Life plus 15 years" with an "aggregate two-thirds date of 40 years from the date computation begins" and ultimately "Petitioner's two-thirds date is correctly calculated as February 12, 2023," Doc. 9, p.5, to which it cited and provides a copy of a BOP Sentence Monitoring Independant Sentence Computation (SMISC) printout of "09-19-2009," Doc. 9-2, p.42, which with obvious disingenuity shows on its face two distinct two-thirds dates. id.

The SMISC shows the following:

2/3 OR 30 YR DT: 10-15-2009
EFT DT.....: 02-12-2023....**Two-Thirds Date**

Id. The underline is added obviously by someone desiring to draw the Court's attention to the two-thirds date of interest and, notably, the four periods following the "2023" and the "**Two-Thirds Date**" all appear with darkened font.

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the law underlying the decision and an intervening "bright-line test... is binding on all courts in [the] Circuit"). See United States v. Nachigal, 507 U.S. 1, 2-6 (1993)(per curiam) (holding it error for inferior court to fail to apply intervening Supreme Court ruling although it did not expressly overrule Circuit precedent). See also FDIC v. Mahajan, 923 F.Supp. 1133, 1139-40 (N.D. Ill. 2013); Wisconsin Bell, Inc. v. Ameritech Wisconsin, 301 F.Supp. 893, 897-98 (W.D. Wis. 2002); Wisconsin v. Stockbridge - Munsee Community, 67 F.Supp. 990, 1009 (E.D. Wisc. 1999); Miller v. Gammie, 335 F.3d 889, 893, 899-900 (9th Cir. 2003) (en banc).

For similiar reasons the 1990 and 1996 amendments purporting to change 5 to 10 years and then 10 to 15 years - i.e., that the 5 "shall be deemed" to be 10 and the 10 "shall be deemed" to be 15, 104 Stat. 5115; 110 Stat. 3055, did not clearly require retroactive application as required under Landgraf and St. Cyr. See e.g., Jeudy v. Holder, 768 F.3d 595, 599-600, 603-05 (7th Cir. 2014) (statutory language requiring that "period" of time "shall be deemed" to end at time of specific occurrences founf to lack "'unmistakable clarity'" for retroactive application). Presumably, they too applied prospevively only and not to Petitioner, in which case USPC jurisdiction over him ceased to exist at the expiration of the 5-year period and this Court must apply the Landgraf/St. Cyr rules to those amendments as well.

Petitioner has submitted a copy of the SMISC as provided to him by Respondent. (See Tr. App. 271).

An EFT date, as noted earlier, is not a two-thirds date of any kind. An EFT date is the "Expires Full Term date," PS 5880.30, Ch. VII, § 3.a (Tr. App. 292), and is "the maximum date of the sentence." id.

The "2/3 OR 30 YR DT" is the well-known "two-thirds or thirty year provision, referred to as **Mandatory Parole** by the Parole Commission (see **28 C.F.R. § 2.53)**" - the statutory provision at **"18 U.S.C. § 4206(d)."** PS 5880.30, Ch. VII, § 5(e) (bold in original); Doc. 9-2, p.34.

The ".... Two-Thirds Date" added at the end of the "EFT DT" is pure deception and seems to be part of a chain of deception - at the end of what surreptitously appears as the insinuation that the Wilson cite, 28 C.F.R. § 0.96, and 18 U.S.C. § 3585(b) somehow constitute a vestiture of statutory authority in the BOP of parole determination powers that flow through PS 5880.30. Doc. 9, pp.4-5.

28 C.F.R. § 0.96 mentions nothing of parole powers in the BOP. Wilson, supra, 503 U.S. at 335, in construing 18 U.S.C. § 3585(b) does reference 18 U.S.C. § 3621(a)'s empowerment of the BOP to commit sentenced prisoners to imprisonment "until the expiration of the term imposed," id. (quoting § 3621(a)), and the administrative duty to credit jail-time against the sentence to determine "how much time of the sentence the offender has"left to serve, id., but does not mention "parole." And, of course, 18 U.S.C. § 3585(b) does not mention parole either.

Petitioner having read the entire Wilson ruling, 28 C.F.R. § 0.96, and 18 U.S.C. § 3585(b) - the only sources of authority purported by Respondent for the BOP's power to alter Petitioners parole release date mandated by 18 U.S.C. § 4206(d) - and unable to comprehend any grant of power stemming from

a statute for parole decision-making to the BOP, assuming arguendo that such power has been granted, its application to Petitioner through PS 5880.30 (promulgated in 1993) beginning on April 12, 1994 to add 10 years to his previously set mandatory parole release date of February 12, 2013 - an undisputably retroactive application - has "result[ed] in 'manifest injustice' violat[ing] the Due Process Clause." Jideonwo v. INS, 224 F.3d 692, 697 (7th Cir. 2000) (citing Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 720 (1974); Landgraf, 511 U.S. 244, 266 (1994); and Accardi v. Shauhnessy, 347 U.S. 260, 266-68 (1954)). See Landgraf, supra, 511 U.S. at 266 (emphasizing due process "interests in fair notice and repose that may be compromised by retroactive legislation" and "justification sufficient [for] prospective application [or due process purposes] 'may not suffice' [to permit] retroactive application'") (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976)). And see cases cited in Note 23, supra.

