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A GAME OF CAT AND MOUSE—OR GOVERNMENT AND PRISONER: GRANTING RELIEF TO AN ERRONEOUSLY RELEASED PRISONER IN *VEGA v. UNITED STATES*

“The government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the [expiration] of his debt to society and his reintegration into the free community.”<sup>1</sup>

I. INTRODUCTION

On April 22, 2007, *The Boston Globe* reported the shocking tale of Rommel Jones, an inmate who was held in prison four years longer than his criminal sentence.<sup>2</sup> In the article, prison officials blamed the error on the prison’s computer system, which tracked time served, credits for good behavior, and other factors affecting the length of criminal sentences.<sup>3</sup>

1. *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (acknowledging common law rule that government cannot require service of criminal sentence in installments and, therefore, prison sentence runs continuously from date defendant begins serving it even if prisoner is erroneously released). In *Dunne*, Chief Judge Posner used the phrase “play[ing] cat and mouse” to describe the actions of the government in releasing prisoners only to reincarcerate them later. *See id.* (suggesting that rule against installment punishment protects against arbitrary use of governmental power). The phrase “to play cat and mouse” is a common idiom used to describe a situation in which one person tries to defeat another person by tricking him or her into making a mistake in an effort to gain an advantage later. *See* CAMBRIDGE INTERNATIONAL DICTIONARY OF IDIOMS (2d ed. 1998), available at <http://idioms.thefreedictionary.com/play+at+and+mouse> (last visited Jan. 19, 2008) (defining phrase “play cat and mouse”). This phrase is based on the way a cat plays with a mouse before killing it. *See id.* (providing etymology of phrase).

2. *See* Thomas Farragher, *Correction System ‘Mess’ Held Inmates Past Their Time*, THE BOSTON GLOBE, Apr. 22, 2007, at A1, available at [http://www.boston.com/news/local/massachusetts/articles/2007/04/22/correction\\_system\\_mess\\_held\\_inmates\\_past\\_their\\_time](http://www.boston.com/news/local/massachusetts/articles/2007/04/22/correction_system_mess_held_inmates_past_their_time) (last visited Jan. 19, 2008) (reporting story of inmate held in Massachusetts prison system four years longer than original sentence due to negligence of prison officials).

3. *See id.* (noting that prison officials admitted inmate was held too long because they relied on computer system that could not adequately account for time off for good behavior, disciplinary history and arcane court guidelines affecting length of criminal sentences). *The Boston Globe* article also mentioned a previous whistleblower case in which a prison employee complained that she was transferred for complaining that inmates were being held past their release dates. *See id.* (discussing prior complaints regarding prison’s sentence computation system). The prison’s correction commissioner testified in this case and admitted that the department sentence tracking system had become so “dysfunctional” that sentences needed to be verified manually. *See id.* at A20. (noting prison official’s admission regarding inadequacy of sentence computation system). The prison system has since instituted a new computer network, the Inmate Management System. *See id.* (describing prison system’s efforts to improve accuracy of sentence calculations). Nevertheless, the prison classification director admitted that the consequences of some court decisions are still beyond the capability of the new computer system. *See id.* (highlighting weaknesses in department’s new sentence

The unveiling of this miscalculation sparked a further investigation by the United States Department of Corrections to determine if other inmates were similarly affected.<sup>4</sup> As a result of this investigation, government officials identified thirteen other inmates who had been detained beyond their release dates for periods ranging from a mere one day to an astounding 515 days.<sup>5</sup>

While stories of inmates being held in prison too long are undoubtedly shocking, even more alarming is the high number of inmates who are released too early.<sup>6</sup> Our society assumes that after an individual is convicted and sentenced to serve jail time, the individual is taken into custody and incarcerated until the sentence expires.<sup>7</sup> Contrary to this assumption, prison officials sometimes mistakenly release prisoners before their sentences expire, or fail to take convicted criminals into custody within a reasonable timeframe.<sup>8</sup> With over-burdened federal, state and local prison systems releasing approximately 630,000 prisoners each year, erroneous release and delayed incarceration of prisoners have become “surprisingly widespread and recurring phenomenon[s]” in the American criminal justice system.<sup>9</sup>

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calculation system). In the case of Rommel Jones, the classification director admitted that the calculation needed to be done by hand but “[t]he department missed it.” *See id.* (noting prison official’s admission of negligence on part of department).

4. *See id.* (discussing prison officials’ efforts to remedy error and mitigate further errors in calculating criminal sentences).

5. *See id.* (discussing results of Department of Corrections investigation that identified other inmates held past their rightful sentences).

6. *See generally* Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 CATH. U. L. REV. 403 (1996) (citing various cases of erroneous release and delayed incarceration, and discussing remedies afforded to affected prisoners).

7. *See* Jay M. Zitter, Annotation, *Effect of Delay in Taking Defendant into Custody After Conviction and Sentence*, 76 A.L.R. 5TH 485, 499 (2000) (noting public’s general assumption that government officials are diligent in incarcerating convicted criminals and ensuring they remain in custody until their sentences expire).

8. *See generally id.* (collecting cases of mistaken release or delayed incarceration and comparing legal consequences across jurisdictions).

9. *See* *Hawkins v. Freeman*, 195 F.3d 732, 742 (4th Cir. 1999) (noting frequency of erroneous release cases and arguing that executive actions effectuating erroneous releases could not be considered arbitrary because of their frequency). In *Hawkins*, the Fourth Circuit referred to an academic comment, *supra* note 6, collecting over 100 such cases of erroneous release or delayed incarceration. *See id.* (noting extent and persistence of erroneous releases and delayed incarceration). The court further speculated that the cases cited could only represent a fraction of true occurrences because not all erroneous releases are actually reported and litigated. *See id.* (drawing inferences to support argument that erroneous release cases do not necessarily involve arbitrary executive action). Based on this analysis, the Fourth Circuit concluded that the erroneous release in *Hawkins* was not so unique to raise any presumption of arbitrariness. *See id.* at 744 (concluding that analysis of history and traditional practice did not suggest that government’s error was arbitrary “in the constitutional sense”). In addition to the Fourth Circuit’s analysis in *Hawkins*, official statistics produced by the Federal Bureau of Prisons also suggest that erroneous release may be a frequent occurrence. *See gen-*

Federal and state courts differ on how to deal with such errors and what remedy, if any, is available to prisoners who have spent time “erroneously at liberty,” through no fault of their own.<sup>10</sup> The traditional rule required prisoners who spent time erroneously at liberty to serve out the remainder of their sentences in their entirety regardless of the circumstances surrounding the erroneous release or delay.<sup>11</sup> Because of the traditional rule’s harsh effects, many courts have formulated exceptions to this rule.<sup>12</sup>

In its recent decision in *Vega v. United States*,<sup>13</sup> the Third Circuit discussed two exceptions to the traditional rule.<sup>14</sup> The first exception is based on constitutional guarantees of due process.<sup>15</sup> The second exception is a judicially-derived doctrine that allows courts to grant credit for time spent erroneously at liberty.<sup>16</sup> Although the Third Circuit denied Vega’s due process claim, the court found a basis for Vega’s request for credit for time spent erroneously at liberty at common law.<sup>17</sup> In its opinion, the court formally recognized the “doctrine of credit for time errone-

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erally FED. BUREAU OF PRISONS, STATE OF THE BUREAU 2005 8, <http://www.bop.gov/news/PDFs/sob05.pdf> (last visited Jan. 19, 2008) (stating that “[m]ore inmates are being released each year than were in the entire Federal prison system 20 years ago”). According to its State of the Bureau Report, the Federal Bureau of Prisons releases approximately 41,000 inmates per year, and all U.S. correctional systems combined release upwards of 630,000. See *id.* (providing statistics and discussing need for re-entry programs for released prisoners).

10. See generally Zitter, *supra* note 7 (comparing cases in which courts have discussed whether, and under what circumstances, criminal sentences are deemed to have run while prisoner is at liberty). Courts use the term “erroneously at liberty” to describe situations in which a convicted criminal is not taken into custody within a reasonable time following the pronouncement of a judgment or released from custody despite not having served time still remaining. See, e.g., Green v. Christiansen, 732 F.2d 1397, 1399 (9th Cir. 1984) (granting appellant credit toward unexpired portion of sentence for time “at liberty following his erroneous release”); Commonwealth v. Blair, 699 A.2d 738, 739 (Pa. Super. Ct. 1997) (denying appellant credit for time “erroneously at liberty” due to delayed incarceration).

11. For a collection of case law and other legal authorities discussing the traditional rule, see *infra* notes 26-28 and accompanying text.

12. See Chin, *supra* note 6, at 403-04 (discussing traditional common law rule and doctrines used by courts to “alleviate [its] draconian effect”). For a further discussion of two exceptions to the traditional common law rule, see *infra* notes 29-66 and accompanying text.

13. 493 F.3d 310 (3d Cir. 2007).

14. See *id.* at 315-18 (discussing due process implications in erroneous release cases and common law doctrine of credit for time erroneously at liberty).

15. See *id.* at 317 (responding to appellant’s claim that requiring him to return to prison after he was erroneously released and had begun rehabilitation process would violate his due process rights).

16. See *id.* at 317-18 (recognizing common law doctrine of credit for time erroneously at liberty as sole basis upon which appellant may seek credit toward his federal sentence). For a further discussion of the Third Circuit’s analysis, see *infra* notes 79-93 and accompanying text.

17. See *id.* at 313 (“The question of whether an erroneously released prisoner is entitled to credit for time spent at liberty is one of first impression for this Court.”).

ously at liberty,” and derived a two-prong test for district courts to follow when applying the doctrine.<sup>18</sup>

This Casenote argues that an erroneously released prisoner may have a valid due process claim if his or her expectations regarding the finality of a criminal sentence have “crystallized.”<sup>19</sup> Furthermore, this Casenote argues that in situations where a prisoner’s expectations have not crystallized, the Third Circuit’s two-prong test for the doctrine of credit for time at liberty may not adequately balance and protect the interests of the state, the prisoner and society.<sup>20</sup> Part II examines the two exceptions addressed in *Vega* and details their varying interpretations across jurisdictions.<sup>21</sup> Part III provides a narrative analysis of the Third Circuit’s decision in *Vega*.<sup>22</sup> Part IV argues that reincarcerating an erroneously released prisoner may violate the prisoner’s due process rights if his or her expectations regarding the finality of a criminal sentence have crystallized.<sup>23</sup> In addition, Part V argues that in situations where the prisoner’s expectations have not crystallized, a totality of circumstances approach—rather than the Third Circuit’s two-prong test—would be a more effective means of balancing the

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18. See *id.* at 317 (declining to find due process violation but recognizing appellant may be entitled to credit under doctrine of credit for time at liberty). Under the “doctrine of credit for time erroneously at liberty” or the “doctrine of credit for time at liberty,” a court may grant day-for-day jail time credit to a prisoner who has been erroneously released by government officials. See, e.g., *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984) (recognizing doctrine of credit for time at liberty and granting full day-for-day credit for time spent on erroneous release). For a further discussion of the doctrine of credit for time erroneously at liberty, see *infra* notes 44-73 and accompanying text.

19. For a discussion of case law and an analysis of American legal principles implying that an erroneously released prisoner may have a viable claim of due process, see *infra* notes 94-150 and accompanying text. The term “crystallize” or “crystallization” is used by courts to describe the point at which it would be fundamentally unfair to frustrate a prisoner’s expectations regarding the finality of the prisoner’s sentence. See, e.g., *Breest v. Helgemoe*, 579 F.2d 95, 101 (1st Cir. 1978) (affirming trial court’s increase of minimum sentence after defendant served fourteen days). Crystallization usually requires either a significant passage of time after the date of the prisoner’s release, or the prisoner’s expectations as to continued freedom to acquire “some real and psychologically critical importance.” See *id.* (describing point at which it would be fundamentally unfair to alter sentence).

20. For an analysis of the Third Circuit’s two-prong test and arguments advocating a broader, totality of circumstances approach, see *infra* notes 151-71 and accompanying text.

21. For a discussion of two exceptions to the traditional rule, the due process exception and the doctrine of credit for time at liberty, and how courts have interpreted and applied these exceptions, see *infra* notes 29-66 and accompanying text.

22. For a synopsis of the factual and procedural background of the *Vega* case as well as the Third Circuit’s rationale, see *infra* notes 67-93 and accompanying text.

23. For a discussion of courts that recognize prisoners’ fundamental rights to settled expectations regarding the finality of their sentences and an analysis of legal principles stressing the importance of finality, see *infra* notes 106-50 and accompanying text.

competing interests at stake.<sup>24</sup> Finally, Part VI urges the Third Circuit not only to reconsider whether erroneously released prisoners have a fundamental interest in preserving their settled expectations of continued freedom, but also to expand its two-prong test to include more than just the government's negligence and the prisoner's contributing fault.<sup>25</sup>

## II. THE "CAT" ALWAYS WINS: THE HARSH EFFECTS OF THE TRADITIONAL RULE

The traditional rule required prisoners who were erroneously released and later reincarcerated to serve out their full sentence regardless of the degree of government negligence, the amount of time lapsed since the release or the prisoner's efforts to bring the mistake to the attention of authorities.<sup>26</sup> Because of the harsh, unyielding effect of the traditional rule, courts have recognized two exceptions to provide relief to a prisoner who has spent time erroneously at liberty: the due process exception and the doctrine of credit for time at liberty.<sup>27</sup> These exceptions have proven

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24. For a critical analysis of the Third Circuit's two-prong test used to determine whether a prisoner is entitled to credit for time at liberty, see *infra* notes 151-80 and accompanying text.

