DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
RENE LIMA-MARIN, **Petitioner** **v.** **RICK RAEMISCH, Director of the Colorado Department of Corrections,** **Respondent**	Case No. **16CV31216** Division: **201**

FINAL ORDER REGARDING RENE LIMA-MARIN'S PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

"The first duty of society is justice." Alexander Hamilton (quoted in *People v. Julien*, 47 P.3d 1194, 1201 n.1 (Colo. 2002) (Bender, J., dissenting)). In the United States' tripartite structure of governance, the Judicial Branch has been entrusted with the awesome responsibility of doing justice through the fair and impartial operation of the judicial system. Consistent with Hamilton's transcendent vision and remarkable prescience, the judicial system is a cornerstone of this country's democracy. But "[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera v. Collins*, 506 U.S. 390, 415, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). So what happens when a criminal defendant is prematurely released from prison as a result of a clerical error in the sentencing order and the government subsequently delays in re-arresting him for almost six years until he already has completed parole, married, adopted a son, fathered a son, started a successful career as a glazier, purchased a home, and become a productive, respected, law-abiding, and well-liked member of the community? What is justice in that situation? Perhaps more poignantly, without the ability to turn back the clock, how does the Court dispense justice under such circumstances?

This habeas proceeding presents a very difficult issue of first impression in Colorado: when an inmate achieves rehabilitation and re-integration into society after he is mistakenly released from prison and allowed to remain out of custody for almost six years through no fault of his own, should he simply be given credit for his time at liberty and then re-incarcerated to complete the rest of his exceedingly lengthy sentence, or should the government be precluded from enforcing the remainder of the sentence? Framed differently, who should bear the consequences of the government's improper acts and omissions in erroneously releasing a prisoner and allowing him to remain out of confinement for a prolonged period of time—the government or the prisoner? This thorny issue foists upon the Court an unenviable Hobson's choice between: honoring and effectuating the rest of the 98-year prison sentence legally imposed on the petitioner, Rene Lima-Marin, notwithstanding its significant interruption by the government; or releasing Lima-Marin, who was a model prisoner for almost ten years and who, while out of custody for almost six years, completed five years of parole with flying colors, was impeccably law-abiding, married his former girlfriend, adopted a son, fathered a son, purchased a home, supported his family, and became a valuable member of the community.

RULING

For the reasons articulated in this Order, and based on the unique and exceptional circumstances involved in this unusual case, the Court rules that the re-incarceration of Lima-Marin violates his constitutional right to substantive due process and that the government must be deemed to have waived its jurisdiction to enforce the remainder of his sentence. More specifically, the Court finds: (1) that the government acted with deliberate indifference, and that such indifference is shocking to the contemporary conscience or the universal sense of justice; (2) that the government infringed two of Lima-Marin's deeply rooted fundamental rights—the right to liberty or to be free from incarceration and the right to preserve settled expectations of freedom and finality—and the infringement was not narrowly tailored to serve a compelling state interest; and (3) that the totality of the circumstances surrounding Lima-Marin's mistaken release and unduly delayed re-incarceration warrants application of the waiver of jurisdiction doctrine.

Although the Court recognizes the importance of correctly applying sentencing laws and regularly enforcing sentences legally imposed, it cannot do so blindly here without regard to the government's conscience-shocking deliberate indifference and the appalling consequences of the protracted,

unjustifiable, and extremely prejudicial delay in re-incarcerating Lima-Marin. Requiring Lima-Marin to serve the rest of his prison sentence all these years later would be draconian, would deprive him of substantive due process, and would perpetrate a manifest injustice. Because the Court finds that Lima-Marin is being unlawfully detained, he is ordered released. No other remedy will result in justice in this case.

PROCEDURAL BACKGROUND

After a jury found Lima-Marin guilty of multiple felonies in connection with the robberies of two video stores, he received consecutive prison sentences to the Department of Corrections (hereinafter "the DOC") totaling 98 years in April 2000. His co-defendant, who was also found guilty of multiple felonies in a separate trial by a different jury, likewise received consecutive prison sentences totaling 98 years. Because Lima-Marin's mittimus incorrectly stated that his sentences were to be served concurrently, rather than consecutively, the DOC released him prematurely in April 2008 based on his longest sentence—16 years. While in prison, Lima-Marin was a model inmate. Further, his conduct was exemplary during five years of mandatory parole and during the eight and a half months that followed.

The government did not discover Lima-Marin's mistaken release until January 7, 2014, almost six years after his release on parole. By then, Lima-Marin had been fully rehabilitated and successfully re-integrated into society—he had completed parole admirably and had become a law-abiding and productive member of the community who was committed to his family and devoted to his faith. At the request of the prosecution in the underlying criminal case, on January 7, 2014, the district court, the Honorable William Sylvester presiding, issued a warrant for Lima-Marin's arrest. Lima-Marin was detained the same day, and Judge Sylvester corrected the mittimus the next day.

Lima-Marin's court-appointed counsel subsequently filed a motion requesting his immediate release. The Court denied the motion, and Lima-Marin appealed. After accepting transfer of the case from the Court of Appeals, the Colorado Supreme Court determined that the case was improperly before it. However, the Supreme Court granted Lima-Marin leave to file a civil petition for writ of habeas corpus with the district court.

Lima-Marin initiated this habeas corpus proceeding on May 16, 2016 against Rick Raemisch, the Director of the DOC, pursuant to section 13-45-101, *et seq.*, C.R.S. (2016). Petition at p. 2. Arguing that he is improperly being

detained, Lima-Marin requests an order requiring the DOC to release him from its custody immediately. *Id*. at p. 3. Raemisch opposes the petition. *See generally* Response. The matter was fully briefed on September 6, 2016. *See generally* Reply. On September 30, 2016, the Court issued an Order indicating that a writ of habeas corpus directed to Raemisch would issue. Following issuance of the writ, the Court held an evidentiary hearing on December 21, 2016 (hereinafter "the December 21 hearing," "the hearing," or "Hearing") to determine the basis for Lima-Marin's current imprisonment and whether he is being lawfully detained. Both sides were heard at the hearing. *See generally* Hearing.[1]

Following the hearing, the Court took the matter under advisement. This Order addresses the merits of the petition filed by Lima-Marin, who remains in the custody of the DOC.

DECEMBER 21, 2016 HEARING

At the hearing, the parties agreed that the Court may consider the contents of the file in this habeas case, as well as the contents of the file in

[1] Because the December 21, 2016 hearing was relatively short and the transcript of the hearing has not yet been prepared, citations to the hearing in this Order do not contain any transcript page numbers.

Lima-Marin's underlying criminal case, 1998CR2401.[2] Further, by stipulation, Exhibits A through M were admitted into evidence.[3]

In addition, the parties agreed that the Court may deem undisputed any exhibit submitted with the pleadings that is not explicitly contested by a party. The Court specifically confirmed the parties' stipulation to allow the Court to accept at face value any uncontested affidavits submitted by Lima-Marin with his petition.

Each party presented testimony at the hearing. Lima-Marin testified and then called his wife, Jasmine Lima-Marin, to the stand. Raemisch, in turn, presented the testimony of Richard Orman, the chief deputy district attorney in charge of the civil and appeals unit of the District Attorney's Office in the 18th Judicial District (hereinafter "DAO"), and Mary Carlson, the manager of the time and release operations unit of the DOC.

CREDIBILITY DETERMINATIONS

The Court observed the manner, demeanor, and body language of each witness while on the stand, and considered his or her means of knowledge,

[2] In a subsequent Order, the Court informed the parties that it understood their agreement to include any and all transcripts and appellate filings. *See* April 24, 2017 Order at p. 2 n.1. Neither party took issue with this understanding.

[3] Any exhibit admitted during the hearing is referenced in this Order as "Ex."

strength of memory, and opportunity for observation. With respect to each witness, the Court assessed the reasonableness or unreasonableness of the testimony, the consistency or lack of consistency of the testimony, and whether the testimony was contradicted or supported by other evidence. The Court examined whether each witness had motives to lie, as well as whether bias, prejudice, or interest in the case affected his or her testimony. Finally, the Court took into account all other facts and circumstances shown by the evidence that affected the credibility of each witness.

The Court found all four witnesses generally credible. Of particular relevance here, Lima-Marin's testimony was generally reliable. The factual findings discussed in this Order reflect the Court's specific credibility determinations.

