UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE BOWLER'S REPORT AND RECOMMENDATION REGARDING SUMMARY JUDGMENT

From March 22, 2007 through April 4, 2008, Petitioner Jack McRae was confined in federal prison while under consideration for civil commitment pursuant to the Adam Walsh Child Protection and Safety Act, 18 U.S.C. § 4248 (2006) ("Walsh Act"). Despite his imprisonment, Respondent Federal Bureau of Prisons ("BOP") considered Mr. McRae "on parole" for that entire 380-day period, and therefore denied him irrevocable sentence-credit for it. As a result, Mr. McRae's 1984 District of Columbia Superior Court sentence for armed rape, which should have expired on October 5, 2009, is not set to expire until December 14, 2010.

Mr. McRae petitioned this Court for a writ of habeas corpus on October 2, 2009, and moved for summary judgment on November 2, 2009. On September 10, 2010, Magistrate Judge Bowler issued a Report and Recommendation denying Mr. McRae's motion and granting Respondents' motion for summary judgment. As set forth below, the Report and Recommendation was riddled with errors. The Court incorrectly concluded that the word "parole," as used in the pertinent District of Columbia Code sections, does not have a plain

meaning, and then deferred to the BOP's unreasonable interpretation of that term. The Court misconstrued a federal statute requiring that Mr. McRae be granted sentence-credit for the 380 days in question and disregarded a District of Columbia statutory provision mandating the same result. Based on these errors, the Court improperly denied Petitioner's habeas corpus, Fifth Amendment, and Eighth Amendment claims and granted Respondents' motion for summary judgment.

This Court should reject the magistrate judge's recommended disposition. It should issue an order restoring to Mr. McRae the 380 days of sentence-credit to which he is entitled and declaring that Respondents violated his rights under the Fifth and Eighth Amendments to the Constitution.

Factual Background

Petitioner incorporates by reference his prior briefing of the facts of this case. *See* Emergency Petition for Writ of Habeas Corpus on Behalf of Jack McRae (DE # 1, "Pet.") at 4-14; Memorandum in Support of Petitioner's Cross-Motion for Summary Judgment (DE # 13, "C-MSJ") at 1; Petitioner's Reply to Respondents' Opposition to Summary Judgment (DE # 18, "Reply") at 1. He summarizes below only those facts most pertinent to the instant pleading.

On February 7, 1984, Mr. McRae was sentenced in District of Columbia Superior Court to a six-to-twenty-year term of imprisonment following his guilty plea to one count of rape while armed. Pet. at 4. He was mandatorily released into the community in 1995. *Id.* On March 22, 2006,[1] the USPC executed a parole violator warrant for Mr. McRae's arrest, based on allegations

[1] In the years between 1995 and 2006, Mr. McRae was twice re-incarcerated for violating technical conditions of his parole, and was re-paroled both times. Pet. at 7 n.3. Additionally, on August 5, 1997, Congress enacted the National Capital Revitalization and Self-Government Improvement Act, D.C. Code § 24-101 *et seq.* ("Revitalization Act"), which closed the prison facility operated by the District of Columbia Department of Corrections and mandated that all existing and future District of Columbia felons be designated to federal prisons across the

that he had consumed alcohol and failed to submit to drug testing in violation of the conditions of his parole. *Id.* at 7. The USPC revoked Mr. McRae's parole, ordered that he remain incarcerated for a 12-month term, and set a presumptive release date of March 22, 2007. *Id.* On March 20, 2007—two days prior to Mr. McRae's presumptive release date—the BOP certified Mr. McRae as a sexually dangerous person under the Walsh Act. *Id.* at 8. On March 22, 2007, the USPC issued a certificate of parole ordering Mr. McRae's release. *Id.* at 8-9.

