UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JACK MCRAE, Petitioner, v. JEFFREY GRONDOLSKY, Warden FMC Devens, and THE FEDERAL BUREAU OF PRISONS, Respondents.	)	Case No. 09-cv-11597-PBS

PETITIONER'S RESPONSE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING

On January 27, 2011, the Court requested further briefing on two questions: "(a) whether the case is moot; and (b) whether the certificate of parole was properly issued after the certificate of sexual dangerousness. *See* 18 U.S.C. 4248(a) (providing that the certification stays release of person pending completion of procedures)."

Petitioner Jack McRae explains below, in response to the Court's first question, that this case is not moot. Mr. McRae remains in custody today as a direct result of the BOP's denial of sentence-credit for the 380 days that he spent in its custody while confined pursuant to the Adam Walsh Act. An order by this Court granting his petition for a writ of habeas corpus would put an immediate end to that injustice by terminating his sentence. As to the Court's second inquiry, Petitioner responds that, given that his release from custody had been stayed by the Walsh Act on March 21, 2007, the United States Parole Commission ("USPC") was without authority to parole him on March 22, 2007.

Mr. McRae therefore respectfully requests that the Court grant his habeas corpus petition at its earliest opportunity.

Argument

I. This Case Is Not Moot.

In Petitioner's most recent pleading, he notified the Court that he had been arrested on November 16, 2010 for violation of technical conditions of his parole, and that the expiration date for his maximum sentence would thus likely be pushed back beyond the then-scheduled full term date of December 14, 2010. *See* Pet. Obj. (DE #30) at 4 n.2. The events of the past several months have confirmed that assessment.

Mr. McRae has been incarcerated since his November 16, 2010 parole violation arrest. The USPC held a parole revocation hearing for Mr. McRae on February 9, 2011, at the end of which the USPC Hearing Examiner recommended that his parole be revoked, that he remain incarcerated, and that he receive no credit towards his sentence for the time between his February 10, 2010 release from FMC Devens and his November arrest. The Hearing Examiner projected that the full term date for Mr. McRae's 1984 District of Columbia armed rape sentence will now fall on or about July 30, 2011, subject to the BOP's official calculation.[1] Without this Court's intervention, then, Mr. McRae will spend yet another five months in prison, each day of which will be as a direct result of the BOP's miscalculation of his sentence. The case clearly is not moot.

[1] Consistent with its regulations, the USPC should issue a final decision regarding revocation by March 11, 2011. *See* 28 C.F.R. § 2.105(c).

II. The Parole Certificate Was Without Effect Because, Upon the Issuance of the Certificate of Sexual Dangerousness, the USPC Lost Parole Jurisdiction Over Mr. McRae.

On March 21, 2007, the United States Attorney filed in this Court the BOP's certification of Mr. McRae as a "sexually dangerous person" under the Walsh Act. Resp't MSJ, Kelly Decl., Ex. I (DE #9). Under the Act, such a filing "shall stay the release of the person pending completion of procedures contained in this section." 18 U.S.C. § 4248(a). By the following day, then, when the USPC issued a parole certificate purporting to parole Mr. McRae, his release from custody had been stayed by statute, stripping the USPC of jurisdiction to parole him and rendering the parole certificate null and void.

The Walsh Act certification and concomitant stay deprived the USPC of jurisdiction to parole him on March 22, 2007 for two reasons. First, the stay rendered him ineligible for parole; if he could not be released from the BOP's custody, he could not be paroled. Second, under logic that Respondents themselves have used throughout this case, the Walsh Act certification stayed the running of Mr. McRae's District of Columbia sentence; since the USPC has parole jurisdiction only over Mr. McRae's D.C. sentence, it was without authority to parole him on March 22, 2007.

A. Because Mr. McRae's Release Was Stayed Pursuant to the Walsh Act on March 21, 2007, He Was Not Eligible for Parole on March 22, 2007.

District of Columbia law designates to the USPC "jurisdiction . . . to grant and deny parole . . . in the case of any imprisoned felon who is *eligible for parole* or reparole under the District of Columbia Code." D.C. Code § 24-131(a)(1) (emphasis added). The USPC's own regulations frame its authority similarly: "The United States Parole Commission has release jurisdiction over all *parole-eligible* District of Columbia Code felony offenders." USPC Rules and Procedures Manual (June 30, 2010) § 2.2, n.2 (emphasis added); *see also* 28 C.F.R. §

2.70(b). It is clear, then, that the USPC may not parole a D.C. Code offender unless he is "eligible for parole." It is equally clear that a prisoner is not "eligible for parole" if his release has been stayed by statute. *See* 18 U.S.C. § 4205(h) (repealed) (stating, in U.S. Code chapter governing USPC parole authority over federal prisoners, that "[n]othing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law"); *see also* 28 C.F.R. § 2.12(c) ("[A] prisoner may not be paroled earlier than the completion of any . . . period of parole ineligibility fixed by law."). Once Mr. McRae's release had been stayed by statute on March 21, 2007, he was no longer "eligible for parole," and the USPC was without jurisdiction to parole him on March 22, 2007.