FINDINGS OF FACT

I. Video Store Robberies

At approximately 9:00 a.m. on September 13, 1998, Lima-Marin and Michael Clifton broke into a Blockbuster Video store on Mississippi Avenue by smashing the store's front windows. Vol. 2, Part 3.2, at p. 419.[4] Lima-

[4] Along with his petition, Lima-Marin filed multiple exhibits, many of which are designated in the electronic file as "APPEAL RECORD." (Lima-Marin initially sought relief from his current detention by filing a motion in 2014 in his underlying criminal

Marin and Clifton were armed with a single rifle. *Id*.[5] Once inside, they ordered the assistant manager of the store to move to the back room and open the safe. *Id*. at pp. 419-20. They then took $6,766 in cash and left through the fire exit door. *Id*. at p. 420. No shots were fired and no one was injured. A witness at a nearby King Soopers called 911. *Id.* This witness later provided officers with a description of the perpetrators and their car, as well as the car's license plate number. *Id*. at pp. 420, 423.

Around midnight on the same day, Lima-Marin and Clifton visited a Hollywood Video store located on Sable Boulevard just minutes before closing time. *Id*. at p. 420, Report Page 3.[6] They were armed with a single rifle

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case, 1998CR2401, and he appealed the denial of that motion; the "APPEAL RECORD" exhibits accompanying the petition appear to be an incomplete copy of this Court's file that was sent to the Court of Appeals for purposes of that appeal.) All of the "APPEAL RECORD" exhibits contain a volume designation in the electronic system (1, 2, and 3), which this Order refers to as "Vol. 1," "Vol. 2," and "Vol. 3." Further, in the electronic file, volumes 1 and 2 contain "part" designations. In this Order, the Court refers to the part designations as "Part 1," "Part 2," and "Part 3." (For example, "Vol. 1, Part 2" refers to part 2 of volume 1 of the Appeal Record in the electronic file). Part 3 of Volume 2 appears to be divided into 6 subparts in the electronic file: "part 1," "part 2," "part 3 part 1," "part 3 part 2," "part 3 part 3," and "part 3 part 4." In the interest of clarity (or at least in the hopes of reducing confusion), the Court refers to the parts of volume 2 as follows: "part 1," "part 2," "part 3.1", "part 3.2," "part 3.3," and "part 3.4."

[5] It is unclear whether the rifle was loaded or unloaded during this incident.

[6] The page that follows page 420 in Vol. 2, Part 3.2, which is part of a police report, is missing the bates-stamped number. It simply has the page number of the police report ("Page 3"). Bates-stamped page number 421 corresponds to the following page of the

again.[7] *Id*. at Report Page 3. Once in the store, they ordered two employees to go into an office and open the safe. *Id*. Lima-Marin and Clifton then took $3,735 in cash and left through the back door. *Id*. No one was injured and no shots were fired. Shortly thereafter, an eyewitness saw Lima-Marin and Clifton exiting a vehicle with a long rifle at their apartment complex; he identified both men through separate photo lineups and provided the car's license plate number. *Id*. at Report Page 3, p. 421.

At the time of the incidents, Lima-Marin and Clifton were best friends; in fact, they had been best friends since they were young boys. Vol. 1, Part 2, at p. 227. Further, Lima-Marin was a former employee of Blockbuster Video, and Clifton was a current employee of the Blockbuster Video store on East 6th Avenue. Vol. 2, Part 3.2, at Report Page 3, p. 421. They were living together in an apartment just behind a Blockbuster Video store. *Id*. at Report Page 3. Clifton's name was on the apartment lease. *Id*. at p. 421.

During the execution of a search warrant of the apartment where Lima-Marin and Clifton were residing, officers seized numerous items connecting Lima-Marin and Clifton to the two video store robberies: three rifles that had

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police report, "Page 4." Therefore, this Order refers to "page 3" of the report as "Report Page 3."

[7] It is unclear whether the rifle was loaded or unloaded during this incident.

been stolen from a Gart Brothers store on September 1, 1998; ammunition; gloves and articles of clothing; two surveillance video recordings; bank bags, cash boxes, a cash drawer, and checks; video games; and CDs that were still in their security casements. *Id*. at pp. 422-23. The car believed to have been used during the robberies was parked outside the apartment and was stopped while driven by Lima-Marin. *Id*. at Report p. 3, p. 421. Its license plate number matched the license plate number provided by the two witnesses. *Id*. at pp. 420-21.

II. Criminal Charges and Jury Trials

Lima-Marin and Clifton were charged as follows in separate cases in Arapahoe County by the DAO: three class 2 felony counts of second degree kidnapping—victim of a robbery (one naming the assistant manager at the Blockbuster Video store as the victim and two naming the employees at the Hollywood Video store as the victims); two class 3 felony counts of first degree burglary (one for each video store); three class 3 felony counts of aggravated robbery (one naming the assistant manager at the Blockbuster Video store as the victim and two naming the employees at the Hollywood Video store as the victims); and a crime of violence sentence-enhancing count that alleged the use, or possession and threatened use of, a deadly weapon

during the commission of each charged crime. Vol. 1, Part 1, at pp. 28, 33-37. Lima-Marin was charged in case number 1998CR2401, and Clifton was charged in case number 1998CR2398. The same prosecutor (hereinafter "Lima-Marin's prosecutor") was primarily responsible for the cases filed against both Lima-Marin and Clifton.

On January 31, 2000, a jury found Lima-Marin guilty of all the substantive counts and concluded that the crime of violence sentence-enhancing allegation had been proven with respect to each substantive count. Vol. 1, Part 2, at pp. 119-34. The jury also found Lima-Marin guilty of the lesser non-included offense of theft by receiving. *Id*. at p. 135.

The following month, a different jury similarly found Clifton "guilty of three counts of kidnapping, two counts of burglary, and three counts of aggravated robbery," and concluded that the crime of violence sentence-enhancing allegation had been proven with respect to each substantive count. *People v. Clifton*, 74 P.3d 519, 520 (Colo. App. 2003). Clifton was also convicted of five counts of the lesser non-included offense of accessory to a crime. *See* Attachment A at p. 182.[8] Neither Lima-Marin's jury, *see* Vol. 1, Part 2, at pp.

[8] Pursuant to the April 24, 2017 Order and CRE 201(e), without objection, the Court takes judicial notice of the contents of certain documents, including official transcripts

119-35, nor Clifton's jury "was [ ] asked to determine whether both incidents were part of an ongoing transaction," *Clifton*, 74 P.3d at 520.

III. Joint Sentencing Hearing

The Court held a joint sentencing hearing for Lima-Marin and Clifton on April 13, 2000. The record reflects that at the time of the two video store robberies, Lima-Marin was 20 years old and Clifton was 19 years old. Vol. 1, Part 2, at p. 219; Vol. 2, Part 3.2, at p. 421. Although Lima-Marin had a juvenile adjudication history for nonviolent theft-related offenses, on April 13, 2000, he stood before the Court on his first adult felony conviction. Vol. 2, Part 3.3, at pp. 445-46; Vol. 1, Part 2, at pp. 223-225. Further, Lima-Marin, who immigrated with his mother and her ex-husband to the United States from Cuba in 1980, did not have a high school diploma. Vol. 2, Part 2, at p. 335; Affidavit in Support of Petition at p. 1. Nor did he have any formal legal education or training. Affidavit in Support of Petition at p. 1.

During the sentencing hearing, the judge and the attorneys had a lengthy and complicated discussion about Colorado law, principles of merger, the applicable sentencing ranges, and whether the Court had any discretion in ordering some of the sentences to be served concurrently instead of

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and appellate filings in Clifton's criminal file (1998CR2398). Any such documents accompany this Order and are referred to as "Attachments."

consecutively. Vol. 2, Part 3.3, at pp. 432-61. Even for someone trained in the law, the exchange reflected in the transcript is at times confusing and difficult to follow. *Id*. Although the attorneys for Lima-Marin and Clifton urged the Court to order some of the sentences served concurrently, they both understood that the minimum mandatory sentence was at least 52 years in the DOC with five years of mandatory parole. *Id*. at pp. 438, 439, 444, 446, and 452. Lima-Marin's prosecutor, on the other hand, argued that Colorado law required each defendant to serve all of his sentences consecutively for a cumulative sentencing range of 98 years to 304 years in prison. *See id*. at pp. 449-50.

At one point, the judge made a reference to the uncertainty of the relevant law on which convictions should merge and require a single sentence: "I think we're going to need more law on this, counsel . . . so there is a clear appellate [record] . . . " *Id*. at p. 457. The sentencing judge ultimately agreed with the People that both video store robberies were part of "an ongoing transaction because [Lima-Marin and Clifton] within 15 hours went out and [ ] committed two serious armed robberies involving three victims." *Id*. at p. 460. Consequently, pursuant to the crime of violence statute, section 18-1.3-406(1)(a), C.R.S. (2016) (formerly section 16-11-309, C.R.S. (2000)), he

ruled that he was required to sentence each defendant to consecutive terms of imprisonment on the convictions related to the eight substantive counts originally charged. *See id*. at pp. 460-61.

