

24-5222
USAP8 No: 23-2620

IN THE
SUPREME COURT OF THE UNITED STATES

Darrell D. Smith,
Petitioner,

FILED

JUN 21 2024

OFFICE OF THE CLERK
SUPREME COURT, U.S.

v.

B. Eischen, Warden
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted By:

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ORIGINAL

Questions Presented

1. "Imposed Term"

Whether "imposed term" used in 18 §3624(g), defining the application of FTCs (First Step Time Credits), has the same credit application meaning as "imposed term" used to guide the application of GTCs (Good Time Credits) as Congress amended into the First Step Act in 18 USC §3624(A)(b)(1)(i), converting "term of imprisonment" to "imposed term" for GTCs?

2. "Liberty Interest"

Whether FTCs are equal to GTCs in "enjoying" a "liberty interest?"

3. "Equal Protection"

Whether the BOP (Bureau of Prisons) is violating an inmate's right to "equal protection" by awarding FTC (Credits) "imputed as earned" to inmates serving 36-month or less sentences, but denying the same "imputation of FTCs (credits) earned on prerelease custody to inmates serving in excess of 36-month sentences?

4. "FTC Earnings"

Does the term "FTC earnings" (18 USC §3632(d)(4) "shall earn") include both (a) real-time earnings ("time served") and (b) "imputed earnings" (projected FTCs earned on prerelease custody and supervised release) in the same manner as "GTC earnings" are computed, applied and awarded, i.e., "up-front?"

Parties to the Proceeding

Petitioner is Darrell D. Smith, an inmate at the Federal Prison Camp located in Duluth, Minnesota.

Respondent is the Warden of Duluth Federal Prison Camp, B. Eischen, being represented by Counsel for the Bureau of Prisons.

Related Proceedings

Initial §2241 filing was in Minnesota, case number 22-cv-0174-NEB, Minnesota District Court (2023).

Smith appealed the denial of his §2241 Habeas Corpus to the Eighth Circuit Court of Appeals, case number 23-2620, citing multiple District Court disagreements on how the FTCs should be computed, applied and when they should be awarded. The Eighth Circuit ruled they would "consider the merits of Smith's" updated arguments, arguments that changed because the BOP kept changing their First Step Act credit (FTC) computation and application system. However, the Eight Circuit did not answer a single disputed FTC statutory questions and instead, issued a single sentence ruling, "The [BOP] is correct in its application [of FTCs]." This ruling did not address the BOP's "dual-FTC application" system, one given to inmates serving 36-months, and another to inmates serving greater than 36-months. The BOP uses a "Chevron Deference" interpretation of 18 USC §3624(g)(3) stating inmates are due up to 365-FTC days, but all FTCs beyond that are "conditions of confinement." Not all district courts in the Eighth Circuit (Kansas) agree with this "Chevron Deference" claim and interpretation by the Minnesota court. The **conflict between district courts** results in inmates in Minnesota spending more time behind bars than other districts.

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Exhibit 1

This shows a copy of the FSA Handbook issued to all inmates November 18, 2023 over the BOP's "Trulinks" web system. On page 10 of this Handbook it shows that FTC credits are being "issued up-front" over the **entire IMPOSED TERM**, even as BOP Policy 5410.01 states **should be done for all inmates**, but is not being done for inmates with sentences in excess of 36-months. The BOP selectively defines "earned" as FTCs "earned" **only behind bars** for those inmates serving in excess of 36-months. The BOP's "newest" interpretation of the First Step Act is that inmates can only receive up to 365-FTCs on prerelease custody, thus, the discrimination against inmates serving sentences in excess of 36-months (over three years an inmate is expected to earn about 365-FTCs).....5,8

Exhibit 2

This Exhibit shows the discrimination relative to "percentage time served" for inmates with varying sentence lengths (Row 10). It also shows that by denying inmates FTC credits while on prerelease custody (being imputed as earned prior to going to prerelease), the Congressional mandated "15-FTC days" per 30-day incarceration period drops to less than 10 days depending on the sentence length (Rows 12 and 24).....3

Exhibit 3

This is a June 2024 "Liberator" article published by Aleph entitled "**Why Punishing People in Jail and Prison Isn't Working.**" The article cites a 2021 study wherein 116 prison studies revealed that (a) the longer the sentence (b) the greater the likelihood of recidivism. Long sentences do not yield fewer criminals - they contribute to greater criminality, defeating the purpose of the First Step Act (a) to decrease recidivism and (b) lower costs associated with prison....22

Exhibit 4

A copy of news letter from attorney Derek Gilna where he states a recent prison study showed that for every incarcerated individual, 20 family members, and relatives, are negatively affected.....(xviii)

Exhibit 5

Copy of BOP's **mandatory employment requirement** for all inmates - **mandatory employment = "mandatory issuance of FTCs = "liberty interest."**17

Exhibit 6

Copies of the Eighth Circuit's Orders stating they would "consider the merits" of Smith's updated FTC arguments, when, in fact, they did not consider a single "updated argument" (arguments updated because the BOP kept changing their FTC application system).....5

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Exhibit 8

Three charts showing detail of "time served" models versus "up-front" FTC applications: (1) **Chart 1** - Smith's 175-Month "Up-Front" model with dates, (2) **Chart 2** - Smith's 175-Month "Time Served" model with dates, (3) **Chart 3** - 36-Month "Up-Front" detailed model, as FTCs should be applied.....8,9

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Introduction

When BOP Director Collette Peters visited Duluth Prison Camp in May 2023, she told both staff and inmates alike that "FTCs would be counted in the same manner as GTCs." This meant that, like GTCs, FTCs would be issued, using the BOP's phrase, "up-front." GTCs were not always issued "up-front." Prior to the First Step Act, the BOP applied GTCs **only while an inmate was "behind bars,"** but not on supervised release. Thus, prior to the First Step Act, someone serving a 10-year sentence would receive 470 GTCs, but, nothing on supervised release, despite the fact that the Supreme Court ruled that "supervised release" was a form of custody.¹ Following the passage of the First Step Act, GTCs were counted "over the entire sentence." Thus, the 10-year sentenced inmate would receive 540 GTCs (54 GTC days per year x 10 years = 540). The reason the BOP made this change is because, in the First Step Act, Congress amended 18 USC §3624(A)(b)(1)(i), that concerned how GTCs were counted, to "**sentence IMPOSED by the court,**" from its prior rendering "term of imprisonment." Over the years courts had used a "Chevron Deference" to rule the BOP had the authority to rule that GTCs were "only earned while an inmate was behind bars."² When Congress passed the First Step Act, they adopted the **same statutory phraseology** as GTCs when computing FTCs, i.e., 18 USC §3624(g), FTCs "**[shall be applied over]...the remainder of the IMPOSED term.**" The BOP wrote policies, (1) the "Final Rule," issued January 22, 2022, (2) BOP Policy 5410.01 issued November 18, 2022, and (3) FSA Handbook issued November 18, 2023, which flatly stated that FTCs would be earned, or awarded, (1) behind bars, (2) on prerelease custody and supervised release, less GTCs, or earned over "the remainder of **IMPOSED term.**" However, when it came time to implement the actual "FTC award

1. Jones v. Cunningham 371 F.3d 236, 9 L.Ed.2d 283, 83 S.Ct. No. 77 (1963) ("in addition to physical imprisonment there are other restraints...")
2. White v. Scibana, LEXIS 24813 (90, No. 04-2410, 7th Cir (2004))

system, the BOP adopted **two separate FTC application system** depending on the length of one's sentence:

1. **36-Months or Less:** Inmates serving 36-months, or less, sentences were issued FTCs "over their entire sentence, less GTCs", or over the "remainder of the **IMPOSED term**" (18 USC §3624(g)). This included FTCs while serving time behind bars, and FTCs "imputed as earned" prior to qualifying for prerelease custody, but awarded prior to actually going on such custody (called the "**Up-Front**" Model);
2. **Greater Than 36-Months:** Inmates serving greater than 36-months were awarded FTCs up to 365-Days (approximately what an inmate would earn over a 36-month sentence), for "time served," but **not** FTCs imputed as earned on prerelease custody (the "**Time-Served**" Model);
The petitioner can only assume they engineered this "split system" because inmates, like Smith, with long sentences, **spend about half** their sentence on home confinement and prerelease custody, so this "365-FTC" day cut-off point was convenient but it **was not consistent with statute**. Specifically, in 18 USC §3624(g)(2)(A)(iv), Congress adopted a "**NO-FTC-EARN-TIME-LIMIT**" as to how many earned FTCs could be applied to prerelease. The court in Minnesota has allowed the BOP to use a **Chevron Deference** argument saying inmates get "up-to 365-FTCs" applied to supervised release, but all FTCs beyond this point are "conditions of confinement,"³ and under 18 USC §3621(b) the BOP has "complete discretion over conditions of confinement."