Further persuasive authority on this point comes from two recent cases in which district courts concluded that a person in Mr. McRae's position—confined and awaiting a civil commitment hearing under the Walsh Act—cannot also be on supervised release during that period. *See United States v. Bolander*, No. 01-CR-2864-L, 2010 U.S. Dist. LEXIS 134749, at *4 (S.D. Cal. Dec. 21, 2010) (holding that "supervised release does not begin when an individual is in the custody of the Bureau of Prisons awaiting the resolution of commitment proceedings under § 4248 because he has not been '*released* from imprisonment'" (emphasis in original)); *United States v. Broncheau*, No. 5:06-HC-2219-BO, 2010 U.S. Dist. LEXIS 115671, at *23 (E.D.N.C. Oct. 29, 2010) (observing that Walsh Act certification had "stay[ed] the commencement of respondents' court-ordered terms of supervised release"). Given the similarity between parole

and supervised release,[2] these cases significantly bolster Petitioner's position that his March 21, 2007 Walsh Act certification made parole the following day an impossibility.

The fact that the Walsh Act's stay on Mr. McRae's release rendered him ineligible for parole also dovetails with the point that has been central to Petitioner's arguments throughout this case: a prisoner cannot be considered "on parole" if he has not been released from the immediate physical custody in which he has been held. Throughout his briefing, Petitioner has marshaled caselaw, dictionary definitions, and even the BOP's own Program Statements in support of this fundamental point.[3] *See, e.g.*, *Jones v. Cunningham*, 371 U.S. 236, 242 (1963) (observing that "petitioner's parole releases him from immediate physical imprisonment"); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("The essence of parole is release from prison, before the completion of sentence . . . ."); *Brennan v. Cunningham*, 813 F.2d 1, 5 (1st Cir. 1987) ("An inmate in a halfway house . . . enjoys some significant liberty, [but] he remains under confinement in a correctional institution. His position is, therefore, not like that of a parolee."); Black's Law Dictionary (8th ed. 2004) (defining "parole" as "[t]he release of a prisoner from imprisonment before the full sentence has been served"); BOP Program Statement 5880.32, ch. 17, p. 1 (Resp't MSJ, Kelly Decl., Ex. F (DE #9)) (defining "parole" as "time spent in the community (street time)").[4]

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[2] "Supervised release *replaced* parole within the federal system as a result of the Sentencing Reform Act of 1984, and both of these forms of conditional release follow, rather than replace, a term of imprisonment." *United States v. Weikert*, 504 F.3d 1, 12 (1st Cir. 2007) (emphasis in original) (citations omitted).

[3] *See* Pet. (DE #1) at 11; Pet. Cross-MSJ (DE #13) at 7-11; Pet. Reply (DE #18) at 2-8; Pet. Obj. (DE #30) at 7-12.

[4] There are numerous other relevant sources suggesting that parole requires release. For instance, the D.C. Code—the source of the USPC's authority to parole D.C. prisoners—describes the USPC's parole authority as follows:

Respondents have countered by arguing that there do exist instances where parole is effected without release—as when the "parolee" is subject to a state or immigration detainer—and therefore the fact that Mr. McRae was not released upon the issuance of his parole certificate has no bearing on whether or not he was paroled. *See* Resp't MSJ (DE #10) at 13-14; Resp't Opp. to Pet. Cross-MSJ (DE #16) at 3-6; Resp. to Pet. Obj. (DE #31) at 4-6. This argument is inapposite for several reasons. First and most obviously, all of the examples Respondents provide involve instances in which a prisoner is paroled to a detainer—but there was never any detainer lodged against Mr. McRae, and it is clear that Mr. McRae's Walsh Act certification cannot be construed as a form a detainer. *Cf. Carchman v. Nash*, 473 U.S. 716, 728-29 (1985) (holding, after reviewing the history of the Interstate Agreement on Detainers, that a detainer cannot be based on non-criminal charges).[5] This point is underscored by the fact that the USPC's regulations, while explicitly contemplating parole to state and immigration detainers, *see* 28 C.F.R. § 2.32, nowhere mention "parole to civil commitment review," or to any other status that might approximate Mr. McRae's during the 380 days in question.