However, the BOP did not release Mr. McRae on March 22. Instead, it kept him in custody pursuant to the Walsh Act, categorizing him as "a Pre-Trial inmate who is waiting to see the judge." *Id.* at 9. Although he was now nominally a "parolee," nothing about Mr. McRae's conditions of confinement changed—he was still imprisoned at FMC Devens, at the same security setting under which he had been confined prior to his March 22 "parole" date. *Id.* He remained there—incarcerated but "on parole" in the eyes of the BOP—for 380 days while awaiting a hearing under the Walsh Act. *Id.* Finally, on April 3, 2008, the United States Attorney submitted that it was not "in the interest of justice" to pursue Mr. McRae's commitment as a sexually dangerous person and dismissed his case prior to trial. *Id.* at 9-10. Mr. McRae was released into the community on April 4, 2008. *Id.* at 10.

Mr. McRae remained in the community under parole supervision until December 11, 2008, when the USPC arrested him for violation of technical conditions of his parole. *Id.* Upon Mr. McRae's return to FMC Devens, the BOP did not give Mr. McRae sentence-credit for the 380 days that he had spent confined awaiting a Walsh Act hearing. *Id.* at 12. Rather than acknowledging that Mr. McRae had been in prison for that period, which would have rendered

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country to serve their District of Columbia Superior Court-imposed sentences. Pet. at 4-5. The Revitalization Act also granted the United States Parole Commission ("USPC") the authority to grant, deny, and revoke the parole of District of Columbia felons. *Id.* at 5.

his time served non-rescindable, the BOP instead maintained that he had been "on parole" for the entire 380 days, which made his time served rescindable. *Id.*

Had he been properly granted credit for the 380 days in question, Mr. McRae's maximum sentence for his 1984 offense would have expired on or about October 5, 2009. *Id.* at 13. Instead, his maximum sentence is currently not set to expire until December 14, 2010. Pet. Appx. O (April 9, 2009 BOP sentence calculation).[2]

Procedural History

On October 2, 2009, Mr. McRae filed an Emergency Petition for Writ of Habeas Corpus, in which he alleged that Respondents had improperly calculated his armed rape sentence under District of Columbia law; had deprived him of the due process of law under the Fifth Amendment; and would violate the Eighth Amendment by incarcerating him beyond October 5, 2009. DE # 1. Respondents filed a Motion to Dismiss and/or for Summary Judgment, DE #8 ("Resp't MSJ"), and Petitioner filed a Cross-Motion for Summary Judgment, DE #12. Magistrate Judge Bowles heard oral argument on the motions on January 21, 2010, and issued a Report and Recommendation on September 10, 2010, DE # 24, in which she recommended that Respondents' Motion to Dismiss and/or for Summary Judgment be allowed and that Petitioner's Cross-Motion for Summary Judgment be denied. These objections follow.[3]

[2] Mr. McRae was arrested on November 16, 2010 for violation of technical conditions of his parole, pursuant to a warrant issued on July 7, 2010. The expiration date for his maximum sentence thus may be pushed back further still.

[3] The magistrate judge gave the parties 14 days to object to her Report and Recommendation. R&R at 40 n.19. On September 23, 2010, this Court granted Petitioner's motion to extend the deadline for filing his objections until November 22, 2010.

Standard of Review

The district judge reviews a magistrate judge's report and recommendation de novo. Fed. R. Civ. P. 72(b)(3). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

Objections

Mr. McRae objects to the magistrate's Report and Recommendation on four grounds: First, the Court wrongly concluded that "parole" has no plain meaning in the relevant D.C. Code sections and acceded to the BOP's unreasonable interpretation of that term. It therefore erroneously held that Mr. McRae was "on parole" for the 380 days that he spent imprisoned awaiting a Walsh Act hearing. Second, the Court misconstrued a federal statute, 18 U.S.C. § 3568, requiring that Mr. McRae be granted sentence-credit for the 380 days in question. Third, the Court ignored D.C. Code § 24-221.03(c), which mandated the same result. Fourth, because of its mistaken conclusion regarding the calculation of Mr. McRae's sentence, the Court dismissed without full consideration Petitioner's Fifth Amendment and Eighth Amendment claims.