This "split-FTC application system" creates discrimination in percentage time spent behind bars, and the following statutory problems:

1. **Imposed Term:** Either "**IMPOSED term**" as applied to GTCs means the same for FTCs, or it doesn't. It is the same term, thus, one would
3. See Brown Jr. v. Kallis, LEXIX 92674, No. 21-cv-920 (PJS/ECW) D. of Minn. (2021), and initial ruling by Judge Brisbois in Fortner v. Eischen, Case No. 24-cv-1496 (JRT/LIB), D. of Minn. (2024).

think they should have (a) equal application, (b) equal liberty interest, (c) equal application and protection under the law, and (d) the definition of earnings would be the same overall. On paper BOP FTC policies look agreeable, **BUT IN APPLYING "IMPOSED term"** to BOP computation systems it comes out quite different. For example, because the BOP is using the "up-front" FTC-credit model for 36-month sentenced individuals or less, they spend about 46% of their time behind bars, the remainder, up to 85% (18 USC §3624(g)(2)(A)(iv)) on prerelease custody. Inmates like Smith only get the "time served" FTC application model and spend up to 70% of their time behind bars. Is this what Congress intended when they adopted **"IMPOSED term"** for both GTCs and FTCs? To justify this split-FTC-system, the BOP quoted 18 USC §3621(b) as giving them complete discretion over FTCs beyond 365 days. However, §3621(b) has limitations that defy this "Deference."

2. Liberty Interest: The Minnesota court allowed the BOP to use their "Chevron Deference" to rule that FTCs beyond 365-days did not enjoy a "liberty interest," unlike GTCs all of which had "liberty protections." They ruled the BOP had "complete discretion" beyond 365-FTCs. Courts in California, New Hampshire, Washington, D.C. and, now Kansas,⁴ ruled that the BOP **did not have complete discretion over FTCs.** These courts ruled that inmates had a "liberty interest" in the **vesting** of FTCs when the FTCs equalled the "remainder of the **IMPOSED term.**" Smith argues that if "vesting" has a liberty interest, then computation of FTCs should also have a liberty interest;

3. Equal Protection: As stated, with a "split-FTC application system" inmates like Smith spend 70% of their time behind bars, whereas those inmates serving less than 36-months get all their FTC credits "up-front" and spend 46% of their time behind bars. This is discrim-

4. *Woodley v. Warden*. LEXIS 87521, Case No. 24-3053-JWL, D. of Kansas (May 2024). Woodley didn't mention "liberty interest," but courts in California and Maryland did.

atory. No recidivistic study, or FSA statute, supports such an interpretation. Inmates with longer sentences spend statistically significant more time behind bars;

4. **Earnings:** GTCs include both (a) "time served" credits and (b) credits "imputed as earned" on supervised release, applied to lower a sentence prior to going on supervised release. Defining "earnings" for FTCs should be the same.

Smith argues that:

1. **"IMPOSED term:"** Both GTCs and FTCs are computed against "**IMPOSED term.**" The BOP should not be allowed a Chevron Deference to interpret "**IMPOSED term**" to mean the "**entire sentence**" for GTCs, but only "**time served**" for FTCs;
2. **Liberty Interest:** The Minnesota court uses 18 USC §3621(b) as their basis for awarding the BOP "**complete discretion**" over FTCs beyond 365-days by claiming, unlike GTCs, FTCs **do not enjoy a liberty interest.** Courts in California and Maryland rule differently. Since GTCs and FTCs are the same in nearly every respect (pages 14-15 comparative notes), then both should equally enjoy a **liberty interest:**
3. **Equal Protection:** All inmates should spend nearly the same percentage time behind bars reference applied FTCs. A dual FTC application system defeats the FSA's purpose, and, in fact, no recidivistic study shows that recidivism decreases relative to more time behind bars - **the opposite is true;**⁵
4. **Earnings:** Loper Bright Enterprises v. Rainmondo, S. Ct. Case No. 22-451 (June 2024), dismantled the "Chevron Deference." Since 18 USC §3624(A)(b)(1)(i), GTC applications, and 18 USC §3624(g), defining FTC applications use the same "**IMPOSED term**" credit application language, all "**credit earnings**" should be **defined with credits given on (a) time served and (b) imputed as earned on prerelease.**
5. See Exhibit 3, "Why Punishing People...In Prison Isn't Working" Aleph publication, Liberator article, June 2024 issue.

Opinions Below

Being a federal inmate with limited access to published Court opinions, Smith has no knowledge of whether Court decisions made in his case(s) are published or unpublished.

Jurisdictional Statement

Jurisdiction of the District Court of Minnesota is based on 18 USC §3621. The Court's jurisdiction is based on 28 USC §1291 which provides for jurisdiction over a final judgment from the United States Appellate Court. Final Judgement was entered May 14, 2024, refusal to hear Smith's case "En Banc" for petition being "overlength." The Supreme Court of the United States has authority to review a sentence imposed under U.S. Sentencing Guidelines pursuant to 18 USC §3742.

Constitutional and Statutory Provisions Involved

"Imposed Term:" (For GTCs)

18 USC §3624(A)(b)(1)(i) - "[GTCs are to be applied] up to 54 days each year of the prisoner's sentence **IMPOSED** by the court..."

"Imposed Term:" (For FTCs)

[FTCs are to be applied] in an amount equal to the remainder of the prisoner's **IMPOSED TERM** (that is, the "imposed term" less GTCs)

14th Amendment to the Constitution

"...nor shall any State deprive any person of life, **liberty**, or property without due process of law; nor deny to any person within its jurisdiction the **equal protection of the law...**"

With the BOP developing a "dual FTC application" system, depending on sentence length, they justify this split claiming GTCs enjoy a **"liberty interest"**, and FTCs **do not**, and by this justification create a claim for **equal protection** for inmates serving sentences beyond 36-months up to 70% of their time behind bars, and those with sentences less than 36-months 45% to 48% of their time behind bars.

Courts in California, Maryland, Hawaii, Washington, New Hampshire and D.C. **disagree** with the BOP relative to (1) "liberty interest", (2) discretion, (3) when FTCs begin, whether at sentencing or upon arrival at a BOP facility, (4) or whether FTCs, like GTCs, should be applied over the **"imposed term"** (entire sentence for GTCs and "remainder of the **imposed term** for FTCs), that is, the **"imposed term"** less GTCs).

Definitions

"Up-Front" FTC Application System - Refers to FTCs that are calculated over the **"entire sentence"** ("remainder of **IMPOSED** term, less GTCs), including FTCs **"imputed"** as earned on prerelease custody and supervised release, being credited to the inmate **prior** to qualifying for prerelease custody. Without such counting of FTCs, inmates are **"charged twice"** for FTC losses if **"behavioral failure"** occurs while on prerelease custody or supervised release: (1) FTCs charged for time served behind bars, and (2) FTCs charged while on prerelease custody. The inmate, however, was not awarded FTCs while on prerelease custody, equalling a **"double charge."**

"Time Served" FTC Application System - Credits FTCs only while behind bars, but not while on prerelease custody or supervised release, even though inmates are required under 18 USC §3624(g)(2)(A)(ii)(bb) to continue programming while on prerelease custody or supervised release.

Statement of the Case

District courts in California, Maryland, Hawaii, New Hampshire Washington, and now, Kansas, have collectively ruled that the BOP does **NOT have discretion** over how FTCs are added, and applied to "vest" once earned FTCs equal the "remainder of the **IMPOSED term**" (18 USC §3624(g)). They justify this position by quoting 18 USC §3632(d)(4)(A), 18 USC §3632(d)(4)(C), and 18 USC §3624(c)(2), all of which, tell the BOP that they "shall issue," "shall apply," and "shall place prisoners on home confinement," once FTCs earned equal the "remainder of the **IMPOSED term**." The district court in Minnesota **rules the opposite**, saying the BOP **DOES have discretion** over how FTCs are earned and applied beyond 365-FTC days (18 USC §3624(g)(3)), citing 18 USC §3621(b) as giving the BOP **complete authority** over FTCs relative to "conditions confinement," and any FTC issued beyond 365-FTC days amounts to "a condition of confinement" **claiming a "Chevron Deference."**

These contradictory rulings create the following statutory-interpretation and FTC equal protection claims:

1. **Imposed Term:** To meet the Congressional intent of "shall apply" FTCs, courts outside Minnesota define "remainder of the **IMPOSED term**" to mean "FTCs earned over the entire sentence less GTCs." Ruling a "Chevron Deference," the Minnesota court allows the BOP to define "remainder of **IMPOSED term**" in their own peculiar way, developing a dual-FTC application system depending on whether an inmate serves less or greater than 36-months. Those serving less than 36-months months get their FTCs "up-front," in the same manner as GTCs, over the entire sentence, less GTCs, spending 46% time **behind bars**, the rest on prerelease custody and/or supervised release. Inmates with sentences greater than 36-months receive FTC credits **only while behind bars**, but receive credit for no FTCs earned while on prerelease

custody and/or supervised release. Inmates like Smith, serving a 175-month sentence spend up to 70% of their time behind bars. With Minnesota court allowance, the BOP justifies this dual-FTC application system by stating that the BOP has no discretion up to 365-FTC days (18 USC §3624(g)(3)), but all FTCs earned beyond this 365-FTC days are "conditions of confinement," and the BOP, by decided case law, has discretion over "conditions of confinement." Because of the discrepancy as to how "remainder of **IMPOSED** term" is defined, inmates in California, Hawaii, New Hampshire, Washington, and, now Kansas prisons, **spend substantially less time behind bars**, than inmates in prisons located in Minnesota;