> Whenever it shall appear to the United States Parole Commission ("Commission") that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his or her *release* is not incompatible with the welfare of society, and that he or she has served the minimum sentence imposed or the prescribed portion of his or her sentence, as the case may be, the Commission may authorize his or her *release* on parole. . . .

D.C. Code § 24-404(a) (emphasis added). The USPC's regulations, similarly, discuss the circumstances under which, "[i]n accordance with D.C. Code 24-404(a), the Commission shall be authorized to *release* a prisoner on parole . . . ." 28 C.F.R. § 2.73(a) (emphasis added). Indeed, even Mr. McRae's parole certificate recognizes that parole must include some form of release. It states (inaccurately) that Mr. McRae "was released on the 22 day of March, 2007." Mar. 22, 2007 Cert. of Parole (Pet., Appx. J (DE #1)). Carolyn Sabol, then-Warden of FMC Devens, is named as the "Official Certifying Release." *Id.*

[5] Even if Mr. McRae's Walsh Act confinement were pursuant to a form of detainer, Respondents' "parole to detainer" argument would still fail—for Mr. McRae was already being held under the Walsh Act *prior* to the USPC's attempt to "parole" him.

Second, Respondents' state detainer example is distinguishable on the grounds that federal parolees serving state sentences still get some irrevocable sentence credit for that time—towards the state sentence. Here, Mr. McRae received no irrevocable credit towards any sentence for the time he spent under Walsh Act confinement. That is the injustice at the heart of this case.

Finally, Respondents' examples in which a prisoner is paroled but remains incarcerated in the same facility—as with the few federal inmates who are paroled to an immigration detainer but remain in the same federal facility, or the similarly few inmates serving concurrent federal and state sentences in a state facility, who are paroled from the federal sentence but remain incarcerated on state charges, *see* Resp. to Pet. Obj. (DE #31) at 5—do not establish that parole may be effected without any form of release. This is because in both of the instances that Respondents cite, the prisoner is still released into the legal custody of another authority—namely, either state or immigration authorities. The USPC regulations regarding "Parole to Local or Immigration Detainers" make this point clearly: "As used in this section 'parole to a detainer' means release to the 'physical custody' of the authorities who have lodged the detainer." 28 C.F.R. § 2.32(c). Here, the fact that the Walsh Act certification preceded issuance of the parole certificate means that any "release" worked by the latter could not have been into custody of another authority—for there was no custody change after Mr. McRae was certified.

B. If, as the Government Suggests, Mr. McRae Was Not Serving His District of Columbia Sentence as of March 21, 2007, then the USPC Lacked Jurisdiction to Parole Him on March 22, 2007.

Ironically, Respondents themselves have highlighted a second reason why the USPC lacked jurisdiction to parole Mr. McRae after he was certified under the Walsh Act. The Government has taken the position throughout this matter—from its responses to Mr. McRae's

administrative appeals through its briefing in response to his habeas petition—that once Mr. McRae was certified as sexually dangerous, he was no longer serving his D.C. sentence. *See, e.g.*, Resp't Opp. to Pet. Cross-MSJ (DE #16) at 9 ("Adam Walsh commitment . . . is distinct from the underlying criminal charges."); Resp't MSJ (DE #10) at 16 (asserting that Mr. McRae's "custodial status" under the Walsh Act was "unrelated" to his 1984 D.C. Superior Court conviction). However, the USPC has parole jurisdiction over Mr. McRae only insofar as he is serving a D.C. Code sentence:

> The Commission shall have sole authority to grant parole, and to establish the conditions of release, for all District of Columbia Code prisoners who are *serving sentences* for felony offenses . . . .

28 C.F.R. § 2.70(b) (emphasis added). Clearly, then, the USPC could not have had the authority to parole Mr. McRae on March 22, 2007 if he was not serving a District of Columbia Code sentence on that date.[6]

Yet that is precisely the position that the Government has taken. Evidently blind to the implication of its argument, the Government has consistently maintained that, upon his Walsh Act certification, Mr. McRae's 1984 D.C. armed rape sentence stopped running. For instance, the USPC's National Appeals Board explained, in denying Mr. McRae sentence-credit for the 380 days in question, "You are not entitled to sentence credit for the period of time you were pending civil commitment, because *it was not service of your criminal sentence*." Apr. 14, 2009 USPC Notice of Action on Appeal (Resp't MSJ, Ex. 17 to Gervasoni Decl. (DE #9)) (emphasis added). The BOP echoed the USPC's logic in denying Mr. McRae's request for relief through its administrative procedures. *See* May 21, 2009 BOP Response to Request for Administrative

[6] The USPC also has parole jurisdiction over prisoners convicted of a federal offense prior to November 1, 1987. *Williams v. United States Parole Comm'n*, 348 Fed. Appx. 713, 714 (3d Cir. 2009). Mr. McRae clearly does not fall into that category.