I. The Court Incorrectly Determined That the 380 Days in Question Did Not Constitute "Parole" Under District of Columbia Law.

Two District of Columbia statutes govern the sentence-credit granted to D.C. offenders for time spent in prison and on parole.[4] Under the Good Time Credits Act of 1986 ("GTCA"), D.C. Code § 24-221.03, "Every person shall be given credit on the maximum and the minimum term of imprisonment for time spent in custody or on parole in accordance with § 24-406, as a

[4] "Although the BOP is responsible for computing sentences of D.C. offenders housed in its facilities, the District of Columbia Code controls the computation of such sentences." *Kier v. Killian*, No. 08 Civ. 0928, 2008 U.S. Dist. LEXIS 61552, at *16 (S.D.N.Y. Aug. 11, 2008).

result of the offense for which the sentence was imposed." Under D.C. Code § 24-406(a) (2008), in the event that a prisoner's parole is revoked, "[t]he time a prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced."[5] Insofar as §24-221.03 and § 24-406(a) are inconsistent—in that the former does not contemplate the possibility that credit for time spent on parole may be rescinded—the District of Columbia Court of Appeals has held that the latter provision controls. R&R at 21-22. The Court framed the question presented in light of these two statutes:

> If petitioner was 'on parole' as of March 22, 2007, or the time spent confined under the Adam Walsh Act was 'on parole,' the 380 days of credit can be rescinded through a straightforward application of D.C. Code § 24-406(a). If petitioner was 'in prison,' however, D.C. Code § 24-406(a) does not apply and the GTCA mandates that petitioner receive the full 380 days of credit.

R&R at 23. However, having properly concluded that this matter turns on the meaning of "parole" in the relevant D.C. statutes, the Court quickly went astray in analyzing whether the BOP, using two USPC regulations as its guide, had appropriately interpreted that term as used in §24-221.03 and § 24-406(a). R&R at 23-31.

To evaluate the BOP's interpretation of the term "parole," the Court "look[ed] to the familiar two-part test enunciated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)." *Id.* at 24 (internal quotation marks omitted). Under *Chevron*'s first step, courts must "employ the traditional tools of statutory construction" to determine whether Congress "had an intention on the precise question at issue." *Chevron*, 567 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, on the

[5] Section 24-406 was amended in 2009 so as no longer to require forfeiture of all credit for time spent "on parole" in the event of revocation. However, this change applied only to "any period of parole that is being served on or after May 20, 2009." D.C. Code § 24-406(d) (2010).

other hand, "the statute is silent or ambiguous with respect to the specific issue," courts are to move on to *Chevron*'s second step, where "the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* at 843.

The Court erred in moving beyond *Chevron*'s first step. Although neither § 24-221.03 nor § 24-406(a) defines "parole," that term has a plain meaning—release from immediate physical confinement—such that there can be no question as to Congress's intent. "If, after employing all the traditional tools of construction, the statue's text seems unambiguous and the ordinary meaning of that unambiguous language yields a reasonable result, the interpretive odyssey is at an end." *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 57 (1st Cir. 2008); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."). Moreover, even if the term "parole" were ambiguous, so that the Court correctly proceeded to *Chevron*'s second step, the BOP's interpretation of that term—based chiefly on a USPC regulation that characterizes "parole" solely by the issuance and signing of the certificate of parole—is not a "permissible construction" under *Chevron*. 567 U.S. at 843. The Court was thus wrong to endorse it.