25. For arguments that the Third Circuit should both reconsider whether an erroneously released prisoner could have a valid due process claim in certain circumstances and expand its two-prong test beyond consideration of the government's negligence and the prisoner's contributing fault, see *infra* notes 94-171 and accompanying text.

26. See *United States v. Martinez*, 837 F.2d 861, 864 (9th Cir. 1988) (recognizing traditional rule requiring erroneously released prisoners to serve full sentences when error is discovered); *United States ex rel. Mayer v. Loisel*, 25 F.2d 300, 301 (5th Cir. 1928) (stating that mere lapse of time without imprisonment does not constitute service of sentence); *Leonard v. Rodda*, 5 App. D.C. 256, 274-75 (D.C. Cir. 1895) (requiring petitioner to serve full sentence although mistakenly released as result of inadvertence of warden and through no fault of his own); *United States v. Vann*, 207 F. Supp 108, 113 (E.D.N.Y. 1962) (holding that delay in incarceration does not invalidate criminal sentence or affect its length because term of imprisonment does not begin until defendant is taken into custody); *Aldredge v. Potts*, 200 S.E. 113, 114-15 (Ga. 1938) (holding that petitioner's sentence was not tolled during periods of parole granted under void court orders); see also *Chin*, *supra* note 6, at 403 (noting that many courts previously applied traditional rule that required defendant to serve his or her full sentence regardless of circumstances surrounding release or delay). See generally *Zitter*, *supra* note 7 (comparing cases in which various courts addressed whether, and under what circumstances, delay in commencement or interruption of sentence should cause sentence to run while prisoner is at liberty).

27. See *Chin*, *supra* note 6, at 403-04 (detailing two exceptions recognized by courts to "alleviate the draconian effect of [the traditional rule]"). This Note examines two of the most common exceptions to the traditional common law rule requiring an erroneously released prisoner to serve out his or her full sentence. The first exception is based on a constitutional due process theory. See *infra* notes 29-43 and accompanying text for a further discussion of the due process theory exception. The second exception is the doctrine of credit for time at liberty. See *infra* notes 44-66 and accompanying text for a further discussion of the doctrine of credit for time at liberty. In addition to these two exceptions, some courts will also recognize an exception based on a theory of equitable estoppel. See *Martinez*, 837

effective in granting relief to prisoners that would otherwise be unavailable under the traditional rule, but they have also created controversy over when and how the exceptions should be applied.<sup>28</sup>

#### A. Due Process Lets the "Mouse" Go Free

The first exception, used to mitigate the harsh effects of the traditional rule, is based on the guarantees of due process found in the United States Constitution.<sup>29</sup> Some courts, such as the Fifth and Eighth Circuits,

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F.2d at 865 (applying estoppel theory but declining to grant relief because, *inter alia*, defendant was not ignorant of facts surrounding delay in execution of sentence); *Green v. Christiansen*, 732 F.2d 1397, 1399 (9th Cir. 1984) (applying estoppel theory and finding government did not mislead defendant so that it would be improper to charge defendant with constructive knowledge that defendant still had time to serve); *Johnson v. Williford*, 682 F.2d 868, 872 (9th Cir. 1982) (holding government is estopped from reincarcerating defendant because he had been led to believe, through eight successive administrative reviews, that defendant was eligible for parole when released). The equitable estoppel theory states that the government is estopped from reincarcerating the prisoner if: (1) the party to be estopped knew the facts; (2) the party to be estopped intended that its conduct would be acted upon or the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel was ignorant of the facts; and (4) that party relied on the former's conduct to its injury. See *Green*, 732 F.2d at 1399 (citing *Johnson*, 682 F.2d at 872) (listing four elements of equitable estoppel).

28. See *Johnson*, 682 F.2d at 873 (affirming district court's grant of habeas corpus because reincarcerating prisoner who was mistakenly paroled would violate due process); see also *Green*, 732 F.2d at 1400 (granting relief to erroneously released prisoner under doctrine of credit for time at liberty). See generally Zitter, *supra* note 7 (compiling list of courts that have granted or denied relief to prisoners under either due process exception or doctrine of credit for time at liberty).

29. See *Shields v. Beto*, 370 F.2d 1003, 1005-06 (5th Cir. 1967) (finding state's lack of interest in execution of defendant's sentence was equivalent to waiver of jurisdiction and requiring defendant to complete sentence would violate his rights under due process clause of Fourteenth Amendment); see also 16C C.J.S. *Constitutional Law* § 1670 (2007) (recognizing that state's attempt to reincarcerate prisoners after misleading them to believe they are free from prison sentences and then making no attempt to reacquire custody for prolonged number of years would violate due process). Due process of law is guaranteed by both the Fifth and the Fourteenth Amendments of the United States Constitution. See 21A AM. JUR. 2D *Criminal Law* § 979 (2007) (discussing sources of constitutional right to due process of law). The Due Process Clause of the Fifth Amendment, which states "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]" only applies to the federal government, and not to the states. U.S. CONST. amend. V, cl. 4 (establishing constitutionally-protected right to due process of law); see also 21A AM. JUR. 2D *Criminal Law* § 979 (2007) (distinguishing due process clause of Fifth Amendment from identical clause in Fourteenth Amendment). Nevertheless, the Due Process Clause of the Fourteenth Amendment imposes this limitation upon the states by providing "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 2 (extending due process limitations to states). As stated by the Supreme Court in *County of Sacramento v. Lewis*, due process aims to protect individuals from arbitrary actions taken by the government that effectively deny an individual procedural fairness or result in the government exerting power without any reasonable justification. 523 U.S. 833, 845-46 (1998) (internal citations omitted) (noting dual purpose of due process in ensuring procedural and substantive fairness); see also

have held that delayed incarceration or reincarceration after an erroneous release violates the prisoner's due process rights and requires the immediate release of the prisoner.<sup>30</sup> Courts have analyzed due process claims made by erroneously released prisoners under three different approaches: (1) the "due process waiver theory"; (2) the balancing approach; and (3) the two-part test established in *County of Sacramento v. Lewis*<sup>31</sup> by the Supreme Court.<sup>32</sup>

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*Hawkins v. Freeman*, 195 F.3d 732, 752 (4th Cir. 1999) (Murnaghan, J., dissenting) ("Although a literal reading of the Clause may suggest that the government only has to afford its citizens a fair process, the Clause has been understood to contain a substantive component as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" (quoting *Lewis*, 523 U.S. at 833)); see also Timothy P. Lydon, Note, *If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free? Balancing the Liberty Interests of Erroneously Released Prisoners*, 88 GEO. L.J. 565, 573 (2000) (noting that Fourteenth Amendment provides two categories of protections: procedural due process, which guarantees that a state may not deprive individual of life, liberty or property without providing procedural safeguards, and substantive due process which prohibits certain state actions regardless of fairness of procedures). Therefore, due process requires that actions by government officials must be consistent with the "fundamental principles of liberty and justice." See *Shields*, 370 F.2d at 1004 (establishing scope of due process protection).

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

31. 523 U.S. 833 (1998).

32. See Lydon, *supra* note 29, at 581 (discussing and assessing approaches to substantive due process analysis in erroneous release cases). Lydon discusses three approaches to substantive due process analysis and argues that the balancing approach, as opposed to the due process waiver theory or the *Lewis* analysis, is the most effective test for erroneous release cases. See *id.* at 603 ("To prevent fundamentally unfair results, courts should balance the competing interests of the state and erroneously released prisoners."). Lydon first discusses the "due process waiver theory," which allows courts to discharge the unserved portion of an erroneously released prisoner's sentence if the government expressly or impliedly waives jurisdiction over the prisoner. See *id.* at 581-82 (noting concept of waiver evolved from *Shields* case and applies in situations where state's conduct is affirmatively wrong or grossly negligent and prisoner has experienced prolonged period of freedom). For a further discussion of the due process waiver theory, see *infra* notes 33-34 and accompanying text. Lydon also discusses the balancing approach, which requires courts to weigh the interests of the prisoner in continued freedom against the interests of the state in reincarcerating the prisoner. See *id.* at 573-74, 583-84 (summarizing use of balancing approach in general substantive due process chal-



Under the due process waiver theory, a court may declare that the government's conduct, in either delaying the commencement of a criminal sentence or allowing an erroneous release, operates as a waiver of jurisdiction over that prisoner.<sup>33</sup> Because the government has waived jurisdiction, reincarcerating the prisoner would violate his or her due process rights.<sup>34</sup> In addition, courts have also used a balancing approach in substantive due process challenges.<sup>35</sup> Under the balancing test, a court may discharge a prisoner's remaining sentence if the prisoner's interest in remaining free outweighs the government's penal interests.<sup>36</sup>

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lenges and tailoring this approach to erroneous release cases). For a further discussion of the balancing approach to substantive due process analysis, see *infra* notes 35-36 and accompanying text. Lastly, Lydon discusses the *Lewis* test, which requires a showing of conscience-shocking conduct on the part of the government that infringes upon a fundamental right. See *id.* at 575-78, 586-94 (explaining *Lewis* test and applying to erroneous release cases). For a further discussion of the *Lewis* test, see *infra* notes 37-40 and accompanying text.

33. See *Shelton*, 578 F.2d at 1244 (remanding for evidentiary hearing to determine if government's conduct in failing to execute judgment and commitment of appellant for seven years was so arbitrary as to constitute waiver of jurisdiction and denial of due process); *Piper*, 485 F.2d at 246 (noting that state waiver theory requires state action that is so affirmatively wrong or inaction that is so grossly negligent that reincarceration would be inconsistent with "fundamental principles of liberty and justice"); *Shields*, 370 F.2d at 1005-06 (holding erroneous release and failure to reincarcerate for more than twenty-eight years operated as pardon of sentence and waiver of jurisdiction; surrendering sovereign lacked authority to demand completion of prior sentence and denied prisoner due process rights); see also *Bonebrake*, 417 F.3d at 941 (applying waiver theory but declining to grant defendant's writ of habeas corpus because government's behavior was not so egregious nor was its inaction so grossly negligent that it would be inconsistent with fundamental principles of liberty and justice).

34. See *Shelton*, 578 F.2d at 1246 (stating that whether appellant's due process rights have been violated depends on whether government's failure to apprehend appellant is sufficient to establish that government has waived jurisdiction over appellant); *Piper*, 485 F.2d at 246 (acknowledging that *Shields* waiver theory is based upon due process clause of Fourteenth Amendment); *Shields*, 370 F.2d at 1006 (holding that state denied appellant due process because state lacked authority to execute sentence after waiving jurisdiction); see also *Chin*, *supra* note 6, at 418 (noting that waiver theory "relies on the due process clause of the Fourteenth Amendment").

35. See *Lydon*, *supra* note 29, at 573-74, 583-86 (explaining balancing approach used by some courts in substantive due process challenges).

36. See *id.* (indicating that state cannot burden individual's liberty interest if it outweighs state's interests). *Lydon* argues that the balancing approach is the most effective means of prohibiting states from reincarcerating rehabilitated individuals who no longer pose a threat to society. See *id.* (advocating balancing approach over waiver theory or *Lewis* test). *Lydon* implies that this approach would not provide a windfall to erroneously released prisoners because states have substantial interests in deterrence, punishment and public safety. See *id.* (noting that state's penal interests will frequently outweigh prisoner's liberty interest). According to *Lydon*, this approach is more appropriate because it provides relief in compelling cases where the prisoner has been free for a significant period of time and made significant progress in rehabilitation. See *id.* (emphasizing benefits of balancing approach).

In more recent cases involving substantive due process challenges, courts have used the two-part *Lewis* test.<sup>37</sup> Under this approach, the prisoner first must show that the government's conduct in reincarcerating the prisoner, after a period of erroneous release, "shock[s] the contemporary conscience."<sup>38</sup> Second, the prisoner must show that the conduct violates a

37. See *Bonebrake*, 417 F.3d at 942-43 (applying *Lewis* test to determine whether state's four-year delay in seeking to execute sentence violated substantive due process); *Hawkins v. Freeman*, 195 F.3d 732, 738-46 (4th Cir. 1999) (using *Lewis* test to determine whether reincarcerating appellant after he was mistakenly released on parole would violate due process).

