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## Implicit in the Concept of Erroneous Liberty: The Need to Ensure Proper Sentence Credit in the Fourth Circuit

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ARTICLES

IMPLICIT IN THE CONCEPT OF *ERRONEOUS*  
LIBERTY: THE NEED TO ENSURE PROPER  
SENTENCE CREDIT IN THE FOURTH CIRCUIT

ANDREW T. WINKLER\*

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## I. INTRODUCTION

*"I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it."*

—Thomas Jefferson<sup>1</sup>

Our Founding Fathers expressed the fundamental principles of our country's democratic framework, declaring in the preamble to the United States Constitution, "We the People of the United States, in Order to form a more perfect Union, establish Justice . . . and secure the Blessings of Liberty to ourselves and our Posterity . . . ."<sup>2</sup> Over 200 years later, we ask whether we as a country are carrying out these principles when the government seeks to re-incarcerate rehabilitated prisoners despite the government's negligence in delaying the commencement of their sentences. Through the doctrine of credit for time spent erroneously at liberty, which traces its origins back to the Tenth Circuit's 1930 decision in *White v. Pearlman*,<sup>3</sup> defendants have sought credit toward their criminal sentences where their time spent out of custody was attributed to government negligence.<sup>4</sup>

While numerous courts have confronted this doctrine, the Fourth Circuit has never addressed whether a defendant may pursue the doctrine of credit for time spent erroneously at liberty as a means of receiving credit toward a federal criminal sentence.<sup>5</sup> In a less than stellar performance, the United States District Court for the District Court of South Carolina recently interpreted the doctrine's applicability in *Bradford v. Rivera*.<sup>6</sup> While the court's opinion in *Bradford* may be unpublished, its lackluster legal analysis illustrates the need for a consistent approach the Fourth Circuit and lower courts within that

1. Thomas Jefferson, Letter to A Friend (Dec. 23, 1791), in *PATRIOTIC NUGGETS; FRANKLIN, WASHINGTON, JEFFERSON, WEBSTER, LINCOLN, BEECHER* 63 (John R. Howard ed., 1899).

2. U.S. CONST. pmbl.

3. *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930); see *Espinoza v. Sabol*, 558 F.3d 83, 88 (1st Cir. 2009) (noting that the "doctrine was . . . first articulated in . . . *White v. Pearlman*"); see also Danielle E. Wall, Note, *A Game of Cat and Mouse—Or Government and Prisoner: Granting Relief to an Erroneously Released Prisoner in Vega v. United States*, 53 *VILL. L. REV.* 385, 396-97 (2008) (providing that following "its inception in *White*, the doctrine . . . has been adopted by a majority of circuits.").

4. See *infra* Part V.

5. See, e.g., *Espinoza*, 558 F.3d 83, 86-90; *Kiendra v. Hadden*, 763 F.2d 69 (2d Cir. 1985); *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937) (per curiam); *Vega v. United States*, 493 F.3d 310, 314-23 (3d Cir. 2007); *Leggett v. Fleming*, 380 F.3d 232, 234-36 (5th Cir. 2004); *United States v. Croft*, 450 F.2d 1094 (6th Cir. 1971); *Dunne v. Keohane*, 14 F.3d 335, 336-37 (7th Cir. 1994); *United States v. Downey*, 469 F.2d 1030 (8th Cir. 1972) (per curiam); *Clark v. Floyd*, 80 F.3d 371 (9th Cir. 1996); *Smith v. Swope*, 91 F.2d 260, 261-62 (9th Cir. 1937); *White*, 42 F.2d at 789; *United States v. Barfield*, 396 F.3d 1144 (11th Cir. 2005).

6. *Bradford v. Rivera*, No. 9:11-462-RBH-BM, 2011 WL 5827788 (D.S.C. Oct. 14, 2011), report and recommendation adopted by No. 9:11-cv-00462-RBH, 2011 WL 5827601 (D.S.C. Nov. 18, 2011).

jurisdiction can use to guide the review of future cases involving this doctrine.

This article urges the Fourth Circuit to adopt the doctrine of credit for time spent erroneously at liberty as a means of preserving liberty and fundamental fairness in those instances where government negligence postpones the commencement of a prisoner's sentence. The recommendation to adopt this doctrine is supported by the fact that the doctrine ensures that the government cannot delay the expiration of a prisoner's sentence.<sup>7</sup> The doctrine also properly awards credit to an individual when the government fails to timely incarcerate, or releases and subsequently re-incarcerates that individual.<sup>8</sup>

Part II of this article introduces Mr. David Bradford, whose case illustrates the varying legal theories associated with prisoners living erroneously at liberty. Bradford was sentenced in Michigan and, with the permission of the court, subsequently moved to Georgia to receive brain cancer treatments over a six-month period.<sup>9</sup> After that time expired, the government failed to designate a facility for Bradford to serve out the remainder of his sentence.<sup>10</sup> For more than six years, Bradford lived erroneously at liberty and successfully rehabilitated himself into society during this time.<sup>11</sup> The government then informed Bradford, albeit over six years after his sentencing, that he was to report to a federal correctional institution in South Carolina.<sup>12</sup> Generally, a federal prisoner's criminal sentence is governed by statute, and the execution of that sentence is delegated to the Bureau of Prisons.<sup>13</sup> However, this situation poses the unique question of whether Bradford must now serve his entire sentence, or whether is he entitled to credit toward his sentence for the six years he spent at liberty.

Part III briefly discusses the applicable statutory provisions at issue in Bradford's case. When adhering strictly to the statutes, Bradford's sentence did not start until he voluntarily turned himself into the correctional institution.<sup>14</sup> According to statutory provisions, Bradford may not credit the time he spent at liberty;<sup>15</sup> however, there are two recognized exceptions to this general rule. Part IV of this article addresses the first exception, which is the likelihood of success if a de-

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7. See *Dunne*, 14 F.3d at 336.

8. *Id.*

9. *United States v. Bradford*, 623 F. Supp. 2d 849, 850-51 (E.D. Mich. 2009).

10. *Id.* at 850.

11. *Id.* at 850-51.

12. *Id.* at 850.

13. See *infra* Part III.

14. *Bradford v. Rivera*, No. 9:11-462-RBH-BM, 2011 WL 5827788, at \*2 (D.S.C. Oct. 14, 2011), *report and recommendation adopted by* No. 9:11-cv-00462-RBH, 2011 WL 5827601 (D.S.C. Nov. 18, 2011).

15. See *infra* notes 46-48.

fendant were to bring a Due Process Clause claim in the Fourth Circuit. However, this approach would not be optimal for Bradford given Fourth Circuit precedent.<sup>16</sup> Part V addresses the second exception, which is the doctrine of credit for time spent at liberty. This section provides an overview of the diverse array of opinions<sup>17</sup> regarding the applicability and scope of the doctrine issued by United States Courts of Appeals. This section also articulates two overriding themes required for the doctrine to apply: (1) negligence on behalf of the government, and (2) a defendant who is not at fault for his liberty.

Part VI provides a recommendation to the Fourth Circuit in light of the *Bradford* decision to apply the doctrine in order to preserve liberty by awarding sentence credit in instances of erroneously delayed sentences. This article contends that the court should apply a two-part test similar to the test employed by the Third Circuit<sup>18</sup> when deciding whether to grant credit. As a threshold inquiry, the court should first determine whether the defendant has “clean hands” or is not at fault for the time spent at liberty. If so, the court should consider whether the government was negligent in the postponement of the defendant’s sentence. In accordance with the framework of habeas corpus, the defendant bears the burden of proof concerning the two foregoing requirements. However, if both requirements are satisfied, the defendant should be entitled to the credit.

Finally, this article’s two-part test will be applied to Bradford’s case, with the recommendation that credit be awarded for the six years spent living erroneously at liberty. This article concludes that this approach is not only consistent with the core principles of the American criminal justice system, but is also substantiated by public policy concerns.

## II. THE BRADFORD STORY

On March 14, 2002, David Bradford was sentenced to an eighty-four-month term of imprisonment by the United States District Court for the Eastern District of Michigan for conspiracy to distribute cocaine and marijuana, and laundering monetary instruments.<sup>19</sup> However, in order for Bradford to pursue brain cancer treatment, the sentencing court deferred his report date for six months.<sup>20</sup>

Later in 2002, Bradford’s physician in Atlanta, Georgia, informed Detroit’s U.S. Probation Office that Bradford’s cancer had

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16. See *Hawkins v. Freeman*, 195 F.3d 732, 750 (4th Cir. 1999).

17. See *supra* note 5.

18. See *Vega v. United States*, 493 F.3d 310, 319.

19. *United States v. Bradford*, 623 F. Supp. 2d 849, 850 (E.D. Mich. 2009).

20. *Id.* at 850-51.

progressed, was incurable, and that his life expectancy was only “1-2 years at best.”<sup>21</sup> When the six-month deferral period expired, there were no court-ordered extensions or requests for extensions and the Bureau of Prisons (BOP) did not designate a facility for Bradford to voluntarily surrender himself.<sup>22</sup> According to the government, “[I]n light of [Defendant’s] alleged exceedingly limited life expectancy, no action was taken with respect to having the Bureau of Prisons designate an institution for service of [Defendant’s] sentence until the summer of 2008.”<sup>23</sup> Bradford remained at liberty for more than six years until the BOP instructed him to report to the Federal Correctional Institution (FCI) Estill in South Carolina on September 4, 2008.<sup>24</sup>

During the six-year time period, Bradford continuously underwent extensive medical treatment for his brain cancer and related health conditions, which included one or more surgeries.<sup>25</sup> He also found work by starting his own towing business and made many positive contributions to both his family and the surrounding community.<sup>26</sup> During this time, Bradford kept in regular contact with a Pretrial Services Officer of the Northern District of Georgia, and was fully compliant with all of his bond conditions.<sup>27</sup>

After BOP finally designated a facility, Federal Correctional Institute in Estill, South Carolina (FCI Estill), Bradford voluntarily surrendered himself to begin serving his sentence on May 4, 2009.<sup>28</sup> Bradford’s current projected release date of May 19, 2015, reflects a reduction of the sentence because of Good Conduct Time (GCT) Release.<sup>29</sup> Presently, Bradford has been credited with only twenty-one days for previous time spent in jail.<sup>30</sup> Here, the question is whether Bradford is entitled to credit toward the completion of his sentence the approximate 2,200 days between the initial date in which he was scheduled to voluntarily surrender<sup>31</sup> and the date the BOP actually designated for his voluntary surrender.<sup>32</sup>

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21. *Id.* at 851.