A. Because "Parole" Has a Plain Meaning, It Was Error for the Court to Move to *Chevron*'s Second Step.

Black's Law Dictionary (8th ed. 2004) defines "parole" as "[t]he release of a prisoner from imprisonment before the full sentence has been served." Webster's gives a similar definition: "The conditional release of a prisoner before his or her term has expired." Webster's II, New College Dictionary (2001). And the Supreme Court, consistent with the dictionaries, has recognized that parole is characterized by "release[] . . . from immediate physical

imprisonment." *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963). Mr. McRae embraced these definitions as evidence of the plain meaning of "parole." *See* C-MSJ at 8 (asserting that the "defining characteristic of parole" is "release from immediate physical imprisonment"); Reply at 5 (citing dictionary definitions).

The Court, however, declined to credit this authority and concluded instead that the relevant D.C. Code sections were "silent or ambiguous" as to the meaning of "parole." R&R at 27. It did so on two grounds: First, it discredited the sources on which Petitioner relied to define "parole." Second, the Court held that Petitioner's definition was underinclusive, in that it failed to account for certain circumstances under which persons may be "on parole" yet still confined in prison, such as when federal parolees are subject to state or immigration detainers. Neither of these points has merit.

1. Petitioner Properly Gleaned the Meaning of "Parole" Through Dictionary Definitions and Common Usage.

The Court was generally dismissive of Petitioner's "attempts to ascertain Congressional intent through common, ordinary definitions of the term 'parole.'" R&R at 25. Such a plain meaning approach, however, is the one to which courts routinely turn when interpreting undefined statutory terms. *See, e.g., Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); *Neang Chea Taing v. Napolitano*, 567 F.3d 19, 24 (1st Cir. 2009) (holding that in *Chevron*'s first step, congressional intent should be gleaned from the "common, ordinary meaning of the words of the statute"); *Textron Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir. 2003) ("The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written."). Indeed, the Court itself

acknowledged the propriety of the plain meaning approach: "The [*Chevron*] analysis begins with the language of the statute in question. This entails examining the common, ordinary meaning of the words of the statute to determine Congressional intent." R&R at 24 (quotation marks and citation omitted).

More particularly, the Court faulted Mr. McRae's attempt to establish plain meaning through "references [to] dictionary definitions of 'parole' that purportedly exhibit the common, ordinary meanings of the term." R&R at 26. But the First Circuit has held that "[d]ictionaries of the English language are a fundamental tool in ascertaining the plain meaning of terms used in statues and regulations." *United States v. Lachman*, 387 F.3d 42, 51 (1st Cir. 2004). Courts in this Circuit thus regularly rely on dictionaries to provide the plain meaning of statutory terms. *See, e.g.*, *Neang Chea Taing*, 567 F.3d at 25 (relying on Black's Law Dictionary for "plain meaning" of undefined statutory term); *Perez-Olivio v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005) ("Because Congress has chosen not to define the phrase [in question] in the statute itself, we can look to the dictionary for clarification of the plain meaning of the words selected by Congress."); *Textron*, 336 F.3d at 32-33 (looking to Webster's Dictionary for plain meaning of regulatory terms and discrediting party's analysis in part because it "does not cite . . . dictionary definitions").[6] The Court's critique of Mr. McRae's reliance on dictionary definitions is badly misplaced.

The Court also faulted Mr. McRae for his reliance on common usage of the word "parole" as reflected in the caselaw. Mr. McRae cited *Morrissey v. Brewer*, 408 U.S. 471, 477

[6] The Supreme Court has just as regularly relied on dictionary definitions. *See, e.g.*, *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (rejecting party's reading of statutory term as inconsistent with Webster's definition, and thus ordinary meaning); *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994) (defining disputed term according to definition reflected in "[v]irtually every dictionary we are aware of"); *Smith*, 508 U.S. at 228-29 (looking to Black's and Webster's dictionaries to establish the "ordinary or natural meaning" of disputed term).