38. See *County of Sacramento v. Lewis*, 523 U.S. 833, 847 & n.8 (1998) (stating only most egregious, conscience-shocking official conduct could bring out substantive due process violation). When the waiver theory was first articulated by the Fifth Circuit in *Shields*, a showing of prolonged inaction or lack of interest on the part of the government sufficed to establish a due process violation. See *Shields*, 370 F.2d at 1006 (finding government's failure to file detainer and lack of interest in appellant for more than twenty-eight years sufficient to operate as waiver of jurisdiction over appellant). This standard was later refined when the Fifth Circuit stated that a "lack of eager pursuit" by the government was not enough. See *Piper*, 485 F.2d at 246 (distinguishing *Shields* and denying claim that conduct by state constituted waiver of jurisdiction). Instead, the court required proof of conduct on the part of the government "so affirmatively wrong or . . . inaction so grossly negligent that it would be unequivocally inconsistent with fundamental principles of liberty and justice to require a legal sentence to be served in the aftermath of such action or inaction." *Id.* at 246 (explaining kind of government conduct that would violate substantive due process) (internal quotations omitted); see also *Shelton*, 578 F.2d at 1244 (finding that, under *Piper*, holding government's choice to hold judgment and commitment papers on appellant for seven years before executing sentence would constitute gross negligence or arbitrary exercise of power). In more recent cases, courts have relied on the Supreme Court's directive in *Lewis* stating that only governmental conduct that "shock[s] the conscience" will suffice to establish a violation of due process. See *Lewis*, 523 U.S. at 847 n.8 (establishing requisite standard of governmental conduct in substantive due process claims); see also *Bonebrake*, 417 F.3d at 942 (applying *Lewis* standard and finding state's four-year delay in executing sentence did not meet this rigorous standard); *Hawkins*, 195 F.3d at 746 (applying *Lewis* standard and holding reincarcerating appellant who had been mistakenly released on parole would not shock contemporary conscience because delay of four years was not overly excessive and there was no evidence that government purposely failed to execute sentence or was grossly negligent in that regard). In his concurring opinion in *Lewis*, Justice Scalia rejected the shocks-the-conscience test comparing this standard to the highly subjective substantive due process methodologies that were previously rejected by the Court. See *Lewis*, 523 U.S. at 861 (Scalia, J., concurring) (rejecting test derived by majority because it closely resembled analysis disfavored by Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997)). Justice Scalia claimed that instead of asking whether the particular activity shocks the conscience, the inquiry should be whether the rights asserted by the individual have traditionally been protected. See *id.* at 863 (same). Although Justice Souter's majority opinion admitted that the shocks-the-conscience test is "no calibrated yard stick," he denied the similarities, perceived by Justice Scalia, between this standard and those rejected in *Glucksberg*. See *id.* at 847 (rebutting Justice Scalia's argument in concurrence). Justice Souter insisted that the threshold question should be whether the executive action shocks the contemporary conscience, otherwise the Constitution would be "demoted to . . . a font of tort law." See *id.* at 847 n.8 (same). Only after the executive action is established as conscience-shocking will the court consider any historical, textual or controlling precedent for the alleged due process violation. See *id.* (establishing

fundamental right or liberty that is implicit in the prisoner's right to due process.<sup>39</sup> A substantive due process claim will only be upheld if the prisoner establishes both requirements.<sup>40</sup>

Courts often disagree over whether an erroneously released prisoner's liberty interest is fundamental and thus subject to due process protection.<sup>41</sup> Some courts will recognize a prisoner's due process claim

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second step in substantive due process analysis). To clarify what kind of government action would shock the conscience, the Supreme Court emphasized in *Lewis* that the Constitution does not guarantee a standard of due care and, therefore, negligence on the part of state officials will not be sufficient to cross the threshold of constitutional due process. *See id.* at 848 (establishing standard of conduct required for substantive due process challenge). Instead, the Court implied conscience-shocking conduct would most likely be intentional actions that are unjustifiable by any legitimate government interest. *See id.* (same). Compare *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (holding that forced pumping of suspect's stomach violated due process rights because such conduct "shock[ed] the conscience" and violated "decencies of civilized conduct"), with *Collins v. Harker Heights*, 503 U.S. 115, 130 (1992) (holding city's alleged failure to train its employees regarding workplace hazards was not arbitrary or conscience-shocking in constitutional sense).

39. *See Lewis*, 523 U.S. at 847 n.8 (announcing that only after showing that conduct is sufficiently egregious will court need to determine whether asserted right warrants due process protection). In *Glucksberg*, the Supreme Court discussed the protections afforded by the Due Process Clause. *See Glucksberg*, 521 U.S. at 720-21 (holding that asserted right to assistance in committing suicide was not fundamental liberty interest protected by due process clause). The Court noted that, in addition to those freedoms enumerated in the Bill of Rights, protection has been extended to other liberties including the right to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity; and to abortion. *See id.* at 720 (listing fundamental rights). Nonetheless, the Court emphasized its reluctance to expand substantive due process rights and the need to "'exercise the utmost care whenever . . . break[ing] new ground in this field.'" *Id.* (quoting *Collins*, 503 U.S. at 125) (disfavoring expansion of due process rights). The Court suggested that among the rights protected are those "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720-21 (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)) (describing fundamental right). The Court further explained due process protection extends to those rights that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)) (establishing requisite showing in substantive due process challenge to legislative action). In addition to a showing of the fundamental nature of the asserted liberty interest, the Court also required a "careful description" of this interest. *See id.* (quoting *Collins*, 503 U.S. at 125) (qualifying requisite showing in substantive due process challenge to legislative action).

40. *See Hawkins*, 195 F.3d at 738 (stating that conscience-shocking standard is threshold test of culpability; if conduct does not meet this test, then due process claim fails; if conduct does meet this test, then court must determine what level of protection is afforded to liberty interest in question); *see also Lydon*, *supra* note 29, at 575-77 (noting first step of *Lewis* test requires conscience-shocking conduct and second step requires court to determine if liberty interest at issue is fundamental).

41. Compare *Johnson v. Williford*, 682 F.2d 868, 873 (9th Cir. 1982) (finding that reincarcerating petitioner after period of erroneous release on parole would violate due process), and *Sanchez v. Warden*, 329 F. Supp. 2d 200, 206 (D.N.H.

where the prisoner's expectations regarding the finality of his sentence and his continued freedom have crystallized.<sup>42</sup> On the contrary, other courts have rejected due process claims under similar circumstances, arguing that the prisoner's asserted liberty interest was not constitutionally protected.<sup>43</sup>

B. *Giving the Mouse Some Cheese: The Doctrine of Credit for Time Erroneously at Liberty*

In addition to the due process exception to the traditional rule, a majority of courts will provide relief to a prisoner via the doctrine of credit for time spent erroneously at liberty.<sup>44</sup> Under this doctrine, courts may grant credit equal to the time spent at liberty toward the prisoner's outstanding sentence.<sup>45</sup> Unlike the due process exception, the doctrine of

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2004) (recognizing that denial of credit for time at liberty that would affect duration of prisoner's confinement and require him to serve sentence in installments may implicate due process protection), *with Hawkins*, 195 F.3d at 742-48 (asserting that erroneous release is too common to be considered conscience-shocking and declaring that right of erroneously released prisoner to continued freedom is not fundamental).

42. *See Hawkins*, 195 F.3d at 756 (Murnaghan, J., dissenting) ("Fourth Circuit law provides that after an inmate is released on parole, his reasonable expectation of continued freedom crystallizes over time. Once crystallized, that reasonable expectation of freedom is a legitimate liberty interest protected by the Due Process Clause."); *United States v. Watkins*, 147 F.3d 1294, 1298 n.5 (11th Cir. 1998) (recognizing that increasing sentence may violate due process if prisoner's expectations regarding its finality have crystallized); *United States v. Davis*, 112 F.3d 118, 123 (3d Cir. 1997) (same); *United States v. Cook*, 890 F.2d 672, 675 (4th Cir. 1989) (same); *United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1985) (same); *United States v. Campbell*, 985 F. Supp. 158, 160-61 (D.D.C. 1997) (same); *United States v. Tolson*, 935 F. Supp. 17, 21 (D.D.C. 1996) (same); *Thayer v. United States*, 937 F. Supp. 662, 667 (E.D. Mich. 1996) (same); *Santiago v. United States*, 954 F. Supp. 1201, 1203 (N.D. Ohio 1996) (same); *United States v. Crowder*, 947 F. Supp. 1183, 1193 (E.D. Tenn. 1996) (same); *see also DeWitt v. Ventetoulo*, 6 F.3d 32, 34-35 (1st Cir. 1993) (asserting that due process imposes some outer limits on power to increase sentences, but recognizing that only in extreme cases will correction to earlier sentence be deemed inconsistent with fundamental notions of fairness).

43. *See Hawkins*, 195 F.3d at 750 (holding that "precise liberty interest asserted here—that of continuing in a state of freedom erroneously granted by government . . .—cannot be found one of those fundamental rights and liberties which are objectively deeply rooted in this Nation's history and tradition") (internal quotations omitted).

44. For a discussion of courts that have adopted the doctrine of credit for time erroneously at liberty, see *infra* notes 51-59 and accompanying text.

45. *See United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (recognizing doctrine of credit for time at liberty but finding appellant's claim under doctrine to be premature because he had not exhausted administrative remedies); *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984) (recognizing doctrine of credit for time at liberty and granting full day-for-day credit for time spent on erroneous release); *see also* 24 C.J.S. *Criminal Law* § 2179 (2007) ("[W]hen a prisoner is released or discharged from prison by mistake, his or her sentence continues to run while he or she is at liberty and his or her sentence must be credited with that time . . .").

credit for time erroneously at liberty does not completely discharge the remaining criminal sentence, but instead reduces the prisoner's remaining sentence.<sup>46</sup>

The doctrine of credit for time erroneously at liberty was first introduced by the Tenth Circuit in *White v. Pearlman*.<sup>47</sup> In *White*, the Tenth Circuit emphasized that a prisoner has certain rights, including the right to serve a continuous sentence free from interruptions.<sup>48</sup> The court concluded that where a prisoner is mistakenly released from a penal institution, through no fault of the prisoner and without violation of parole, the sentence continues to run while the prisoner is at liberty.<sup>49</sup> Because the

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46. Compare *United States v. Merritt*, 478 F. Supp. 804, 808-09 (D.D.C. 1979) (vacating remainder of defendant's federal sentence because reincarceration of defendant would violate fundamental principles of liberty and justice), with *Green*, 732 F.2d at 1400 (remanding to district court for order requiring prison authorities to grant day-for-day credit for time spent erroneously at liberty and to recalculate release date accordingly).

47. 42 F.2d 788, 788 (10th Cir. 1930) (establishing rule against installment punishment and holding that erroneously released prisoner's sentence continues to run while at liberty). In *White*, the petitioner was granted a writ of habeas corpus after he was erroneously released by the warden of the Texas state penitentiary prior to the expiration of his sentence and then ordered to serve the remainder of his sentence after two years at liberty. See *id.* (detailing events leading to Tenth Circuit's review). The Tenth Circuit affirmed the government's power to recommit a prisoner who has been mistakenly released, but also recognized a prisoner's right to a continuous sentence. See *id.* (establishing rights of government and prisoner in cases of erroneous release). The court concluded that "where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty." *Id.* (same). The Tenth Circuit's holding in *White* has since been adopted by a number of courts and gradually evolved into what is now referred to as the doctrine of credit for time at liberty. See *Vega v. United States*, 493 F.3d 310, 315 (3d Cir. 2007) (stating origin of doctrine of credit for time at liberty can be traced to Tenth Circuit's holding in *White*); *Green*, 732 F.2d at 1400 (noting that underlying principle entitling prisoners to credit for time erroneously at liberty was first set forth in *White*); *United States v. Mazzoni*, 677 F. Supp. 339, 341 (E.D. Pa. 1987) (stating principle that prisoner's sentence continues to run while at liberty was first enunciated in *White*).

48. See *White* 42 F.2d at 789 (establishing rule against installment punishment and holding that erroneously released prisoner's sentence continues to run while at liberty). In *White*, the court states that a prisoner has a right to a continuous sentence because the prisoner should be able to serve a timely sentence and re-establish him or herself in society. See *id.* (providing rationale for rule against installment punishment). The court explains that if the government is allowed to enforce service of a criminal sentence in installments, the prisoner will not have a chance to "live down his past." See *id.* (same).

49. See *id.* (establishing rule that sentence continues to run while prisoner is erroneously at liberty but limiting to situations where prisoner is not at fault). The *White* court effectively rejected the traditional common law rule by stating that a prisoner's sentence continues to run while at liberty. See *id.* (holding that sentence continues to run grants credit for time spent at liberty contrary to traditional rule which required prisoner to serve full sentence). The court clearly stated, however, that the rule should not apply to a prisoner who escaped from prison or violated conditions of parole. See *id.* (stating that "escaped prisoner cannot be credited with the time he is at large"). While the Tenth Circuit made clear that this rule

prisoner's sentence continues to run while he or she is not in custody, the Tenth Circuit's rule grants day-for-day credit for time spent at liberty.<sup>50</sup>

Since its inception in *White*, the doctrine of credit for time erroneously at liberty has been adopted by a majority of circuits.<sup>51</sup> In addition,

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should only be available to prisoners without any contributing fault, the court declined to consider whether a prisoner who is cognizant of the mistake has an affirmative duty to ensure his or her sentence is fully executed. *See id.* ("As to whether a prisoner, who knows a mistake is being made and says nothing, is at fault, we do not now consider.").