The statute cited by Respondent - i.e., 18 U.S.C. § 3585(b) - nor the statutes referenced in the Wilson citation or 28 C.F.R. § 0.96 provided any notice to Petitioner (or the public) that Congress was authorizing the BOP to determine or re-determine parole release dates set by the USPC much less any such authority to change such dates set previously to the enactment of § 3585(b) or § 3621(a) (referenced by Wilson, supra, 503 U.S. at 335), as is the case here.

Respondent does not attempt, however, to suggest that the power to effect such retroactive change - ten years of additional imprisonment - even existed until PS 5880.30 was generated in 1993 as exercised first to Petitioner (with neither notice nor hearing) on April 12, 1994 and again more recently on 7/19/2018. Doc. 9-2, p.42.

More important for the due process concerns made clear in Landgraf,

Respondent has not so much as suggested a clear statement by Congress that the powers exercised by the BOP to detrimentally alter Petitioner's mandatory parole release date. Jeudy, supra, 768 F.3d at 599, 603 (citing Landgraf, supra, 511 U.S. at 272-73 & St. Cyr, supra, 533 U.S. at 318). See also Zivkovic v. Holder, 724 F.3d 894, 898 (7th Cir. 2012) (emphasizing a clear statement for retroactive application without which such application is beyond agency competence for even interpretive purposes). Here, Respondent has not pointed to any statutory language that shows Congress clearly intended the BOP to exercise a retroactive parole decision-making power applicable to Petitioner (or anyone else) and the ambiguity here is not such statutory language but the ambiguity as to which statute the BOP relies on for such powers.

Moreover, the amendment to § 235(b) by which the original 5-year period saving the PCRA was extended to 10 years, Pub.L. 101-650, supra, Tit. III, § 316, December 1, 1990, 104 Stat. 5115, did not expressly provide a clear statement for retroactivity and thus insofar as it extend the 5-year period of § 235(b)(3) which mandated the setting of final release dates for prisoners such as Petitioner see 98 Stat. 2032; but see 101 Stat. 1266, 1272 (amending § 235(b)(3) by restoring § 4206 parole discretion for offenses committed after December 7, 1987), the 10-year period presumably was not intended to apply to Petitioner whose 30-year mandatory parole release date of February 12, 2013 had been settled.

For purposes of Landgraf, and St. Cyr retroactivity analysis "detrimental reliance is not required" to be shown, Jeudy, 768 F.3d at 604; see also Vartelas v. Holder, 566 U.S. _____, _____, 182 L.Ed. 2d 473, 489 (2012), "the likelihood of reliance on prior law strengthens the case for reading a newly enacted law prospectively." id., at _____, 182 L.Ed 2d at 489.[24]

24. The "likelihood" that prisoners such as Petitioner relied on the final repeal of the PCRA and abolition of parole and the USPC along with certainty in their release dates prior to the end of the 5-year expiration period was

It was during the period amended by the 1990 Act, 104 Stat. 5115, that the BOP generated and applied PS 5880.30 (regardless of its true statutory source) to Petitioner and had the extended period of 10 years not been retroactively applied to him, as far as he was concerned he would have been provided an unchangable release date at least prior to November 1, 1992 and the repeal of the PCRA along with § 4206(d) - if its applied to him at all at the time - would have forever limited his remaining servable sentence as ending for parole purposes at no later than February 12, 2013. The BOP would have been without even a pretence for administering the long repealed § 4206(d) and Petitioner would have been released long ago.

Ultimately, whatever statutory authority Respondent is insinuating for the vestiture of the retroactive powers admittedly employed through PS 5880.30, Respondent has shown no language whatsoever by Congress - much less clear language - that the BOP (or any other agency) was endowed with the retroactive powers as applied. If not for every other possible reason, due process was violated by the BOP's actions in altering Petitioner's 30-year mandatory parole release date by adding ten years thereto under Landgraf and its progeny whichever statute may be the statute underlying PS 5880.30.

