

## **I. EXHAUSTION IS NOT A BAR TO CONSIDERATION ON THE MERITS.**

Although the BOP should generally have an opportunity to reconsider its decision to deny good time credits, there are circumstances where exhaustion of administrative remedies should not bar consideration of the merits. This is such a case. First, because Mr. NAME is challenging the duration and not the conditions of his confinement under 28 U.S.C. §2241, exhaustion of administrative remedies is not jurisdictional. Second, because Mr. NAME challenges the validity BOP's interpretation of Section 3624, exhaustion of administrative remedies is futile and cause irreparable harm with every day the Mr. NAME loses good time credits.

### *A. Exhaustion Of Administrative Remedies Is Not A Jurisdictional Requirement.*

Although exhaustion of administrative remedies is generally preferred, it is not a not a jurisdictional requirement in Section 2241 actions. *United States v. Woods*, 888 F.2d 653, 654 (10<sup>th</sup> Cir. 1989)). Congress did not include a requirement of exhaustion of administrative remedies in the statute upon which this Court's jurisdiction is based -- 28 U.S.C. § 2241. The absence of such a requirement leaves the Court with the authority to reach the merits. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *Brown v. Rison*, 895 F.2d 533, 535 (9<sup>th</sup> Cir. 1990). Unlike the PLRA that includes a statutory mandate that, before a prisoner can litigate a civil claim regarding prison conditions, the prisoner must exhaust administrative remedies, eliminating "both the discretion to dispense with administrative exhaustion and the condition that the remedy be 'plain, speedy, and effective' before exhaustion could be required"), *Booth v. Churner*, 121 S.Ct. 1819, 1824 (2001) (construing 42 U.S.C. § 1997e(a)), Congress has given no such direction, even in the Antiterrorism And Effective Death Penalty Act of 1996 (AEDPA), that habeas corpus petitioners are statutorily required to exhaust administrative remedies before

filing under Section 2241 for habeas corpus relief. *Brown*, 895 F.2d at 535 (“The requirement that federal prisoners exhaust remedies before filing a habeas corpus petition was judicially created; it is not a statutory requirement.”). The presence of the requirement in the PLRA and the AEDPA and its absence in Section 2241 means that Congress intended the distinction and deliberately chose not to require exhaustion in these habeas actions. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (“[W]here 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 purposely in the disparate inclusion or exclusion.”); 2A N. Singer, *Sutherland Statutory Construction* §§ 57.06, at 654 (Sands 4th ed. 1984) (“Contrasting language in similar statutes may show that the legislature intended different standards of compliance.”); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

The Supreme Court expressly recognized this distinction in *Porter v. Nussle*, 122 S.Ct. 983 (2002). In *Porter*, the Court stated:

[O]ur opinion in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), had described the two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement.

*Porter*, 122 S.Ct. at 989 (citing *McCarthy v. Bronson*, 500 U.S. 136 (1991)). *Preiser* concerned state prisoners challenging the forfeiture of good time credits under Section 1983, rather than under Section 2254. The Court found that habeas under Section 2254 was the sole remedy available, because the prisoners challenged the duration of their sentences, not the conditions under which they were incarcerated. *Preiser*, 411 U.S. at 456. The Court described prison condition cases as those involving the denial of prison privileges, such as ability to purchase certain religious materials, or living conditions, or disciplinary measures resulting in physical

injuries. *Preiser*, 411 U.S. at 498.<sup>1</sup> To the same extent, the PLRA's plain language applies only to prison conditions litigations:

No action shall be brought with respect to *prison conditions* under section 1983, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. §1997e(a) (emphasis added). *Preiser* emphatically held that the two types of claims were quite distinct and should not be conflated or confused. The BOP's efforts to treat the two types of prisoner cases as one flies in the face of *Preiser*. Because Mr. NAME challenging the length of confinement, not the conditions of his incarceration, his Section 2241 habeas corpus action is not subject to the exhaustion provision in 42 U.S.C. §1997e(a). Thus, the futility and irreparable harm doctrine remains intact.