50. *See id.* (establishing rule that sentence continues to run after mistaken release and effectually granting credit for time spent at liberty). The defendant in *White* was reincarcerated after being mistakenly discharged. *See id.* (recounting events leading up to prisoner's filing of habeas petition and court's grant of relief). Shortly after the date on which his original sentence would have expired had he not been released, the defendant applied for a writ of habeas corpus. *See id.* (same). The district court granted the writ and the Tenth Circuit affirmed. *See id.* (detailing procedural history and court's holding).

51. *See, e.g., Vega v. United States*, 493 F.3d 310, 315 (3d Cir. 2007) (formulating test to determine when credit for time at liberty should be awarded and remanding case to district court for further consideration consistent with this test); *Leggett v. Fleming*, 380 F.3d 232, 234 (5th Cir. 2004) (acknowledging credit may be granted to erroneously released prisoners under certain circumstances but denying defendant credit because delay in commencement of service does not constitute service of that sentence); *Thompson v. Cockrell*, 263 F.3d 423, 427 (5th Cir. 2001) (stating defendant has right to continuous sentence and is entitled to credit for time spent erroneously at liberty as long as defendant was not at fault); *Clark v. Floyd*, 80 F.3d 371, 374 (9th Cir. 1996) (granting credit for time spent at liberty following erroneous release); *Dunne v. Keohane*, 14 F.3d 335, 336-37 (7th Cir. 1994) (recognizing common law rule against service of sentence in installments but denying credit on facts); *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (stating doctrine of credit for time at liberty would apply to defendant's case but claim for credit was premature because defendant had not exhausted administrative remedies); *Kiendra v. Hadden*, 763 F.2d 69, 73 (2d Cir. 1985) (holding failure of marshals to take custody of defendant did not prevent his sentence from running while he was at liberty); *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984) (granting credit for time spent at liberty based on doctrine set forth in *White* and adopted by Ninth Circuit in *Smith*); *Cox v. United States ex rel. Arron*, 551 F.2d 1096, 1098-99 (7th Cir. 1977) (recognizing doctrine of credit for time at liberty but denying credit based on circumstances of case); *United States v. Downey*, 469 F.2d 1030, 1032 (8th Cir. 1972) (stating criminal sentence runs from date on which defendant is taken into custody and granting defendant credit for time spent in state custody prior to commencement of federal sentence); *United States v. Croft*, 450 F.2d 1094, 1099 (6th Cir. 1971) (concluding defendant's sentence ran from date of federal court's order of commitment even though defendant first held in county jail and later delivered to state prison); *United States ex rel. Binion v. O'Brien*, 273 F.2d 495, 498 (3d Cir. 1959) (granting defendant credit against criminal sentence for time required to report to probation officer after probation had expired); *Smith v. Swope*, 91 F.2d 260, 262 (9th Cir. 1937) (reversing denial of writ because prisoner entitled to serve time promptly and deemed to be serving it from date ordered and taken into custody); *United States v. Nickens*, 856 F. Supp. 72, 73 (D.P.R. 1994) (recognizing doctrine of credit for time at liberty as adopted by Ninth Circuit), *vacated pursuant to settlement*, No. 94-1861, 1995 WL 314483 (1st Cir. Apr. 14, 1995) (granting credit upon joint motion for disposition of appeal).

In *Nickens*, the District Court for the District of Puerto Rico recognized the common law doctrine of credit for time at liberty but declined to award credit because the defendant failed to show that the government was negligent. *See id.* at

many state courts have also adopted the doctrine.<sup>52</sup> Despite the broad acceptance of the doctrine of credit for time erroneously at liberty, courts recognizing the doctrine disagree on the factors that should be considered when granting credit towards a criminal sentence.<sup>53</sup>

One issue that courts disagree over is whether a prisoner should receive credit only when there is an interruption of a sentence, and not merely a delay in its commencement.<sup>54</sup> Some courts, such as the Fifth and Ninth Circuits, have argued that the doctrine of credit for time erroneously at liberty only applies in situations where the prisoner was erroneously released after serving some portion of the original sentence.<sup>55</sup> Other courts, including the Second and Seventh Circuits, state that a prisoner can be afforded credit under the doctrine regardless of whether the prisoner's sentence actually began.<sup>56</sup> As suggested by one commentator, the key to the doctrine of credit for time at liberty is disobedience of a court order, not interruption of a criminal sentence.<sup>57</sup> For instance, when

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74 (denying credit on facts). This holding was later vacated by the First Circuit and the case was remanded to the district court to award credit against the defendant's sentence as originally requested. *See* *United States v. Nickens*, No. 94-1861, 1995 WL 314483 (1st Cir. Apr. 14, 1995) (granting credit upon joint motion for disposition of appeal).

52. *See* Chin, *supra* note 6, at 408-10 nn.25-44 (collecting cases from state courts in District of Columbia, Alabama, Arizona, Colorado, Florida, Georgia, Louisiana, Massachusetts, New Jersey, New York, Oklahoma, Pennsylvania, Tennessee, Texas, California, Iowa, Mississippi, Missouri, New Hampshire and Ohio that have recognized doctrine of credit for time at liberty). Chin also cites to cases in which the United States Department of Justice and authorities in Delaware, Nevada and Wisconsin granted credit without litigation in support of the proposition that the doctrine of credit for time at liberty is widely accepted. *See id.* at 410 nn.45-48 (collecting cases in which prosecutors have recognized doctrine and granted credit without contention).

53. For a further discussion of the varying interpretations of the doctrine of credit for time at liberty and the factors over which different jurisdictions are split, *see infra* notes 61-73 and accompanying text.

54. *See* Chin, *supra* note 6, at 420-28 (discussing whether doctrine of credit for time erroneously at liberty should apply only to interruptions of sentences).

55. *See* *Leggett v. Fleming*, 380 F.3d 232, 234 (5th Cir. 2004) (asserting delay in commencement of sentence does not constitute service of that sentence); *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (relying on *Smith and White* to support proposition that doctrine of credit for time at liberty has only been applied in cases where convicted person has served some part of sentence and then been erroneously released).

56. *See* *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (stating that "government is not permitted to delay the expiration of the sentence either by postponing the commencement of the sentence or by releasing the prisoner for a time and then reimprisoning him"); *Kiendra v. Hadden*, 763 F.2d 69, 73 (2d Cir. 1985) (finding federal sentence began to run on date ordered even though appellant was never taken into custody).

57. *See* Chin, *supra* note 6, at 421 (asserting that doctrine has typically been triggered when court order is ignored regardless of whether prisoner has begun service of sentence). Chin argues that the doctrine of credit for time erroneously at liberty applies to interruptions of sentences as well as delays in the commencement of a sentence. *See id.* (acknowledging circuit split over issue and arguing that

a court imposes a sentence that is meant to run concurrent to an existing sentence but the marshal fails to execute the court order, the doctrine prevents the prisoner from serving consecutive state and federal time.<sup>58</sup> As such, the doctrine of credit for time at liberty provides a means for effectuating the court's original intent, even though a sentence has not technically been interrupted.<sup>59</sup>

A second area of disagreement is whether a finding of negligence on the part of the imprisoning sovereign is required to grant credit toward a prisoner's outstanding sentence.<sup>60</sup> The Ninth Circuit, for instance, will grant credit upon a showing of negligence by any government entity, not just the imprisoning sovereign.<sup>61</sup> Although circuits disagree over which party must be negligent, the circuits generally agree that a showing of simple or mere negligence will entitle a prisoner to credit.<sup>62</sup>

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doctrine can apply regardless of whether sentence was interrupted or never began). Chin criticizes the Ninth Circuit's interpretation of *Smith* and *White*, and argues that these cases do not support the conclusion that credit can only be afforded when a sentence is interrupted. *See id.* (noting that defendant in *Smith* had not begun service of sentence and both *Smith* and *White* relied on *In re Jennings*, 118 F. 479 (C.C.E.D. Mo. 1902), in which defendant had not begun service of sentence). Chin also refutes the argument that Title 18 Section 3585(a) of the United States Code prohibits the doctrine from applying where the defendant has not begun service of the sentence before being erroneously released. *See id.* at 423-28 (asserting that granting credit to prisoner who has not starting serving sentence is not inconsistent with language or purpose of Code). According to this section of the Code, "[a] sentence to a term of imprisonment commences on the date the defendant is received in custody, awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a) (2000). As Chin points out, the United States Department of Justice has suggested that this statute should be interpreted liberally and, therefore, a majority of courts have held that the federal statute is not a bar to credit even when a sentence never began because a defendant was erroneously at liberty. *See Chin, supra* note 6, at 424 (arguing doctrine of credit for time at liberty does not only apply when sentence has been interrupted).

58. *See Chin, supra* note 6, at 422 (providing rationale for assertion that doctrine of credit for time erroneously at liberty applies to delayed incarcerations in addition to erroneous releases).

59. *See id.* (outlining application of doctrine of credit for time erroneously at liberty).

60. *See Leggett*, 380 F.3d at 235-36 (stating prisoner should not receive credit for time at liberty when erroneous release was mistake of independent sovereign).

61. *See Clark v. Floyd*, 80 F.3d 371, 374 (9th Cir. 1996) (holding negligence on part of any government entity is sufficient to grant credit for time erroneously at liberty).

62. *See id.* at 374 (requiring only showing of simple or mere negligence); *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (asserting that defendant released on bond pending appeal can receive credit based solely on theory of simple or mere negligence); *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984) (granting defendant full credit for time at liberty upon showing of mere negligence). *But see United States v. Nickens*, 856 F. Supp. 72, 75 (D.P.R. 1994) (stating that action based on mere or simple negligence may not be recognized in First Circuit but failing to suggest what level of negligence is required), *vacated pursuant to settlement*, No. 94-1861, 1995 WL 314483 (D.P.R. April 14, 1995) (granting credit upon joint motion for disposition of appeal).



Lastly, courts disagree about whether an erroneously released prisoner has an affirmative duty to ensure service of the full sentence.<sup>63</sup> Although the Tenth Circuit stated in *White* that prisoners will only be entitled to credit if they were released through no fault of their own, the court did not address whether prisoners have an affirmative duty to bring mistakes to the attention of authorities.<sup>64</sup> Consequently, courts that have adopted the doctrine of credit for time erroneously at liberty have taken different stances on this issue.<sup>65</sup> In *Vega*, the Third Circuit addressed the issue regarding a prisoner's responsibility as well as many other relevant issues that have created a decisive circuit split.<sup>66</sup>

### III. VEGA V. UNITED STATES: THE THIRD CIRCUIT TAKES THE ROLE OF REFEREE IN A GAME OF CAT AND MOUSE

#### A. Prisoner is Set Free . . . By Mistake

The principal issue before the Third Circuit in *Vega* was whether the appellant was entitled to credit toward his federal sentence for the time he spent at liberty after being erroneously released from state prison.<sup>67</sup> On

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63. See Chin, *supra* note 6, at 414 (recognizing that federal case law implies that prisoner is still entitled to credit even if prisoner was aware of mistake and remained silent, but pointing out that some state courts have declined credit under similar circumstances).

64. See *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930) (stating “[a]s to whether a prisoner, who knows a mistake is being made and says nothing, is at fault, we do not now consider”).

65. Compare *Martinez*, 837 F.2d at 866 (asserting defendant “has no affirmative duty to aid in execution of his sentence”), with *Nickens*, 856 F. Supp. at 76 (concluding defendant had affirmative duty under original judgment and sentence to stay in contact with officials and to arrange for surrender), and *Brown v. Brittain*, 773 P.2d 570, 574-75 (Colo. 1989) (en banc) (stating that where prisoner is released through no fault of his own but remains silent regarding mistake, court should put more weight on his conduct while at liberty).

66. For a discussion of the Third Circuit's analysis and holding in *Vega*, see *infra* notes 86-100 and accompanying text.