4. The Retroactive Application Of 18 U.S.C. § 3585(b) And PS 5880.30 To Alter Petitioner's Established 30-Year Mandatory Parole Release From February 12, 2013 To February 12, 2023 Violated The Ex Post Facto Clause

Respondent admits that the BOP's alteration of his formerly established mandatory parole release date of February 12, 2013 to February 12, 2023 was

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24. Footnote (Cont). not a small matter. Petitioner, in fact, had originally expected release at his originally set 10-year reconsideration hearing from June 1994 based upon existing law, see pages 8-11, 17-18, and in no case beyond his acknowledged 30-year mandatory parole release date. See Doc. 1, ¶¶ 9-10. His "separation from close family members" beyond his expected release dates was no less than the Petitioner in Vartelas, 566 U.S. at _____, 182 L.Ed. 2d at 486.

effected by application of PS 5880.30 and insinuates its statutory authority flowed from 18 U.S.C. § 3585(b), Doc. 9, p.5, and perhaps more remotely from Wilson, supra, 503 U.S. at 335 (to the suggestive authority from 18 U.S.C. § 3621(a)) and 28 C.F.R. § 0.96. id., p.4. Wilson of course is not a statute nor an act of Congress, but a Court opinion construing questions involving 18 U.S.C. § 3585(b), while 28 C.F.R. § 0.96 simply lists "[d]elegated powers" of the BOP and is likewise not a statute.

18 U.S.C. § 3585(b), like § 3621(a), is a statutory provision enacted on October 12, 1984 as part of the SRA of 1984, see pages 37-38, long after Petitioner's purported offenses. As § 3585(b) is the only statute cited directly by Respondent for the actions taken through PS 5880.30, he can but assume such statute is, as Respondent implies, the statutory basis of the BOP's authority for its alteration of Petitioner's MPR date.

Insofar as a statute or regulation enacted after the commission of an offense creates a "significant risk of enhanced punishment" it violates Article I, § 9, Cl. 3's prohibition against ex post facto laws. Robertson, supra, 662 F.3d at 875 (citing cases). Here, the actual course of events makes it unnecessary to speculate about what might have happened," Lynce, supra, 529 U.S. at 446, as the "risk" of imprisonment beyond Petitioner's altered MPR date of February 12, 2013 is a fait accompli. It is 2018. It has in fact "happened." id.

The BOP admittedly has altered the date resetting it to February 12, 2023. Respondent is admittedly detaining and imprisoning Petitioner on behalf of the BOP pursuant to that change under the purported authority of PS 5880.30 (generated in August 1993) and § 3585(b) enacted on October 12, 1984. Regardless of what § 3585(b) actually says, Respondent has indicated that the BOP construed it as authority to retroactively alter his MPR date and extend it by 10 years

through PS 5880.30. However disingenuous, as so applied, § 3585(b) is an ex post facto law and the BOP's official alteration of Petitioner's MPR date thereunder through PS 5880.30 is void. Respondent is imprisoning Petitioner unlawfully on the face of his answer.

SUPPLIMENTAL PRAYER

Upon the facts and law asserted in traverse to Respondent's allegations, Petitioner hereby suppliments his prayer and asks this Court in addition to his initial prayer to:

1. Declare that Respondent has failed to show cause why the writ should not issue and issue the writ requested instanter and order the discharge of Petitioner from the custody of Respondent immediately;

2. Declare that the USPC's amendments to 28 C.F.R. § 2.12 and 2.14 promulgated on August 29, 1984 and applied to Petitioner in July 1986 off-setting his reconsideration hearing of June 1994 to June 2001 unconstitutional for violating the Constitution's Ex Post Facto Clause, Art. I, § 9, Cl. 3;

3. Declare the USPC's July 17, 1986 Notice of Action unconstitutional for applying the 1984 amendments to 28 C.F.R. § 2.12 and 2.14 and therefore null and void reading Petitioner's imprisonment thereunder unlawful;

4. Declare each USPC Notice of Action issued thereafter respectively on July 28, 1988, August 16, 1990, January 4, 1993, and May 22, 1995 unconstitutional for continuing to apply the 1984 amendments to 28 C.F.R. §§ 2.12 and 2.14 and continuing the order of July 17, 1986 null and void rendering Petitioner's continuing imprisonment thereunder unlawful;

5. Declare on the face of the BOP's uncontested Sentence Monitoring Independent Sentence Computation printout of 7/19/2018 as certified by the USPC's Assitant General Counsel Bernard M. Desrosiers that Petitioner's statutory release date with credited good time is no later than December 22, 2009 and his imprisonment since that date is unlawful;

6. Declare Petitioner's imprisonment unlawful nunc pro tunc as of July 17 , 1986 under the USPC's Notice of Action and order that date;

7. Declare Petitioner's imprisonment unlawful nunc pro tunc as of his statutory release date of December 22, 2009;

8. Declare Petitioner's imprisonment unlawful nunc pro tunc as of his originally established 30-year mandatory parole release date; and

9. Retain jurisdiction over Petitioner, Respondent and this case as necessary to effectuate justice in these matters.

Insofar as Petitioner alleges facts herein such facts within his knowledge and belief are true and correct and he so declares under penalty of perjury as required by 28 U.S.C. § 1746 by his signature below.

This 2nd day of November, 2018.

Yorie Von Kahl

Yorie Von Kahl #04565-059
Petitioner/Declarant
Federal Correctional Institution
Pekin
P.O. Box 5000
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As corrected/errata 11/5/2018

Yorie Von Kahl