22. *Id.* at 850.

23. *Id.* at 851.

24. *Id.* at 850.

25. *Id.* at 851.

26. *Id.*

27. *Id.* at 852.

28. *Bradford v. Rivera*, No. 9:11-462-RBH-BM, 2011 WL 5827788, at \*2 (D.S.C. Oct. 14, 2011), *report and recommendation adopted by* No. 9:11-cv-00462-RBH, 2011 WL 5827601 (D.S.C. Nov. 18, 2011).

29. *Id.*

30. *Id.* at \*3

31. *See id.* at \*2 (asserting that the date for voluntary surrender should have been designated August 27, 2002).

32. *See id.* (providing the date on which he voluntarily surrendered, which was September 4, 2008).

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After exhausting all of his administrative remedies, Bradford filed a writ of habeas corpus on February 25, 2011, in the United States District Court of South Carolina seeking credit for the six-year time period he spent at liberty.<sup>33</sup> United States Magistrate Judge Bristow Marchant issued a Report and Recommendation on October 14, 2011, stating that Bradford's claim should be dismissed because he failed to establish that he was entitled to any credit while out on bond.<sup>34</sup>

On November 18, 2011, United States District Court Judge R. Bryan Harwell adopted the Report and Recommendation of Judge Marchant, and subsequently dismissed Bradford's claim with prejudice. The reasoning behind the court's decision will be discussed in greater length in section VII.A of this article. For now, we turn to the statutory provisions that generally govern the awarding of prior sentence credit.

### III. STATUTORY SENTENCE COMPUTATION

In the federal criminal justice system, the method by which a defendant's sentence may be adjusted based on credit has been largely set by legislation.<sup>35</sup> Since the Sentencing Reform Act of 1984<sup>36</sup> abolished parole,<sup>37</sup> defendants may receive credit only in carefully circumscribed situations, such as their good behavior while incarcerated.<sup>38</sup> Under 28 U.S.C. § 2241,<sup>39</sup> a habeas corpus petition is appropriate when a prisoner challenges the computation or execution of a federal sentence<sup>40</sup> and has exhausted the administrative remedy process.<sup>41</sup> Generally, the commencement of a federal prisoner's sentence is governed by 18

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33. *Bradford v. Rivera*, No. 9:11-462-RBH-BM, 2011 WL 5827788, at \*1-3 (D.S.C. Oct. 14, 2011), *report and recommendation adopted by* No. 9:11-cv-00462-RBH, 2011 WL 5827601 (D.S.C. Nov. 18, 2011).

34. *Id.* at \*4.

35. *See infra* notes 41-43.

36. 18 U.S.C. § 3624 (2012).

37. *See id.* § 3624(a) (stating that a prisoner is released at "the expiration of the prisoner's term of imprisonment, less any time credited" as provided in § 3624(b)).

38. *Id.* § 3624(b) (allowing credit toward the service of a sentence for satisfactory behavior).

39. 28 U.S.C. § 2241 (2012) (providing that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

40. *See United States v. Little*, 392 F.3d 671, 679 (4th Cir. 2004) (citing *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (en banc)).

41. *See United States v. Bradford*, 623 F. Supp. 2d 849, 854-55 (E.D. Mich. 2009) (holding that if "there is statutory authority for awarding defendant credit toward . . . his sentence . . . he must first seek relief from the BOP and exhaust any available administrative remedies before seeking judicial review of the BOP's determination on this point.") (citing *United States v. Wilson*, 503 U.S. 329, 334-36 (1992)).

U.S.C. § 3585(a),<sup>42</sup> while any credit for prior custody is governed by 18 U.S.C. § 3585(b).<sup>43</sup>

To receive credit toward a federal sentence, the defendant must have been in official detention<sup>44</sup> before the commencement of the sentence.<sup>45</sup> While the execution of a defendant's sentence and the computation of jail time is an administrative function of the Attorney General, this task has been delegated to the BOP.<sup>46</sup> The BOP is tasked with determining whether a defendant is entitled to receive any credit for previous jail time and calculating when a sentence terminates based on the actual commencement of the sentence.<sup>47</sup>

Adhering strictly to the statutory language of § 3585, Bradford's term of imprisonment started when he voluntarily surrendered himself to FCI Estill in South Carolina on May 4, 2009. Prior to this date, Bradford was at liberty and was not in official detention or its equivalent. While Bradford kept in contact with a Pretrial Services Officer and remained compliant with all bond conditions, these inconveniences do not rise to the level of official detention for purposes of § 3585.<sup>48</sup> However, this does not mean that Bradford may not be entitled to credit the approximate 2,200 days toward the completion of his sentence. There are primarily two options available to a defendant in Bradford's position—either (1) he must bring a due process claim against the government, or (2) he must bring a claim against the government under the doctrine of credit for time spent erroneously at liberty. The two approaches addressing this issue are considered in turn.

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42. 18 U.S.C. § 3585(a) (2012) ("A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.").

43. 18 U.S.C. § 3585(b) (2012) ("A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences— (1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence.").

44. "Official detention." *See* *United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991) (quoting *United States v. Woods*, 888 F.2d 653, 655 (10th Cir. 1989) (providing that "official detention" has been defined as "imprisonment in a place of confinement, not stipulations or conditions imposed upon a person not subject to full physical incarceration."); *see also* *Randall v. Whelan*, 938 F.2d 522, 526 (4th Cir.1991) (declining to credit against a term of imprisonment any time spent in a community confinement center); *Reno v. Koray*, 515 U.S. 50, 65 (1995) (holding that time spent at a community treatment center did not constitute official detention).

45. *See* *Binford v. United States*, 436 F.3d 1252, 1254 (10th Cir. 2006).

46. *United States v. Wilson*, 503 U.S. 329, 335 (1992) (citing 18 U.S.C. § 3621(a)).

47. *Id.*

48. *See supra* notes 31-32.



## IV. THE DUE PROCESS CLAUSE APPROACH

The Due Process Clause of the U.S. Constitution guarantees that “[n]o person shall . . . be deprived of . . . liberty . . . without due process of law . . . .”<sup>49</sup> A defendant may seek to bring a claim that re-incarceration after time spent at liberty violates the basic guarantees of due process afforded by the U.S. Constitution.<sup>50</sup> As noted by Supreme Court Justice Stephen Breyer, “Freedom from imprisonment lies at the heart of the ‘liberty’ that the Constitution protects.”<sup>51</sup> Typically, federal courts have taken two different approaches in their review of due process claims made in these instances—the waiver theory<sup>52</sup> or the two-part test,<sup>53</sup> which was established by the U.S. Supreme Court in *County of Sacramento v. Lewis*.<sup>54</sup>

A. *The Waiver of Jurisdiction Theory*

Several courts, including the Fifth, Eighth, and Ninth Circuits, have accepted a “waiver of jurisdiction” theory in situations involving the re-incarceration of a defendant after time spent erroneously at liberty.<sup>55</sup> This theory differs from the doctrine of time spent at liberty because it prevents authorities from re-incarcerating a prisoner even if that prisoner still has time remaining on his or her sentence.<sup>56</sup>

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49. U.S. CONST. amend. V; see also U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”)

50. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal citations omitted) (providing that due process aims to protect individuals from arbitrary actions taken by the government that effectively deny an individual procedural fairness or result in the government exerting power without any reasonable justification., and noting the dual purpose of due process in ensuring procedural and substantive fairness).

51. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 103 (2010).

52. See *infra* Part IV.A.

53. See *infra* Part IV.B.

54. *Cnty. of Sacramento*, 523 U.S. 833.

55. See *Johnson v. Williford*, 682 F.2d 868, 873-74 (9th Cir. 1982) (concluding re-incarceration of prisoner after mistakenly discharged on parole would be inconsistent with fundamental principles of liberty and justice and consequently violate due process); *Shelton v. Ciccone*, 578 F.2d 1241, 1245-46 (8th Cir. 1978) (remanding case upon finding defendant’s allegations—that the government knew of his whereabouts but either purposefully or out of extreme negligence failed to execute his sentence for seven years—sufficient to suggest defendant had been denied due process); *Piper v. Estelle*, 485 F.2d 245, 246 (5th Cir. 1973) (denying relief based on the facts of the case but recognizing that the re-incarceration of a defendant upon a showing of affirmative wrongdoing or gross negligence on the part of the state would be inconsistent with the fundamental principles of liberty and justice); *Shields v. Beto*, 370 F.2d 1003, 1006 (5th Cir. 1967) (holding re-incarceration of defendant after lapse of twenty-eight years would be inconsistent with fundamental principles of liberty and justice and violate due process); see also *Bonebrake v. Norris*, 417 F.3d 938, 943 (8th Cir. 2005) (denying due process claim because four-year delay in executing sentence was not conscience-shocking).

56. See *Shields*, 370 F.2d at 1006.

However, in 1999, the Fourth Circuit addressed the waiver of jurisdiction theory in *Hawkins v. Freeman*.<sup>57</sup> There, the court held that such an approach was not appropriate to use when reviewing a challenger's substantive due process claim.<sup>58</sup> According to the Fourth Circuit:

In finding a substantive due process violation on that basis [the waiver of jurisdiction theory], it either assumes that substantive due process protects against any sufficiently arbitrary act of government, without regard to the existence of any affected liberty interest, or that a constitutionally protected liberty interest can be created simply by the expectation-inducing conduct of state officials. Neither assumption is valid under contemporary substantive due process jurisprudence.<sup>59</sup>

Because the waiver of jurisdiction theory “runs afoul of both [of] these limiting principles of contemporary substantive due process law,” the court found its application to be unacceptable.<sup>60</sup>

### B. *The Two-Part Lewis Test*

More recently, courts have reviewed substantive due process challenges under the two-part *Lewis* test.<sup>61</sup> Under this approach, the challenger must first show that the government's conduct “shock[s] the contemporary conscience.”<sup>62</sup> The challenger must then show that the conduct violates a fundamental right or liberty that is implicit in the challenger's right to due process.<sup>63</sup> A substantive due process claim will only be upheld if the challenger has met both of these requirements.<sup>64</sup> Thus, a challenger must show both that re-incarceration shocks the conscience *and* that re-incarceration violates a fundamental right or liberty.