2. **Liberty Interest:** The district Court in Minnesota further justifies this "split FTC-application system" by claiming, that unlike GTCs, FTCs **do not have a liberty interest**. Without a "liberty interest" gain, loss, or award of FTC credits are subjective, and the BOP can apply FTCs, as they see fit, per inmate, discriminating reference the length of an inmate's sentence. Distrct courts in California, Maryland, Hawaii, New Hampshire, Washington, and now, Kansas, have ruled that FTCs **do enjoy a liberty interest in vesting**, that is, once earned FTC credits equal "the remainder of the **IMPOSED** term," a "liberty interest" for inmates is generated. Smith argues here that if "vesting" is a "liberty interest," then the FTC-accumulation formula that gets an inmate to vesting, must also be "protected" and this must apply to prisons in Minnesota and everywhere;
3. **Equal Protection:** Because of the BOP's dual-FTC application system, inmates with 36-month sentences or less spend about 46% of their time behind bars, receiving all due FTC credits "up-front," but, inmates like Smith spend 70% of their time behind bars, receiving

no FTC credits "up-front" for prerelease custody and/or supervised release. Smith argues there should be equal FTC application for all;

4. **"Earning:"** When GTCs are applied "over the entire sentence", inmates continue to earn GTCs while on supervised release - with such GTCs applied to the inmate's sentence **before** he actually goes on supervised release. This means that "earning" for GTCs has a dual-credit definition: (a) GTCs earned while behind bars and (b) GTCs assumed, or projected to be earned while on supervised release, but, applied to lower an inmate's sentence before an inmate actually goes on supervised release. The BOP gives this "up-front" application of FTCs to inmates serving 36-months or less, but not to inmates serving greater than 36-months. They use this "36-month" cut-off because the court in Minnesota allows the BOP this "Chevron Deference" that the BOP has no discretion regarding FTCs up to 365-FTC days. Inmates serving 36-month sentences earn "about" 365-FTCs during the first three year term, and spend about 46% of this time (428 days of a 933-GTC adjusted sentence) behind bars. Those with sentences beyond 36-months spend up to 70% of their time behind bars (See Exhibit 2, line 10). Thus, "FTC earnings" for inmates serving 36-months or less includes FTCs (a) earned behind bars and (b) FTCs projected to be earned up-to-365 FTC days. Those serving greater than 36-month sentences **only receive FTCs** (a) earned while behind bars, but (b) no FTCs projected to be earned on prerelease custody and/or supervised release. Smith believes that defining "earnings" for inmates should be the same for all inmates regardless of the length of the sentence.

Factual Background

The First Step Act was passed on December 21, 2018. However, by

April 2022, the BOP still had not given inmates any "paper copy" of FTC credits as earned per inmate from January 2019 through September 2022, a period in excess of three and a half years. Smith filed a BOP Administrative Remedy (1) requesting a copy of his FTC credits as earned, and (2) to disclose the manner in which FTCs were being awarded. The BOP administrative remedy process failed, so Smith filed a §2241. Through this §2241 process the BOP disclosed that Smith had earned 675 FTC days, but these FTC credits came with (a) no computation sheet and (b) did not include any information as to how FTCs would accumulate to equal the "remainder of the **IMPOSED** term," which, according to the FSA Final Rule, issued by the BOP January 22, 2022, was to include FTCs earned on prerelease custody.

District Court Proceedings

Between Smith's initial filing of his §2241 and the Minnesota Judge's final ruling in 2023, the BOP had altered their FTC (a) computation and (b) application system four times. Smith sought clarity on these changes, asking the court to answer why BOP Policy 5410.01 was not being followed: and how FTC credits to be earned on prerelease custody were to be applied given that an inmate may already be on prerelease prior to earning them? Instead of answering these questions, the Minnesota court, given the prompting of the BOP's attorney, ruled that D. Smith did not qualify for "immediate application of FTC credits" as his earned credits did not equal the "remainder of the **IMPOSED** term." Smith asked how the BOP's attorney.. and the court, could make this determination when **nothing was being disclosed, computationally, as to how an inmate mathematically "arrived at remainder of IMPOSED term?"** The Minnesota court refused to answer this question, sticking with their ruling that Smith did not qualify for "immediate application

of FTC credits". (See Exhibit 7, "Alternate History of Case").

Circuit Opinion

Because the Minnesota court refused to answer Smith's question as to how the BOP was arriving at computing "remainder of the **IMPOSED** term" Smith filed an appeal before the Eighth Circuit. However, following Smith's filed appeal, counsel for the BOP ruled that the the Eighth Circuit should reject Smith's appellate arguments because Smith failed to "adequately raise the 'IMPOSED term' questions" at the district level. Smith replied that given the BOP had changed their FTC computation and application system four times - with yet **ANOTHER CHANGE** coming **AFTER** Smth had filed his appeal (the BOP issued the FSA A&O Handbook, Exhibit 1, November 18, 2023 showing that inmates with 36-month sentences were being afforded FTC credits on prerelease custody and supervised release "up-front"), how could Smith possibly "adequately argue" questions regarding computation of "remainder of **IMPOSED** term?" The Eighth Circuit chose **not to answer a single statutory question Smith asked of it**. Instead they ruled the "BOP had accurately calculated Smith's earned FTCs." This ruling did not address the fact that the BOP was **NOW** using a "split FTC application system" - giving FTCs "up-front" to inmates serving 36-months or less, but awarding FTCs only on a "time served" basis to longer sentences. Smith filed multiple "updates" to his Appeal following all these changes, and the Eighth Circuit ruled they would "consider the merits of these changes." But, alas, they ruled on **NONE OF THESE CHANGES⁷, or statutory questions.** Smith requested an En Banc hearing. But, following submission, the Court ruled it was 93 words over the 3900 word limit, rejecting the En Banc.

Introduction to Smith's Arguments

In reviewing many inmate FSA comp sheets, Smith realized the BOP was

7. See Exhibit 6 where court will "consider merits," but, then, doesn't.

discriminating against inmates with longer sentences. That is, the BOP was applying an "up-front" FTC application system to inmates serving 36-months or less, but not to inmates like Smith. Longer sentenced inmates were receiving only FTCs on "time served" with no FTC credit given for prerelease custody or supervised release (less GTCs) - not being in accordance with BOP Policy 5410.01 which states FTCs are to be issued over the entire sentence, less GTCs, i.e., "remainder of **IMPOSED** term." This "dual FTC application system" created these questions: (1) should FTCs be issued "up-front" over the entire sentence, less GTCs, that is, over the "remainder of the **IMPOSED** term?", (2) is the Minnesota court correct in giving the BOP discretion over all FTCs beyond 365-days, claiming FTCs lack a "**liberty interest?**", (3) does not this dual FTC application system create a claim for **equal protection?**, and (4) should **FTC "earnings"** include (a) time served and (b) imputed FTCs, without which FTC imputation, FTCs become worthless earned on prerelease custody and supervised release? if not applied prior to qualifying for such?

ARGUMENTS

Claim 1: Whether "**IMPOSED term**" used in 18 §3624(g), defining the application of FTCs has the same credit application meaning as "sentence **IMPOSED by the court**" in 18 USC §3624(A)(B)(1)(i), as applied to GTCs?

In White v. Scibana 390 F.3d 997, LEXIS 2481 No. 04-2410, 7th Cir. (2004), reference calculating GTCs, the court ruled (pre-FSA):

"The district court agreed with the inmate that the phrase "term of imprisonment" as used in §3624 was unambiguous and referred to the sentence **IMPOSED**, rather than the term an inmate had actually served [time served]. The statute granted the inmate a maximum of 54 days of good time per year. Because a petitioner had been sentenced to 10 years he argued that he was entitled to 540 days [of GTCs]. The [BOP] allowed an award of up to 54 [GTC days] each year the inmate was **actually in prison...under the [BOP]'s formula, the inmate was ONLY ENTITLED TO 470 DAYS OF [GTC]**. The court of appeals reversed, finding that Congress' language was **subject to...a full Chevron deference...**"

With the passage of the First Step Act, Congress amended "**term of imprisonment**" to "**IMPOSED term**" in 18 USC §3624(A)(b)(1)(i). Because of

this change, the BOP awarded inmates GTCs over their **entire IMPOSED term** versus awarding them only while they were behind bars. Congress adopted the same statutory language for FTCs:

1. **GTCs:** "[GTCs are applied] up to 54 days for each year of the prisoner's sentence **IMPOSED** by the court" [18 USC §3624(A)(b)(1)(i)];
2. **FTCs:** "[FTCs are applied] in an amount equal to the remainder of the **IMPOSED term...**" [18 USC §3624(g)].

Smith argues that because both GTCs and FTCs are governed by "**IMPOSED term**," then both should be applied in the same manner - "up-front."

Computation of GTCs

Prior to the passage of the First Step Act, GTCs were awarded while an inmate was serving time, but **not** awarded on prerelease custody. After the passage of the First Step Act, Congress amended 18 USC §3624(A)(b)(1)(i) from "**term of imprisonment**" to "**IMPOSED term**", meaning GTCs were to be applied over the entire sentence, not just while "behind bars."