67. See 493 F.3d 310, 314 (3d Cir. 2007) (discussing issues addressed on appeal). In addition to requesting credit for time spent erroneously at liberty, the appellant also requested credit for the time he was in the custody of state officials prior to his transfer into federal custody pursuant to the writ of habeas corpus ad prosquendum. See *id.* (recounting facts relevant to question of whether appellant was entitled to credit for time served in state custody). At trial, the district court declined to award credit for this time period. See *id.* (providing procedural history regarding question of whether appellant was entitled to credit for time served in state custody). In its opinion, the district court determined that appellant had received full credit on his federal sentence for the time he spent in state custody after being charged with federal offenses but before he was sentenced. See *id.* (providing rationale for district court's finding that appellant was not entitled to credit for time spent in state custody). The appellant, therefore, still had sixty-seven months and twenty-eight days left to serve and was not entitled to any further credit. See *id.* (detailing amount of credit appellant deserved). On appeal, the appellant argued that because he was a Category Three parole violator his sentence should have been calculated as the time spent in custody on the parole violation warrant plus three months. See *id.* (summarizing appellant's argument on

August 27, 1998, New York state authorities arrested Vega and charged him with drug possession, assault and violation of his state parole.<sup>68</sup> Approximately one year later, Vega was charged with federal offenses based upon the same conduct which gave rise to the state charges.<sup>69</sup> Vega pled guilty and was sentenced to ninety-six months in federal prison.<sup>70</sup>

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appeal). In response, the Government argued that this time period had already been credited towards the appellant's state parole violation sentence of 1,261 days and could not also be credited towards the appellant's federal sentence. *See id.* (denying appellant's request on appeal for credit for time served). The Third Circuit denied the appellant's claim on this issue because of the lack of evidence suggesting that the appellant qualified as a Category Three violator. *See id.* (providing rationale for denying credit for time served in state custody). Furthermore, the Third Circuit found the Bureau of Prisons had correctly credited this time to the appellant's state parole violation and no further credit was due to the appellant. *See id.* (specifying amount of credit appellant deserved). In conclusion, the Third Circuit found the district court's denial of credit against the appellant's federal sentence was not clearly erroneous. *See id.* (affirming district court's holding).

68. *See id.* at 313 (detailing charges leading to appellant's conviction by state authorities). On August 1, 2001, the State dismissed all of its charges, except for the parole violation. *See id.* (recounting events leading up to appellant's erroneous release). The appellant's parole was later revoked on February 8, 2002, and he received a forty-four month sentence in state prison. *See id.* (outlining appellant's parole terms).

69. *See id.* (detailing basis for appellant's federal conviction). The appellant was transferred from state to federal custody pursuant to a writ of habeas corpus ad prosequendum. *See id.* (describing procedural means used by federal authorities to charge and convict appellant while he was in state custody). Habeas corpus ad prosequendum is Latin for "that you have the body to prosecute." BLACK'S LAW DICTIONARY 728 (8th ed. 2004). A writ of habeas corpus ad prosequendum is used in criminal cases to bring before a court a prisoner to be tried on charges other than those for which the prisoner is currently being confined. *See id.*; *see also* 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* § 1 (2007) (summarizing and defining various types of habeas corpus petitions). When state authorities are first to arrest a criminal defendant, the state takes primary jurisdiction over the defendant for trial, sentencing and incarceration. *See* Erin É. Goffette, Note, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. U. L. REV. 1035, 1055-56 (2003) (discussing procedural rules regarding sequence of custody and order in which sentences are served when single defendant is charged in multiple jurisdictions). Federal authorities may "borrow" the defendant for prosecution on federal offenses pursuant to a writ of habeas corpus ad prosequendum but they may not interfere with a state sentence. *See id.* (describing federal court procedure for defendant serving state sentence). If the defendant is convicted on the federal offenses, the defendant is returned to state custody to serve the state sentence first. *See id.* (outlining incarceration procedure for defendant serving concurrent federal and state sentences). If the federal sentence is to be served consecutively, the defendant will begin to serve the federal sentence only after completion of the state sentence and release of the defendant pursuant to the federal detainer lodged by the U.S. Marshal. *See id.* at 1056-57 (detailing procedure for defendant serving consecutive state and federal sentences).

70. *See Vega*, 493 F.3d at 313 (describing procedural means used to ensure appellant would be remitted to federal authorities when state sentence had expired). The Marshals Service never received confirmation that state authorities

After Vega's federal conviction, the U.S. Marshals Service lodged a federal detainer advising the state warden to notify the marshal when Vega completed his state sentence.<sup>71</sup> Despite its request, Vega was released from state prison instead of being transferred directly to federal custody.<sup>72</sup> Approximately two years after his release, federal authorities arrested Vega and ordered him to complete his outstanding federal sentence.<sup>73</sup>

In response, Vega filed a petition for habeas corpus requesting credit for the time he spent erroneously at liberty after being released from state prison.<sup>74</sup> The district court denied credit toward Vega's federal sentence

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had received and would honor the detainer. *See id.* (implying that facts were unclear as to whether state authorities received federal detainer).

71. *See id.* (detailing appellant's erroneous release from state custody).

72. *See id.* (detailing appellant's rearrest by federal authorities after he was erroneously released from state custody).

73. *See id.* (stating basis for appellant's initial claim and subsequent appeal).

74. *See id.* (discussing district court's finding in initial habeas proceeding). A writ of habeas corpus, also referred to as habeas corpus ad subjiciendum, is employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal. *See* BLACK'S LAW DICTIONARY 728 (8th ed. 2004); *see also* 39 AM. JUR. 2d *Habeas Corpus and Postconviction Remedies* § 1 (2007) (summarizing and defining various types of habeas corpus petitions). The purpose of this writ is not to determine the guilt or innocence of a prisoner, but instead to determine the legality of the restraint under which a person is held. *See id.* (describing purpose of each type of habeas corpus petition). This procedural device, therefore, safeguards individual freedom against arbitrary and lawless state action and subjects executive, judicial or private restraints on liberty to judicial scrutiny. *See id.* (same). *See generally* Maureen A. Dowd, Note, *A Comparison of Section 1983 and Federal Habeas Corpus in State Prisoners' Litigation*, 59 NOTRE DAME L. REV. 1315, 1319-25 (1984) (discussing development and uses of federal habeas corpus). Title 28 Section 2241 of the United States Code grants courts the power to issue writs. 28 U.S.C. § 2241 (2006). The applicable section of the Code states:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

because his release resulted from the error of a separate sovereign, not the imprisoning sovereign.<sup>75</sup> Vega appealed the district court's decision challenging the calculation of his sentence and the denial of credit toward his federal sentence.<sup>76</sup> On appeal, the Third Circuit denied Vega's due process claim but upheld his request for credit under the doctrine of credit for time erroneously at liberty.<sup>77</sup> Accordingly, the Third Circuit formulated a two-prong test to determine whether Vega was entitled to relief under the doctrine, but found it necessary to remand the case to the district court for further consideration.<sup>78</sup>

B. *Giving the Cat the Advantage: The Third Circuit Denies Vega's Due Process Claim and Limits the Doctrine of Credit for Time at Liberty*

The Third Circuit began its analysis by stating that the doctrine of credit for time at liberty does not have a constitutional basis and, therefore, denying credit would not violate Vega's due process rights.<sup>79</sup> In its opinion, the Third Circuit referred to the *Lewis* case, in which the Supreme Court stated that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer . . . [would] shock the contemporary conscience."<sup>80</sup> Moreover, the Third Circuit emphasized that the government's conduct must also infringe upon one of the "fundamental rights . . . implicit in the concept of ordered liberty" to invoke due process protection.<sup>81</sup> The Third Circuit

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*Id.* (establishing prisoner's right to petition for writ of habeas corpus and outlining requirements necessary to invoke this right).

75. *See Vega*, 493 F.3d at 313 (stating district court's basis for denying appellant credit for time spent erroneously at liberty).

76. *See id.* (detailing appellant's arguments on appeal to Third Circuit).

77. *See id.* at 317 (declining to find due process violation and stating that common law doctrine of credit for time erroneously at liberty is sole basis upon which appellant may request credit towards his federal sentence). For a further discussion of the rulings of the Third Circuit on the appellant's request for credit for the time he spent in state custody, see *supra* note 74 and accompanying text.

78. *See id.* at 319-22 (establishing two-prong test that grants prisoner credit for time erroneously at liberty only if defendant was negligently released by government officials through no fault of the prisoner's own, and emphasizing lack of specific findings regarding appellant's behavior while at liberty and remanding to determine whether appellant thwarted governmental attempts at rearrest).

79. *See id.* at 317 (denying prisoner's assertion that he had due process right to receive credit for time at liberty).

80. *See id.* at 316-17 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)) (adopting conscience-shocking standard for due process challenges to executive action). For a discussion of the test laid out by the Supreme Court in *Lewis*, see *supra* note 29 and accompanying text.

81. *See id.* at 317 (quoting *Bonebrake v. Norris*, 417 F.3d 938, 944 n.2 (8th Cir. 2005)) (internal quotations omitted) (describing nature of rights protected by due process).

concluded that denying Vega credit for time erroneously at liberty did not violate his due process rights.<sup>82</sup>

Although the Third Circuit failed to find a constitutional basis for Vega's claim, the court recognized that he may have a valid claim under the doctrine of credit for time erroneously at liberty.<sup>83</sup> Considering the various interpretations of the doctrine and the lack of Third Circuit precedent regarding the issue, the court formulated a two-prong test aimed at balancing the paramount interests at stake.<sup>84</sup> As such, the Third Circuit considered three interests: (1) simple fairness to the prisoner; (2) the need to limit the arbitrary exercise of governmental power in executing criminal sentences; and (3) the government's and society's interests in incarcerating and rehabilitating convicted criminals.<sup>85</sup>

First, the Third Circuit's test requires the prisoner to show that the prisoner was prematurely released despite not serving his or her complete sentence.<sup>86</sup> If the prisoner can establish this, the burden then shifts to the government to prove either: (1) that the imprisoning sovereign was not negligent; or (2) that the prisoner obtained or retained liberty through his or her own efforts.<sup>87</sup> If the government fails to meet its burden, the prisoner will be granted credit for the time spent at liberty.<sup>88</sup>

In addition to formulating this two-prong test, the Third Circuit provided additional guidance for the district court in deciding whether to grant credit for time spent at liberty.<sup>89</sup> First, the Third Circuit stated that simple or mere negligence, as opposed to gross negligence, will entitle a prisoner to credit.<sup>90</sup> To counteract this relatively low standard, the court stated that the imprisoning sovereign, not an independent sovereign, must be the negligent party.<sup>91</sup> Further, the Third Circuit emphasized that the

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82. *See id.* (relying on decisions in other jurisdictions to support finding that denying credit for time at liberty does not violate appellant's due process rights).

83. *See id.* (citing cases from other jurisdictions prohibiting government from delaying expiration of sentence or requiring prisoner to serve sentence in installments).

84. *See id.* at 318 (recognizing need for guidance regarding how and when doctrine should apply).

85. *See id.* (identifying three important interests at stake in erroneous release cases).

86. *See id.* at 319 (placing initial burden on prisoner to show right to relief).

87. *See id.* (placing subsequent burden of proof on government to show why prisoner is not entitled to relief).

88. *See id.* at 322 (explaining outcome if prisoner meets initial burden but government fails to meet subsequent burden).

89. For a further discussion of the additional guidance provided by the Third Circuit, see *infra* notes 97-99 and accompanying text.

90. *See Vega*, 493 F.3d at 320 (establishing degree of government negligence required to grant credit for time at liberty).

91. *See id.* (limiting negligence to imprisoning sovereign). In its opinion, the Third Circuit acknowledges the circuit split regarding this issue. *See id.* (comparing Fifth Circuit rule with Ninth Circuit rule). The court notes that the Ninth Circuit considers a showing of negligence on the part of any governmental entity sufficient, whereas the Fifth Circuit has denied credit when the release was the

government could not meet its burden under the second prong of the test by showing that the prisoner did not take affirmative steps to effectuate his or her own sentence.<sup>92</sup> Based on its new two-prong test, the Third Circuit remanded Vega's request for credit toward his federal sentence to the district court for further consideration.<sup>93</sup>

#### IV. A MOUSE HAS SOME RIGHTS: FINDING A CONSTITUTIONAL BASIS FOR AN ERRONEOUSLY RELEASED PRISONER'S CLAIM

As the Tenth Circuit stated in *White*, "[a] prisoner has some rights" including the right to a continuous sentence, and the opportunity to re-establish one's self in society.<sup>94</sup> Contrary to the Third Circuit's holding in *Vega*, a prisoner may also have a fundamental, constitutionally-protected interest in the finality of a criminal sentence if the prisoner's expectations have crystallized.<sup>95</sup> In *Vega*, the Third Circuit did not analyze whether reincarcerating Vega after a period of erroneous liberty would shock the conscience, as required by the Supreme Court in *Lewis*.<sup>96</sup> Instead, the court focused on whether reincarcerating Vega would infringe upon a fundamental right.<sup>97</sup> The Third Circuit held that Vega did not have a fundamental right to credit for time erroneously at liberty, but neglected to consider whether Vega had a fundamental interest in the finality of his

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mistake of an independent sovereign. *See id.* (same). The court analyzes the circuits' opposing views on the issue and is ultimately persuaded by the reasoning of the Fifth Circuit. *See id.* (adopting Fifth Circuit rule to avoid windfalls to erroneously released prisoners).

92. *See id.* at 322 (establishing limitation on ways by which government can meet its burden under second prong of test). The Third Circuit also noted that while a prisoner who violates his or her parole or thwarts governmental attempts to regain custody will not be entitled to credit, a prisoner who knows a mistake has been made is not obligated to notify prison authorities of the mistake and may nevertheless be granted credit. *See id.* (refusing to impose affirmative duty on prisoner to notify imprisoning sovereigns of mistakes).