However, the judge expressed his displeasure with the prosecution's charging decisions, which took away his discretion and required him to sentence each defendant to prison between 98 years and 304 years with five years of mandatory parole. *See id*. at p. 460. The judge spoke as follows: "I am not comfortable, frankly, with the way the case is charged, but that is a District Attorney executive branch decision that I find that I have no control over." *Id*. Nevertheless, the judge sentenced each defendant in accordance with Colorado law: "[o]n counts 1, 2, and 3 [second degree kidnapping] for 16 years each; on counts 4, 5, 6, 7, and 8 [two counts of first degree burglary and three counts of aggravated robbery] for ten years each." *Id*. Moreover, as required by Colorado law, the judge specifically ordered "[e]ach sentence consecutive and not concurrent with each other." *Id*. at pp. 460-61. The judge observed that he had no choice in the matter: "I believe that's . . . [a] 98-year

sentence [on each defendant] which the court finds must be imposed." *Id*. at p. 460.[9]

The judge did not sentence Lima-Marin on the theft by receiving lesser non-included offense, and the People did not request that he impose a sentence on that crime. *Id*. at pp. 426-65. On each of Clifton's lesser non-included accessory offenses, the judge imposed a four-year prison sentence, "but [ran]" it "concurrently and not consecutively with the [other] sentences." *Id*. at p. 461.

At the end of the sentencing hearing, the judge advised Lima-Marin and Clifton that each was "entitled to reconsideration of [his] sentence after an appeal," and that each had the right to "request reconsideration of the sentence 120 days after all the appellate processes [were] completed." *Id*. at p. 462. The judge also appointed appellate counsel to each defendant and indicated that "both [would] get [ ] appeals without cost to [them]." *Id*.

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[9] Lima-Marin and Clifton each had a second criminal case pending in connection with the robbery of a Blockbuster Video store on Iliff Avenue that occurred on or about September 5, 1998. Pursuant to the April 24, 2017 Order and CRE 201(e), without objection, the Court takes judicial notice that: (1) in case number 1998CR3247, on May 5, 2000, Lima-Marin pled guilty to one count of robbery, a class 4 felony, and was sentenced to five years in prison with three years of mandatory parole, concurrent with the 98-year sentence he received in 1998CR2401; and (2) on June 22, 2000, at the People's request, the Court dismissed Clifton's second case, 1998CR3244. *See* Attachments B and C. There were no injuries or shots fired in the September 5, 1998 incident.

Following the sentencing hearing, Lima-Marin understood that the judge had sentenced him and Clifton each to a total of 98 years in prison. *See generally* Hearing. However, he also realized that the judge did not agree with the way the prosecution had charged their cases. *See id*. Lima-Marin was in shock after the exceedingly lengthy sentences were imposed. *See id*.

IV. The Erroneous Mittimus

The sentencing hearing transcript, the minute order, and the record of court proceedings all correctly reflect the sentence imposed on Lima-Marin. Vol. 2, Part 3.3, at pp. 460-61; Vol. 1, Part 1, at p. 26; Vol. 1, Part 2, at pp. 200-02; *see also* Response at p. 4. However, the "ADDITIONAL REQUIREMENTS" section of the mittimus signed by the sentencing judge, which started on page 1 but continued to page 2, incorrectly stated: "ALL SENTENCES CONCURRENT." Vol. 1, Part 2, at p. 216. There is no dispute that this was an inadvertent error in the mittimus signed by the sentencing judge. *See generally* Hearing.

The DOC "receive[s] the mittimus" for each defendant sentenced to prison. *Id*. Even in the unusual situation in which the DOC receives other documents in relation to a sentence, "the mittimus is all [the DOC] use[s] for computing" parole-eligibility and release dates. *Id*. With respect to each

defendant, the DOC reviews the mittimus, ensures it understands the mittimus correctly, enters the contents of the mittimus into its computer system, and computes parole-eligibility and mandatory release dates based on the date of the sentence, the length of the sentence, and the amount of presentence confinement credit. *Id*. If an inmate has multiple sentences, the DOC relies on the mittimus to determine whether they were ordered to be served concurrently or consecutively with each other. *Id*.

In Lima-Marin's case, the mittimus was the only document the time and release operations unit at the DOC received in 2000 in relation to his sentence. *Id*. Because Lima-Marin's mittimus incorrectly stated that all eight sentences were to be served concurrently, *see* Vol. 1, Part 2, at p. 216, and because the longest sentence was 16 years, *see id*. at p. 215, the DOC erroneously concluded that Lima-Marin had to serve the equivalent of a 16-year sentence. *See generally* Hearing.

V. Confinement at the DOC

Upon being transferred to the DOC, Lima-Marin was taken to the Denver Reception and Diagnostic Center (hereinafter "the DRDC"). *Id*. The DRDC reviewed his convictions and sentences, discussed them with him,

drew a sample of his blood for testing, gave him "points,"[10] calculated his estimated parole-eligibility date, and gave him a piece of paper documenting his estimated parole-eligibility date calculation. *See id*. There is no sound evidence in the record about the specific parole-eligibility date calculation performed by the DRDC with respect to Lima-Marin. There is also a dearth of reliable evidence regarding the precise information the DRDC conveyed to Lima-Marin about his parole-eligibility date.[11] While in the DRDC, Lima-Marin continued to believe that his sentence was a 98-year prison sentence. *Id*.

Lima-Marin and Clifton were housed in separate areas in the DRDC. *See id*. They only came into contact once, during a church service. *Id*. From the DRDC, Lima-Marin was taken to a medium security facility in Crowley County. *Id*. He was under the impression that Clifton was taken to a prison facility categorized at a higher security level. *Id*.

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[10] Each inmate receives points based on multiple factors, including the nature of his conviction and the length of his sentence. *See generally* Hearing. However, inasmuch as this was Lima-Marin's first time in prison, he did not truly understand the point system when he was at the DRDC. *Id*.

[11] At the hearing, Lima-Marin was asked on cross-examination if the "piece of paper" the DRDC handed him indicated that "2014" was his estimated parole-eligibility date. *See generally* Hearing. Lima-Marin responded, credibly, that he did not "remember exactly what [the piece of paper] said." *Id*. Then he added that he was "sure it did, yeah." *Id*. Lima-Marin was paroled in April 2008.

VI. Direct Appeal Proceedings

On or about May 30, 2000, the Public Defender's Office (hereinafter "the PDO") filed a notice of appeal and a designation of record on behalf of Lima-Marin; both pleadings were served on the Attorney General's Office (hereinafter "the AGO").[12] Vol. 1, Part 2, at pp. 232-33; Vol. 2, Part 3.4, at pp. 493-94. The notice correctly stated that the sentence imposed on Lima-Marin was "98 years plus 5 years Mandatory Parole." Vol. 2, Part 3.4, at pp. 493-94. However, Lima-Marin did not see the notice. Affidavit in Support of Petition at p. 1.

On or about June 1, Clifton filed a notice of appeal and a designation of record through his court-appointed counsel. *See* Attachments D & E. These documents, too, were served on the AGO. *Id*.

Clifton filed and served on the AGO his amended opening brief on March 16, 2001. *See* Attachment F. Ten days later, on March 26, before Lima-Marin's opening brief was filed, Joan Mounteer, the attorney assigned by the

[12] The PDO also represented Lima-Marin at trial. However, the notice of appeal and designation of record were not signed by trial counsel; they were signed by Kathleen Lord, the PDO's Chief Appellate Deputy at the time.

PDO to Lima-Marin's case after the trial, moved to dismiss his appeal. Vol. 2, Part 3.4, at pp. 496-98.[13]

The motion to dismiss indicated that, being "fully advised of his right to appeal his conviction," Lima-Marin had "advised his attorney to request the Colorado Court of Appeals to dismiss the appeal . . ., but without prejudice to any subsequent application for post-conviction relief, which Mr. Lima-Marin, in his discretion, may deem appropriate . . . ." *Id*. at p. 496. In the affidavit accompanying the motion, Lima-Marin attested, as relevant here, that he: (1) had "been fully advised by his attorneys and [was] fully aware of his right to appeal his sentence to the Colorado Court of Appeals;" (2) fully understood that he was "entitled to but one direct appeal" and that, by requesting dismissal of his appeal, he "waive[d] any and all right to said direct appeal;" (3) did "not intend to relinquish his right to apply for post-conviction relief at a subsequent time in his discretion;" and (4) had "been advised by his attorneys of the legal and factual issues which could be presented on the within [sic] appeal and of the legal significance and merit of such issues with respect to the probability of the success of such an appeal." *Id*. at p. 498.

[13] The record reflects that one of the reporters responsible for preparing transcripts in Lima-Marin's case sought and obtained multiple extensions of time to submit those transcripts to the Court of Appeals.