Remedy (Pet., Appx. Q. (DE #1)). And Respondents have repeated the same point in their habeas briefing, most recently when they argued that prior to his Walsh Act certification,

> McRae was held in a BOP facility, but he was detained pursuant to the D.C. sentence. The "authority" detaining him was the District of Columbia, not BOP. When he was paroled from the D.C. sentence, he was "released" from the confinement imposed by the District of Columbia. The detaining authority, upon Adam Walsh certification, became the United States, not the District of Columbia.

Resp. to Pet. Obj. (DE #31) at 5 n.7. Respondents have their chronology wrong here—they imply that the "parole" took place prior to the Walsh Act certification—which is perhaps why they do not recognize the import of their assertion that Mr. McRae was not serving a D.C. sentence once he was certified under the Walsh Act. The Court should recognize Respondents' position for what it is—an acknowledgement (albeit unwitting) that the USPC did not have jurisdiction to parole Mr. McRae on March 22, 2007.

Mr. McRae, of course, is due sentence-credit for the 380 days in question regardless of whether he was technically serving a D.C. sentence during that period. This is made clear by two statutes that Petitioner has already discussed at length. First, Mr. McRae is due credit under 18 U.S.C § 3568 (repealed), which governs the jail credit given to D.C. offenders sentenced from June 22, 1966 to April 10, 1987 and holds that such persons shall receive "credit toward service of [their] sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." There can be no doubt that the time Mr. McRae spent in Walsh Act confinement was "in connection with" his 1984 armed rape conviction, for the BOP cited that conviction as chief among the reasons why he was deemed sexually dangerous. *See* Pet. Cross-MSJ (DE #13) at 16-18; Pet. Reply (DE #18) at 8-10; Pet. Obj. (DE #30) at 14-15; *see also United States v. DeBellis*, 649 F.2d 1, 2 (1st Cir. 1981) (granting defendant sentence-credit under

§ 3568 for time spent in pre-trial civil commitment). He is thus due sentence-credit for the time, even if he was not technically serving his D.C. sentence during that period.

Mr. McRae is also due credit under two provisions of the Good Time Credits Act, D.C. Code § 24-221. First, the Act grants prisoners sentence-credit for all time "spent in custody . . . *as a result of* the offense for which the sentence was imposed." D.C. Code § 24-221.03(a) (emphasis added). For the same reason that Mr. McRae's Walsh Act custody was "in connection with" the acts for which he was sentenced in D.C. Superior Court under 18 U.S.C § 3568—his 1984 conviction was the primary justification for his Walsh Act certification—it was "as a result of" that offense under § 24-221.03(a). Second, the Act holds that "[a]ny person who is sentenced to a term of confinement in a correctional facility or hospital shall have deducted from the term all time actually spent, pursuant to a court order, by the person in a hospital for examination purposes or treatment prior to trial or pending an appeal." D.C. Code § 24-221.03(c). As Petitioner has argued, he spent the 380 days in question in Federal Medical Center Devens for examination purposes pursuant to the Walsh Act, during which time he was categorized by the BOP as "a Pre-Trial inmate who is waiting to see the judge." Pet. Obj. (DE #30) at 16. Mr. McRae was thus being held "for examination purposes . . . prior to trial" under § 24-221.03(c); accordingly, he should "have deducted from [his] term all time" spent in such confinement.[7]

[7] As he has explained previously, although Mr. McRae does not meet the requirements of the GTCA to the letter—he was confined for the period in question pursuant to the BOP's Walsh Act certification, not "a court order"—the District of Columbia Court of Appeals has construed § 24-221.03(c) broadly. *See Shelton v. United States*, 721 A.2d 603, 610 (D.C. 1998) (holding that even though D.C. Code § 24-431(c), which is now codified at § 24-221.03(c), "does not literally cover the case before us," petitioner was still entitled to sentence-credit under it, for there was "no indication that the legislature intended to occupy the field by the precise terms of § 24-431(c)").

Conclusion

For the reasons stated above and in Petitioner's previous briefing, this Court should issue an order (1) restoring to Mr. McRae the 380 days of sentence-credit to which he is entitled; (2) immediately terminating his sentence; and (3) declaring that Respondents violated his rights under the Fifth and Eighth Amendments to the Constitution.

Respectfully submitted,

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Date: February 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Response to the Court's Request for Supplemental Briefing* was filed through the Electronic Court Filing system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ David A. Taylor
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Date: February 28, 2011