93. *See id.* (providing instructions for district court on remand). Furthermore, the Third Circuit instructed the district court to consider first, whether the State of New York was acting as an agent of the federal government and secondly, whether the appellant frustrated the government's efforts to reincarcerate him after his erroneous release. *See id.* at 322-23 (outlining proper application of two-prong test).

94. *See White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930) (establishing rule against installment punishment).

95. *See, e.g., United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1986) (recognizing that frustrating prisoner's settled expectations regarding finality may violate due process). For a collection of cases acknowledging prisoner's interest in the finality of his or her sentence, see *supra* note 42 and accompanying text.

96. *See Vega*, 493 F.3d at 316-17 (acknowledging conscience-shocking standard but proceeding immediately to question of whether government's conduct violated fundamental right).

97. *See id.* (failing to comment on whether government's conduct was conscience-shocking and basing denial of due process claim on lack of fundamental interest).

sentence.<sup>98</sup> If Vega's expectations regarding the finality of his sentence had crystallized, he may have a viable due process claim.<sup>99</sup>

### A. *Examining the Conscience-Shocking Standard*

The Third Circuit bypassed the question of whether reincarcerating Vega would shock the conscience and, instead, focused on whether the asserted liberty interest was fundamental.<sup>100</sup> Although the Supreme Court has emphasized that the conscience-shocking standard requires particularly egregious behavior on the part of government officials, the Court has also suggested that the required level of culpability depends on the context of the situation.<sup>101</sup> To determine whether the government's conduct was conscience-shocking in this particular context, the Third Circuit should have considered a variety of factors, such as: the diligence of the government in prompt correction of the error,<sup>102</sup> the appellant's progress in rehabilitating and re-establishing himself,<sup>103</sup> and the government's interest in reincarceration.<sup>104</sup> For instance, if the government showed a lack of interest in Vega for a substantial period of time and afforded him the

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98. *See id.* (concluding that credit for time erroneously spent at liberty is not fundamental right without analyzing threshold question of whether governmental behavior shocks contemporary conscience).

99. *See generally* *United States v. Watkins*, 147 F.3d 1294 (11th Cir. 1998) (recognizing that increasing sentence may violate due process if prisoner's expectations regarding its finality have crystallized).

100. *See Vega*, 493 F.3d at 317 (evading first part of *Lewis* test that requires conscience-shocking conduct and referring to other courts that declined to find due process violations in erroneous release cases).

101. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking."); *see also Bonebrake v. Norris*, 417 F.3d 938, 943 (8th Cir. 2005) (recognizing that whether actions are conscience-shocking depends on circumstances surrounding actions).

102. *See United States v. Mercedes*, No. 90 Cr. 450, 1997 U.S. Dist. LEXIS 3009, at \*14 (S.D.N.Y. Mar. 17, 1997) (listing various factors to be considered when assessing due process claims in erroneous release cases including length of time between mistake and correction).

103. *See Johnson v. Williford*, 682 F.2d 868, 873 n.3 (9th Cir. 1982) (finding government estopped from reincarcerating petitioner because he adjusted well to society, was living with wife and children, operating agriculture business and abiding by parole conditions); *United States v. Merritt*, 478 F. Supp. 804, 808 (D.D.C. 1979) (acknowledging defendant's substantial adjustment to society, including getting married, starting family, becoming active in church and becoming part-owner and vice president of construction company; finding that reincarceration would destroy life defendant has established and be inconsistent with fundamental principles of liberty and justice).

104. *See United States v. Mazzoni*, 677 F. Supp. 339, 342 (E.D. Pa. 1987) (stating that decision to reincarcerate erroneously released prisoner should involve weighing government's interest in reincarceration against defendant's interest in adjustment and progress in community life).

opportunity to reintegrate into society, reincarcerating him may shock the conscience and invoke due process protection.<sup>105</sup>

B. *Recognizing a Prisoner's Fundamental Interest in the Finality of a Sentence*

In determining whether Vega's interest in credit for time at liberty was fundamental, the Third Circuit should have considered case law suggesting that a prisoner's interest in the finality of his or her sentence may be considered fundamental in certain circumstances.<sup>106</sup> As the Tenth Circuit stated in *White*, "[a] prisoner has some rights" including the right to a continuous sentence and the opportunity to re-establish one's self in society.<sup>107</sup> In addition, prisoners also have the right to settled expectations regarding the finality of their criminal sentence in certain circumstances.<sup>108</sup> The fundamental nature of these rights has not only been recognized at common law, but is also implicit in the American legal tradition and the concept of ordered liberty.<sup>109</sup>

1. *Finding a Constitutionally-Protected Interest in the Finality of a Criminal Sentence*

Although the Supreme Court has urged courts to be reluctant in recognizing new fundamental rights, some courts, including the Third and Fourth Circuits, have alluded to a constitutionally-protected interest in the

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105. See *Merritt*, 478 F. Supp. at 808 (holding that reincarcerating defendant, who had spent substantial time at liberty and demonstrated exceptional progress in rehabilitation, would be so inconsistent with fundamental principles of liberty and justice that it would "shock the conscience of the Court").

106. See *United States v. Davis*, 112 F.3d 118, 123 (3d Cir. 1997) (noting that defendant does not automatically acquire vested interest, but instead needs to demonstrate legitimate expectation of finality).

107. See *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930) (establishing rule against installment punishment).

108. See, e.g., *Breest v. Helgemoe*, 579 F.2d 95, 101 (1st Cir. 1978) (stating that altering criminal sentence after substantial period of time may violate prisoner's due process rights by postponing his or her parole eligibility or release date); *Hawkins v. Freeman*, 195 F.3d 732, 754 (4th Cir. 1999) (Murnaghan, J., dissenting) (claiming that prisoner's liberty interest in preserving settled expectations regarding finality of his sentence is fundamental).

109. See *Hawkins*, 195 F.3d at 743-59 (Murnaghan, J., dissenting) (referring to prior case law and emphasis on finality of sentences in other aspects of American criminal justice system to support determination that reincarcerating prisoner after period of erroneous release would violate due process).



finality of a criminal sentence.<sup>110</sup> In *Hawkins v. Freeman*,<sup>111</sup> the dissent recognized the fundamental nature of this interest and argued that reincarcerating the appellant, who had been mistakenly granted parole years earlier, violated due process.<sup>112</sup> The dissent noted that the Due Process Clause of the Constitution not only guarantees fair process, but also contains a substantive component that protects individual liberty beyond those rights specifically enumerated in the Bill of Rights.<sup>113</sup> Furthermore,

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110. See, e.g., *id.* at 756 (“Fourth Circuit law provides that after an inmate is released on parole, his reasonable expectation of continued freedom crystallizes over time. Once crystallized, that reasonable expectation of freedom is a legitimate liberty interest protected by the Due Process Clause.”). For a comprehensive collection of cases recognizing prisoner’s fundamental interest in the finality of their sentences after their expectations have crystallized, see *supra* note 42. Those cases expand substantive due process protection to rights that are not enumerated in the Constitution, which the Supreme Court has expressly disfavored. See *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (affirming reluctance to expand substantive due process and expressing preference to refer to constitutional text for protection rather than substantive due process).

111. 195 F.3d 732 (4th Cir. 1999).

112. See *id.* at 756-57 (Murnaghan, J., dissenting) (disagreeing with majority’s opinion based on theory that prisoner has fundamental liberty interest in preserving settled expectations regarding finality of sentence).

113. See *id.* at 752-53 (establishing concept of substantive due process). The dissent in *Hawkins* asserts that courts must use reasoned judgment to determine what personal liberties warrant due process protection. See *id.* at 753 (proposing that courts must use reasoned judgment in protecting fundamental liberties). Furthermore, the dissent adopts Justice Harlan’s opinion in *Poe v. Ullman* that due process “cannot be determined by reference to any code,” but it represents “the balance with our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of the organized society.” See *id.* (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)) (arguing that due process is discrete concept). In *Poe*, Justice Harlan further states in dissent,

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

*Poe*, 367 U.S. at 542 (Harlan, J., dissenting from dismissal on jurisdictional grounds) (arguing that statute prohibiting use of contraceptive devices and giving of medical advice regarding devices invaded right to marital privacy and violated substantive due process). The Supreme Court has embraced this flexible approach to defining fundamental interests as suggested by the various unenumerated rights that it has found to be “fundamental” including, *inter alia*, the right to marry, to have children and to direct one’s children’s upbringing. See *Hawkins*, 195 F.3d at 747-48 (contrasting unenumerated rights that Supreme Court has found to have fundamental quality with asserted right to remain free on erroneously granted parole). Arguing for a flexible approach to defining fundamental rights protected by the Due Process Clause, the dissent in *Hawkins* notes that the right to marry is not mentioned in the Bill of Rights yet the Supreme Court found restrictions on interracial marriage interfered with an aspect of liberty protected by substantive due process. See *id.* at 753 (Murnaghan, J., dissenting) (arguing that due process protects certain personal liberties from government interference); see

the dissent asserted that acknowledgment of this fundamental right does not break new ground, considering that some courts have found it fundamentally unfair to increase a criminal sentence after a prisoner's expectations regarding its finality have crystallized.<sup>114</sup>

As noted in the *Hawkins* dissent, the Fourth Circuit has considered a prisoner's interest in the finality of his or her sentence fundamental in other circumstances.<sup>115</sup> In *United States v. Lundien*,<sup>116</sup> the Fourth Circuit asserted that the due process clause imposes outer limits on the government's ability to alter a criminal sentence.<sup>117</sup> In *Lundien*, the appellant was sentenced to concurrent terms of ten years on two separate counts.<sup>118</sup> Five days later, however, the district court increased one of the sentences to twenty years.<sup>119</sup> In its opinion, the Fourth Circuit claimed that the concept of constitutional due process fairness should apply not only to the trial itself but also to sentencing.<sup>120</sup> The court agreed with the First Circuit's finding in *Breest v. Helgemoe*,<sup>121</sup> specifically that a prisoner's expectation of release on a certain date is of such a psychological importance that it may be fundamentally unfair to frustrate this expectation by significantly postponing this release.<sup>122</sup> In conclusion, the Fourth Circuit stated that it

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*also Lydon, supra* note 29, at 575 (asserting that fundamental due process rights should be viewed as existing along a broad continuum not restricted to textual provisions of the Constitution and arguing for balancing approach to substantive due process analysis). *But see Hawkins*, 195 F.3d at 748 (asserting that "liberty interests entitled to procedural due process protection may be created by state law as well as the Constitution itself, those entitled to substantive due process protection . . . are 'created only by the Constitution'" (Powell, J., concurring) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985))).

114. *See Hawkins*, 195 F.3d at 754 (Murnaghan, J., dissenting) (asserting right to crystallized expectations is fundamental interest).

115. *See, e.g., United States v. Cook*, 890 F.2d 672, 675 (4th Cir. 1989) (asserting that it would be fundamentally unfair and violate due process to enhance sentence after defendant's expectations regarding its finality have crystallized).

116. 769 F.2d 981 (4th Cir. 1985).

117. *See id.* at 987 (recognizing limits on government's ability to alter sentence, but finding that resentencing appellant was not fundamentally unfair because there was no evidence of improper motive in resentencing, and delay in resentencing of five days was not enough time for expectations to crystallize).

118. *See id.* at 982 (detailing appellant's original sentences).

119. *See id.* at 982-83 (stating facts leading to appellant's due process and double jeopardy claims).

120. *See id.* at 986 (expanding scope of due process protection to sentencing phase).

121. 579 F.2d 95, 101 (1st Cir. 1978) (recognizing temporal limit for amending sentence, but finding resentencing after two months did not exceed time limit, and was thus not fundamentally unfair).

122. *See Lundien*, 769 F.2d at 987 (agreeing with principle stated in *Breest* that frustrating prisoner's expectations regarding release date may violate due process). As cited by the Fourth Circuit, the First Circuit stated in *Breest*:

[T]he power of a sentencing court to correct even a statutorily invalid sentence must be subject to some temporal limit. When a prisoner first commences to serve his sentence, especially if it involves a long prison term . . . the prospect of release . . . may seem but a dimly perceived,

may be a denial of due process to increase defendants' sentences after their expectations regarding the finality of the sentence have crystallized.<sup>123</sup> To disregard and frustrate the prisoners' expectations after crystallization would be fundamentally unfair and would violate due process.<sup>124</sup>

The theory that prisoners have a fundamental interest in the finality of their sentence is closely linked with, and finds support in, the common law rule that a prisoner has the right to serve a prompt, continuous sentence and cannot be required to serve it in installments.<sup>125</sup> The majority of courts agree that the government cannot delay the expiration of criminal sentences by postponing the beginning of these sentences or by releasing prisoners only to imprison them later.<sup>126</sup> Allowing the executive branch this type of authority would promote exactly the kind of arbitrary

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largely unreal hope. As the months and years pass, however, the date of that prospect must assume a real and psychologically critical importance. The prisoner may be aided in enduring his confinement and coping with the prison regime by the knowledge that with good behavior release on parole or release outright will be achieved on a date certain. After a substantial period of time, therefore, it might be fundamentally unfair, and thus violative of due process for a court to alter even an illegal sentence in a way which frustrates a prisoner's expectations by postponing his parole eligibility or release date far beyond that originally set.