Computation of FTCs

Congress adopted "**IMPOSED term**" for FTCs as well under 18 USC §3624(g), "[FTCs were to be applied over] the remainder of the **IMPOSED term**." Multiple courts read this phrase as meaning "the entire sentence less GTCs." And, this is exactly how the BOP "programmed" their FTC application system for inmates serving 36-months or less, as shown below:

36-Month Sentence - "Up-Front" FTCs
1095 Day Sentence = (933 "Remainder Days") + (162 GTC Days)

"Remainder of Imposed Term		GTCs
933 Days		162 Days
(933 Days Earning FTCs)		
428 Behind Bars Days		415 FTC Days
175 FTCs Earned		195 FTCs Earned
175 FTCs + 195 FTCs + 45 FTCs = 415 FTCs on S.R. & H.C.)		45 FTCs
FTC Check: (933 Elg. FTC Days) / (30-FTC Day Per.) = 31 FTC Pers.		
(31 FTC Pers.) X (15-FTC Days Per Per.) = 465 Maximum FTCs		
(465 Max. FTCs) - (50 FTCs Lost First Year) = 415 Maximum Net FTCs		
(428 Days Behind Bars) + (415 FTC Days) + (90 SCA Days) + (162 GTCs) = 1095 Sen. Days		

The FTC illustration on the previous page was taken directly from the BOP's own "FSA A&O Handbook", issued to inmates November 18, 2023 (See page 10 of Exhibit 1). If the BOP only awarded FTCs on a "time served" (behind bars) basis, then the inmate's "stay in prison" would look like the following:

36-Month Sentence - "TIME SERVED" FTC Application Model

Behind Bars	FTCs	SCAs	GTCs
593 Days	250 Days	90 Days	162 Days
(250 FTCs Earned Behind Bars)	[DENIED FTCs	[DENIED FTCs	
<p style="text-align: center;">[Denied 165 FTC Days While on Prerelease & S.R. Math Check: (340 Days) / (30-FTC Day Pers) = 11 15-FTC Day Periods = (11 FTC Per)X(15-FTC Days)= Missing 165 FTCs</p>			
(593 Days Behind Bars)+(250 FTC Days)+(90 SCA Days)+(162 GTCs)=1095 Sen. Days			

Thus, if you compare the two models you come up with these differences:

1. Total Sentence in Days	"Time Served"	"Up-Front"	Difference
	[1095 Days	[1095 Days	0 Days
Deductions:			
a) Days Behind Bars	[(593 Days)	[(428 Days)	165 Days
b) GTCs	[(162 Days)	[(162 Days)	0 Days
c) FTCs Earned:			
1) Behind Bars	[(250 Days)	[(175 Days)	75 Days
2) Prerelease & Sup. Re.	[(0 Days)	[(195 Days)	(195 Days)
3) Second Chance Act	[(0 Days)	[(45 Days)	(45 Days)
d) Days on Second Chance	[(90 Days)	[(90 Days)	(0 Days)
Total Days Deductions	[(1095 Days)	[(1095 Days)	⁸

Inmates under the "time served" model spend 165 **more days behind bars** than the "up-front" model. The 165 day difference is the exact number "FTCs lost" while spending 340 Days on prerelease custody and supervised release. The BOP is awarding inmates serving 36-months, or less, this "up-front" FTC application system, **but is denying it to inmates with longer sentences like Smith's claiming that inmates are only due up to 365-FTC days on a "non-discretionary basis** (18 USC §3624(g)(3)), but any FTC beyond the 365-FTC days is a "condition of confinement" and fully "discretionary". There is not even a "hint" giving the BOP such discretion in the First Step Act - yet, the Minnesota court has allowed the 8. See Exhibit 8, Chart 3, for full month-by-month credit details w/dates

the BOP this "Chevron Deference" statutory interpretation.

The following charts compare the "time served" model with the "up-front" model for Smith's specific sentence:

Smith's 175-Month Sentence - "Up-Front" Model

5323 Day Sentence = (3925 "Remainder Days") + (611 Pre-FSA Days) + (787 GTCs)

] ----- "Remainder Days" ----- [

[--Pre-FSA--	----- Remainder of Imposed Term Earning FTCs-----	-----GTCs-----]
Jail Time	----- Behind Bars-----	-----PreR & S.R.-----[--S.C.A.s---[
--611 Dys--	-----1860 Days-----	-----1885 Dys-----[--180 Dys---[--787 Dys--]
	(865 FTC Days Earned	930, FTC Days [(90 FTCs
	Behind Bars)	Earned PreR & SR] Earned SCA) [
	865 FTCs + 930 FTCs + 90 FTCs) = 1885. FTCs	
(611 PreFSA)+(1860 Dys Prison)+(1885 PreR & SR)+(180 SCA)+(787 GTCs)=		5323 Dys

Smith's 175-Month Sentence - "Time Served" Model

As can be seen from the above "comparative" models, with the "time served" model Smith is denied 690 FTCs while on prerelease custody and supervised for 1390 days. The two methods are further compared below:

	"Time Served"	"Up-Front"	Difference
1. Total Sentence in Days	5323 Days	5323 Days	0 Days
Deductions:			
a) Days Behind Bars	(3146 Days)	(2471 Days)	675 Days
b) GTCs	(787 Days)	(787 Days)	(0 Days)
c) FTCs Earned			
1) Behind Bars	(1210 Days)	(865 Days)	345 Days
2) Prerelease & S.R.	(0 Days)	(930 Days)	(930 Days)
3) Second Chance Act	(0 Days)	(90 Days)	(90 Days)
d) Days on Second Chance Act	(180 Days)	(180 Days)	(0 Days)
Total Days Deductions	(5323 Days)	(5323 Days)	9

The "key metric" to consider is that with the "Time Served" model Smith is on prerelease custody and supervised release for 1390 days, **earning no**

NO FTC CREDITS - unlike what the BOP affords inmates serving 36-month

9. See Exhibit 8, Charts 1 and 2 for full year-by-year FTC credit details

sentences or less. Had Smith "earned," as "imputed" FTC credits while on prerelease custody and supervised release, like those serving 36-month or less, Smith would have spent 675 fewer days behind bars - 675 days being the exact number of FTCs denied Smith while on prerelease custody and supervised release. Below is the "percentage time served" behind bars comparison for the 36-month sentenced inmate and Smith's sentence:

		"Time Served"	"Up-Front"	Difference
1. Total Sentence in Days				
a) 36-Month Sentenced Inmate		1095 Days	1095 Days	0 Days
b) 175-Month Sentenced Smith		5323 Days	5 Days	0 Days
2. Days GTCs Deducted				
a) 36-Month Sentenced Inmate		(162 Days)	(162 Days)	(0 Days)
b) 175-Month Sentenced Smith		(773 Days)	(773 Days)	(0 Days)
3. Net GTC-Day Adjusted Sentence				
a) 36-Month Sentenced Inmate		933 Days	933 Days	0 Days
b) 175-Month Sentenced Smith		4550 Days	4550 Days	0 Days
4. Gross Days Behind Bars				
a) 36-Month Sentenced Inmate		593 Days	428 Days	(165 Days)
b) 175-Month Sentenced Inmate		2535 Days	1860 Days	(675 Days)
5. Percentage Diff. Bw FTC Methods				
a) 36-Month Sentenced Inmate		593/933 Days =64%	428/933 Days =46%	(18 %)
b) 175-Month Sentenced Smith		3170/4550 Days =69%	2470/4550 Days =54%	(15 %)

The mathematical reason that Smith spends 54% of his time "behind bars," versus 46% for inmates serving 36-months or less, using the "up-front" FTC credit application model, is because Smith spent 611 days in jail and prison prior to the passage of the First Step Act. Had FTCs been "earned" during this 611 days, Smith would have earned an additional $611 / (30 - \text{FTC Day Periods}) = 20$ FTC 15-Day periods, or 300 additional FTC days. Thus, 2470 less 300 = 2170, and $2170 / 4550 = 47\%$. This "47%" time behind bars **mirrors what the BOP is giving inmates serving 36-month sentences or less.** The 36-month computation model was afforded inmate Solberg, and argued in his §2241 filing, Solberg v. Eischen, Case No. 23-cv-3568, D. Minn. (2023). But, even in Solberg's case, the BOP was counting "up-front" FTCs wrongly.

In Russello v. U.S. 464 US 16, S.Ct. 23 (1983), the Supreme Court ruled:

"Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in disparate inclusion or exclusion..."

Since both (1) GTCs and (2) FTCs used the same "**imposed term**" language in the First Step Act, why then would not the BOP impute as earned **both** GTCs and FTCs earned while on prerelease custody as "being earned" prior to going to prerelease custody? Why discriminate against inmates with sentences beyond 36-months and then claim "discriminatory Chevron" - as GTCs have a "liberty interest" and FTCs do not? Why is it not important to the Eighth Circuit to rule on this matter? Why would it not be important for the Supreme Court to rule? Why allow continued discrimination when both used "**imposed term**" - and Congressional word choice is "generally purposeful?" Congress certinaly knew what they were doing with GTCs when they changed "term of imprisonment" to "imposed term" for GTCs - as this discussion was clear from viewing Congressional discussion records prior to passage. If they knew "**imposed term**" caused GTCs earned on prerelease custody to be counted prior to going to prerelease custody with the change to "**imposed term**," why would they not also intend this to be the case for FTCs?

BOP Policy Statements Support "Imposed Term" "Up-Front" FTCs

In BOP Policy Statement 5410.01, the BOP stated that **ALL INMATES** would receive a computation of FTCs **over their entire sentence** to help determine their projected FTC release date (page 16, BOP Policy 5410.01):

"...the Bureau will initially estimate an FSA conditional Projected Release Date (PRD) by calculating the **MAXIMUM NUMBER OF POTENTIAL FTC THAT AN INMATE MAY EARN DURING HIS OR HER SENTENCE.**"

Additionally, on page 17 of BOP Policy 5410.01, it states that inmates

will earn FTCs **while on prerelease custody** (i.e., "home confinement", halfway house, or supervised release):

"As explained in Section 10(b) the Bureau will calculate an inmate's PRD by assuming that an inmate WILL REMAIN IN EARNING STATUS THROUGHOUT HIS OR HER SENTENCE, INCLUDING WHILE ON PRERELEASE CUSTODY."