Courts often disagree over whether a prisoner's liberty interest is fundamental and thus subject to due process protection.<sup>65</sup> In *Hawkins*

57. *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) (en banc).

58. *Id.* at 743-45, 749.

59. *Id.* at 749.

60. *Id.* at 750.

61. See, e.g., *Bonebrake v. Norris*, 417 F.3d 938, 942-43 (8th Cir. 2005) (applying the *Lewis* test to determine whether the state's four-year delay in seeking to execute a sentence violated substantive due process); *Hawkins*, 195 F.3d at 738-46. (using the *Lewis* test to determine whether re-incarcerating the appellant after he was mistakenly released on parole would violate due process).

62. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 & n.8 (1998).

63. *Id.*

64. See *Hawkins*, 195 F.3d at 738 (stating that the conscience-shocking standard is the threshold test of culpability, and that if conduct does not meet this test, the due process claim fails while if conduct does meet this test, the court must determine what level of protection is afforded to the liberty interest in question).

65. Compare *Johnson v. Williford*, 682 F.2d 868, 871, 873-74 (9th Cir. 1982) (finding that re-incarcerating petitioner after period of erroneous release on parole would violate due process), and *Sanchez v. Warden*, 329 F. Supp. 2d 200, 206 (D. N.H. 2004) (recognizing that denial of

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*v. Freeman*, the Fourth Circuit rejected the waiver of jurisdiction theory for due process claims<sup>66</sup> and instead applied the two-part *Lewis* test.<sup>67</sup> The court found that delayed incarceration in general is not a unique occurrence and that the two-year delay in re-incarcerating the petitioner in *Hawkins* did not shock the conscience.<sup>68</sup> Additionally, the court held that the petitioner's asserted "right to be free from unjust incarceration"<sup>69</sup> was not a right or liberty interest that could be declared a "fundamental" one that is "objectively, deeply rooted in this Nation's history and tradition."<sup>70</sup> Having found that the two-year delay did not shock the conscience, and that there was no fundamental right or liberty interest implicated by re-incarceration, the court denied the petitioner's due process claim.<sup>71</sup>

In a dissenting opinion in *Hawkins*, Judge Francis Murnaghan found the "shock the conscience" inquiry to be inappropriate in a case involving the non-discretionary application of a legislative policy, and provided that instead the analysis of the petitioner's claim should be conducted under the framework of *Washington v. Glucksberg*.<sup>72</sup> Judge Murnaghan also stated that Fourth Circuit precedent recognized the defendant's interest in the finality of his sentence.<sup>73</sup> Accord-

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credit from time at liberty that would affect duration of prisoner's confinement and require him to serve sentence in installments may implicate due process protection), with *Hawkins*, 195 F.3d at 742-48 (asserting that erroneous release is too common to be considered conscience-shocking and declaring that the right of an erroneously released prisoner's continued freedom is not fundamental).

66. *Hawkins*, 195 F.3d at 738.

67. *Id.* at 741-48, 750.

68. *Id.* at 745-48; see also *Bonebrake v. Norris*, 417 F.3d 938, 943 (8th Cir. 2005) (finding that a four-year delay in incarcerating the petitioner did not shock the conscience).

69. *Hawkins*, 195 F.3d at 747 (citing Brief for Appellant at 10, *Hawkins*, 195 F.3d 732, No. 96-7539, 1998 WL 34101969 at \*1).

70. *Hawkins*, 195 F.3d at 747 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720703 (1997)).

71. *Id.* at 750.

72. *Id.* at 753-60 (Murnaghan, J., dissenting) (for the sake of argument the dissent did apply the "shock the conscience" analysis to the government's conduct and found that the "conduct was sufficiently egregious so as to shock the contemporary conscience.") .

73. *Id.* at 754 (Murnaghan, J., dissenting) (citing *United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1985); *United States v. Cook*, 890 F.2d 672, 675 (4th Cir. 1989)). A number of other courts, both at the federal and state level, have recognized the due process right set out in *Lundien* and *Cook*. Most of these courts have held for the government on the facts. None of these courts, however, has questioned the legitimacy of the due process principle set out in our prior decisions. See *DeWitt v. Ventetoulo*, 6 F.3d 32, 35-36 (1st Cir. 1993) (holding re-incarceration violated the Due Process Clause and that fundamental fairness prohibited the State from re-imposing defendant's original life term); see also *United States v. Watkins*, 147 F.3d 1294, 1298 n. 5 (11th Cir. 1998) ("We are mindful that a defendant's due process rights may be violated 'when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them.'") (quoting *Lundien*, 769 F.2d at 987); *United States v. Tolson*, 935 F. Supp. 17, 21 (D.D.C. 1996) ("[T]he Due Process Clause prohibits enhancing a defendant's sentence after he has served so much of it that his expectations have crystallized."); *United States v. Davis*, 112 F.3d

ing to the dissent in *Hawkins*, once a defendant is released, he has a reasonable expectation of continued freedom that crystallizes over time.<sup>74</sup> “Once crystallized, that reasonable expectation to freedom is a legitimate liberty interest protected by the Due Process Clause.”<sup>75</sup> According to the dissent, the government could not then satisfy a strict scrutiny analysis.<sup>76</sup>

While Bradford’s six-year delay might rise to the level of shocking the community conscience, it is highly doubtful that he would successfully satisfy the second prong of the *Lewis* test. Even if Bradford argued that his expectation of freedom had crystallized after six years at liberty in accordance with the *Hawkins* dissent, the *Hawkins* majority opinion would ultimately defeat the claim.

There is, however, another challenge to re-incarceration that Bradford may be able to pursue. Although the likelihood of success is extremely low, if Bradford is denied proper medical treatment of his brain cancer while incarcerated, he might attempt to challenge the re-incarceration on the grounds that such an act would infringe upon his right to the personal control of his medical treatment.<sup>77</sup>

#### V. THE DOCTRINE OF CREDIT FOR TIME SPENT ERRONEOUSLY AT LIBERTY APPROACH

The traditional rule applied by courts in similar instances was harsh—“no matter how long a defendant spent at liberty, no matter how negligent the government had been, and regardless of whether the defendant brought the issue to the attention of the authorities, the defendant would be required to serve his full sentence.”<sup>78</sup> While Bradford may not have any statutory or constitutional authority to

118, 123 (3d Cir.1997); *United States v. Campbell*, 985 F. Supp. 158, 160-61 (D.D.C.1997), *aff’d*, 172 F.3d 921 (D.C. Cir.1998); *Thayer v. United States*, 937 F. Supp. 662, 667 (E.D. Mich. 1996); *Santiago v. United States*, 954 F. Supp. 1201, 1203 (N.D. Ohio 1996); *United States v. Crowder*, 947 F. Supp. 1183, 1193 (E.D.Tenn.1996); *Merritt v. United States*, 930 F. Supp. 1109, 1115 (E.D. N.C. 1996); *State v. Humes*, 581 N.W.2d 317, 321 (Minn. 1998); *Austin v. State*, 663 A.2d 62, 64-65 (Me. 1995); *Nelson v. Commonwealth*, 12 Va. App. 835, 839 (1991).

74. *Hawkins*, 195 F.3d at 756 (Murnaghan, J., dissenting).

75. *Id.*

76. *Id.* at 757 (Murnaghan, J., dissenting) (for a more comprehensive analysis of why the government’s interests do not survive strict scrutiny, see the panel opinion at *Hawkins v. Freeman*, 166 F.3d 267, 279-80 (4th Cir. 1999)).

77. See generally *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (recognizing the “principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.”).

78. Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 CATH. U. L. REV. 403 (1996); see *United States ex rel. Mayer v. Loisel*, 25 F.2d 300, 301 (5th Cir. 1928); *Morris v. United States*, 185 F. 73, 76 (8th Cir. 1911) (explaining that an offer to surrender in accordance with judgment, which was refused by the marshal, did not constitute service of sentence); *Leonard v. Rodda*, 5 App. D.C. 256, 274-75 (D.C. 1895) (denying credit based on erroneous release).

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support the claim that he is entitled to approximately 2,200 days of credit toward the reduction of his sentence, the First,<sup>79</sup> Second,<sup>80</sup> Third,<sup>81</sup> Fifth,<sup>82</sup> Sixth,<sup>83</sup> Seventh,<sup>84</sup> Eighth,<sup>85</sup> Ninth,<sup>86</sup> Tenth,<sup>87</sup> and Eleventh<sup>88</sup> Circuits have all recognized the “rule” or “doctrine” of credit for time spent at liberty as an exception to the traditional rule.<sup>89</sup>

Generally, under this doctrine, courts may award the defendant credit toward his outstanding federal sentence for the time he spent at liberty through no fault of his own.<sup>90</sup> Unlike the due process exception, the doctrine of credit for time spent erroneously at liberty only reduces the prisoner’s sentence.<sup>91</sup> It does not completely discharge the defendant.<sup>92</sup> Credit for time spent at liberty is not a novel concept, and its origins can be traced back to the Tenth Circuit’s 1930 opinion in *White v. Pearlman*.<sup>93</sup> In *White*, which will be discussed in greater length later in Part V.I, the Tenth Circuit emphasized that prisoners have certain rights, including the right to serve a continuous sentence free from interruptions.<sup>94</sup>

However, there is disagreement about whether the doctrine applies when there is merely a delay in the commencement of the sentence, or whether it applies only in those instances where the sentence is interrupted. The Fifth and Eleventh Circuits have found that the doctrine

79. See *Espinoza v. Sabol*, 558 F.3d 83, 90 (1st Cir. 2009).

80. See *Kiendra v. Hadden*, 763 F.2d 69, 73 (2d Cir. 1985); *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937) (per curiam) (*Learned Hand*, *Augustus Hand*, and *Harrie Chase*, JJ.) (awarding credit for the period of erroneous relief).