When Lima-Marin was advised by his attorney to dismiss his appeal, he was meeting her for the first time. *See generally* Hearing.[14] After introducing herself, Mounteer told Lima-Marin that he should "dismiss the appeal" because there was "no need to do the appeal," since his sentence had been reduced to "a 16-year sentence" and it was no longer a 98-year sentence. *Id*. She explained that, "since [his] sentence had already been reduced to 16 years, which is what [they] would be fighting for in the appeal anyway, there was no point to continuing the appeal." Affidavit in Support of Petition at pp. 1-2; *see also generally* Hearing.

Lima-Marin did not question the information provided by Mounteer because a 16-year sentence is "what [he] felt [he] deserved in the first place." *See generally* Hearing. He had no reason to believe that the reduction of his sentence was the result of a clerical error. *Id*. Instead, he "assum[ed] that the judge [had] ordered" his sentence reduced; "[o]therwise, how would [he] have [a 16-year sentence]?" *Id*. "All [he] knew was, [his] prayers had been answered." *Id*.

This was Lima-Marin's "first felony as an adult" and he had no idea about "how any of this worked" in the judicial system. *Id*. The following

[14] As is customary, the PDO assigned a different attorney than trial counsel to represent Lima-Marin on appeal.

exchange during Lima-Marin's cross-examination at the December 21 hearing reflects Lima-Marin's thought process when he learned that his sentence was no longer 98 years:

> Q. So without ever requesting from the court and knowing that you had a 98-year sentence, your sentence just miraculously changed into a 16-year sentence?
>
> A. You're asking me?
>
> Q. Yes.
>
> A. Like I told you before . . . I had no clue as to how any of this worked. This . . . professional in this field who was appointed to me is telling me that I have 16 years. So who was I to question this professional that was appointed to me to assist me in this process? All I know is, okay, you're telling me this is what I have. This is what I have. And then on top of that . . . when she left, I went and checked with my case manager, and my case manager gave me . . . what's called a green sheet stating the exact same things that she just stated. . . . I had no reason to argue with either one of those people about it or ask questions. All I knew was, my prayers had been answered.
>
> Q. Without any action or without ever going before a judge, your sentence changed from 98 years to 16 years?
>
> A. Again, you're asking me that question.
>
> Q. Yes.
>
> A. I don't—I have—yes, I guess so.
>
> Q. Well, you never went before a court to get a new sentence, did you?
>
> A. But you're asking me something that—I don't know how the court works. I don't know if that's something that's possible or isn't possible. You do, but I didn't know that.

Id.

After advising Lima-Marin in connection with the motion to dismiss, Mounteer showed him the paperwork "drawn up" and asked him to sign it.

Id. He heeded her advice and signed the affidavit she drafted for him, which was filed with the motion to dismiss. Affidavit in Support of Petition at p. 2. That affidavit referred to "his right to appeal his sentence." Vol. 2, Part 3.4, at p. 498 (attesting that he had "been fully advised by his attorneys and [was] fully aware of his right to appeal ***his sentence*** to the Colorado Court of Appeals") (emphasis added).[15] This is consistent with both his 2016 affidavit in support of the habeas petition and his subsequent testimony at the December 21 hearing—he attested and later testified that he moved to dismiss his appeal when he learned that his sentence had been reduced because 16 years is what he felt he deserved and the 98-year sentence imposed in 2000 is all he would have been contesting in the appeal. Affidavit in Support of Petition at pp. 1-2; *see also generally* Hearing.

Although the government did not know about the ministerial error in Lima-Marin's mittimus, it was aware that it is extremely rare for a criminal defendant to request the dismissal of his direct appeal in a case like 1998CR2401. *See generally* Hearing. Raemisch's own witness, Orman, testified credibly on direct examination that it is "extremely uncommon" to have a defendant in that type of case—who stands convicted of eight crimes of

[15] The motion to dismiss signed and filed by Mounteer referred to Lima-Marin's "right to appeal his conviction." Vol. 2, Part 3.4, at p. 496.

violence, including three class 2 felonies and five class 3 felonies, and is serving a sentence to 98 years in prison—move to dismiss his direct appeal. *Id*. In fact, according to Orman, in a case like 1998CR2401, it is "unheard of" to have the defendant abandon his appeal. *Id*.

The Court of Appeals dismissed Lima-Marin's appeal on April 9, 2001. Vol. 2, Part 3.4, at p. 496. For the same reason Lima-Marin agreed to the dismissal of his appeal, he concluded that there was no need to seek post-conviction relief. *See generally* Hearing. Therefore, after his appeal was dismissed, he did not file a motion for sentence reconsideration or any other motion for post-conviction relief. *See id*.; Affidavit in Support of Petition at p. 2.

VII. The AGO's Incorrect Belief Regarding the Co-Defendant's Mittimus

Around the same time it received the rare motion to dismiss filed by Lima-Marin, the AGO concluded that there was a clerical error in the co-defendant's mittimus. Specifically, four days after Lima-Marin filed his motion to dismiss his direct appeal, the AGO noted in its answer brief in Clifton's appeal that Clifton's mittimus needed to "be corrected to reflect that

his eight sentences are to be served consecutively." Attachment G at p. 18.[16] In addition to urging the Court of Appeals to affirm Clifton's judgment of conviction and sentences, the AGO asked that the case be remanded for the trial court to amend the mittimus because it did "not reflect that Clifton's eight sentences are to be served consecutively, as the trial court ordered." *Id*. The Court of Appeals vacated the judgment and sentence as to one count, but affirmed the judgment and sentences as to all the other counts. *People v. Clifton*, 69 P.3d 81, 86 (Colo. App. 2001). Further, because the Court "agree[d]" with the AGO "that the mittimus should be corrected to reflect that [Clifton's] sentences [were] to be served consecutively," it remanded the case to the trial court "for correction of the mittimus . . . to reflect defendant's consecutive sentences." *Id*.

The Colorado Supreme Court subsequently vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals "for reconsideration in light of *People v. Borghesi*, 01SC479 (Colo. March 24, 2003)." *People v. Clifton*, No. 02SC80, 2003 WL 1906360, at *1 (Colo. Apr. 21, 2003). On remand from the Colorado Supreme Court, the Court of Appeals again stated

[16] Lima-Marin's motion to dismiss was filed on Monday, March 26, 2001. Vol. 2, Part 3.4, at pp. 496-98. The AGO filed its answer brief in Clifton's case on Friday, March 30. *See* Attachment G.

that Clifton's mittimus "should be corrected to reflect that [his] sentences are to be served consecutively." *Clifton*, 74 P.3d at 521. Thus, in 2003, after applying *Borghesi* and affirming the judgment of conviction and sentences on all the counts, the Court of Appeals remanded Clifton's case to the trial court "for correction of the mittimus." *Id*.

As it turns out, there was actually no error in Clifton's mittimus. Instead, it appears that the AGO focused solely on page 1 of the two-page mittimus. *See* Attachment G at p. 18 (the AGO's answer brief citing to page 1 of the mittimus). To be sure, page 1 of Clifton's mittimus does not indicate whether his sentences were ordered to be served consecutively or concurrently. *See* Attachment A. But page 2 does, and it does so in no uncertain terms. *Id*. The "ADDITIONAL REQUIREMENTS"[17] section of the mittimus states as follows:

> SENTENCES ON COUNTS 1-8 ARE CONSECUTIVE . . . ON 2 VERDICTS OF GUILTY TO ACCESSORY TO CRIME (1ST DEGREE BURGLARY) AND 3 VERDICTS OF GUILTY TO ACCESSORY TO CRIM [SIC] (AGGRAVATED ROBBERY) DEF SENTENCED TO 4 YEARS DOC, CONCURRENT. UPON COMPLETION OF SENTENCE DEFENDANT MUST SERVE 5 YEARS MANDATORY PAROLE.

[17] Like Lima-Marin's mittimus, the "ADDITIONAL REQUIREMENTS" section of Clifton's mittimus started on page 1 and continued to page 2. Vol. 1, Part 2, at pp. 215-16; Attachment A.

The AGO did not realize during the relevant timeframe that its reading of Clifton's mittimus was mistaken. Surprisingly, as late as August 2016, when it filed Raemisch's response to Lima-Marin's habeas petition, the AGO continued to believe, incorrectly, that Clifton's mittimus contained "the same error" as Lima-Marin's mittimus. Response at pp. 26-27. In fact, the response filed by the AGO goes so far as to assert that such "error was fixed in" Clifton's case. *Id*. The AGO persisted in its mistaken view during the December 21 hearing. *See generally* Hearing (counsel asserting that the Court of Appeals "caught" the error in Clifton's mittimus). Contrary to the AGO's contentions, Clifton's mittimus did not contain an error, did not need to be corrected, and was never amended.