FTCs "earned" on prerelease custody is also confirmed by two additional BOP Policy Statements:

BOP Final Rule Issued January 22, 2022

"...the Bureau agrees that inmates in prerelease custody - whether in residential reentry center (RRC) or home confinement -- are eligible to earn FSA time credits under 18 USC §3624(d)(4)(A)..."

First Step Act A&O Handbook Issued November 18, 2023 (page 9, Exhibit 1)

Question: Do I earn FTCs while in Halfway and/or Home Confinement?

Answer: Yes. As long as you continue to successfully program.

Question: How does FTCs work with Pre-Release Placement?

Answer: Your halfway house and/or home confinement recommendation will include the total number of days recommended under the Second Chance Act, plus the remaining number of FTCs NOT APPLIED to Supervised Release [that is, FTCs beyond 365-days of FTCs earned for "supervised release"] at the time of referral."

While the above is being implemented for inmates with sentences of 36-months or less, **this is NOT** being done for inmates serving sentences beyond 36-months; that is, inmates with sentences less than 36-months are receiving (being "imputed as earned") all their FTC credits to be earned on prerelease custody **prior to going to prerelease custody.**

Note that BOP Policy Statement 5410.01 states "will calculate a[n]... PRD by **assuming** that an inmate will remain in earning status..." This word "assuming" is a future projected, "imputed earnings", not yet earned but, imputed as being earned in the future for present-day calculation purposes. In the case Williams v. Birkholz, No. 20-cv-2190, 2021 WL 4155614, at *6 n.6 (D.Minn. July 20, 2021), the Judge ruled that:

"RRC [prerelease custody] is a place of confinement..."

Thus, whether the prisoner is "behind bars" or on prerelease custody,

the inmate is STILL CONFINED TO A FORM OF CUSTODY OR CONFINEMENT. BOP policy
Congress ruled that GTCs were to be applied while "behind bars" ~~and to~~ supervised release ("IMPOSED term"). Thus, Minnesota Judge Brisbois' argument, quoted on page 18 of this document, in Fortner v. Eischen, Case No. 24-cv-1496-(JRT/LIB) (2024) wherein he appears to state that supervised release is not "custody" (up to 365-FTC days) would be inaccurate:

"...has already applied 365 days of time credits toward his release from custody and placement on supervised release..."

Arriving at 365-FTC earned days does not produce "custody release magic." Fortner isn't released from custody after earning 365-FTC days - supervised release, and prerelease, are forms of custody. Smith, like Fortner, is due FTC days "while in custody" computed to be the "remainder of the IMPOSED term" (the IMPOSED term less GTCs). And, according to BOP policy 5410.01, both Smith and Fortner, with long sentences, are due FTC days "up-front" in the same manner as inmates serving 36-months are so afforded. Obviously, the BOP knows this argument is accurate, otherwise, Director Peters would not have communicated to inmates and staff alike that FTC credits would be issued "up-front in the same manner as GTCs" in May 2023. Smith still awaits such an "applied FTC computation."

Claim 2: Whether FTCs are equal to GTCs in "enjoying" a liberty interest?

In Smith's Minnesota case, case no. 22-cv-1704, 23 WL 3170436, the Judge ruled that FTCs, unlike GTCs, did not have a liberty interest because FTCs "could be lost due to behavioral issues." Smith pointed out that GTCs could also be lost due to behavioral issues. In fact, in Solberg's case, Case No. 23-cv-3568, D. of Minn. (2023), Solberg developed the following chart in his De Novo Review, following denial, showing the differences/similarities between GTCs and FTCs. In **EVERY**

aspect, GTCs were equal in "statutory and BOP maintenance" as FTCs.

There is only one aspect wherein GTCs differ from FTCs - GTCs, cannot be restored except through Court order, or some due process violation by the BOP against an inmate. However, FTCs can be restored without Court intervention. Theoretically, then FTCs are "superior" to GTCs in (1) longevity, (2) restoration, and (3) proven residivism reduction. The following chart is borrowed from Solberg's case:

Comparative GTC and FTC Charts

Difference Or Similarity Identified	CTCs & Statutes With Explanation(s)	FTCs & Statutes With Explanation(s)
Credits Earned	[GTCs are earned per [18 USC §3624(b)(1)]	[FTCs are earned per [18 USC §3624(d)(4)(A)]
Credits Lost	[GTCs can be lost per [28 CFR §523.20, or BOP [BOP Program Statem. 5884.93]	[FTCs can be lost per [28 CFR §523.20(a)(2)]
Credits Restored Once Lost	[Cannot be restored once lost even in behavior im- [proves (Wolff v. McDonneil, [418 US 539 41 LEd 2d 935 [94 S.Ct. 293 #73-679 (1974) [and 18 USC §3624(b)(1), [i.e. a [GTC] credit that [has not been earned may not [be later granted..."]	[Can be restored if lost [due to improved behavior [28 CFR 523 & 524 "FSA [Final Rule" issued Jan- [uary 22, 2022
Credits are Conditional based on participation and behavior	[GTCs are conditional based [on behavior and participation in GED programming and [other educational require- [ments 28 CFR 541.3 (see [full listing)]	[FTCs are conditional [based on behavior and participation in program- [ming per 18 USC §3632(d)]
Can Become Ineligible for Credits	[Inmates can become ineligible for GTC credits depend- [ing on the number of policy [infractions [26 CFR 541.3 (see full list)]	[Inmates can ONLY BECOME [ineligible if they commit [a crime which denies FTC participation per [18 USC §3632(d)(4)(D)]
First Step Act Statutory Language	["up to 54 days each year of [the prisoner's sentence [IMPOSED by the Court..." [18 USC §3624(A)(b)(1)(i)]	["has earned time credits [equal to the remainder [...] of the IMPOSED TERM" [18 USC §3624(g)]
Purpose of the Credits	["subject to determination by [the BOP]...the prisoner that [has not satisfactorily com- [plied shall receive no [GTC] [credit" 18 USC §3624(b)(1) [Purpose: Satisfactory comp- [liance with education and [behavior	["...the purpose of award- [ing [FTCs] is to incen- [tivize inmates to [lower [recidivism]..." 18 USC §3624(d) [Purpose: Satisfactory [compliance with required [schooling and behavior

Difference Or Similarity Identified	GTCs & Statutes With Explanation(s)	FTCs & Statutes With Explanation(s)
"Liberty Interest History"	<p>[Prior to passage of First Step Act, GTCs were applied as "time served" (earn-as-you-go). Smith can find no legal correlation between "time served" method of GTC accounting and a "liberty interest" (See Wolf v. McDonnell, cited earlier)</p>	<p>{Minnesota district court ruled that inmates do not enjoy a liberty interest in FTCs because FTCs are discretionary. However, in Arellano-Ortiz v. Quintana, C. Dist. of Calif., Case 2:23-06290-ADS, Jan 2024, Judge stated (1) the inmate had a liberty interest in FTCs, (2) FTCs were NOT discretionary, and (3) the BOP counsel AGREED with the the Judge</p>
Credits are "conditional"	<p>[GTCs are conditional based on behavior and educational requirements being satisfied, and cannot be restored once lost for "improved behavior"</p>	<p>{Per BOP Policy, FTCs are automatically credited to inmates that qualify up entering prison because PRISON EMPLOYMENT IS MANDATORY - FTCs are issued for programming and "productive activities" - prison employment is a "productive activity"</p>
Present entitlement to future credits	<p>[With the passage of the First Step Act, inmates have a present entitlement to future GTCs imputed to be earned while on prerelease custody, when Congress changed "term of imprisonment" to "IMPOSED TERM"</p>	<p>{Because Congress used the same "IMPOSED TERM" phrase to project FTCs, FTCs should have an equal "present entitlement to future FTCs imputed as earned on prerelease custody, otherwise FTCs so earned become worthless. Congress did not AUTHORIZE THE BOP TO MAKE FTCs WORTHLESS.</p>

The above comparative list shows that GTCs and FTCs are equal in all respects - how, then can the Minnesota Court unilaterally declare that GTCs have a "liberty interest" and FTCs do not have a "liberty interest"¹⁰ both can be (1) lost due to behavior, (2) only FTCs can be restored based on renewed behavior, and (3) both used the applied method of "imposed term." The California court case, Arellano-Ortiz v. Quintana, C. Dist. of Calif., case no. 2:23-06290-ADS, January 2024, Judge Speth ruled that

FTCs DO ENJOY A LIBERTY INTEREST:

10. The Minnesota Court uses this "liberty interest" argument to claim FTCs are issued as "time served" giving the BOP "complete discretion."

"In light of the record, Petitioner has shown that he had a **vested liberty interest in his ETC credits**, which, if applied, would have resulted in his release, possibly as early as December 2, 2022... his further detention by the BOP is **UNLAWFUL...**"

Even if the Court parses the "credit-hair" such that a liberty interest in FTCs is only realized upon "vesting," then the Court must rule as to whether a liberty interest is also not met relative to "computation;" because without "proper computation", how can an inmate arrive at "vesting?"

Additionally, in Lerma-Jaras v. Birkholz, C. Dist. of Calif. LEXIS 22654, case no. 2:23-cv-09427-ODW-JDE (2023), Judge Wright stated the following after the COUNSEL FOR THE BOP AGREED IN WRITING THAT **INMATE LERMA-JARAS HAD A LIBERTY INTEREST IN HIS FTCS:**

"Respondent [i.e., BOP] ALSO AGREED that Petitioner had a **due process liberty interest** in his release as of the [ETC-adjusted] date..."