81. See *Vega v. United States*, 493 F.3d 310, 314-19 (3d Cir. 2007).

82. See *Leggett v. Fleming*, 380 F.3d 232, 234-35 (5th Cir. 2004).

83. See *United States v. Croft*, 450 F.2d 1094, 1095-99 (6th Cir. 1971).

84. See *Dunne v. Keohane*, 14 F.3d 335, 336-37 (7th Cir. 1994), *cert. denied*, 511 U.S. 1149 (1994).

85. See *United States v. Downey*, 469 F.2d 1030, 1031-32 (8th Cir. 1972) (per curiam).

86. See *Clark v. Floyd*, 80 F.3d 371, 372-74 (9th Cir. 1996); *Smith v. Swope*, 91 F.2d 260, 261-62 (9th Cir. 1937).

87. See *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930).

88. See *United States v. Barfield*, 396 F.3d 1144, 1147 (11th Cir. 2005).

89. *Vega v. United States*, 493 F.3d 310, 315-22 (3d Cir. 2007) (engaging in a comprehensive summary of cases recognizing the applicability of the doctrine); see also *Application of Nelson*, 434 F.2d 748, 749-50 (8th Cir. 1970) vacated, *Nelson v. United States*, 402 U.S. 1006 (1971), *remanded to Application of Nelson*, 445 F.2d 631, 632 (8th Cir. 1971) (illustrating the position of the United States Department to read the statute liberally rather than literally as they agreed with the defendant that it would be inequitable to deny credit to a prisoner whose federal sentence never commenced, for purposes of the statute, because he was too poor to post bail for a state conviction which turned out to be invalid).

90. See *infra* notes 100-179 and accompanying text (explaining the doctrine of credit for time spent erroneously at liberty as applied by a majority of United States Courts of Appeals).

91. See *Shields v. Beto*, 370 F.2d 1003, 1005-06 (5th Cir. 1967).

92. *Id.* (recognizing the general outcome of a due process violation, while keeping in mind that the likely effect in Mr. Bradford’s case would be release from custody given the length of time that may be awarded for time spent at liberty.).

93. *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930).

94. *Id.* at 789.

only applies in situations where the prisoner was erroneously released after serving some portion of the original sentence.<sup>95</sup> Other courts, including the Second, Seventh, and Ninth Circuits, have implicitly or expressly held that a prisoner can be afforded credit under the doctrine regardless of whether the sentence has actually begun.<sup>96</sup>

The following sub-sections briefly review the varying tests employed by other circuits when applying the doctrine of credit for time spent erroneously at liberty. While the Fourth Circuit has never addressed the applicability and scope of the doctrine, the Third Circuit has observed, at a minimum, that “[n]early every court to have considered the rule of credit for time at liberty has required that the government’s actions in releasing or failing to incarcerate the prisoner be negligent.”<sup>97</sup>

#### A. *The First Circuit*

In 2009, the First Circuit addressed the doctrine of credit for time spent erroneously at liberty for the first time in *Espinoza v. Sabol*.<sup>98</sup> Although acknowledging the applicability of the doctrine, the court ultimately chose not to specifically define its contours or application.<sup>99</sup> The court, however, discussed the relevance of considering both the government’s negligence and the need for the defendant to have clean hands in order to receive credit while at liberty.<sup>100</sup> Unlike the Third

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95. *Leggett v. Fleming*, 380 F.3d 232, 234 (5th Cir. 2004) (asserting that delay in the commencement of a sentence does not constitute service of that sentence); *United States v. Barfield*, 396 F.3d 1144, 1145-48 (11th Cir. 2005) (holding that defendant was not entitled to credit for an eight-year delay where defendant’s sentence had not commenced). The Eleventh Circuit relied on past binding precedent from the Fifth Circuit in reaching its decision in *Barfield*. See *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit).

96. *Kiendra v. Hadden*, 763 F.2d 69, 73 (2d Cir. 1985) (finding that the federal sentence began to run on the date ordered even though the appellant was never taken into custody); *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (“[G]overnment is not permitted to delay the expiration of the sentence either by postponing the commencement of the sentence or by releasing the prisoner for a time and the reimprisoning him”); *Clark v. Floyd*, 80 F.3d 371, 373-74 (9th Cir. 1996) (granting credit for time at liberty to a habeas petitioner whose sentence was merely delayed). Compare *Smith v. Swope*, 91 F.2d 260, 261 (9th Cir. 1937) (while defendant was in the custody of the marshal at the time of sentence, he never was actually delivered to a penitentiary to begin service of his sentence), with *Swope*, 91 F.2d at 262-63 (Haney, J., dissenting) (arguing that credit was unavailable because the defendant had never been received by the prison). See also, Chin, *supra* note 78, at 421 (“The key to the doctrine of credit for time at liberty is disobedience of a court order, not interruption of a criminal sentence.”).

97. *Vega v. United States*, 493 F.3d 310, 320 (3rd Cir. 2007).

98. *Espinoza v. Sabol*, 558 F.3d 83 (1st Cir. 2009).

99. *Id.* at 90 (“[W]e need not define the outer reaches of the doctrine.”).

100. *Id.* (“The degree of negligence and, indeed, whether there was intentional error by the government may be highly relevant considerations . . .”).

Circuit's burden-shifting test,<sup>101</sup> the First Circuit requires that the defendant bear the burden of proof under the doctrine.<sup>102</sup>

Assuming that the government was negligent, the court reviewed the defendant's actions that led to his release.<sup>103</sup> In fact, the court's analysis seemed to place the clean hands requirement as the initial threshold analysis for determining whether to award sentence credit. Relying exclusively on the common-law requirement of clean hands,<sup>104</sup> the court held that the defendant was not entitled to credit because his liberty was attributed solely to his escape from his halfway house.<sup>105</sup> According to the court, "A doctrine meant to protect against government abuses of prisoners through cat and mouse games of imprisonment cannot be turned into a game of catch me if you can."<sup>106</sup>

### B. *The Second Circuit*

In *Kiendra v. Hadden*,<sup>107</sup> adhering to the doctrine's core principle that the government is not entitled to delay the expiration of a prisoner's sentence, the Second Circuit credited a defendant for the time period between his date of release from state penitentiary and the time he was finally taken into federal custody to serve his federal sentence.<sup>108</sup>

In *Kiendra*, the district court sentenced the defendant to three years of federal imprisonment slated to start once the defendant was released from state custody.<sup>109</sup> On September 16, 1981, the defendant was released from the Rhode Island Adult Correctional Institution, but the federal government did not assume custody.<sup>110</sup> Approximately one month later, the defendant pled guilty to an unrelated state charge and was sentenced to a four-year prison term to be served in a federal institution.<sup>111</sup> The state sentence was scheduled to run concurrently with his federal sentence.<sup>112</sup> Again, the federal marshals took no action.<sup>113</sup> In fact, no action was taken until February 17, 1984,

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101. *Vega*, 493 F.3d at 319.

102. *Espinoza*, 558 F.3d at 89-90.

103. *Id.* at 90.

104. *Id.* ("At common law, an escaped prisoner could not have received credit for the time he was at large, and there must not have been any contributing fault on his part.") (citing *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930)).

105. *Espinoza*, 558 F.3d at 90 ("But for his escape, the issue would not have arisen.").

106. *Id.*

107. *Kiendra v. Hadden*, 763 F.2d 69 (2d Cir.1985).

108. *Id.* at 73.

109. *Id.* at 70.

110. *Id.*

111. *Id.* at 70-71.

112. *Id.*

113. *Id.* at 71.

when the defendant completed his state sentence and federal marshals took him into custody and later transported him to a federal correctional facility.<sup>114</sup>

Relying on the opinions issued by the Ninth and Tenth Circuits,<sup>115</sup> the Second Circuit held that the defendant was entitled to credit even though he was not placed in federal custody until February 1984.<sup>116</sup> According to the court, a defendant's sentence begins to run on the date the federal court directed at sentencing.<sup>117</sup>

### C. *The Third Circuit*

In *Vega v. United States*,<sup>118</sup> the Third Circuit engaged in a comprehensive survey of courts confronting the issue of the doctrine of credit for time spent erroneously at liberty.<sup>119</sup> After reviewing decisions issued by those courts, the Third Circuit adopted a two-prong test to determine whether the defendant is entitled to credit for time spent at liberty.<sup>120</sup> First, the petitioner's habeas petition must "contain facts that demonstrate that he has been released despite having unserved time remaining on his sentence."<sup>121</sup> Once this prong is satisfied, "[T]he burden shifts to the government to prove either: (1) that there was no negligence on the part of the imprisoning sovereign, or (2) that the prisoner obtained or retained his liberty through his own efforts."<sup>122</sup> If the government fails to establish either of these, the defendant will be granted relief under the doctrine.<sup>123</sup>

The court reasoned that the burden-shifting approach gave effect to the language of the habeas framework.<sup>124</sup> Thus, the test places "the initial burden on the prisoner to show his right to relief, which he does by indicating that his right to serve his sentence continuously, has been denied him."<sup>125</sup> "The test then requires the court to grant the petition unless the respondent government can 'show cause why the

114. *Id.*

115. See *id.* at 72-73 (citing *Smith v. Swope*, 91 F.2d 260, 262 (9th Cir. 1937); *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930)).

116. *Kiendra*, 763 F.2d at 71-73 ("It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty.") (citing *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930)).

117. *Kiendra*, 763 F.2d at 73.

118. *Vega v. United States*, 493 F.3d 310 (3d Cir. 2007).

119. *Id.* at 315-22.

120. *Id.* at 319; see generally Wall, *supra* note 3, at 414-17 (providing an argument in favor of a totality of the circumstances approach, rather than the Third Circuit's two-prong test).