(1972), for instance, for its observation that "the function of parole in the correctional process" is the "practice of releasing prisoners . . . before the end of their sentences" and its holding that "[t]he essence of parole is release from prison, before the completion of sentence . . . ." *See also Jones*, 371 U.S. at 243 (observing that "petitioner's parole releases him from immediate physical imprisonment"). In the Court's view, with these and similar references,[7] "Petitioner place[d] undue emphasis . . . on qualifying the 'essence' and 'function' of parole." R&R at 26. But it is beyond dispute that the common law is a reliable reference for the common usage of statutory language. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (embracing construction of contested term that "reflects common law usage"); *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 382-383 (2004) (adopting meaning of statutory term that "is consistent with our [previous] interpretations of the term"); *Smith*, 508 U.S. at 229 (giving deference to "gloss" put on statutory term by Court "over 100 years ago"). And the "essence" and "function" of a concept (such as "parole"), which the Court criticized Mr. McRae for underscoring, are what most would call its plain meaning.

The common law usage of "parole" is also consistent with the BOP's own definition of "parole" as "time spent in the community (street time)." BOP Program Statement 5880.32, ch. 17, p. 1 (Resp't MSJ, Ex. F). The Court rejected Mr. McRae's reliance on the Program Statement on the grounds that "[t]here is little, if any, indication that the BOP adopted this Program Statement utilizing the notice and comment procedures in the APA." R&R at 28. But

[7] The common law is strewn with uses of "parole" that are in concert with Petitioner's definition. *See, e.g.*, *United States v. Estrella*, 104 F.3d 3, 7 (1st Cir. 1997) ("[I]t is doubtful that a paroled prisoner would normally be described as being in the custody of a correctional institution." (quotation marks omitted)); *Brennan v. Cunningham*, 813 F.2d 1, 5 (1st Cir. 1987) ("An inmate in a halfway house . . . enjoys some significant liberty, [but] he remains under confinement in a correctional institution. His position is, therefore, not like that of a parolee."); *Sexton v. Wise*, 494 F.2d 1176, 1178 (5th Cir. 1974) ("Before a prisoner can be officially paroled, the final step of physical release must be taken.").

even if the Program Statement does not carry the authority of an agency rule passed after notice and comment, it still provides further evidence that the plain, common meaning of "parole" is release from immediate physical confinement. *See Smith*, 508 U.S. at 243 (Scalia, J., dissenting) (observing that the "normal usage" of a disputed term "is reflected" in a United States Sentencing Commission Guidelines Manual). The fact that the BOP itself uses "parole" as Mr. McRae suggests it should be is yet another fact in support of his proffered definition.

2. Petitioner's Definition of "Parole" Is Not Underinclusive.

The Court's second ground for rejecting Mr. McRae's definition of "parole" was that it is underinclusive, for "[n]ot all individuals who are granted parole are permitted to return to the community of to the street, such as federal parolees subject to state or immigration detainers." R&R at 26; *see also id.* ("Petitioner places undue emphasis on the phrase 'street time' . . . ."); *id.* at 26-27 (ascribing to Mr. McRae "[t]he assertion that all parolees must be returned to the community" and concluding that "[t]he definitions provided by petitioner overlook the fact that not all parolees are released to the street"). Mr. McRae has not, however, defined parole as "street time," nor has he asserted that all parolees must be returned to the community. Instead, he has defined parole as "release from immediate physical imprisonment." C-MSJ at 8. This definition, while appropriately emphasizing that parolees are most frequently released into the community, nevertheless also embraces the two circumstances to which the Court pointed—state and immigration detainers—under which federal parolees are released into the custody of another authority. In all events, parolees are released from the immediate physical custody of the authority that has been holding them. It is that release—whether into the community or into the custody of another authority—that is the touchstone of parole. *Cf.* 28 C.F.R. § 2.32(c) ("'[P]arole to a detainer' means *release* to the 'physical custody' of the authorities who have

lodged the detainer." (emphasis added)). Because Mr. McRae was not released subject to a state or immigration detainer, but instead remained in the physical custody of the BOP during the relevant 380 days, he was never paroled.