*Id.* (quoting *Breest*, 579 F.2d at 101).

123. *See id.* (recognizing that increasing criminal sentence after expectations have crystallized may violate due process, but finding no violation because period of incarceration was too short for expectations to crystallize).

124. *See id.* (noting fundamental unfairness of increases in sentencing after crystallization of expectation).

125. *See White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930) (establishing rule against serving criminal sentence in installments); *accord Shields v. Beto*, 370 F.2d 1003, 1006 (5th Cir. 1967) (stating that requiring defendant to serve full sentence after twenty-eight years spent erroneously at liberty would violate due process because prisoner cannot be required to serve sentence in installments); *see also Smith v. Swope*, 91 F.2d 260, 262 (9th Cir. 1937) (stating that "prisoner is entitled to serve his time promptly if such is the judgment imposed . . .").

126. *See Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (recognizing common law rule that, "unless interrupted by fault of prisoner," sentence continues to run because prisoner cannot be required to serve sentence in installments). In its opinion, the Seventh Circuit provides an example demonstrating this principle. *See id.* (explaining rule against installment punishment). The court said that if a defendant begins serving a five-year sentence on July 1, 1990, but was released between January 1, 1992, and December 31, 1992, expiration of the sentence could not be postponed from June 30, 1995, to June 30, 1996. *See id.* (illustrating rule against installment punishment). In this situation, the Seventh Circuit claims the sentence would expire on June 30, 1995, even though the prisoner only served four out of the five years. *See id.* (same); *see also Shields*, 370 F.2d at 1005-06 (holding that reincarceration of appellant after twenty-eight years at liberty would impose installment punishment and violate due process because government had waived jurisdiction).

and capricious exercise of power that the Due Process Clause seeks to prohibit.<sup>127</sup>

Moreover, delaying the expiration of a criminal sentence also jeopardizes the prisoner's ability to reintegrate into society.<sup>128</sup> Courts, including the First and Ninth Circuits, have held that where an erroneously released prisoner demonstrates an exceptional adjustment to society, reincarceration would be inconsistent with fundamental principles of liberty and justice.<sup>129</sup> In *United States v. Merritt*,<sup>130</sup> the United States District Court for the District of Columbia vacated the defendant's federal sentence largely because the defendant demonstrated exceptional adjustment to society after being erroneously released on parole.<sup>131</sup> Letters from friends and neighbors attesting to the defendant's good character and his transformation into a productive, law-abiding citizen persuaded the court.<sup>132</sup> The court dismissed the sentence after concluding that reincarceration would jeopardize the defendant's rehabilitation, disrupt the productive life he had established and "be inconsistent with fundamental principles of liberty and justice."<sup>133</sup>

Assuming that a prisoner's interest in the finality of his or her sentence is classified as fundamental, the government may not infringe upon this right unless the infringement is "narrowly tailored to serve a compel-

127. See *Smith*, 91 F.2d at 262 (holding that sentence of appellant ran from date ordered to serve and placed in custody of marshal despite marshal's failure to place appellant in proper custody and stating that any other holding would allow arbitrary and capricious exercise of governmental power). In furtherance of its opinion, the court in *Smith* theorized that absent a continuous sentence, a prisoner sentenced for one year could "be required to wait forty years under the shadow of [an] unserved sentence" before the marshal decides to execute the sentence. See *id.* (providing rationale for court's holding).

128. See *Dunne*, 14 F.3d at 336 ("The government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the expiation of his debt to society and his reintegration into the free community.").

129. See *DeWitt v. Ventetoulo*, 6 F.3d 32, 36 (1st Cir. 1993) (considering "formation of new roots" when determining if increase in sentence after prisoner had been released on parole violated due process); *Johnson v. Williford*, 682 F.2d 868, 873 n.3 (9th Cir. 1982) (holding reincarceration of prisoner mistakenly paroled would violate due process because it would disrupt prisoner's family life, his employees' lives and "affairs of his business creditors, and threaten his own long-term adjustment to society"); *United States v. Merritt*, 478 F. Supp. 804, 808 (D.D.C. 1979) (vacating sentence of erroneously released prisoner because reincarceration of prisoner who successfully adjusted to society and progressed into law-abiding citizen "would be inconsistent with fundamental principles of liberty and justice" and shock conscience of court).

130. 478 F. Supp. 804 (D.D.C. 1979).

131. See *id.* at 807-08 (granting defendant's motion to vacate sentence upon finding that defendant did not contribute to early release, marshal gave defendant incorrect information about execution of detainer and reincarceration would "jeopardize defendant's long-term adjustment to society").

132. See *id.* at 808 n.12 (noting letters from acquaintances of defendant referring to him as "conscientious . . . respectful . . . [an] asset to the community").

133. See *id.* at 808 (vacating sentence because reincarceration of rehabilitated defendant would be conscience-shocking).

ling state interest.”<sup>134</sup> Although the government has a strong interest in protecting public safety and rehabilitating criminals, this interest becomes less paramount if a prisoner has spent a substantial period of time at liberty and no longer threatens society.<sup>135</sup> In addition, the government does not sacrifice its interest in deterring future crime by granting prisoners relief in compelling situations.<sup>136</sup> As the dissent suggested in *Hawkins*, it is unlikely that “an individual will be less deterred from committing a crime” because of the chance that he or she will be erroneously released.<sup>137</sup>

Like the defendants in *Hawkins*, *Lundien* and *Breest*, Vega also has a fundamental interest in the finality of his sentence.<sup>138</sup> If his expectations regarding the finality of his sentence have crystallized, it would be fundamentally unfair to require Vega to serve the remainder of his sentence.<sup>139</sup> Reincarceration would violate Vega’s due process rights by postponing the duration and finality of his original sentence, requiring him to serve his sentence in installments and jeopardizing his successful reintegration into the community.<sup>140</sup> Furthermore, the government may not infringe upon Vega’s fundamental interest unless the infringement is “narrowly tailored to serve a compelling government interest.”<sup>141</sup> If Vega has adjusted to

134. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (asserting that government cannot infringe upon fundamental liberty interests “unless the infringement is narrowly tailored to serve a compelling state interest”) (citation omitted).

135. See *Lydon*, *supra* note 29, at 588 (recognizing government’s legitimate interests in preventing crime, punishing criminals and protecting public, but implying that these interests subside in situations where prisoner has been rehabilitated).

136. See *Hawkins v. Freeman*, 195 F.3d 732, 757 (4th Cir. 1999) (Murnaghan, J., dissenting) (arguing that state’s interest in deterrence does not survive strict scrutiny and reincarceration “is not narrowly tailored to serve any compelling interest in general or specific deterrence”).

137. See *id.* (explaining why state does not have compelling interest in deterrence).

138. For a further discussion of *Hawkins*, *Lundien* and *Breest*, see *supra* notes 108-24 and accompanying text.

139. See *United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1985) (asserting that altering sentence after crystallization of defendant’s expectations of sentence finality would violate due process).

140. See *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (explaining effect of time erroneously at liberty on expiration of sentence); *Johnson v. Williford*, 682 F.2d 868, 873 (9th Cir. 1982) (finding that reincarcerating rehabilitated petitioner would jeopardize long-term readjustment and violate due process); see also *Sanchez v. Warden, N.H. State Prison*, 329 F. Supp. 2d 200, 206 (D.N.H. 2004) (recognizing that denial of credit for time at liberty that would affect duration of prisoner’s confinement and require prisoner to serve sentence in installments may implicate due process protection).

141. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (asserting that government cannot infringe upon fundamental liberty interests “unless the infringement is narrowly tailored to serve a compelling state interest”) (citation omitted).

society and refrained from criminal misconduct since his release, the government no longer has a compelling interest in his rehabilitation.<sup>142</sup>

## 2. *Examining American Legal Tradition*

Aside from precedent identifying prisoners' fundamental, constitutionally-protected interest in the finality of their sentences, an analysis of American legal tradition also suggests that this interest is implicit in the concept of ordered liberty.<sup>143</sup> As suggested by the dissent in *Hawkins*, the Double Jeopardy Clause of the Constitution demonstrates the importance of preserving the finality of judgments.<sup>144</sup> This clause prohibits multiple prosecutions for the same offense based on the principle that the government cannot repeatedly attempt to convict a person, compelling that person to live in a constant state of anxiety and insecurity.<sup>145</sup> In addition, the Supreme Court has held that the Double Jeopardy Clause may prohibit increasing the length of a criminal sentence after conviction in cases

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142. See Lydon, *supra* note 29, at 588 (suggesting that government's interest in reincarcerating erroneously released prisoner may be diminished if prisoner has been at liberty for extended period of time and is no longer threat to society).

143. See *Hawkins*, 195 F.3d at 758-60 (4th Cir. 1999) (Murnaghan, J., dissenting) (performing *Glucksberg* historical inquiry and finding appellant's right to resist reincarceration and protect "settled expectation[s] of freedom" was sufficiently rooted in legal tradition to be considered fundamental). In *Hawkins*, the majority declined to follow the principles stated in *Lundien* and *Cook* because these cases did not perform the *Glucksberg* inquiry into history and legal tradition to determine whether the right asserted was fundamental and protected by due process. See *id.* at 748-49 (majority opinion) (distinguishing *Lundien* and *Cook* and dismissing principles cited by defendant as dicta). In response to the majority's argument, the dissent in *Hawkins* performed the *Glucksberg* inquiry and found the asserted liberty interest was, in fact, fundamental. See *id.* at 759 (Murnaghan, J., dissenting) (analyzing legal tradition and concluding that interest in "settled expectation[s] of freedom" and finality of sentence is implicit in American legal system). The dissent recognized the lack of historical data regarding erroneous release cases, but nevertheless found the importance of finality of judgments and preservation of settled expectations stressed throughout the American legal tradition. See *id.* at 758-59 (same). The dissent specifically refers to the Double Jeopardy Clause, the Ex Post Facto Clause and the presumption against retroactive application of new laws, and concludes that the right to preserve settled expectations and the need for finality are fundamental to our system of justice. See *id.* (same).

144. See *id.* at 758 (asserting that principles on which double jeopardy clause is based suggest that prisoner's interest in finality of sentence is fundamental). The Double Jeopardy Clause states that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

145. See 21 AM. JUR. 2D *Criminal Law* § 323 (2007) (stating that double jeopardy clause prohibits (1) "second prosecution for same offense after acquittal"; (2) "second prosecution for same offense after conviction"; and (3) "multiple punishments for same offense"); see also Donald T. Kramer, Annotation, *Double Jeopardy Considerations in Federal Criminal Cases—Supreme Court Cases*, 162 A.L.R. FED. 415 (2007) (collecting Supreme Court cases analyzing scope of double jeopardy clause in federal criminal cases).

where the defendant had a legitimate expectation of finality in the sentence.<sup>146</sup>

The Ex Post Facto Clause of the Constitution further suggests the importance of settled expectations regarding criminal sentencing.<sup>147</sup> This clause prohibits the government from enacting ex post facto laws, which either retrospectively criminalize actions that were legal when committed, or change the punishment prescribed for the crime.<sup>148</sup> The purpose of the Ex Post Facto Clause is to give citizens fair warning regarding the legal consequences of certain acts and allow convicted persons to build realistic expectations regarding the length of their imprisonment.<sup>149</sup> Accordingly, the Double Jeopardy and Ex Post Facto Clauses, which are fundamental to American legal tradition, stress the importance of finality and suggest that a prisoner's right to preserve settled expectations is constitutionally-protected.<sup>150</sup>

#### V. PROTECTING THE INTERESTS OF BOTH THE CAT AND THE MOUSE: EXPANDING THE THIRD CIRCUIT'S TWO-PRONG TEST

Assuming, *arguendo*, that Vega's asserted liberty interest is not protected by the Due Process Clause, a totality of circumstances approach would be a more effective means of balancing the competing interests at stake than the two-prong test employed by the Third Circuit.<sup>151</sup> As the court suggests in *Vega*, there are three competing interests that must be addressed in erroneous-release cases: (1) "simple fairness toward the prisoner"; (2) the need to limit the arbitrary use of governmental power; and (3) the interests of the government and society in seeing that criminals

146. See *United States v. Silvers*, 90 F.3d 95, 101 (4th Cir. 1996) (vacating re-sentencing order because reimposition of sentence on counts upon which defendant had fully satisfied sentence violated double jeopardy clause based on Supreme Court guidance).

147. See *Hawkins*, 195 F.3d at 759 (Murnaghan, J., dissenting) (asserting that principles on which ex post facto clause is based suggest prisoner's interest in finality of sentence is fundamental); see also U.S. CONST. art. I, § 10 (stating that "[n]o state shall . . . pass any . . . ex post facto law").