121. *Vega*, 493 F.3d at 319.

122. *Id.*

123. *Id.*

124. *Id.* at 319-20.

125. *Id.* (citing 28 U.S.C. § 2242 (2012)).



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writ should not be granted.’”<sup>126</sup> According to the court, “The burden shifting scheme also places the burden on the party that has greater access to documents tending to prove a lack of governmental negligence or prisoner fault.”<sup>127</sup>

#### D. *The Fifth Circuit*

The Fifth Circuit has declined to apply the doctrine to instances where there is only a delay in the commencement of a prisoner’s sentence.<sup>128</sup> In *Leggett v. Fleming*,<sup>129</sup> the court acknowledged that the Ninth Circuit has held that a defendant is “entitled to a credit against his sentence for time spent erroneously at liberty even though he had not yet begun his federal sentence because he was released through the inadvertence of agents and through no fault of his own.”<sup>130</sup> However, prior Fifth Circuit precedent has held that “a prisoner is not entitled to a credit when there is merely a delay in the execution of one’s sentence.”<sup>131</sup> Ultimately, the Fifth Circuit declined the defendant’s argument to adopt the reasoning of the Ninth Circuit and instead chose to follow its own precedent.<sup>132</sup>

#### E. *The Sixth Circuit*

In *United States v. Croft*,<sup>133</sup> the Sixth Circuit seemingly endorsed the applicability of the doctrine when it relied on the Ninth Circuit’s opinion in *Smith v. Swope*<sup>134</sup> to credit the defendant’s federal sentence.<sup>135</sup> However, the court did not provide any further guidance on the application or scope of the doctrine. In *Croft*, the defendant was always under some form of government custody, whether state or federal.<sup>136</sup> He was not “at liberty” as typically observed in other cases.<sup>137</sup> The court held that the prisoner’s federal sentence began to run from the date of the federal court’s order of commitment regardless of the prisoner first being held in county jail and subsequently transported to a

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126. *Id.* at 320 (quoting 28 U.S.C. § 2243 (2012)).

127. *Id.*

128. *Leggett v. Fleming*, 380 F.3d 232, 234 (5th Cir. 2004).

129. *Id.* at 232.

130. *Id.* at 235 (citing *Clark v. Floyd*, 80 F.3d 371, 372 (9th Cir. 1996)).

131. *Id.* (citing *United States ex rel. Mayer v. Loisel*, 25 F.2d 300, 301 (5th Cir. 1928); *Scott v. United States*, 434 F.2d 11, 23 (5th Cir. 1970)).

132. *Id.*

133. *United States v. Croft*, 450 F.2d 1094 (6th Cir. 1971).

134. *Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937).

135. *Croft*, 450 F.2d at 1099 (pointing to *Smith* as “the authority that guides determination in this case,” finding that the defendant was entitled to credit against his federal sentence for time served when he was erroneously sent to state prison instead of first serving his federal sentence).

136. *Id.*

137. *Id.*

state prison.<sup>138</sup> Thus, this case illustrates the core principle upon which the doctrine rests—the government is not permitted to delay the expiration of a prisoner's sentence.<sup>139</sup>

#### F. *The Seventh Circuit*

In *Dunne v. Keohane*,<sup>140</sup> the Seventh Circuit simply and succinctly stated that when the prisoner is not at fault for his time at liberty under the common law, “The government is not permitted to delay the expiration of the sentence either by postponing the commencement of the sentence or by releasing the prisoner for a time and then reimprisoning him.”<sup>141</sup> Addressing the need for rehabilitation, the Seventh Circuit further explained the core purpose of the doctrine: “The government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the expiration of his debt to society and his reintegration into the free community.”<sup>142</sup>

#### G. *The Eighth Circuit*

In *United States v. Downey*,<sup>143</sup> the Eighth Circuit granted credit to the defendant's federal criminal sentence.<sup>144</sup> Much like the circumstances presented in the Sixth Circuit's *Croft*<sup>145</sup> decision, the defendant in *Downey* sought credit for time spent while he was in custody of the government, and not at “liberty.”<sup>146</sup> The court held that a criminal sentence starts on the date that the defendant is taken into custody.<sup>147</sup> Accordingly, the court granted the defendant credit for time spent in state custody before the commencement of his federal sentence.<sup>148</sup> Like the Sixth Circuit, the Eighth Circuit *Downey* decision illustrates that doctrine's underlying principle—the government is not permitted to delay the expiration of a prisoner's sentence.<sup>149</sup>

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138. *Id.*

139. *Cf. Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994).

140. *Dunne v. Keohane*, 14 F.3d 335 (7th Cir. 1994).

141. *Id.* at 336 (*See, e.g., United States v. Melody*, 863 F.2d 499, 504 (7th Cir. 1988); *Cox v. United States ex rel. Arron*, 551 F.2d 1096, 1099 (7th Cir. 1977); *Shields v. Beto*, 370 F.2d 1003, 1006 (5th Cir. 1967); *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930); *Ex parte Eley*, 130 P. 821 (Okla. Crim. App. 1913); *In re Strickler*, 33 P. 620 (Kan. 1893)).

142. *Id.*

143. *United States v. Downey*, 469 F.2d 1030 (8th Cir. 1972).

144. *Id.* at 1032.

145. *United States v. Croft*, 450 F.2d 1094 (6th Cir. 1971).

146. *Downey*, 469 F.2d at 1031.

147. *Id.* at 1032 (citing 18 U.S.C. § 3568).

148. *Id.*

149. *Cf. Dunne*, 14 F.3d at 336 (7th Cir. 1994).

H. *The Ninth Circuit*

In *Smith v. Swope*,<sup>150</sup> the Ninth Circuit recognized that a delay in the commencement of a prisoner's sentence, whose liberty was the result of government error, should not be borne by the prisoner.<sup>151</sup> In *Swope*, the marshal, charged with transporting the prisoner to a federal correctional institution, failed to do as instructed.<sup>152</sup> When the prisoner was finally brought into federal custody, he filed a writ of habeas corpus contending that he was being unlawfully deprived of his liberty.<sup>153</sup> Agreeing with the prisoner, the Ninth Circuit aptly stated:

The least to which a prisoner is entitled is the execution of the sentence of the court to whose judgment he is duly subject. *If a ministerial officer, such as a marshal, charged with the duty to execute the court's orders, fails to carry out such orders, that failure cannot be charged up against the prisoner.* The prisoner is entitled to serve his time promptly if such is the judgment imposed, and he must be deemed to be serving it from the date he is ordered to serve it and is in the custody of the marshal under the commitment, if, *without his fault*, the marshal neglects to place him in the proper custody. *Any other holding would give the marshal, a ministerial officer, power more arbitrary and capricious than any known in the law.* A prisoner sentenced for one year might thus be required to wait forty under the shadow of his unserved sentence before it pleases the marshal to incarcerate him. Such authority is not even granted to courts of justice, let alone their ministerial officers. *Citation of authority is hardly needed to establish so elementary a proposition.*<sup>154</sup>

The Ninth Circuit further espoused upon the liberty doctrine in *United States v. Martinez*.<sup>155</sup> According to the court:

Under the doctrine of credit for time at liberty, a convicted person is entitled to credit against his sentence for the time he was erroneously at liberty provided there is a showing of simple or mere negligence on behalf of the government and provided the delay in execution of sentence was through no fault of his own.<sup>156</sup>

Unlike the Third and Fifth Circuits, the Ninth Circuit held that negligence by *any* governmental entity is sufficient to allow credit from time spent at liberty.<sup>157</sup>

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150. *Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937).

151. *Id.* at 262.

152. *Id.* at 261.

153. *Id.* at 260-61.

154. *Id.* at 262 (citing *In re Jennings*, 118 F. 479, 481 (C.C.E.D. Mo. 1902); *Albiori v. United States*, 67 F.2d 4, 6 (9th Cir. 1933); *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930)) (emphasis added).

155. *United States v. Martinez*, 837 F.2d 861 (9th Cir. 1988).

156. *Id.* at 865; *see also* *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984).

157. *Compare* *Clark v. Floyd*, 80 F.3d 371, 374 (9th Cir. 1996), *with* *Vega v. United States*, 493 F.3d 310, 320 (3d Cir. 2007), *and* *Leggett v. Fleming*, 380 F.3d 232, 235-36 (5th Cir. 2004).

In 1996, the Ninth Circuit returned to the application of the doctrine to an erroneously released prisoner.<sup>158</sup> In *Clark v. Floyd*,<sup>159</sup> the commencement of the prisoner's sentence was delayed "through the inadvertence of agents of the government."<sup>160</sup> Relying on its opinion in *Smith v. Swope*, the Ninth Circuit held that the prisoner was entitled to credit for time he spent erroneously at liberty even though he had yet to serve any portion of his federal sentence.<sup>161</sup>

### I. *The Tenth Circuit*

The Tenth's Circuit's opinion in *White v. Pearlman*<sup>162</sup> is the seminal case applying the doctrine of credit for time spent at liberty, cited by almost every court addressing the doctrine.<sup>163</sup> In *White*, David Pearlman was sentenced to a five-year term of imprisonment in March 1925.<sup>164</sup> Approximately one year later, Pearlman was informed that his sentence would expire in July 1926.<sup>165</sup> Despite expressing his concern that a mistake had been made, Pearlman was released and successfully re-established himself in society.<sup>166</sup> More than two years later, Pearlman voluntarily surrendered himself to authorities after being advised that he was required to serve the remainder of his sentence.<sup>167</sup> In seeking credit for the time he was at liberty, the district court granted Pearlman's order for a writ of habeas corpus and the warden appealed.<sup>168</sup>

In affirming the district court's order, the Tenth Circuit held that prisoners have some rights, including the right to serve a continuous sentence.<sup>169</sup> The court recognized that "a prisoner should have the chance to re-establish himself and live down his past," and held that "where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of

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158. See *Clark v. Floyd*, 80 F.3d 371 (9th Cir. 1996).

159. *Id.*

160. *Id.* at 374 (internal citation omitted).