Based on its several misunderstandings concerning Clifton's mittimus, the AGO states that "Lima-Marin dismissed his appeal shortly after the mittimus error was discovered in his co-defendant's appeal." Response at p. 27 n.13. The AGO implies that when Lima-Marin learned that the error in Clifton's mittimus had been ordered corrected by the Court of Appeals, he promptly dismissed his own appeal to avoid the same fate. *See id*. The Court rejects this speculative factual assertion, which is disputed by Lima-Marin. Affidavit in Support of Petition at p. 2 ("I was never told there was an error in

. . . the mittimus, and that if I went through with my appeal, the court would discover the error and correct it, reinstating a 98-year sentence"); *see generally* Hearing. Lima-Marin moved to dismiss his appeal before, not after, the AGO filed its answer brief in Clifton's case.[18] *Compare* Vol. 2, Part 3.4, at pp. 496-98 *with* Attachment G. Further, when the motion to dismiss was filed, Lima-Marin had no reason to be concerned about Clifton's appeal because there was in fact no error in Clifton's mittimus.

VIII. <u>Conduct in the DOC</u>

By all accounts, Lima-Marin was a model prisoner in the DOC and took advantage of opportunities for rehabilitation. *See generally* Hearing. He "changed [his] life completely." *Id*. He became "a different person, a different man." *Id*. More specifically, he became a spiritual person and formed a gospel rap music group. *Id*.; Vol. 2, Part 2, at p. 358. He testified credibly that he "received the Lord" and "basically dedicated [his] life to learning about what it is to walk for Him and to teach others also to do the same." *See generally* Hearing. In addition, he obtained his GED and received certifications for computer applications, computer programming, braille

[18] At the hearing, the AGO acknowledged that Lima-Marin moved to dismiss his appeal before the Court of Appeals ordered Clifton's mittimus corrected. *See generally* Hearing.

transcription, and "a lot of [other] different things." *Id*.; Vol. 2, Part 2, at p. 336, 349.

While confined, Lima-Marin and Clifton exchanged letters in which they discussed different topics. For example, Lima-Marin shared that he was "becoming a different man" and did not want to hear about "the stuff" Clifton was still involved in or how Clifton "still want[ed] to do different things." *See generally* Hearing. Lima-Marin made his feelings known to Clifton and told Clifton that he did not want to know "where he was at."[19] *Id.* Although it is unclear whether they ever discussed Lima-Marin's shortened sentence, Lima-Marin knew that Clifton continued serving a 98-year sentence. *Id*. However, based on what his attorney had told him, Lima-Marin believed that the judge had ordered his sentence reduced to 16 years. *See* Affidavit in Support of Petition at pp. 1-2.

IX. Conduct During Parole and Subsequent Eight and a Half Months

Lima-Marin was released on parole on April 24, 2008, after he completed approximately nine years and seven months of the 16-year

[19] Lima-Marin's attorney stated at the hearing that Clifton's conduct while incarcerated "has been less than stellar." *See generally* Hearing. Because there is not a request from Clifton before the Court, there is very little information in the record regarding his behavior in the DOC.

sentence listed in his original mittimus.[20] Petition at p. 6. At the time of his release, Lima-Marin knew that Clifton remained in custody. *See generally* Hearing. Lima-Marin was successfully discharged from parole on April 24, 2013.[21] Petition at p. 6.

Lima-Marin had no violations during the five years he was on parole. *Id*. To the contrary, his conduct while on parole was exemplary. *See* Vol. 2, Part 2, pp. 335-61. As required by the standard terms and conditions of his parole, he led a law-abiding life,[22] became a productive member of the community, and was successfully re-integrated into society. *See id*. Moreover, Lima-Marin continued thriving after he was discharged from parole. *See id.* Thus, while on erroneous release for almost six years, Lima-Marin demonstrated that he is fully rehabilitated.

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[20] This includes the approximately 19 months (578 days) of credit for time served granted by the trial court during his sentencing hearing on April 13, 2000.

[21] Neither party submitted any proof of the date when Lima-Marin was paroled or the date when he was discharged from parole. Because there does not appear to be any dispute about the dates referenced in the petition, the Court relies on them.

[22] The DOC's Admission Data Summary from January 23, 2014, which is part of the Court file in 1998CR2401, reflects that Lima-Marin had a traffic case in Arapahoe County (case number 2012T12446), which he resolved by paying a fine. Otherwise, Lima-Marin does not appear to have had any contact with law enforcement between April 2008 and January 2014.

First, he reunited with his former girlfriend, Jasmine, and helped raise her son from a prior relationship as his own.[23] Vol. 2, Part 2, at pp. 336, 340, 349, 352; Vol. 1, Part 2, at p. 226. Lima-Marin is the only father that child has known since 2010. Vol. 2, Part 2, at pp. 349, 352. In April 2010, Lima-Marin and his wife had a son. *Id*. at p. 353. That child never would have been born if Lima-Marin had not been erroneously released and allowed to remain at liberty for an extended period of time by the government. Lima-Marin is a loving and supporting husband and a caring and nurturing father. *See id*. at pp. 335-61.

Second, Lima-Marin was consistently employed. Although it was initially difficult to find employment, he was eventually hired by a marketing company, where he worked long hours selling coupon books. *Id*. at pp. 350, 352. He next worked for three and a half years at a company that sold phones, first as a phone rep and later as a supervisor. *Id*. at pp. 352-53. Finally, in 2012, he took up a career as a glazier at Harmon. *Id*. at pp. 353, 356, 361. He started at Harmon as a first-year apprentice glazier; he joined the

[23] The couple met when they were teenagers. Vol. 1, Part 2, at p. 226; Vol. 2, Part 2, at p. 352. Although they had been "involved in a long-term relationship," they broke up before he was sentenced in April 2000 in 1998CR2401. Vol. 1, Part 2, at p. 226.

union and began an apprenticeship program. *Id*. at p. 361. He progressed in his apprenticeship program to second-year glazier apprentice. *Id*.

Two glazier foremen at Harmon describe Lima-Marin in glowing terms—as a great, humble, respectful, strong, dedicated, and dependable employee with a strong work ethic, a good attitude, and a willingness to learn. *Id*. at pp. 356, 360. A Harmon superintendent echoes some of those comments. *See id*. at p. 361. Lima-Marin's supervisors attest that he worked well with others, inspired coworkers, kept everyone around him in positive spirits, and was always punctual and prepared to work. *Id*. In fact, he was one of the most reliable employees at Harmon—"a valuable asset." *Id*. at pp. 356, 360. When he was re-arrested, Lima-Marin was difficult to replace; his absence had a strong impact on his crew. *Id*. at pp. 356, 360.

Third, after saving some money, Lima-Marin and his wife purchased a home in Aurora, Colorado, where they lived starting in April 2011. *Id*. at pp. 336, 338, 358. He enjoyed the company of family, friends, and neighbors, many of whom submitted affidavits attesting to his accomplishments and good character. *Id*. at pp. 335-61. It is clear that they respect Lima-Marin and genuinely like him. *See id*.

Fourth, Lima-Marin has become "an asset to society," "a leader," and "an outstanding citizen." *Id*. at p. 350. As part of developing and fostering his spirituality, he worked with many young people, encouraging them to make good choices in life. *See id*. at pp. 346, 349. He "found a unique and positive way to speak to teenagers and young adults by combining Christianity and music." *Id*. at p. 346. He performed with his Christian rap group at local churches and played in over twenty concerts, always delivering a positive message. *Id*. at pp. 346, 349, 358. He took the time before and after each show to answer questions and counsel anyone seeking his guidance. *Id*. at p. 346. Lima-Marin is committed to improving as a human being by helping others and by being active in the church. *Id*. at pp. 346-47.

Finally, there is no evidence in the record that Lima-Marin ever attempted to flee this jurisdiction, the State, or the country. Nor is there any indication that Lima-Marin ever attempted to conceal his identity from anyone or that he was living in hiding or in fear that he would be re-incarcerated upon the discovery of a clerical error in his mittimus. To the contrary, the record reflects that Lima-Marin lived proudly and openly in the community in and around Aurora, the same general community where he lived before he was sentenced in April 2000 in 1998CR2401. *Id*. at pp. 335-61.

X. The Government Finally Caught the Mittimus Error

On January 7, 2014, while Lima-Marin was enjoying his sixth year out of prison and continuing to be a law-abiding and contributing member of society, Orman received an email from Lima-Marin's prosecutor at approximately 7:45 in the morning.[24] *See generally* Hearing. The email was titled "a bolt out of the blue." *Id.* Lima-Marin's prosecutor informed Orman that he had prosecuted Lima-Marin and that he was unable to find out Lima-Marin's status after "looking on the inmate locator" on the DOC website. *Id.*[25] Lima-Marin's prosecutor remembered that Lima-Marin had received a 98-year prison sentence and, consequently, believed "that he should still be in prison." *Id.* Troubled by the apparent absence of Lima-Marin's name from the inmate locator, Lima-Marin's prosecutor asked Orman "to look into" the matter. *Id.*

Orman initially confirmed through the case record on the Colorado State Courts—Data Access computer system that Lima-Marin had received a

[24] Lima-Marin's prosecutor was a magistrate in this judicial district when he contacted Orman; he currently holds the same position. For the sake of clarity and convenience, the Court will continue referring to him as "Lima-Marin's prosecutor" throughout this Order.