*B. Requiring Exhaustion In This Case Should Be Excepted Because The Revocation For All Practical Purposes Is A Final Decision Making The Administrative Remedy Process Futile, And Because Last Minute Revocation Deprived Mr. NAME' Of An Opportunity to Seek Administrative Redress Without Suffering Irreparable Harm.*

Because there is no statutory bar, the Court may in its discretion consider the merits of a petitioner's claim. *Brown*, 895 F.2d at 535. The Supreme Court has provided the following guidance on the balancing necessary in a case involving administrative remedies:

[T]his Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interests of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. "[A]dministrative remedies need not be pursued at the litigant's interest in immediate judicial review

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<sup>1</sup> The drafters intended that the PLRA target prisoner lawsuits regarding the conditions of confinement, such as how bright the lights are and how warm the food is. 141 Cong.Rec. S18295-02 (Dec. 8, 1995); *see also* 142 Cong.Rec. S3703-01 (Apr. 19, 1996) (citing to a prisoner who sued for \$1 million because his ice cream melted, and another who sued because he was served chunky instead of smooth peanut butter).

outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." . . . Application of this balancing principle is "intensely practical," . . . because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.

*McCarthy*, 503 U.S. at 146. The petitioner's side of the balance is extremely basic -- the interest in earlier freedom from incarceration. Among the institutional interests are to have an opportunity to correct its mistakes and to develop a factual record for subsequent judicial intervention. *Id.* at 145-46. Under controlling precedent, the balances favor prisoners where exhaustion of administrative remedies that would be futile or cause irreparable harm by delaying relief. *Downey v. Crabtree*, 923 F.Supp. 164, 165 (D.Or.), *affirmed*, 100 F.3d 662 (9th Cir. 1996); *Dougherty v. Crabtree*, 812 F.Supp. 1089, 1091 (D.Or. 1991), *affirmed*, 981 F.3d 1258 (9th Cir. 1992); *Buggs v. Crabtree*, 32 F.Supp.2d 1215, 1217-18 (D.Or. 1998).

Both the futility and irreparable harm exceptions to exhaustion are especially strong in this case. Because Mr. NAME challenges the validity of the good time rule, not its application to him, further appeal would be futile. The BOP is obligated to follow its own rules, and has no discretion to disregard those rules in the administrative remedy process. *See Wallace v. Christensen*, 802 F.2d 1539, 1552 (9<sup>th</sup> Cir. 1986) ("The [Parole] Commission, like other agencies, is thus bound by its own regulations so long as they remain in force.") (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267(1954)). Under the BOP's rules, there are no higher officers to whom to appeal. 28 C.F.R. §542.15(a) ("Appeal to the General Counsel is the final administrative appeal."). *See also* Program Statement 1330.13, Administrative Remedy Program, §9 (October 7, 1997), Operations Memorandum 089-98. To expect Mr. NAME to ask the Warden or the regional director to overrule existing rules is to send him on a fool's errand.

The irreparable injury exception also favors Mr. NAME for several reasons. First, and most obvious, Mr. NAME would be entitled to earlier release with a correct calculation of his good time credits. Secondly, the review process is lengthy and the timing entirely under the BOP's control. According to Program Statement 1330.13, prisoners must "first present an issue of concern informally to staff and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy." P.S. 1330.13 §7(a). Then a prisoner must formally request the forms with which to file a Request for Administrative remedy. The rules provide that the Warden has 20 calendar days to respond, the Regional Director has 30 calendar days, and the General Counsel has 40 days to respond. P.S. 1330.13 §12. The Warden, Regional Director and General Counsel also may extend the time for response by an additional 20, 30 and 20 days, respectively. *Id.* There are no provisions to expedite the review process except in emergencies that threaten the prisoner's immediate health or welfare. *Id.* Thus, even if the BOP were to reverse its decision, Mr. NAME already has lost \_\_\_\_\_ days of good time credit. Mr. NAME' situation squarely falls into both exceptions to the exhaustion doctrine. Any further exhaustion should be excused in this case because Mr. NAME faces irreparable harm and further administrative remedies are futile.