161. *Id.*

162. *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930).

163. *Espinoza v. Sabol*, 558 F.3d 83, 88 (1st Cir. 2009); *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937); *Kiendra v. Hadden*, 763 F.2d 69, 72-3 (2d Cir. 1985); *Vega v. United States*, 493 F.3d 310, 315 (3d Cir. 2007); *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994); *Smith v. Swope*, 91 F.2d 260, 262 (9th Cir. 1937); *United States v. Martinez*, 837 F.2d 861, 864 (9th Cir. 1988); *Clark v. Floyd*, 80 F.3d 371, 375 (9th Cir. 1996) (J. Fernandez, dissenting); *Weekes v. Fleming*, 301 F.3d 1175, 1178-80 (10th Cir. 2002); *United States v. Barfield*, 396 F.3d 1144, 1147 n.1 (11th Cir. 2005); *United States v. Merritt*, 478 F. Supp. 804, 806 (D.D.C. 1979).

164. *White*, 42 F.2d at 789.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

parole, that his sentence continues to run while he is at liberty.”<sup>170</sup> If the prisoner procured his release by escape, or violated conditions of parole, no credit should be applied toward the sentence.<sup>171</sup> However, the court chose not to answer the question of whether a prisoner, who knows a mistake is being made and says nothing, is at fault.<sup>172</sup>

### J. *The Eleventh Circuit*

Adhering to binding precedent from the former Fifth Circuit,<sup>173</sup> the Eleventh Circuit held in *United States v. Barfield*<sup>174</sup> that the doctrine does not apply when the commencement of a prisoner’s sentence is *merely delayed*.<sup>175</sup> In support of this conclusion, the court referenced the Fifth Circuit’s *Leggett v. Fleming* decision.<sup>176</sup> The court noted that the Fifth Circuit also relied upon the same prior precedent in reaching the same result.<sup>177</sup>

Appearing in a footnote, the court alluded to the requirement for a defendant to have clean hands, stating that the court’s decision in *Barfield* is “peculiarly appropriate in those cases where the convicted party had himself been instrumental in causing the delay in execution.”<sup>178</sup> Additionally, the court recognized that the Ninth Circuit has applied the doctrine to cases where a defendant’s sentence has been delayed (which was also conspicuously contained in a footnote).<sup>179</sup>

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170. *Id.*

171. *Id.* (citing *Anderson v. Corall*, 263 U.S. 193 (1923)).

172. *White*, 42 F.2d, at 789.

173. In *Bonner v. City of Prichard*, the Eleventh Circuit adopted as binding precedent all decision of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

174. *United States v. Barfield*, 396 F.3d 1144 (11th Cir. 2005); see also *Little v. Holder*, 396 F.3d 1319, 1322 (11th Cir. 2005) (declining to award credit by holding that a mere delay of a federal sentence falls within the holding of *Barfield*).

175. *Barfield*, 396 F.3d at 1147-48 (relying on *Scott v. United States*, 434 F.2d 11, 23 (5th Cir. 1970) (“This Court holds that the mere lapse of time that occurred here [27 months], without petitioner undergoing any actual imprisonment to which he was sentenced . . . does not constitute service of that sentence, and this sentence remains subject to be executed, notwithstanding the delay in executing it.”) and *United States ex rel. Mayer v. Loisel*, 25 F.2d 300, 301 (5th Cir. 1928) (“Mere lapse of time without the appellant undergoing the imprisonment to which she was sentenced did not constitute service of the sentence, which remained subject to be enforced . . .”)).

176. *Id.* at 1148 (citing *Leggett v. Fleming*, 380 F.3d 232 (5th Cir. 2004)).

177. *Id.* (“*Leggett* similarly relied on *Scott* and *Mayer*-precedent binding our Court as well as the Fifth Circuit-in holding prisoners cannot receive credit for time at liberty when their sentences have only been delayed.”)

178. *Id.* at 1147-48 n.3 (quoting *Scott v. United States*, 434 F.2d 11, 23 (5th Cir. 1970)).

179. *Id.* at 1148 n.4 (citing *Clark v. Floyd*, 80 F.3d 371, 373-74 (9th Cir. 1996); *Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937)).

## VI. A RECOMMENDATION TO THE FOURTH CIRCUIT

A. *Considerations of Punishment and Rehabilitation, a Starting Point for Any Court*

First and foremost, a cornerstone of the American criminal justice system is the concept of rehabilitation.<sup>180</sup> According to classical utilitarianism,<sup>181</sup> the justification of punishment depends solely on its consequences.<sup>182</sup> And thus “the purpose of all laws is to maximize the net happiness of society.”<sup>183</sup> Rehabilitation is a non-classical variety of utilitarianism.<sup>184</sup> Proponents of this approach “prefer to use the correctional system to reform the wrongdoer rather than to secure compliance through the fear or ‘bad taste’ of punishment.”<sup>185</sup> While inevitably case specific, methods of rehabilitation may include psychiatric care, addiction therapy, or vocational training.<sup>186</sup>

Arguably more important than its retributive<sup>187</sup> and deterrent<sup>188</sup> purposes, punishment seeks to rehabilitate the defendant so that, if released, the defendant will be a positive and contributing member of society.<sup>189</sup> However, opponents often criticize the need and effectiveness of rehabilitation by pointing to the results of empirical studies.<sup>190</sup> Regardless of the skepticism toward general, widespread rehabilitation efforts in federal correctional institutions, the effectiveness of rehabilitation on a criminal defendant should be considered on a case-by-case basis. The doctrine of credit for time spent erroneously at

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180. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14 (5th ed. 2009).

181. *Id.* (“Utilitarianism is a form of ‘consequentialism.’”).

182. *Id.*

183. *Id.* (citing Jeremy Bentham, *Principles of Penal Law*, in *Bentham’s Works* 396, 402 (J. Bowring ed., 1843)).

184. *Id.* at 15.

185. *Id.*

186. *Id.*

187. The theory of retributive punishment provides that “the wrongdoer should be punished, whether or not it will result in a reduction of crime.” According to a retributivist, “[i]t is morally fitting that an offender should suffer in proportion to [his] desert or culpable wrongdoing.” *Id.* at 16.

188. Utilitarians also emphasize the importance of deterrence, both general and specific. According to this approach, by punishing the defendant, the general public will gain awareness of impermissible behavior and its consequences, and will be deterred from committing like-acts in the future. In the alternative, specific deterrence applies to the individual defendant. Punishment will deter that defendant from committing future crime. See *id.* at 15. Of course, it is possible for one to argue that allowing the government to re-incarcerate a defendant after spending time erroneously at liberty without credit serves as a strong deterrent both generally and specifically. The intimidation and fear or threat of future re-incarceration could perceivably deter both the public and the defendant from committing other crimes.

189. See *id.* 14-15.

190. *Id.* at 21 (citing Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22 (1974)). But see Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentence Reform*, 7 HOFSTRA L. REV. 243 (1979).

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liberty encapsulates the concept of rehabilitation by prohibiting the government from delaying the expiration of a prisoner's sentence.<sup>191</sup>

The U.S. District Court for the District of Columbia's opinion in *United States v. Merritt*<sup>192</sup> exemplifies the importance of rehabilitation in the context of a prisoner at liberty. In *Merritt*, the defendant was released from state custody but was never taken into federal custody as a result of governmental negligence.<sup>193</sup> After his release from state custody, the defendant was erroneously at liberty for three years.<sup>194</sup> During that period, the defendant married, had one natural child and adopted another child who was partially handicapped, became an active member of his local church, and became part owner and vice president of a construction company.<sup>195</sup> The defendant was later arrested on an outstanding federal detainer, and he began serving his federal sentence.<sup>196</sup> Under a number of theories, the defendant sought to either vacate, set aside, or correct his sentence.<sup>197</sup>

In its decision to vacate and set aside the defendant's sentence, the district court recognized and applied the doctrine for time spent at liberty.<sup>198</sup> The court stated:

It is well settled that when a prisoner is released prior to service or expiration of his sentence through no fault or connivance of his own, and the authorities make no attempt over a prolonged period of time to reacquire custody over him, he may be given credit for the time involved, and he will not be required at some later time to serve the remainder of his sentence.<sup>199</sup>

While recognizing the multitude of theoretical bases for reaching this conclusion, the court addressed several factors that must be considered in order to grant a defendant relief, including whether the defen-

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191. See, e.g., *White*, 42 F.2d at 789 ("Certainly a prisoner should have his chance to re-establish himself and live down his past."); *Vega v. United States*, 493 F.3d 310, 318 (3d Cir. 2007) ("A prisoner has a right to . . . resettle . . . without the fear that the government, at some undetermined point in the future will re-incarcerate him."); *Dunne v. Keohane*, 14 F.3d 335 (7th Cir. 1994) ("The government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the expiration of his debt to society and his reintegration into the free community."); *Espinoza v. Sabol*, 558 F.3d 83, 89 (1st Cir. 2009) (citing *White*, 42 F.2d at 789).

192. *United States v. Merritt*, 478 F. Supp. 804 (D.D.C. 1979).

193. *Id.* at 805-06.

194. *Id.* at 806.

195. *Id.*

196. *Id.*

197. *Id.* ("[D]efendant claims that (1) he is entitled to credit towards his federal sentence for the time spent at Patuxent and therefore to release from confinement, (2) in the alternative, since he is still under the supervision of the Patuxent authorities, service of his federal sentence is premature, and (3) service of his federal sentence under the circumstances of this case amounts to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.").

198. *Id.* at 806-08.