So, you have the BOP counsel in Minnesota claiming that inmates do not have a liberty interest in FTCs, but in California agreeing that they do have a liberty interest.

The Minnesota Court ruled that FTCs are "discretionary"¹¹ but Judge Standish in Jones v. Englemann, C. Dist. of Calif. LEXIS 185635, case no. 22-cv-05292-MCS (GJS) (2022), ruled that FSAs are **NOT DISCRETIONARY**:

"The FSA has told the BOP that it "shall" apply their earned ETCs and "shall" afford them an early release. Allowing the BOP - on a belated and **AFTER-THE-FACT BASIS** - to purport to write in the FSA statutes a **DISCRETION FOR ITSELF THAT DOES NOT APPEAR THEREIN AND TO SNATCH AWAY FROM PRISONERS WHOSE EFFORTS HAVE EARNED THEM ETC-RELATED BENEFITS** not only is **unfair** but would be **contrary TO THE FSA'S GOAL** of incentivizing prisoners to engage in these salutary programs and activities..."

However, in Solberg's case, referenced earlier, Judge Schultz stated the following:

"FTCs are conditional benefits contingent on numerous factors that may result in the inmate's inability to apply them toward early

¹¹ The Minnesota court argues that because FTCs are "discretionary", they have no "liberty interest" and must be earned "as time served" only.

release."

Judge Schultz then goes on to quote CFR §523.41(c)(4)(iii) as his basis for claiming that FTCs are "contingent" or "discretionary". CFR §523.41(c), however, is not "First Step Act" policy, but the BOP's interpretation of BOP policy - the same problem that Judge Stanish stated was the problem - the BOP converting a "shall" into something discretionary (using "Chevron Deference" defense). Further "enabling" the BOP's discretion, Judge Schultz, on page 5, of Solberg's order states:

"...the Court cannot adjudicate the reasonableness of BOP policies..."

Thus, on one hand, Judge Schultz justifies his "discretionary FTC opinion" on BOP policy, then states the court cannot adjudicate the reasonableness of BOP policy? Judge Schultz, essentially converts the First Step Act's "shall issue" FTC credits into a "may award" based on effective participation in programming. However, the BOP makes it mandatory that inmates participate in both programming and productive activities (see Exhibit 5, mandatory employment for all inmates) while incarcerated and on all custody forms (18 USC §3624(g)(2)(A)(III)(b)).

In White v. Warden, Cumberland Dist. of Maryland, LEXIS 133608 case no. UKC-22-2371 (2023), Judge Chasanow stated that FTC awards are not discretionary, ruling:

"Given that application of FTCs to eligible prisoners who have earned them is required, NOT DISCRETIONARY, under USC §3632(d)(4)(C), the Court finds that dismissal is not warranted on the ground that it lacks jurisdiction to contest the BOP discretionary action with respect to FTCs (See Rodriguez v. Copenhaver, 823 F.3d 1238, 1242 (9th Cir. 2016) ("Although a district court has no jurisdiction over discretionary designation decisions, it does have jurisdiction to decide whether the BOP acted contrary to established federal law, violated the Constitution, or exceeded its statutory authority when it acted pursuant to 18 USC §3621..."))"

The Minnesota court then uses this "liberty interest" claim to justify their "belief" that FTCs should be issued as "time served", unlike GTCs.

On June 28, 2024, in Loper Bright Enterprises v. Rainmondo, S.Ct., Case No. 22-451, the Court ruled that:

"...courts may not defer to an agency interpretation of law simply because [the agency interprets the law to be ambiguous]."

The BOP is using a "Chevron Deference" argument to claim that inmates are due up to 365-FTC days, and all FTCs beyond "confinement conditions." In Fortner v. Eischen, case no. 24-cv-1496-(JRT/LIB) (2024), Judge Brisbois ruled that Fortner had to "show cause" to claim that FTCs should be applied to home confinement, Fortner being eligible for home confinement if his FTCs had been credited "Up-Front" as demonstrated in this filing. Judge Brisbois ruled the following:

"Petitioner's habeas petition itself makes clear that the BOP has already applied 365 days of time credit toward his **release from custody** and placement on supervised release. If so, then the habeas petition concerns only when Petitioner will become eligible for prerelease custody. It is **well established**, however, that a claim that a federal prisoner would sooner be transferred to prerelease custody or home confinement amounts only to an attack on the conditions of the prisoner's confinement and therefore is **not cognizable on habeas review...**"

The above "365-FTC days applied to supervised release" and all other FTCs are a "condition of confinement" is a BOP "Chevron Deference" claim which the Minnesota court is upholding. However, under a **new case OUT OF KANSAS**, also in the Eighth Circuit, in Woodley v. Warden LEXIS 87521, No. 24-3053-JWL, D. of Kansas (May 2024), Judge Lungstrom ruled differently from Judge Brisbois "conditions of confinement" claim above:

"...under a plain reading of this provision of the FSA [18 USC §3624(c)(2)] which includes the word "shall", the BOP is **required to transfer a prisoner to prerelease custody or supervised release if the prisoner is "eligible" as determined under Subsection 3624(g) [when FTCs equal..."remainder of the **IMPOSED** term"]...which remainder amount has been computed, and the prisoner has met certain benchmarks for assessed risk of recidivism...Respondent's excuse for delaying petitioner's transfer...is that **bed space is not available...**no such condition concerning bed availability is included among prerelease custody requirements...numerous courts have held that the BOP **has no discretion to delay or refuse transfer of an eligible prisoner to prerelease custody, which transfer is MANDATORY.** See e.g., Doe v. Federal Bur. of Prisons, 2024 US Dist. LEXIS 19755, 2024 WL 455309 at**

*1-4 (S.D.N.Y. Feb 2024) (transfer was required despite the prisoner's participation in the witness protection program); Ramirez v. Phillips, 2023 US Dist LEXIS 228778, 2023 WL 8878993, at *4 (E.D. of Cal. Dec. 22, 2023) (agreeing with the interpretation that transfer to prerelease was **mandatory**, the BOP **has no discretion not to transfer**); Komando v. Luna, 2023 US Dist LEXIS 11477, 2023 WL 310580, at *4-8 (D.N.H. Jan 13, 2023) (transfer to prerelease custody was required despite outstanding detainer; rejecting argument that the BOP had discretion to determine which prisoners were suitable for placement in prerelease custody...Jones v. Engleman, 2022 U.S. Dist. LEXIS 185635, 2022 WL 6563744, at *9-13 (C.D. Cal. Sept 7 2022) (transfer to prerelease custody was mandatory despite pending charges and argument that the prisoner was a flight risk) [and many more cases cited]..."

Judge Lungstrum ruled in favor of Woodley, and Woodley is now completing his sentence on home confinement. In this case, the BOP argued they had unlimited discretion reference 18 USC §3621(b). However, other courts have noted that 18 USC §3621(b) has multiple limitations, one being that the BOP has discretion over conditions of confinement "**notwithstanding any other provision of law**" and, the "**shall place on home confinement**" (18 USC §3624(c)(2)) could be such a limitation on 18 USC §3621(b), in addition to all the other limitations listed.

The bottom line is that:

1. If placement on home confinement when your FTC credits equal the "remainder of your **IMPOSED term**" is **mandatory**, then this represents a **liberty interest**;
2. The BOP cannot unilaterally, without court review, use the Chevron Deference to define "FTCs" beyond 365-FTC days (§3624(g)(3)) as meaning "BOP discretion,"--"complete discretion" meaning having no "liberty interest" in computing the remainder of the **IMPOSED term**;"
3. The BOP should be mandated by law to define what "remainder of the **IMPOSED term**" means, and how inmates computationally arrive there - the BOP's current "black box" dual computation system violates every concept of due process and equal protection;
4. 18 USC §3621(b) should not be used as a carte blanche check to deny

inmate's "liberty interest" claims without review of 18 USC §3621(b)'s exception, i.e., "notwithstanding any other law."

Claim 3: Whether the BOP is violating an inmate's right to "equal protection" by awarding FTC credits imputed as earned to inmates serving 36-months or less, but denying the same imputation to inmates serving sentences in excess of 36-months?

The 14th Amendment to the Constitution reads:

"...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws..."

Smith argues that it is a violation to Smith's right to "equal protection," to convert the First Step Act into an instrument of discrimination.

Those serving 36-month sentences or less spend 46% of their time behind bars, whereas inmates like Smith spend up to 70%; there is no law nor criminologic study to point to that allows such disparity. In fact, studies show that those with shorter drug related sentences tend to recidivize with greater frequency than inmate's like Smith. Additionally, if averaged over time, Smith's 15-FTC days a month allowance decreases to 9-FTC days a month given the BOP is denying Smith FTC credits on pre-release custody "up-front," as is being allowed shorter sentences ¹². In (a) the FSA Final Rule, (2) BOP Policy 5410.01, and (3) the FSA A&O Handbook, the BOP states they are awarding inmates FTC credits while on prerelease custody, but what good are they if they can't be applied prior to going on prerelease? They are worthless, except to those serving 36-month sentences or less; and such inmates earn, on average, 15-FTC days per month, not like Smith's 9-FTC days average per month.