148. See BLACK'S LAW DICTIONARY 620 (8th ed. 2004) (defining ex post facto law as "[a] law that impermissibly applies retroactively, esp[ecially] in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed"); see also 16B AM. JUR. 2D *Constitutional Law* § 643 (2007) (discussing prohibitions afforded by ex post facto clause).

149. See *Constitutional Law*, *supra* note 148 (discussing purpose of prohibitions afforded by ex post facto clause); see also *Hawkins*, 195 F.3d at 759 (Murnaghan, J., dissenting) (asserting that purpose of ex post facto clause is to "preserve settled expectations" and suggesting that concept of finality is deeply embedded in American legal tradition).

150. See *Hawkins*, 195 F.3d at 759 (arguing that interest in settled expectations regarding finality of criminal sentence is implicit in American legal tradition).

151. See generally Lydon, *supra* note 29 (advocating balancing approach for analyzing due process claims made in erroneous release cases). For a further discussion of the interests at stake and the weaknesses of the Third Circuit's two-prong test, see *infra* notes 159-78 and accompanying text.

pay their debts to society.<sup>152</sup> First, the Third Circuit's two-prong test may not ensure fairness to the prisoner because it focuses solely on the imprisoning sovereign's negligence and the prisoner's contributing fault, neglecting other important factors.<sup>153</sup> The test neglects to consider crucial factors—including the time spent at liberty, the prisoner's re-adjustment into society and the government's degree of negligence.<sup>154</sup> A totality of the circumstances approach would allow courts to weigh these factors and provide for more equitable results in cases of erroneous release or delayed incarceration.<sup>155</sup> For instance, where the government was grossly negligent in allowing the prisoner to remain at liberty for an extended period of time and the prisoner has made significant progress in re-establishing himself in society, fairness to the prisoner would outweigh the government's interest in reincarceration.<sup>156</sup>

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152. See *Vega v. United States*, 493 F.3d 310, 318 (3d Cir. 2007) (announcing three paramount interests to consider “when determining whether erroneously released prisoner should be granted credit for time” at liberty).

153. See *id.* at 319 (establishing two-prong test “requiring government to prove either (1) that there was no negligence on part of imprisoning sovereign, or (2) that prisoner obtained or retained liberty through own efforts”).

154. See *DeWitt v. Ventetoulo*, 6 F.3d 32, 36 (1st Cir. 1993) (considering and weighing factors such as period of time since release, reason for release and formation of new roots to determine whether reincarceration of parolee would violate due process).

155. See *id.* (holding that court could not reinstate petitioner's original life sentence that had been suspended after petitioner came to aid of prison guard in prison fight because petitioner had been paroled for number of years, obtained work and established relationships); *United States v. Martinez*, 837 F.2d 861, 864 (9th Cir. 1988) (referring to cases examining totality of circumstances when execution of sentence was delayed); *Johnson v. Williford*, 682 F.2d 868, 873 n.3 (9th Cir. 1982) (finding that government was estopped from reincarcerating erroneously paroled petitioner because it would disrupt petitioner's family, employees and business creditors, and “jeopardize petitioner's long-term adjustment”); *United States v. Mazzoni*, 677 F. Supp. 339, 342 (E.D. Pa. 1987) (stating that “a decision to recommit defendant requires consideration of defendant's behavior while on release as well as a weighing of the government's interest in reincarceration against defendant's interest in adjustment and progress in community life”); *United States v. Merritt*, 478 F. Supp. 804, 808 (D.D.C. 1979) (noting that defendant's exceptional adjustment and progress vindicated state's judgment that reincarceration would disrupt family, “destroy economic base” and threaten long-term adjustment). See generally *Zitter*, *supra* note 7 (collecting cases in which courts considered totality of circumstances surrounding delay in execution of sentence to determine what effect delay should have on sentence).

156. See *Johnson*, 682 F.2d at 873 n.3 (finding that government was estopped from reincarcerating erroneously paroled petitioner because it would disrupt petitioner's family, employees and business creditors, and “jeopardize petitioner's long-term adjustment”); *Merritt*, 478 F. Supp. at 808 (vacating federal sentence after defendant had been paroled for three years during which he married, started family, became active in church and became part owner and vice president of company).



Additionally, a totality of the circumstances approach would more effectively safeguard against the arbitrary use of governmental power.<sup>157</sup> The Third Circuit's two-prong test only requires negligence on the part of the imprisoning sovereign.<sup>158</sup> In contrast, the Ninth Circuit held in *Clark v. Floyd*<sup>159</sup> that negligence on the part of any government entity entitles the prisoner to credit for time at liberty.<sup>160</sup> There, the appellant spent nearly three years erroneously at liberty after state authorities failed to notify federal authorities of the appellant's release from state custody.<sup>161</sup> The Ninth Circuit granted the appellant credit toward his federal sentence because he was inadvertently released by a government agent through no fault of his own.<sup>162</sup> Other courts have also granted relief in similar situations based on the presumption that federal authorities are responsible for staying abreast of the status of a state prisoner who must also serve a federal sentence.<sup>163</sup>

On the other hand, the Third Circuit was correct in holding that prisoners do not have an affirmative duty to effectuate their sentences.<sup>164</sup> The majority of courts agree that no relief is warranted to a prisoner who escapes from custody, violates parole conditions or thwarts the government's efforts to regain custody.<sup>165</sup> Although courts tend to look more favorably on prisoners who notify authorities of mistakes regarding re-

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157. See generally Lydon, *supra* note 29 (asserting that waiver and balancing tests are flexible enough to grant relief in compelling situations).

158. See *Vega*, 493 F.3d at 321 (stating that credit should not be granted where negligence was on part of independent sovereign instead of imprisoning entity). For a discussion of the Ninth Circuit's opposing view finding credit may be granted upon showing of negligence of any governmental entity, see *infra* notes 159-62 and accompanying text.

159. 80 F.3d 371 (9th Cir. 1996).

160. See *id.* at 374 (granting credit against federal sentence for time spent erroneously at liberty due to negligence of state authorities).

161. See *id.* at 372-73 (establishing events leading to petitioner-appellant's erroneous release by state authorities and subsequent arrest by federal authorities).

162. See *id.* at 374 (granting credit because prisoner was released by inadvertence of government agent without consideration of whether negligent party was imprisoning sovereign).

163. Cf. *United States v. Mercedes*, No. 90 Cr. 450, 1997 U.S. Dist. LEXIS 3009, at \*14-15 (S.D.N.Y. Mar. 17, 1997) (vacating defendant's federal sentence even though he was erroneously released by state authorities because federal authorities showed lack of diligence in ensuring sentence was carried out).

164. See *Chin*, *supra* note 6, at 414 (asserting that federal case law suggests that prisoner's awareness of mistake does not affect his or her ability to be granted credit). *Chin* implies that it would be unfair to presume defendants "can correctly calculate their sentences to the day" given the complexity of some sentencing regimes and the plethora of permissible forms of release. See *id.* at 415 (demonstrating that defendant's knowledge regarding error in release should not preclude defendant from credit).

165. See e.g., *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930) ("Nor can there be any doubt that an escaped prisoner cannot be credited with the time he is at large."). The court noted that prisoners who violate parole or demonstrate fault may not be credited. See *id.* (describing situations in which former prisoner will not be given credit for time at liberty).

lease, it does not follow that a prisoner has an affirmative duty to aid in the execution of his or her sentence.<sup>166</sup>

Under Title 28 Section 516 of the United States Code, the United States Department of Justice is responsible for prosecuting all federal offenses.<sup>167</sup> In addition, the Department of Justice must also ensure that defendants are taken into custody and that their criminal sentences are diligently executed.<sup>168</sup> Therefore, it seems appropriate that the government alone should bear the consequences of its mistakes, especially because it is in the best position to prevent erroneous releases and delayed incarcerations.<sup>169</sup> By ensuring that convicted criminals are taken into custody in a timely manner and held for the duration of their sentences, the government can prevent the doctrine of credit for time at liberty from ever applying.<sup>170</sup> Moreover, to place an affirmative duty on the convicted person would be ineffective, as convicts will not likely be eager to effectuate their sentences, and inconsistent with an adversarial system of justice.<sup>171</sup>

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166. See *United States v. Martinez*, 837 F.2d 861, 866 (9th Cir. 1988) (asserting that defendant “has no affirmative duty to aid in the execution of his sentence”); *United States v. Mazzoni*, 677 F. Supp. 339, 342 (E.D. Pa. 1987) (“Thus, defendant’s failure to come forward on his own initiative does not rise to the level of wrongful conduct that limits the continuity of his sentence.”); see also Chin, *supra* note 6, at 413 (noting that compelling case for granting credit is when convicted person attempts in good faith to begin or continue service but is denied by authorities).

167. See 28 U.S.C. § 516 (2007) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

168. See Chin, *supra* note 6, at 416-17 (suggesting government alone bears burden of executing criminal sentences and prisoner has no duty in this regard). In support of the proposition that the government alone is responsible for effectuating criminal sentences, Chin cites a Supreme Court case stating:

[The district attorney] is specially charged with the prosecution of all delinquents for crimes and offences; and these duties do not end with the judgment or order of the court. He is bound to provide the marshal with all necessary process to carry into execution the judgment of the court.

*Levy Court v. Ringgold*, 30 U.S. 451, 454 (1831).

169. See Chin, *supra* note 6, at 416 (asserting that because government is responsible for executing criminal sentences, it should also bear consequences of its errors in carrying out its duties). See *id.* at 433 (concluding that because government is in best position to prevent mistakes in executing criminal sentences, it should bear consequences of its mistakes).

170. See *id.* at 433 (concluding that doctrine of credit for time erroneously at liberty would never apply if government made “sure that people who should be in custody in fact are in custody”).

171. See *id.* at 417 (stating that to expect defendants to ensure sentences are properly executed would cause “mouse-guarding-the-cheese” problem and be inconsistent with legal authorities suggesting that neither defendant nor defense counsel is responsible for enforcing criminal judgments).

## VI. CONCLUSION

An individual's personal liberty is one of the inalienable, fundamental and inherent rights afforded to American citizens.<sup>172</sup> This principle was first expressed in the Declaration of Independence and later reinforced through the Constitution of the United States.<sup>173</sup> Considering the strong emphasis on protecting personal liberty inherent in the American legal system, the Third Circuit should reconsider whether erroneously released prisoners' interests in preserving their settled expectations of continued freedom are fundamental and, therefore, constitutionally-protected.<sup>174</sup>

While this theory is more liberal in granting relief to erroneously released prisoners, it is not without limitations.<sup>175</sup> Prisoners must show that their expectations regarding the finality of their sentences have crystallized to the extent that reincarceration would significantly frustrate these settled expectations.<sup>176</sup> This theory will not result in windfalls to convicted criminals who have not served their debts to society, but instead will grant equitable relief to prisoners who were released through no fault of their own, spent a considerable time at liberty and have become productive members of the community.<sup>177</sup>

Even if the Third Circuit fails to reconsider whether erroneously released prisoners have fundamental interests in the finality of their sentences, the court should expand its two-prong test.<sup>178</sup> In addition to considering the government's negligence and the prisoner's contributing fault, the court should consider factors such as the length of time spent at liberty, the prisoner's progress in re-integrating into society and the pris-

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172. See 16A AM. JUR. 2D *Constitutional Law* § 560 (2007) (summarizing sources of fundamental rights and privileges).

173. See *id.* (citing the Declaration of Independence, which states "all men . . . are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of happiness"); see also *id.* (noting that Constitution provides that "neither Congress nor states may deprive any person of life, liberty, or property without due process of law").

174. See *Hawkins v. Freeman*, 195 F.3d 732, 752-59 (4th Cir. 1999) (Murnaghan, J., dissenting) (arguing that erroneously released prisoner has viable due process claim based on prior case law and analysis of legal tradition).

175. See *id.* at 756 (conceding that most courts that recognize fundamental nature of prisoner's interest in finality of his or her sentence have held for government on facts).

176. See *United States v. Davis*, 112 F.3d 118, 123 (3d Cir. 1997) (noting that "defendant . . . does not automatically acquire vested interest," but instead needs to demonstrate "legitimate expectation of finality").

177. See *DeWitt v. Ventetoulo*, 6 F.3d 32, 35 (1st Cir. 1993) (stating that "[o]nly in the extreme case can a court properly say that the later upward revision of a sentence . . . is so unfair that it must be deemed inconsistent with fundamental notions of fairness . . .").

178. For a discussion of why a totality of circumstances approach would more effectively protect and balance the competing interests in erroneous release cases, see *supra* notes 151-63 and accompanying text.

oner's efforts in bringing the mistake to the attention of authorities.<sup>179</sup> This flexible approach will not only prevent unfair, unnecessary incarceration, but will also blow the whistle on this game of cat and mouse.<sup>180</sup>

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179. *See generally* Johnson v. Williford, 682 F.2d 868 (9th Cir. 1982) (advocating totality of circumstances approach to due process analysis in erroneous release cases).

180. *See generally* Lydon, *supra* note 29 (arguing that balancing test should be used in due process challenges because it will prohibit reincarcerating rehabilitated individual when the state's interests or justifications for reimprisonment are weak).