199. *Id.* at 806 (citing *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930); *Bailey v. Ciccone*, 420 F. Supp. 344, 347 (W.D. Mo. 1976); *Albort v. United States*, 67 F.2d 4 (9th Cir. 1933)).

dant was at fault for his liberty, the government's inaction amounting to more than simple negligence, and whether "the situation brought about by [the] defendant's release and his re-incarceration [was] *unequivocally inconsistent with fundamental principles of liberty and justice*."<sup>200</sup>

In its assessment of whether the defendant was at fault for the time he spent at liberty, the court held that "[i]t is wholly unreasonable to ascribe fault to th[e] defendant because he did not, after [ ] release, continue to badger the authorities to execute the detainer against him."<sup>201</sup> According to the court, the responsibility for the defendant's liberty rests squarely upon the government.<sup>202</sup>

The district court further described the importance of rehabilitation by recognizing the consequence of requiring the defendant to serve his delayed federal sentence.<sup>203</sup> In *Merritt*, the defendant had reintegrated himself in the community<sup>204</sup> when he was "plucked from a wholly peaceful and productive life."<sup>205</sup> The district court held that "[a]n order requiring service of the defendant's sentence now would needlessly jeopardize his long-term adjustment to society, disrupt both his family and his family life, and destroy his economic base, all for no purpose other than to secure blind obedience to the federal sentence as it was then imposed."<sup>206</sup> For these reasons, the court vacated the sentence and ordered his release.<sup>207</sup>

Much like the defendant discussed above in *Merritt*,<sup>208</sup> Bradford has also successfully reintegrated himself into the community over the past six years. Bradford found work by starting his own towing business and made many positive contributions to both his family and the surrounding community.<sup>209</sup> After six years of these positive contributions, it would serve no purpose other than blind obedience to his 2002 federal sentence to disrupt his family and destroy his economic base in requiring Bradford to serve an eighty-four-month sentence. The defendant has demonstrated exceptional adjustment to society after living erroneously at liberty and re-incarceration would only jeopardize that progress. Considerations of rehabilitation lie at the heart of both punishment and the liberty doctrine.

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200. *Id.* at 807 (internal quotations and citations omitted) (emphasis added).

201. *Id.*

202. *Id.*

203. *Id.* at 808

204. *Id.* at 806.

205. *Id.* at 807 n.8.

206. *Id.* at 808.

207. *Id.* at 808-09.

208. *See supra* Part VI.A.

209. *United States v. Bradford*, 623 F. Supp. 2d 849, 851 (E.D. Mich. 2009).



B. *Reviewing the District Court of South Carolina's Bradford v. Rivera Opinion*

Although the District Court of South Carolina has undoubtedly read the U.S. District Court for the Eastern District of Michigan's opinion in *United States v. Bradford*,<sup>210</sup> it fails to appreciate the thoroughness of that court's research regarding the doctrine of credit for time spent erroneously at liberty.<sup>211</sup>

The Fourth Circuit has never squarely addressed the applicability and scope of the doctrine of credit for time spent erroneously at liberty.<sup>212</sup> Thus, given the lack of binding authority, it is appropriate for the district court to turn to non-binding precedent decided by other circuits to persuade and guide its decision. While the district court claims to have reviewed "the applicable law,"<sup>213</sup> it failed to acknowledge persuasive opinions arising out of several other circuits.<sup>214</sup>

In its opinion, the district court noted that both the Fifth and Eleventh Circuits have held that the doctrine does not entitle a defendant to credit the time spent at liberty when there is only a delay in the commencement of a sentence.<sup>215</sup> Again, it should be noted that the Fifth and Eleventh Circuits relied on the same binding precedent to reach their conclusions.<sup>216</sup> While there may be "two" circuits that have reached the same conclusion, the persuasive value is significantly diminished given the need for the Eleventh Circuit to adhere to former Fifth Circuit precedent.<sup>217</sup>

Unlike the Fifth and Eleventh Circuits, the Second, Seventh, and Ninth Circuits have held otherwise, applying the doctrine to situations

210. Both the magistrate judge's report and recommendation and the district court judge's opinion cite *United States v. Bradford*, 623 F. Supp. 2d 849 (E.D. Mich. 2009). See *Bradford v. Rivera*, No. 9:11-462-RBH-BM, 2011 WL 5827788, at \*1-2 (D. S. C. Oct. 14, 2011); *Bradford v. Rivera*, No. 9:11-cv-00462-RBH, 2011 WL 5827601, at \*1-3 (D.S.C. Nov. 18, 2011).

211. The U.S. District Court for the Eastern District of Michigan, through its own independent research, recognized that there is a "fair amount of case law" about the doctrine. *Bradford*, 623 F. Supp. 2d at 852. The court briefly examined the Third, Fifth, Sixth, Seventh, and Ninth Circuits' approach toward the doctrine, acknowledging the variety of interpretations and application. *Id.* at 852-53 (citing *Vega v. United States*, 493 F.3d 310, 315-22 (3d Cir. 2007); *Leggett v. Fleming*, 380 F.3d 232, 234 (5th Cir. 2004); *United States v. Croft*, 450 F.2d 1094, 1099 (6th Cir. 1971); *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994); *Smith v. Swope*, 91 F.2d 260, 263 (9th Cir. 1937)).

212. The Fourth Circuit exercises appellate jurisdiction over federal district courts in the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

213. *Bradford v. Rivera*, No. 9:11-cv-00462-RBH, 2011 WL 5827601, at \*4 (D.S.C. Nov. 18, 2011).

214. *Id.* at \*1-3.

215. *Id.* at \*4 (citing *United States v. Barfield*, 396 F.3d 1144, 1147-48 (11th Cir. 2005); *Leggett v. Fleming*, 380 F.3d 232, 235 (5th Cir. 2004)).

216. See *United States v. Barfield*, 396 F.3d 1144, 1148 (11th Cir. 2005).

217. See *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit).

where a defendant has not served any portion of his sentence.<sup>218</sup> Each of these circuit opinions was conspicuously absent from the district court's review of "the applicable law."<sup>219</sup> Also absent was any explanation as to why the Fifth and Eleventh Circuits' rule is more persuasive than the majority rule in other circuits. Contrary to the court's result-oriented decision to dismiss Bradford's case with prejudice, it is essential that the Fourth Circuit acknowledge that other circuits have applied the doctrine where the commencement of a defendant's sentence has been delayed.

Furthermore, the district court held that Bradford's erroneous liberty was attributed, at least in part, to his own fault.<sup>220</sup> The court held that the delay in designating a correctional institution resulted from Bradford's medical condition (his cancer diagnosis).<sup>221</sup> The court also mentioned that Bradford did not file a motion to self-surrender or take any action to self-surrender.<sup>222</sup> Accordingly, the court concluded that Bradford was not entitled to any credit for time spent erroneously at liberty.<sup>223</sup>

The court's reliance on Bradford's failure to take affirmative steps to ensure his own incarceration stands in stark contrast to the common-law requirement of a defendant's clean hands. As stated by both the Seventh and Tenth Circuits, a defendant is "at fault" if he procured his own release or delayed the commencement of the sentence.<sup>224</sup> The Tenth Circuit held that a defendant is not entitled to credit if he escaped from custody, or violated conditions of parole.<sup>225</sup> The Seventh Circuit also used the example of a prison escapee as a defendant at fault.<sup>226</sup> While a prisoner may not be entitled to credit if he took affirmative acts to procure his liberty, the common law does

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218. See *Kiendra v. Hadden*, 763 F.2d 69, 73 (2d Cir. 1985) (finding federal sentence began to run on date ordered even though appellant was never taken into custody); *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (stating that "government is not permitted to delay the expiration of the sentence either by postponing the commencement of the sentence or by releasing the prisoner for a time and the reimprisoning him"); *Clark v. Floyd*, 80 F.3d 371, 373-74 (9th Cir. 1996) (granting credit for time at liberty to a habeas petitioner whose sentence was merely delayed).

219. *Bradford v. Rivera*, No. 9:11-cv-00462-RBH, 2011 WL 5827601, at \*4 (D.S.C. Nov. 18, 2011).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *White*, 42 F.2d at 789; *Dunne*, 14 F.3d at 336.

225. *White*, 42 F.2d at 789.

226. *Dunne*, 14 F.3d at 336. See also *Espinoza v. Sabol*, 558 F.3d 83, 90 (1st Cir. 2009) (declining to award credit to defendant whose liberty was the result of his escape from a halfway house).

not require a defendant to take affirmative acts to correct a government mistake.<sup>227</sup>

In this case, while it can hardly be said that one can affirmatively seek to get brain cancer in order to delay the commencement of a criminal sentence, Bradford could arguably be attributed to the initial six-month period of liberty given the need for brain cancer treatment (even though it was the sentencing court that deferred the reporting date).<sup>228</sup> But once this time period was over, any time spent at liberty is solely attributed to the government's failure to designate a facility. For more than six years, the government took no action to incarcerate Bradford.<sup>229</sup> While he did not take any affirmative action to ensure his incarceration, Bradford also took no affirmative action to procure his release or continued liberty. Bradford did not escape from federal custody; he did not hide from or evade the government; he did not violate any bond conditions.<sup>230</sup> In fact, Bradford kept in regular contact with the government through his Pretrial Services Officer.<sup>231</sup>

Despite the district court's contention that Bradford is not entitled to credit because he did not self-surrender, the common law does not require a defendant to bear the burden of ensuring that his criminal sentence is properly executed amidst blatant government negligence.<sup>232</sup> A defendant is not responsible for doing the government's work.<sup>233</sup>

### C. *A Recommendation to the Fourth Circuit on How to Protect Fundamental Principles of Liberty and Justice*

The government is not permitted to delay the expiration of a defendant's debt to society and his reintegration into the free community.<sup>234</sup> In keeping with this core principle of the doctrine and principles of liberty and fundamental fairness, I recommend that the Fourth Circuit adopt the following two-part test in determining whether to grant a defendant relief under the doctrine of credit for time spent erroneously at liberty.<sup>235</sup> While similar to the two-part test used by the Third

227. See *White*, 42 F.2d at 789.

228. See *United States v. Bradford*, 623 F. Supp. 2d 849, 850 (E.D. Mich. 2009).

229. *Id.* at 850-51.

230. See *id.* at 852.

231. See *id.*

232. Compare *Bradford v. Rivera*, No. 9:11-cv-00462-RBH, 2011 WL 5827601, at \*4 (D.S.C. Nov. 18, 2011) with *White*, 42 F.2d at 789 and *Dunne*, 14 F.3d at 336.