The only "inmate-discrimination" case law that Smith could find that addressed discrimination was Pargo et.al., v. Elliott, et. al. LEXIS 16566 894 F. Supp. 1243, Case No. 4-92-cv-20781 (1995), wherein male inmates in the

¹². See Exhibit 2, Rows 12 and 14 showing monthly FTC average drop given length of sentence.

prison system in the State of Iowa claimed, that "women prisoners" were receiving "unequal, improved" sentences and treatment. The Judge cited Supreme Court case Parham v. Hughes 441 US 347 60 L.Ed 2d 269 99 S.Ct. 1742 (1979), among other cases, to state there is a three-step process to determine if an equal protection claim is warranted for inmates:

1. **Similarly Situated Discrimination Test;**
2. **Arithmetic Mean of Computation Test;**
3. **Process Differences Test.**

(1) --By the BOP denying inmates serving sentences in excess of 36-months FTC credits "imputed as earned" while on prerelease custody while awarding the same to those serving 36-months or less - the BOP is violating the **"similarly situated discrimination test."** All inmates, regardless of length of sentence should be receiving the same, equal FTC applied system since (a) the First Step Act does not permit such discrimination, (b) BOP policy statements do not permit discrimination, and (c) it is against "common sense" that certain inmates spend 46% of their time behind bars, while those with longer sentences serve up to 70%;¹³

(2) --With the BOP denying inmates FTC credits earned on prerelease custody equally, those serving longer sentences in excess of 36-months have their average 15-FSA days per month decreased to 9-FSA days per month - the BOP is violating the **"arithmetic mean of computation test."** Also, there is simply no common sensical way to justify the "arithmetic mean" violation which allows inmates serving 36-months or less, to serve 46% of their time behind bars, but, then through FTC-mathematical manipulation, and the "blessing" of the Minnesota District Court, cause inmates serving beyond 36-months to spend 70% of their time behind bars - this is absurd, but, it is exactly what the BOP is currently doing with the current "computerized projected release system" - violating their own

13. See Exhibit 2, Row 10.

BOP Policy Statement 5410.01 which states a conditional projected release date will be based on "**the MAXIMUM number of FTCs computed over the entire sentence**" - not COMPUTED UP TO A MAXIMUM OF 365-DAYS AS THEY ARE NOW DOING.

(3)--With the BOP applying **two different FTC award prerelease custody systems**, depending on whether the inmate is serving greater or less than 36-months - the BOP is violating the "Process Differences test."

In short, if using the Supreme Court's own "equal protection" discrimination test for prisoners, the BOP is violating **every discrimination test** as summarized by the Judge in the Pargo case.

Additionally, the First Step Act specifically mentions "length of sentence" as a "discrimination test" cited under 18 USC §3621(h) (A) :

"shall...implement and complete the initial intake risk and needs assessment for each prisoner (including for each prisoner who was a prisoner prior to the effective date of this subsection [enacted December 21, 2018], **regardless of the prisoner's LENGTH OF IMPOSED TERM OF IMPRISONMENT** and begin to assign prisoners to appropriate evidence-based recidivism reduction programs..."

As the Aleph article points out (Exhibit 3), there is a direct link between **increased rates of recidivism and the length of the sentence.** This stands to common sense and reason - the longer a prisoner spends behind bars (1) the greater the degree of institutionalization, and (2) the greater the degree of institutionalization, the greater the propensity to "act on the outside" as one "acts while incarcerated" U.S. prisons inculcate "manners of behavior" which attempt to circumvent what prisoners consider "minimalistic rules" which harass. The current prison system does not provide an equal recidivistic opportunity for all. Per the Aleph article, "Why Punishing People in...Prison Isn't Working:"

"While behind bars, people are often subjected to dangerous conditions resulting in trauma. In addition, incarceration severs a persons' ties with family and support networks and causes them to lose their jobs and housing. Upon release, people with a criminal conviction face barriers to housing and employment. All of these factors make it difficult for people to move forward. **A 2021 analysis of 116 studies found that prison time does not prevent people from reoffending, and, in fact, CAN INCREASE THE LIKELIHOOD THAT THEY WILL...**"

This stands to reason because (1) the longer the sentence, the greater the loss to community ties, and (2) the greater the loss to community ties, the "narrower the window" of acceptable behavior. The narrower the window, the greater the probability of failure. **Prison can help create propensity toward increased criminality.** As a long-time sentenced individual once told Smith, "prison is run by criminals for criminals." And having been in prison this long, Smith can attest this is true.

Smith has currently served 60% of his "GTC-adjusted" sentence, well in excess of the 46% those serving 36-months or less are having to spend. And, what is crazy is that those with lower sentences, 60% of which are drug offenses, tend to recidivate at a higher rate. Inmates like Smith, that are older have 2% chance of recidivism, with that 2% being mainly forgetting to call the parole officer, not committing additional crimes. Had the BOP counted **all of Smith's jail time** (they refuse to count 330 days of additional jail, and Smith has filed a separate Appellate court action on this refusal), then **Smith will have spent 64% of his time behind bars.** The only "redidivistic" value Smith has gained while serving time is (1) since Smith is a song writer, the increased number of songs written, and (2) an increased desire to bring justice to the wrongs done to Smith and investors which Smith still challenges. Regardless, Smith has developed three "incarceration charts" which support the "time served" and "up-front" charts listed on pages 7 through 9, showing in year-by-year detail Smith's sentence. **With the "Up-Front" FTC counting system, Smith would have been on prerelease Jan. 1, 2024,**

seven months ago (see Exhibit 8, Chart 1).

What Exhibit 8 Proves

The Charts in Exhibit 8 are detailed, proving an "equal protection violation" against Smith:

1. **Arithmetic Mean:** Chart 1 shows Smith's 175-Month sentence calculated on a year-by-year basis, with dates, proving that with an "up-front" FTC calculation system, Smith spends about 47% of his time behind bars, this "percentage time" being equal to inmates serving 36-months or less, with FTCs "imputed as earned" on prerelease custody awarded before Smith actually goes on prerelease custody;
2. **Similarly Situated Inmates:** It is unreasonable to discriminate against inmates with longer sentences especially when 18 USC §3624(g)(2)(A) (II)(bb) requires **THAT AN INMATE CONTINUE PROGRAMMING WHILE ON PRERELEASE CUSTODY**. Obviously, if an inmate is (a) required to program while on prerelease custody, (b) why then is the BOP denying Smith FTCs while programming? The "only" way to account for FTCs "earned" on programming is to "impute them as earned" before one actually goes on prerelease custody;
3. **Process Differences Test:** According to 18 USC §3624(g)(2)(A)(iv) **all inmates must serve UP TO 85% OF THEIR IMPOSED SENTENCE**, in some form of custody. The FSA clearly states that the BOP "shall transfer an inmate to home confinement" (18 USC §3624(c)(2)) once the inmate qualifies. With the BOP claiming "discretion" over a "shall transfer" by using 18 USC §3621(b) as their basis, and then "inventing" this "365-Day non-discretionary limit," they create a "process difference" depending on the length of one's sentence. **There is no empirical data on which the BOP can rely to justify adopting a "process difference discretion" based on the length of one's sentence.** Since all

inmates, regardless of length of sentence, are relegated to some form of custody up to 85% of their sentence, being "behind bars" yields no provable additional criminalologic recidivistic improvement. Thus, for the BOP, it must only come down to a "money issue" - they get more money keeping inmates behind bars longer - what other reason could there be?

Claim 4: Does the term "FTC earnings" include both (a) real-time earnings, and (b) "imputed earnings," in the same manner as "GTC earnings" are so defined?

Regarding calculating FTCs, BOP Policy 5410.01 states the BOP "will calculate a...PRD by **ASSUMING** that an inmate will remain in earning status [throughout his term of imprisonment]." This word "assuming" implies a **future projection of FTCs** that must be calculated in order to arrive at a Projected Release Date (PRD) which includes a "**maximum number of FTCs**" calculated over the entire sentence less GTCs. Without FTCs "assumed to be earned" while on prerelease custody, then the BOP cannot fulfill **all the terms of the First Step Act**, especially accounting for 18 USC §3624(g)(2)(A)(II)(b) where inmates are required to continue **programming while on prerelease custody**. If an inmate, like Smith is already on prerelease custody, then to where will these "FTC earnings" be applied? Prior to the passage of the First Step Act, an inmate serving a 10-year sentence received 470 GTCs "while behind bars" only. After the FSA passage, the GTCs were applied "over the entire sentence" including on supervised release, making the GTCs 540. The "math" difference between 470 and 540 GTCs is 70 GTC days. Obviously, the inmate is earning "70 GTC days" **imputed** to him or her before the inmate actually goes on supervised release. In the same manner, FTCs also use "**IMPOSED term**" from which to apply FTCs "remainder of **IMPOSED term**." Should not

FTCs also include both (a) real-time earnings (behind bars) and (b) "imputed earnings" - "assumed earnings?" Both the GTCs and FTCs can be removed for "bad behavior," so why deny inmates with longer sentences imputed FTC earnings since it would result in **double punishment** - that is - if the inmate "screws-up" on prerelease custody, and he has not received FTCs for such custody, then the BOP would be removing FTCs from the inmate which were earned while he was "behind bars." The inmate serving 36-months, having already been credited "up-front" for FTCs earned on supervised release, and when he or she screws-up on supervised release, then the BOP **removes from the inmate what has already been imputed, or credited as earned.** Inmates like Smith, however, could be punished twice (a) not receiving FTCs for prerelease custody or supervised release, and (b) having FTCs deducted that were legitimately earned for not failing while behind bars - this makes no logical, legal or mathematical sense.