B. Even if the Court Was Correct to Move to *Chevron*'s Second Step, It Should Have Found the BOP's Interpretation of "Parole" Unreasonable.

Even if the Court correctly held that "parole" has no plain meaning, it still should have rejected the BOP's interpretation of that term because it was not "based on a permissible construction of the statute." *Chevron*, 406 U.S. at 843; *see also id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

The BOP's interpretation of "parole," embraced by the Court, relies on a pair of USPC regulations. It places chief emphasis on 28 CFR § 2.86(e), which states, "A grant of parole becomes operative upon the authorized delivery of a certificate of parole to the prisoner, and the signing of that certificate by the prisoner, who thereafter becomes a parolee." The BOP takes this language and runs with it, contending that parole is characterized *solely* by its technical onset: "Time after [the certificate is signed] is time spent 'on parole.'" Resp't MSJ at 14. This form-over-substance position, which does not contemplate whether or where the "parolee" is still confined after he signs the parole certificate, leaves too much room for absurd results.[8] *See Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Gen'l Motors Corp. v. Darling's*, 444 F.3d 98, 108 (1st Cir.

[8] BOP's reliance on § 2.86 is made even more of a stretch by the fact that, as Mr. McRae has previously noted, that section does not even purport to define the term "parole." *See* Reply at 3. The section merely affirms the USPC's authority to rescind an earlier grant of parole up until the moment when a parole certificate is delivered and signed by a prisoner—and it has only been cited as authority for that single proposition. *Id.*

2006) (courts should "avoid statutory constructions that create absurd, illogical, or inconsistent results"). For instance, under the BOP's view, a prisoner who signs a certificate of parole but through administrative error is held in the same prison, under the same conditions, for the next sixty years, is not a lifelong prisoner but a lifelong parolee. Mr. McRae's plight, wherein he has received no sentence credit, in any form, for more than a year served in prison, is less absurd only as a matter of degree.[9] Nonetheless, the Court favored the BOP's stiff logic over Mr. McRae's plain meaning analysis: "Petitioner's arguments concerning qualitative aspects of 'parole' are surpassed by the simple fact that petitioner was granted parole by the USPC and was therefore on parole." R&R at 31. That is, Mr. McRae was on parole because the government says he was.

The second USPC regulation on which the BOP relies is 28 CFR § 2.105(d) (2008), which holds that time spent on parole can include "time the parolee may have spent in confinement on other sentences."[10] According to the Court, this supports the BOP's position that Mr. McRae was on parole while under Walsh Act confinement because "[c]onfinement on other sentences logically extends to confinement under a civil commitment order." R&R at 30. This conclusion, which the Court supports with neither authority nor analysis, is flawed. Mr. McRae was not confined "under a civil commitment order." Instead, he was confined pending a hearing on whether he should be civilly committed—and that hearing never occurred. There was thus no "order" that even arguably could have led to "[an]other sentence[]." This is underscored by the

[9] The BOP's interpretation also has the perverse result of punishing those inmates who, like Mr. McRae, are fully compliant during their time in prison. *See* C-MSJ at 12-13 (noting that whereas sentence will continue to run, and sentence-credit to accrue, for inmate certified under Walsh Act whose parole release date is rescinded for in-prison misconduct, it will not for compliant prisoner, like Mr. McRae, who is in fact granted "parole" while awaiting Walsh Act hearing).

[10] This language was removed from 28 CFR § 2.105(d) in 2009 when the regulation was amended to mirror the amendment to D.C. Code § 24-406. *See supra*, note 5.

fact that Mr. McRae's Walsh Act confinement flowed directly from, and depended directly upon, his 1984 sentence. Mr. McRae was only eligible to be certified under the Walsh Act because he was "in the custody of the Bureau of Prisons," 18 U.S.C. § 4248(a), and the only offense for which he was in the custody of the Bureau of Prisons was his 1984 conviction. By no stretch, then, were the 380 days in question in service of a sentence "other" than the one he received for the 1984 conviction.