[25] There is no explanation in the record as to why Lima-Marin's prosecutor was searching for Lima-Marin on the inmate locator on the DOC website almost 14 years after Lima-Marin was sentenced in 1998CR2401.

number of consecutive sentences in 1998CR2401 that added up to 98 years in prison. *Id*. He noticed a strange notation next to each sentence: either "no consecutive/concurrent sentence[]" or "no concurrent/consecutive sentence[]." *Id*.[26] Based on "a particularly heinous incident" involving "the courts and the Department of Corrections,"[27] Orman strongly suspected that Lima-Marin's mittimus may not have correctly indicated that the sentences were to be served consecutively. *Id*. At approximately 8:10 in the morning, Orman called the DOC and explained the situation. *Id*. The DOC advised him that its records showed that Lima-Marin had a 16-year prison sentence, had been released on parole, and had been discharged from parole "about eight months" earlier. *Id*. At that point, Orman "knew for certain what had

[26] Orman could not remember at the hearing which one of these two notations was accurate. *See generally* Hearing.

[27] Orman was referring to Evan Ebel's premature release from the DOC as a result of a concurrent/consecutive error in his mittimus. *See* Hearing. At the hearing, Orman testified that he believed Ebel "murdered the [E]xecutive [D]irector of the Department of Corrections while at large and when he still should have been in prison." *Id*. Although Orman could not recall the exact timeframe when this occurred, the Director of the DOC, Tom Clements, was murdered in March 2013, about ten months before Orman was contacted by Lima-Marin's prosecutor. *See generally* Hearing; *see also* Jordan Steffen et al., *Tom Clements, executive director of Colorado prisons, killed in his home in Monument*, THE DENVER POST (Mar. 19, 2013, 11:29 PM) http://www.denverpost.com/2013/03/19/tom-clements-executive-director-of-colorado-prisons-killed-in-his-home-in-Monument/. The news media widely reported in March and April of 2013 that Ebel was erroneously released from prison in January 2013. *See*, *e.g.*, Michael Winter, *Colo. parolee ditched tracking device before slayings*, USA TODAY (Apr. 2, 2013, 3:43 PM) https://www.usatoday.com/story/news/nation/2013/04/02/colorado-parolee-evan-ebel-tracking-device/2047265/.

happened." *Id*. Thus, it took Orman about thirty minutes to figure out the clerical error that led to the DOC prematurely releasing Lima-Marin and allowing him to remain out of custody for a prolonged period of time. *See id*.

Orman's next step was to request the Court's file and the sentencing hearing transcript in order to confirm his conclusion that there was an issue with the mittimus. *Id*. While awaiting these materials, Orman emailed Lima-Marin's prosecutor and informed him about the results of his investigation. *Id*. Later, upon reviewing the materials obtained from the Court, Orman confirmed that, although Lima-Marin had been sentenced to 98 years in prison—the minimum mandatory term—the mittimus incorrectly stated that the sentences were to be served concurrently, instead of consecutively, which resulted in a much lower imprisonment period of 16 years. *Id*.

XI. Warrant, Hearing, Mittimus Correction, and Re-Incarceration

By 12:30 p.m., Orman had drafted, filed, and served on the PDO a motion on behalf of the People of the State of Colorado to correct the mittimus in 1998CR2401 pursuant to Crim. P. 36. *Id*.; Exs. G, H. The motion also asked the Court to issue an arrest warrant for Lima-Marin and to have him remanded into the custody of the DOC to serve the remainder of his 98-year sentence. *See generally* Hearing; Ex. G. The Court, the Honorable William

Sylvester presiding, immediately signed the proposed order attached to the People's motion.[28] *See generally* Hearing; Exs. G, I. By 2:30 p.m., an arrest warrant had issued for Lima-Marin. *See generally* Hearing. Orman asked law enforcement to execute the arrest warrant, and Lima-Marin was taken into custody around 11:00 p.m. the same day in Aurora. *Id*.

Judge Sylvester held a hearing the next day. *Id*. The PDO appeared on behalf of Lima-Marin, who remained in custody. *Id*. Although Judge Sylvester granted the PDO leave to file a motion seeking relief on some future date, he denied its request to postpone the hearing. *Id*. After considering counsel's arguments, he amended the mittimus and remanded Lima-Marin into the custody of the DOC to serve the remainder of his 98-year sentence. *Id*.; Ex. K. The amended mittimus indicates that Lima-Marin's sentences are to be served consecutive to each other. *Id*. Further, it is dated January 8, 2014, *nunc pro tunc* April 13, 2000, and indicates that Lima-Marin is "to receive credit for all time served, including earned time." Ex. K.

Carlson's testimony regarding the credit Lima-Marin received was not completely clear. *See generally* Hearing. But the amended mittimus, itself,

[28] The Order was inadvertently dated "2013."

appears to reflect that Lima-Marin received credit for the time he served on parole, as well as for the eight and a half months that followed. *Id*.

On the issue of parole, Carlson was clear that Lima-Marin will not have to complete it again. *Id*. However, there is nothing in writing that the Court has seen from the DOC documenting Carlson's statement. Further, the mittimus, as amended by Judge Sylvester, contradicts Carlson's testimony; it states as follows: "DEFENDANT TO COMPLETE MANDATORY PAROLE." Ex. K. Carlson did not address this note in the mittimus. Nor did she explain how Lima-Marin's release date would be calculated if he is not required to complete parole again. When he becomes parole-eligible, will he simply be released at that time? Or, if he is not placed on parole again, will he have to wait in prison until his mandatory release date? Other questions remain—Who will make this determination? When will the determination be made? And on what legal authority will the determination be based?

The questions related to Lima-Marin's potential "re-parole" are important because there could be a significant difference between the parole-eligibility date and the mandatory release date. For example, Clifton's parole-eligibility date is "somewhere in the late 2040s," but his "mandatory release

date" appears to be "in the 2090s," a difference of approximately 50 years. Ex. L, Exhibit 10, p. 4. (Orman speaking at the January 8, 2014 hearing).[29]

XII. Lima-Marin Lacked Both Knowledge and Contributing Fault

Lima-Marin did not know until he was re-arrested in January 2014 that a clerical mistake in his mittimus was actually responsible for his release in April 2008. *See generally* Hearing. Following his sentencing hearing in April 2000, he did not see the mittimus signed by the judge and he was not told that there was an error in the mittimus. Affidavit in Support of Petition at pp. 1-2. Nor did Lima-Marin contribute in any way to his erroneous release or the substantial delay in his re-incarceration. *See generally* Hearing.

XIII. Post-Conviction Litigation

On March 10, 2014, the PDO requested Lima-Marin's immediate release. Ex. J. The PDO did not cite Crim. P. 35. *Id*. Nor did it file a civil proceeding

[29] At the January 8, 2014 hearing, Orman made the same error the AGO made regarding Clifton's mittimus. He assumed that "the same mistake" that was made in Lima-Marin's mittimus was made in Clifton's mittimus. Ex. L, Exhibit 10, p. 4. Like the AGO, Orman further believed, mistakenly, that the trial court had corrected Clifton's mittimus. *Id*. Judge Sylvester had Clifton's mittimus retrieved during the hearing; since it reflected that the sentences were to be served consecutively, he, too, assumed it had been corrected on remand. *Id*. at pp. 7-9. Like Orman, he failed to notice that the mittimus in the file was signed in April 2000 by the sentencing judge, who retired in 2006. As indicated earlier, Clifton's mittimus was never amended. Attachment A (showing that the mittimus was signed by the sentencing judge on April 20, 2000, a week after the sentencing hearing, and entered *nunc pro tunc* April 13, 2000).

against the DOC seeking habeas corpus relief. *Id*. Instead, the PDO filed a motion in 1998CR2401, claiming that Lima-Marin's re-incarceration violated: the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; article II, sections 7, 16, 18, and 25 of the Colorado Constitution; and various Colorado statutes. *Id*. On March 24, 2014, the People filed a response urging the Court to dismiss the motion as procedurally improper and to allow Lima-Marin to file a petition for writ of habeas corpus instead. Ex. L. Ignoring the People's procedural arguments, Judge Sylvester denied Lima-Marin's motion on the merits in an Order dated April 21, 2014. Ex. M.