233. See *Smith v. Swope*, 91 F.2d 260, 262 (9th Cir. 1937) ("If a ministerial officer, such as a marshal, charged with the duty to execute the court's orders, fails to carry out such orders, that failure cannot be charged up against the prisoner.").

234. *Dunne*, 14 F.3d at 336.

235. Some commentators believe that a totality of the circumstances approach would be more appropriate. See *Wall*, *supra* note 3, at 398-99.

Circuit, this recommendation also incorporates other aspects from opinions out of the First, Second, Seventh, Ninth, and Tenth Circuits.

First, as a threshold inquiry, the defendant must establish that he was not at fault for his time at liberty; he must have “cleans hands before he may receive credit for time at liberty.”<sup>236</sup> Simple notions of fairness alone dictate that a prisoner who procures his own liberty is not entitled to credit the time spent out of custody to his federal sentence.<sup>237</sup> In fact, when a prisoner is at fault, it can hardly be said that his liberty was *erroneous*. But what exactly constitutes fault?

Other circuits have overwhelmingly held that a defendant is considered at fault when he takes affirmative steps either to gain his liberty by means of escape,<sup>238</sup> or delays the commencement of his sentence by evading the government.<sup>239</sup> However, a defendant should not have to take any and all affirmative steps to ensure that the government properly executes his sentence.<sup>240</sup>

Second, the defendant must show that the delay in the execution of his sentence was the result of simple or mere government negligence.<sup>241</sup> Nearly every court that has considered the applicability of the doctrine requires that “the government’s actions in releasing or failing to incarcerate the prisoner be negligent.”<sup>242</sup> This article’s recommendation is in accord with the Third and Ninth Circuits to the extent that simple or mere negligence, as opposed to gross negligence, is the appropriate standard.<sup>243</sup> Additionally, like the Ninth Circuit, the defendant satisfies this prong by showing the negligence of *any*

236. *Vega v. United States*, 492 F.3d 310, 322 (3d Cir. 2007).

237. *See, e.g., id.*; *White*, 42 F.2d at 789 (10th Cir. 1930).

238. *See, e.g., White*, 42 F.2d at 789; *Espinoza v. Sabol*, 558 F.3d 83, 90 (1st Cir. 2009) (declining to award credit to defendant whose liberty was the result of his escape from a halfway house).

239. *Vega*, 493 F.3d at 322 (“All courts agree that if a prisoner has actively effectuated his release, for example by escaping, or actively thwarted governmental attempts to recover him, he may not receive credit for time at liberty.”); *see also Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994).

240. *See, e.g., Vega*, 493 F.3d at 322 (holding that a defendant is not at fault if he “did not take affirmative steps to effectuate his own sentence.”); *Smith*, 91 F.2d at 262.

241. *See, e.g., Vega*, 493 F.3d at 319; *Clark v. Floyd*, 80 F.3d 371, 374 (9th Cir. 1996); *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988); *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984).

242. *Vega*, 493 F.3d at 320 (citing *Leggett v. Fleming*, 380 F.3d 232, 235-36 (5th Cir. 2004); *Green v. Christiansen*, 732 F.2d 1397, 1400; *United States v. Croft*, 450 F.2d 1094, 1097 (6th Cir. 1971); *Gillman v. Saxby*, 392 F. Supp. 1070, 1073 (D. Haw. 1975); *Derrer v. Anthony*, 463 S.E.2d 690, 693 (Ga. 1995)).

243. *Id.* (citing *Green v. Christiansen*, 732 F.2d, 1397, 1399-1401 (9th Cir. 1984) (granting prisoner credit for time at liberty even though governmental actions were not so egregious as to constitute gross negligence thereby allowing waiver)); *Clark v. Floyd*, 837 F.2d 861, 865 (9th Cir. 1988) (“Under the doctrine of credit for time at liberty, a convicted person is entitled to credit against his sentence for the time he was erroneously at liberty provided there is a showing of simple or mere negligence on behalf of the government and provided that the delay in execution of sentence was through no fault of his own.”).

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governmental entity.<sup>244</sup> Accordingly, credit under the doctrine should be awarded if a defendant's liberty resulted "through the inadvertence of agents of the government and through no fault of his own."<sup>245</sup> Determining whether or not the government was negligent and to what degree are questions of fact for which a district court is better suited to answer.<sup>246</sup>

This recommended two-part test places the burden on the defendant to establish both prongs. Unlike the Third Circuit's burden-shifting test,<sup>247</sup> this article agrees with the First Circuit that the framework of habeas corpus places the burden of proof on the defendant.<sup>248</sup> Under 28 U.S.C. § 2241,<sup>249</sup> a habeas corpus petition is appropriate when a prisoner challenges the computation or execution of a federal sentence<sup>250</sup> and has exhausted the administrative remedy process.<sup>251</sup> As a defendant asserting a right to credit upon the grounds that the sentence imposed is in violation of the law, "[t]he burden of proof of showing deprivation of rights leading to unlawful detention is on the petitioner."<sup>252</sup>

Thus, if a defendant shows that he was not at fault and government negligence delayed the expiration of his sentence, credit shall be awarded for time spent erroneously at liberty.

#### D. *Applying the Recommendation: Returning to Mr. Bradford*

Under the proposed recommendation, to receive credit for the approximate six years spent at liberty, Bradford bears the burden of showing that he was not at fault, and his liberty was the result of gov-

244. *Clark v. Floyd*, 80 F.3d 371, 374 (9th Cir. 1996). *But see Vega*, 493 F.3d at 320-21 (holding that the fault must lie with the imprisoning authority).

245. *Id.*

246. *See Vega*, 493 F.3d at 322.

247. Once the defendant shows that he was prematurely released or has failed to serve his complete sentence, the burden shifts to the government to show either that it was not negligent or the defendant did not have clean hands. *Id.* at 319. "The burden shifting scheme also places the burden on the party that has greater access to documents tending to prove a lack of governmental negligence or prisoner fault." *Id.* at 320.

248. *Espinoza v. Sabol*, 558 F.3d 83, 89-90 (1st Cir. 2009).

249. 28 U.S.C. § 2241 (2008) (providing that in relevant part, "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

250. *See United States v. Little*, 392 F.3d 671, 679 (4th Cir. 2004) (citing *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997) (en banc)).

251. *See United States v. Bradford*, 623 F. Supp. 2d 849, 854-55 (E.D. Mich. 2009) (holding that if there is statutory authority for awarding defendant credit toward his sentence, he must first seek relief from the BOP and exhaust any available administrative remedies before seeking judicial review of the BOP's determination on this point) (citing *United States v. Wilson*, 503 U.S. 329, 334-36 (1992)).

252. *Espinoza*, 558 F.3d at 89-90 (citing *Walker v. Johnston*, 312 U.S. 275, 286 (1941); *Waddington v. Sarausad*, 555 U.S. 179, 189-90 (2009); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *Bader v. Warden*, 488 F.3d 483, 488 (1st Cir. 2007)).

ernment negligence. Turning to this article's recommended test, we must first determine whether or not Bradford has clean hands. As previously mentioned, Bradford cannot be considered at fault for his liberty.<sup>253</sup> While the deferred sentence for six months<sup>254</sup> could arguably be attributed to Bradford's need for brain cancer treatment, the remaining time at liberty was not his fault. For more than six years, the government took no action to incarcerate Bradford.<sup>255</sup> While he did not take any affirmative action to ensure his incarceration, Bradford also took no affirmative action to procure his release or continued liberty. Bradford neither escaped from federal custody, nor evaded the government's efforts to re-incarcerate him. In fact, Bradford kept in regular contact with the government through his Pretrial Services Officer and remained compliant with all bond conditions.<sup>256</sup>

Since the first prong has been satisfied, Bradford must now show that the delay in the execution of his sentence was the result of simple or mere governmental negligence. Here, the length of time in designating a federal correctional facility alone weighs heavily in favor of simple or mere negligence on the government's part. It took more than six years for the government to designate a facility in South Carolina to which Bradford should report.<sup>257</sup> At a minimum, that Bradford also kept in regular contact with the government during this time would suggest negligence on the part of the government. Given that Bradford has satisfied both prongs of the recommended test, he should be entitled to the approximately six years he spent erroneously at liberty.

## VII. CONCLUSION

*"No one talks more passionately about his rights than he who in the depths of his soul doubts whether he has any. By enlisting passion on his side he wants to stifle his reason and its doubts: thus he will acquire a good conscience and with it success among his fellow men."*

– Friedrich Nietzsche<sup>258</sup>

Our Constitution prohibits the government from depriving any person of liberty without due process of law.<sup>259</sup> When the government's negligent acts significantly impede upon one's liberty, there must be an avenue to redress such errors, even in the rarest of occasions.

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253. See *supra* Part VI.B.

254. *United States v. Bradford*, 623 F. Supp. 2d 849, 850 (E.D. Mich. 2009).

255. *Id.* at 850-51.

256. See *id.* at 852.

257. *Id.* at 850-51.

258. FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN* 191 (R.J. Hollingdale trans., 1996).

259. See U.S. CONST. amend. V, XIV.

Courts, including the Fourth Circuit, have roundly rejected constitutional due process claims of erroneously released prisoners.<sup>260</sup> And since the Sentencing Reform Act of 1984 abolished parole, defendants may receive credit only in carefully circumscribed situations, such as their good behavior while incarcerated.<sup>261</sup> Given the lack of legal avenues to challenge one's federal criminal sentence, the doctrine of credit for time spent erroneously at liberty ensures that the government cannot delay the expiration of a defendant's sentence by failing to incarcerate the defendant.

When courts fail to recognize the doctrine, erroneously released prisoners who have successfully rehabilitated themselves into society must continually suffer under the auspice that the government may one day require re-incarceration for the service of an unfulfilled sentence. If we do not afford even the avenue to challenge the government's intrusion upon our liberty, our Union will never achieve perfection.

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260. See *Hawkins v. Freeman*, 195 F.3d 732, 738-46 (4th Cir. 1999)

261. 18 U.S.C. § 3624(b) (allowing credit toward the service of a sentence for satisfactory behavior).