II. The Court Misconstrued 18 U.S.C. § 3568, Which Mandates that Mr. McRae Be Given Sentence-Credit for the 380 Days.

18 U.S.C. § 3568, which the BOP itself argues applies to Mr. McRae's sentence, Resp't MSJ at 16, provides an independent reason why Mr. McRae should be credited for the time in question. Under that section, which governed the jail credit given to D.C. offenders sentenced from June 22, 1966 to April 10, 1987, "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody *in connection with* the offense or acts for which sentence was imposed." 18 U.S.C. § 3568 (repealed) (emphasis added). As explained above, Mr. McRae's Walsh Act confinement was only possible by virtue of his 1984 conviction. Moreover, in its Walsh Act certification, the BOP cited Mr. McRae's 1984 conviction as chief among the reasons why he was deemed sexually dangerous. *See* Resp't MSJ Ex. I. The Walsh Act confinement was thus, by definition, "in connection with" the 1984 conviction. *See United States v. Thompson*, 32 F.3d 1, 5 (1st Cir. 1994) (defining "connection," in accordance with Webster's Dictionary, as a "causal or logical relation or sequence").

The Court disagreed, concluding that "[c]ommitment pursuant to section 4248 of the Adam Walsh Act is not custody in connection with [his] underlying 1984 conviction," and therefore that Mr. McRae is not due sentence-credit under § 4248. R&R at 33. The Court cited *Kansas v. Hendricks*, 521 U.S. 346 (1997), in support of its view, but that case is inapposite.

Hendricks "dealt with a [Kansas] statute whose elements are similar to those of the Adam Walsh Act" and, in the Court's view, drew a distinction between civil commitment and underlying criminal conduct. R&R at 33-34. However, *Hendricks* is distinguishable from the instant case on a fundamental ground: the Kansas statute at issue in *Hendricks* "does not make a criminal conviction a prerequisite for commitment." *Hendricks*, 521 U.S. at 362. This is in contrast to Walsh Act confinement, for which, as the Court itself held, "a past criminal conviction for a sexually violent offense is a necessary prerequisite." R&R at 33. The fact that the *Hendricks* Court arguably drew a line between a past conviction and present civil commitment thus has no bearing on whether such a line exists under the facts of this case.

As Mr. McRae pointed out in his briefs, the more germane authority comes from *United States v. DeBellis*, 649 F.2d 1 (1st Cir. 1981). *See* C-MSJ at 17-18. There, the First Circuit granted the defendant sentence-credit for his time spent in pre-trial civil commitment because it qualified, under § 3568, as "time spent in custody *in connection with* the offense or acts for which the sentence was imposed." *Id.* at 2 (emphasis added). The Court attempted to distinguish *DeBellis* on the grounds that the civil commitment there was "pre-trial detention for competency evaluation[]," R&R at 34, but it provided no explanation of why that distinction makes a difference. There is no reason why time spent awaiting a pre-trial evaluation is any further "in connection" with an eventual sentence than time spent awaiting Walsh Act evaluation is with a predicate sentence. And any distinction between the two periods of confinement is further blurred by the fact that the BOP itself deemed Mr. McRae "a Pre-Trial inmate" during his Walsh Act confinement. Pet. at 9.