Lima-Marin filed a notice of appeal with the Colorado Court of Appeals challenging Judge Sylvester's ruling. On appeal, the People again asserted that Lima-Marin's claims were not cognizable in a Crim. P. 35 motion in 1998CR2401 and should have been raised in a civil habeas corpus proceeding. The People thus sought dismissal of the appeal without prejudice so that Lima-Marin could file a habeas corpus petition naming the DOC as the respondent. After reviewing the record, the Court of Appeals found that the case was in effect an appeal of the denial of a writ of habeas corpus and that, therefore, the Colorado Supreme Court had exclusive jurisdiction to consider Lima-Marin's appeal. Accordingly, the Court of Appeals asked the Supreme

Court consider the appeal. On August 6, 2015, the Supreme Court accepted the Court of Appeals' request and later heard oral argument.

In an Order dated January 14, 2016, the Supreme Court ruled that the case was improperly before it as a Crim. P. 35 motion because Lima-Marin was not challenging his sentence, but was, instead, arguing that he was being unlawfully detained by the DOC. *Lima-Marin v. People*, 2015SA192, at *4 (Colo. Jan. 14, 2016).[30] The Supreme Court further concluded that the case was not properly before it as an original habeas corpus proceeding because Lima-Marin: (1) did not follow the procedural requirements of the Habeas Corpus Act ("the Act"), §§ 13-45-101 to -119, C.R.S. (2015) or C.A.R. 21; and (2) did not file a petition for writ of habeas corpus in district court. *Id*. Hence, the Supreme Court dismissed the case for lack of jurisdiction. *Id*.

The Supreme Court nevertheless granted Lima-Marin "leave to file a civil petition for writ of habeas corpus with the district court pursuant to §§ 13-45-101 to –119, setting forth sufficient facts to make a prima-facie case warranting an evidentiary hearing and supporting his allegations that his re-incarceration and current detention by the DOC are unlawful." *Id*. Lima-Marin filed his petition for habeas corpus relief in this Court on May 16, 2016.

[30] The Supreme Court's Order is part of the electronic file in this civil case; it was filed with the petition.

The DOC filed a response on August 12, 2016, and Lima-Marin filed a reply on September 6, 2016. On September 30, 2016, the Court issued a writ of habeas corpus directed to Raemisch. After Raemisch made return of the writ, the Court held an evidentiary hearing on December 21, 2016 to determine the basis for Lima-Marin's current imprisonment and whether he is properly being detained.

XIV. Lima-Marin Has Already Served the Equivalent of a 32-Year Prison Sentence

Lima-Marin has been in custody for three years and four months since he was re-incarcerated on January 7, 2014. Counting this time, he has served a total of approximately 18 years in custody (including the five years of mandatory parole he completed, which Raemisch agrees should be included in Lima-Marin's credit-for-time-served computation, and the time he spent in pretrial confinement). When the Court includes the almost eight and a half months Lima-Marin was at liberty after successfully completing his parole, which Raemisch concedes the Court should do, the total length of Lima-Marin's confinement is closer to 19 years. Inasmuch as Lima-Marin served approximately 60% of the 16-year prison term he completed (115 months out of the total 192 months), as of May 2017, he has essentially discharged the equivalent of a 32-year sentence to the DOC (60% of 32 years is 19.2 years) on

his first felony conviction for robbing two video stores at the tender age of 20 years old. In the Court's experience, a 32-year prison sentence falls comfortably within the range of sentences—and likely the high end of the range—imposed for the type of conduct involved here when committed by a very young defendant appearing on his first adult felony conviction.

XV. March 2013 Initiative

In March 2013, almost immediately after Clements' murder, with the assistance of the State Court Administrator's Office, the DOC started a statewide initiative (hereinafter "the initiative") to ensure that active concurrent sentences were authorized by Colorado law and were intended by the sentencing judges. *See generally* Hearing.[31] Although Orman lamented that this initiative was limited to inmates still serving sentences in the DOC, *see generally* Hearing, there is no evidence in the record that the DAO or any other prosecution office conducted a similar initiative or implemented any other measures—whether in conjunction with the DOC or independently—with respect to inmates who had already been released from the DOC.

The undersigned is personally aware that, as part of the initiative, the DOC sent the Judicial Branch numerous spreadsheets with inquiries seeking

[31] Lima-Marin had already been released on parole in March 2013; he was discharged from parole in April 2013. Therefore, his mittimus was not included in the initiative.

clarification or correction of some mittimuses that included sentences being served concurrent with another sentence or other sentences. Those spreadsheets, in turn, were distributed to the appropriate judicial districts, where the sentencing judges were asked to review the inquiries from the DOC and respond to them promptly. Judges responded by: (1) amending the mittimus in question, including by stating clearly whether a sentence was to be served concurrent with or consecutive to another sentence; or (2) stating that the mittimus had been reviewed and did not need to be amended.

The undersigned, in his capacity as a Colorado trial court judge, has first-hand knowledge that, following the initiative, the DOC has continued to regularly contact trial court judges with inquiries about sentences they have imposed. These inquiries include at least a couple of different situations: (1) where a mittimus fails to state whether the sentences are to run consecutive to or concurrent with each other and any other sentences, and the issue of concurrent versus consecutive sentencing is in the judge's discretion; and (2) where, pursuant to the applicable statutory authority, the sentence must be served consecutive to another sentence or other sentences, but the mittimus fails to so require. *See People v. Wiseman*, 14CA0339, 2017 WL 1404213, at *6 (Colo. App. Apr. 20, 2017) (mentioning the 2013 "DOC and State Court

Administrator's Office initiative to identify individuals with potentially illegal concurrent sentences when consecutive sentences were mandated by statute").

XVI. Impact of Lima-Marin's Re-incarceration

Since Lima-Marin was re-incarcerated, his wife has struggled to pay for their mortgage, to ensure "there is food on the table for the boys," and to pay for their youngest son's preschool. Vol. 2, Part 2, at p. 346. She wonders how she is going to pay the bills with one income. *Id*. at p. 354. It has also been difficult to explain to the children where their father is "and when he will come home," *id*., or why he is not "there to kiss them goodnight or help with their homework," *id*. at p. 346.

Lima-Marin's wife may have most eloquently explained the impact that Lima-Marin's re-incarceration and subsequent absence has had on his family:

> [O]n January 7, 2014 our family was torn apart. I had never experienced pain until I looked into my husband's eyes as he was being arrested in front of me and our children. My husband was reborn during his ten years in prison. When he was paroled in April of 2008, he was no longer the same person he was when he was eighteen years old; he was determined to do everything in his power that he could to never become that person ever again . . . . He is no longer able to do the things he valued most in life (being a father and husband). I know this is killing him.
>
> My husband being put back in prison has had a tremendous effect on my life. To wake up every morning and not have the person

> that makes me whole next to me. My better half is no longer with me—the one who lets me know every day how strong and beautiful I am. The one that showed me life is worth living and anyone can change for the better. My husband showed me what the true meaning of love is. My husband has always made us feel protected and know that no matter what everything would be okay. I no longer have that feeling anymore . . . . I try to figure out how I will raise two boys on my own so they do not end up as their father once was. I wonder how to raise them to be wonderful men as their father is now.

Id. at pp. 353-54.

Of course, this only addresses the initial impact of Lima-Marin's re-incarceration. If Lima-Marin is denied relief, the impact on his life, wife, and children would be devastating. Although to a much lesser degree, there would also be a significant negative impact on the community and society as a whole.

ANALYSIS

Lima-Marin seeks habeas corpus relief, arguing that his re-incarceration is unlawful. Petition at pp. 14-27. Raemisch counters that Lima-Marin's petition lacks merit. Response at pp. 22-39. In an Order dated September 30, 2016, the Court determined both that Lima-Marin's unlawful detention claim was properly brought in a petition for writ of habeas corpus and that Lima-Marin had complied with all of the applicable procedural requirements. *See* September 30, 2016 Order at pp. 9-10. Having reviewed the briefs filed and

considered the evidence and arguments presented at the December 21 hearing, the Court now proceeds to examine the merits of Lima-Marin's assertions.[32] Because the Court concludes that Lima-Marin is being unlawfully detained, it grants the habeas corpus relief requested and orders Raemisch, in his role as Director of the DOC, to release Lima-Marin.