Conclusion

Smith requests the court consider his requests:

- 1. Imposed Term:** That the Court rule that when Congress adopted "sentence IMPOSED by the Court" reference 18 USC §3624(A)(b)(1)(i) for applying GTCs to an inmate's sentence, wherein GTCs were counted as (a) earned under "time served" and (b) "imputed" as earned under supervised release, that the same "**credit applied meaning**" be applied to counting FTCs reference "remainder of the **IMPOSED term**" (the "remainder" being the "entire sentence less GTCs);
- 2. Liberty Interest:** That the court agree with courts in California, Hawaii, New Hampshire, Washington, D.C., and, now, Kansas, that once "earned" FTCs equal the "remainder of the **IMPOSED term**" that inmates have a "**liberty interest**" in the vesting of FTCs. Of course,

Smith argues that if "vesting of FTCs" have a liberty interest, then the computation of FTCs should also have a **liberty interest**, as how can anyone know what "vesting equals" if the computation method is not also (a) disclosed and (b) applied equally to all inmates? Without such "liberty protection" the BOP can choose any means of "subjective analysis" to keep inmates incarcerated beyond some objectively disclosed date. The BOP is **not currently doing this for inmates**;

3. **Equal Protection:** The BOP currently uses a "dual-FTC application system" depending on whether an inmate's sentence is less or greater than 36-months. The BOP "justifies" this "dual application" by claiming (a) a Chevron Deference, (b) that inmates are only due up to 365-FTCs on a non-discretionary basis (18 USC §3624(g)(3)), and (c) any FTC issued beyond 365-days constitute "conditions of confinement", which only the BOP has authority over. The "dual-FTC" application is best described as (a) those serving 36-months or less receive all their FTC credits "up-front," including credits "earned" on prerelease custody and supervised release, whereas (b) inmates serving greater than 36-months receive FTC credits beyond 365-FTC days only as to "time served," receiving no FTCs for prerelease custody or supervised release. This dual FTC application system allows those serving less than 36-months spend 46% of their time behind bars, while inmates like Smith spend 70% of their time behind bars. This is discriminatory and a claim for equal protection. 18 USC §3624(g)(2)(A)(ii)(bb) requires that inmates **continue programming** while on prerelease custody and supervised release, however if an inmate "screws-up" on prerelease custody, then the BOP removes FTC credits the inmate earned while behind bars -- a "double jeopardy" FTC loss compared to those serving 36-month sentences

**Reasons for Granting Petition
Reasons the High Court Should Take This Case**

If the High Court refuses to answer the four main, FTC-related statutory questions posed herein, then:

1. **District Courts will remain split** over whether FTCs should be applied under the old "time served" ("earn-as-you-go" application system) or whether, like GTCs, FTCs should be awarded "up-front," that is, FTCs (a) earned while imprisoned and (b) earned while on prerelease custody should both count toward lowering an inmate's time behind bars. Even though the First Step Act uses the same "imposed term" statutory language for both GTCs and FTCs, Courts in Minnesota have ruled that FTCs "can only be earned behind bars," while Courts in Maryland and California state that the BOP should follow their own BOP Policy Statement 5410.01, and issue FTCs over the entire sentence, not simply while "behind bars." As a result, inmates in the Eighth Circuit serve **more time behind bars**, COMPARED to inmates in California and Maryland prisons. Smith argues that the same "imposed term" statutory language should yield the same applied computation system for GTCs and FTCs ("up-front");
2. **The BOP will continue to discriminate** against inmates serving sentences beyond 36-months. Those serving sentences of 36-months or less spend 45% to 48% of their time behind bars, whereas those serving sentences in excess of 36-months spend 60% to 70% of their time behind bars. While those serving 36-months sentences or less get all their FTCs "up-front", those with sentences in excess of 36 months do not get the benefit of FTCs earned while on prerelease custody;
3. **District Courts will remain split** over whether FTCs are (a) discretionary and (b) do not have a liberty interest (Minnesota) or whether (a) they are not discretionary and (b) do enjoy a "liberty interest?" This differing interpretation results in differing FTC

application systems, depending on the court district. Inmates in the Eighth Circuit spend more time behind bars than inmates on East and West coasts of the U.S. This is happening because courts on the coasts claim FTCs, even those earned for home confinement, are not discretionary given "shall award" language of the FSA, while the Minnesota court rules that the BOP has "discretion over FTCs awarded beyond 365-FTC days" (18 USC §3624(g)(3));

4. **The BOP will continue to use a "Chevron Deference" to apply unequal protection** claiming that 18 USC §3621(b) gives them "complete discretion" over FTCs issued beyond 365-days. Courts outside Minnesota quote 18 USC §3632 ("shall award," "shall apply" FTCs), 18 USC §3624(g) ("[FTCs shall be applied over] the remainder of IMPOSED term") and 18 USC §3624(c)(2) ("the Director **SHALL...** place prisoners...on home confinement for the maximum amount...", to rule that the BOP has no discretion over any FTC once those FTCs equal the "remainder of the IMPOSED term" (18 USC §3624(g))). The Court in Minnesota sides with the BOP's "Chevron Deference" discretion claim, that the BOP has discretion over FTCs beyond 365-FTC days. As a result of this "Chevron deference" allowance, inmates with sentences longer than 36-months spend up to 70% of their time behind bars, while those with 36-months or less spend 46% of their time behind bars;
5. **The BOP will continue to define "earnings" one way for GTCs, and use a "dual meaning" for FTCs.** Credit "earnings" for GTCs includes GTCs (a) earned while imprisoned, and (b) imputed as earned while on prerelease custody - the credits being awarded "up-front" before the inmate actually goes on prerelease custody. The BOP is applying this same "earnings" definition to FTCs for inmates serving 36-months or less, but state that "FTC earnings" only include "time spent behind bars" for inmates with sentences greater than 36-months.

Defining "FTC earnings" as only including "time served" (behind bars) is a violation of the First Step Act because:

- a) **18 USC §3624(g)(2)(A)(II)(bb):** This section requires that inmates on prerelease custody **continue programming**. If "programming continuance" is required, but no FTC earnings were "imputed", then to what purpose does this programming serve? Not imputing FTCs prior to engaging in such programming is discriminatory;
- b) **18 USC §3624(g)(2)(A)(iv):** This section requires that all inmates stay on prerelease custody up to 85% of their term of imprisonment ("remainder of the **IMPOSED term**"). If "85% of the **IMPOSED term**" is the sentence goal to which all inmates must reach, then it stands to reason that FTC credits should include both (a) earned FTCs behind bars and (b) "imputed as earned" prior to going to prerelease custody or supervised release;
- c) **28 CFR §523.20(a)(2):** FTC credits can be lost. If no credits are issued to inmates on prerelease custody, and if the inmate "fails" prison standards on prerelease custody, then how can you deduct "nothing" from "nothing?" No FTCs were awarded on prerelease equals "what is there to "lose?"" GTCs can also be lost due to behavior, why then does the Minnesota court claim GTCs are superior in liberty?

6. **Without proper interpretation of "earnings" the BOP defeats the purpose of the FSA:** (a) lower prison costs, (b) lower recidivism and (c) get non-violent inmates back to their families sooner. There is no empirical data or recidivistic study to which the BOP can point that proves keeping non-violent inmates behind bars longer (those with longer sentences) lowers recidivism - the **opposite is true - STUDIES SHOW RECIDIVISM GOES UP THE LONGER ONE IS BEHIND BARS**. Additionally, it costs substantially more to keep an inmate behind bars, and the inmate is not contributing to the work force. Exhibit 3 shows that for every inmate that goes to

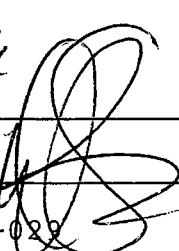
prison, 20 family members and friends are **negatively affected**. With US prisons and jails currently holding nearly 2 million men and women behind bars, multiplied times 20 people = 80 million people affected, or one-third of the U.S. population negatively affected.⁶ Defining earnings properly fulfills the purposes of the First Step Act and lowers recidivism.

6. See Exhibit 4, Newsletter from Attorney D. Gilna.

or less (18 USC §3624(g)(2)(A)(ii)(bb)). All inmates should be awarded the same FTC application system;

4. FTC Earnings: "FTC earnings" for inmates serving 36-month sentences include FTCs earned both (a) as "time served" behind bars, and (b) while on prerelease custody or supervised release. "FTC earnings" for inmates like Smith includes only FTCs "earned" for "time served." A dual-FTC application system based on sentence length violates "FSA statutes," not the least of which is 18 USC §3624(g)(2)(A)(ii)(bb), where inmates are **required by law** to continue programming while on prerelease custody and supervised release. Yet, without "imputed" FTCs earned **prior to going to prerelease custody or supervised release**, then such FTC "earnings are worthless" and can only be applied to "thin air" (as one BOP counselor put it when asked). FTC earnings should be defined equally for all inmates and include (a) FTCs earned while behind bars and (b) "imputed as earned" prior to qualifying for prerelease custody. Without such a singular definition, inmates serving 36-month sentences or less spend 46% of their time behind bars, and inmates like Smith spend up to 70% of their time behind bars. Such discrepancy in "percentage time behind bars" is not justified by statute nor by recidivistic studies. In fact, recidivistic studies show that inmates forced to spend more time behind bars, tend to recidivize more - a "horseshoe" type statistical anomaly.

Signed this 16th Day of July Year 2024

Signed by 

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