III. The Court Ignored a District of Columbia Statutory Basis for Granting Mr. McRae Sentence-Credit.

There is a second, independent statutory basis for granting Mr. McRae credit for the 380 days, this one in D.C. law. Under the GTCA, "Any person who is sentenced to a term of confinement in a correctional facility or hospital shall have deducted from the term all time actually spent, pursuant to a court order, by the person in a hospital for examination purposes or treatment prior to trial or pending appeal." D.C. Code § 24-221.03(c). Mr. McRae was unquestionably "sentenced to a term of a confinement in a correctional facility," and he spent the 380 days in question in Federal Medical Center Devens awaiting "a hearing to determine whether [he was] a sexually dangerous person," 18 U.S.C. § 4248(a). During that time, he was categorized by the BOP as "a Pre-Trial inmate who is waiting to see the judge." Pet. at 9. Mr. McRae was thus being held "for examination purposes . . . prior to trial" under § 24-221.03(c); accordingly, he should "have deducted from [his] term all time" spent in such confinement.[11]

It is true that Mr. McRae does not meet the requirements of the GTCA to the letter: he was confined for the period in question pursuant to the BOP's Walsh Act certification, not "a court order." But the District of Columbia Court of Appeals has construed § 24-221.03(c) broadly. In *Shelton v. United States*, 721 A.2d 603, 610 (D.C. 1998), the Court of Appeals considered whether a prisoner committed pursuant to the Sexual Psychopath Act was due credit under that section despite the fact that his confinement was neither "prior to trial" nor "pending

[11] This view finds support beyond § 24-221.03(c), in both the caselaw and the BOP's own internal guidelines. *See McNeil v. Patuxent Institution*, 407 U.S. 245, 252 (1972) (granting petitioner credit towards his sentence for time spent in custody under examination for civil commitment); *Cephus v. United States*, 389 F.2d 317 (D.C. Cir. 1967) (granting appellant sentence-credit for pre-trial confinement in hospital for mental examination); BOP Program Statement 5880.28, ch. 2, p. 12 (if a prisoner serving a sentence undergoes examination to determine if he is suffering from a mental disease or defect, "the person is serving a sentence during the examination"); BOP Program Statement 5880.32, ch. 6, p. 1 (The sentence of a prisoner committed for examination under D.C. Code § 24-302 "will not become inoperative.").

appeal." The court held that, even though "the subsection does not literally cover the case before us," petitioner was indeed entitled to credit, for there was "no indication that the legislature intended to occupy the field by the precise terms of 24-431(c)."[12] *Id.* at 611.

Had the Court considered § 24-221.03(c), it would have been bound by the D.C. Court of Appeals' broad construction of it in *Shelton*, for federal courts "ha[ve] no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court." *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999). However, the Court never addressed Mr. McRae's § 24-221.03(c) argument in its Report and Recommendation. That was error, to which Mr. McRae objects.

IV. The Court's Error on Mr. McRae's Claim to Credit for the 380 Days Infected Its Recommendations as to His Fifth Amendment and Eighth Amendment Claims.

Based on her holding that Mr. McRae had not been improperly deprived of 380 days of sentence-credit, the magistrate judge summarily dismissed Mr. McRae's Fifth Amendment and Eighth Amendment claims. *See* R&R at 39 ("The liberty interest in being free from bodily restraint does not extend to a prisoner seeking release prior to the end of his prison sentence."); *id.* at 37 ("[B]ecause petitioner will not remain incarcerated beyond the true expiration of his 1984 sentence, there is no Eighth Amendment violation."). A rejection by this Court of the magistrate judge's recommendation on the sentence-credit issue would thus breathe life into Mr. McRae's two constitutional claims. For all of the reasons set forth in Mr. McRae's Emergency Petition and the briefs filed in support of it, this Court should issue a declaration that Respondents violated his rights under the Fifth and Eighth Amendments to the Constitution.

[12] 24-431(c) is now codified at 24-221.03(c).

Conclusion

For the reasons stated, this Court should reject the magistrate judge's recommended disposition. It should issue an order restoring to Mr. McRae the 380 days of sentence-credit to which he is entitled and declaring that Respondents violated his rights under the Fifth and Eighth Amendments to the Constitution.

Respectfully submitted,

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Date: November 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Objections were filed through the Electronic Court Filing system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Sandra K. Levick
Sandra K. Levick

Date: November 19, 2010