I. Merits of Lima-Marin's Claim

Lima-Marin contends that the government has waived its jurisdiction to enforce the rest of his sentence. Petition at pp. 14-27. Therefore, asserts Lima-Marin, his re-incarceration violates his constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, as well as article II, section 25 of the Colorado Constitution. *Id*. at pp. 14-15.[33]

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[32] Lima-Marin's petition sets forth two general claims: a claim which the Court views as directly or indirectly challenging the validity of his sentence in 1998CR2401, and a substantive due process claim based on his re-incarceration in January 2014 in the same criminal case. *See generally* Petition. In the September 30, 2016 Order issuing a writ and requiring an evidentiary hearing, the Court found that the first claim in the petition "clearly relate[s] to the validity of [Lima-Marin's] sentence" and is not a proper claim in this civil habeas corpus proceeding. September 30, 2016 Order at p. 8. Accordingly, the Court declines to address the merits of that claim. This Order addresses only the merits of the substantive due process claim regarding Lima-Marin's re-incarceration in January 2014. *See* Petition at pp. 14-31; Response at pp. 22-40. This Order sometimes refers generically to this claim as "Lima-Marin's claim."

[33] Lima-Marin advances three theories in support of his substantive due process claim: (1) waiver of jurisdiction; (2) equitable estoppel; and (3) the common law doctrine of

Although Colorado's Appellate Courts have addressed erroneous release claims on a handful of occasions, it has been more than two decades since they have done so and they have never dealt with a case like this one before. Colorado's precedent is certainly instructive, but the Court ultimately views the issue before it as one of first impression and looks to other jurisdictions for additional guidance. Because the analysis is typically fact-specific, however, there is no uniformity in the approach taken by other jurisdictions. The Court does its best in this Order to follow the approach it believes the Colorado Supreme Court would adopt.

The Court first embarks on a historical journey to ascertain the standard of review applicable to Lima-Marin's claim. This requires the Court to navigate the very choppy and unpredictable sea of mistaken release jurisprudence. The Court reviews the seminal cases that gave birth to the two leading theories of relief: the installment theory and the waiver of jurisdiction theory. Mindful of this history, the Court discusses the rich, but inconsistent and confusing, case law that has developed with respect to the waiver of jurisdiction theory, the theory on which Lima-Marin relies. The Court then

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laches. Petition at pp. 14-29. Inasmuch as the Court rules in Lima-Marin's favor on the waiver of jurisdiction theory, it does not address the other two theories. Nor does the Court determine whether the other two theories were properly advanced under a substantive due process claim.

analyzes the constitutional right to substantive due process and its interplay with the waiver of jurisdiction theory in mistaken release claims. More specifically, the Court attempts to discern where the common law and constitutional law streams confluence to become the source of relief in appropriate cases.

The Court finds that Lima-Marin may only rely on the waiver of jurisdiction theory if he first satisfies the demanding requirements to establish a substantive due process violation. Therefore, the Court adopts a three-step test to evaluate the merits of Lima-Marin's claim. Lima-Marin must demonstrate: (1) that the government acted with a deliberate indifference that shocks the contemporary conscience; (2) that the government infringed a deeply rooted fundamental right or liberty interest, and that the infringement was not narrowly tailored to serve a compelling state interest; and (3) that the totality of the circumstances surrounding Lima-Marin's mistaken release and significantly delayed re-incarceration compels the conclusion that the government has waived its jurisdiction over him. Applying this test, the Court rules in Lima-Marin's favor.

A. Standard of Review

1. The Beginning

The common law required a defendant in a criminal case to serve his sentence in its entirety, regardless of whether it was interrupted. *Ex parte Bugg*, 145 S.W. 831, 832 (Mo. Ct. App. 1912); *Lewis v. Bowling*, Nos. 2003-SC-0165-MR & 2003-SC-0238-MR, 2004 WL 538399, at *3 (Ky. Mar. 18, 2004). In *Bugg*, one of the earliest cases to have addressed the premature release of an inmate from prison, the Springfield Court of Appeals in Missouri acknowledged that "[n]either the honest mistake nor the willful disregard of duty on the part of the officers whose duty it is to enforce the judgment can release the convicted party from its consequences." *Bugg*, 145 S.W. at 832. But the common law also recognized that delay in the execution of a sentence is unacceptable. *In re Jennings*, 118 F. 479, 481 (C.C.E.D. Mo. 1902).

The question that naturally flows from these two conflicting principles is "whether there should be any limit to the time within which a judgment may be enforced" when a prisoner is re-arrested after being erroneously released. *Bugg*, 145 S.W. at 832. The absence of such a limit is problematic:

> ***If there is to be no limitation, then a case might arise in which, years after the judgment had been pronounced, and possibly after a man had reared a family and attained to a position of high standing in the community, he and his family might be***

> ***humiliated and disgraced by the bringing to light of an old judgment long since forgotten, and which, in all good conscience, ought never again to see the light of day.*** To say that, under such circumstances, a man should be cast into prison to satisfy an outraged law, would be as absurd as to hold, on the other hand, that society could have no protection against the honest mistakes or willful neglect of the officers it commissions as the guardians of its welfare.

Id. (emphasis added).

Courts have granted relief to some prisoners who have been re-incarcerated after being prematurely released. But courts have not taken a homogeneous approach, and it is sometimes difficult to discern whether the legal theory upon which they relied was of an equitable nature under the non-constitutional common law or grounded in constitutional jurisprudence. *Hurd v. District of Columbia*, 146 F. Supp. 3d 57, 65 (D.D.C. 2015). Finding the appropriate remedy has also proven challenging for courts—"would the prisoner be entitled only to have his street time credited toward his sentence or to be relieved from that sentence altogether?" *Id*. at 66. Moreover, what some courts have viewed as a remedy, such as credit for time while erroneously at liberty, has been treated by other courts as a theory of relief, and vice-versa. The result of this prevalent inconsistency is a legal landscape that is as diverse as it is confounding.

An understanding of the evolution of the case law regarding mistaken release claims is important. Therefore, the Court provides a synopsis of it next.

2. Two Common Law Theories of Relief

There are two common law theories upon which courts have predominantly relied in granting relief in mistaken release cases: the installment theory and the waiver of jurisdiction theory. *Bailey v. Ciccone*, 420 F. Supp. 344, 347 (W.D. Mo. 1976).[34] Although Lima-Marin does not proceed under an installment theoretical basis, the Court discusses it here because it provides context to the discussion of the waiver of jurisdiction theory.

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[34] Some prisoners have relied on a third theory, equitable estoppel. *See, e.g.*, *Johnson v. Williford*, 682 F.2d 868, 871-73 (9th Cir. 1982); *Green v. Christiansen*, 732 F.2d 1397, 1399 (9th Cir. 1984); *McPhearson v. Benov*, 613 F. App'x 645, 646 (9th Cir. 2015); *Hughes v. Oliver*, 596 F. App'x 597, 599-600 (10th Cir. 2014); *United States v. Mazzoni*, 677 F. Supp. 339, 342 (E.D. Pa. 1987); *State v. Bandics*, 805 P.2d 66, 67-68 (Nev. 1991); *Schwichtenberg v. State*, 951 P.2d 449, 452 (Ariz. 1997); *State v. Roberts*, 568 So. 2d 1017, 1019 (La. 1990); *Anderson v. Houston*, 744 N.W.2d 410, 419 (Neb. 2008); *Commonwealth v. Blair*, 699 A.2d 738, 744-45 (Pa. Super. Ct. 1997); *Bowling*, 2004 WL 538399, at *3; *see also United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988) (a case involving a delay in execution of the sentence imposed). However, the Court's research unearthed only one case in which this theory was successful. *See Johnson*, 682 F.2d at 871-73 (treating the estoppel theory as grounded in due process, and finding that the prisoner was entitled to relief). At least one prisoner has relied on a fourth theory, the doctrine of laches, to no avail. *See United States v. Barfield*, 396 F.3d 1144, 1150-51 (11th Cir. 2005). *Barfield* involved a lengthy delay in the enforcement of a sentence, not re-incarceration following an erroneous release, and the delay was caused by the defendant's fraud, not by the government. *Id*. at 1145-47. Finally, in *Roberts*, the Court granted relief—ordering the defendant released on parole early—even though it found that neither waiver of jurisdiction nor equitable estoppel applied. 568 So. 2d at 1019. The Court did not identify the theory of relief on which it relied. *Id*.

The genesis of the installment theory is most often traced back to *White v. Pearlman*, where the Tenth Circuit reasoned as follows:

> ***A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past.*** Yet, under the strict rule contended for by the warden, a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back. ***It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, [ ] his sentence continues to run while he is at liberty.***

42 F.2d 788, 789 (10th Cir. 1930) (emphasis added). As Judge Posner eloquently put it, "[t]he 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;" therefore, "[p]unishment on the installment plan is forbidden." *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994); *see also United States v. Melody*, 863 F.2d 499, 504 (7th Cir. 1988) (discussing the "common law rule that a defendant ordinarily cannot be required to serve his sentence in installments—that is, a prisoner normally should serve his sentence continuously once he is imprisoned").

When a prisoner prevails on a mistaken release claim under the installment theory, courts usually grant day-for-day credit for the time he was erroneously at liberty.[35] Many jurisdictions refer to the installment theory by the remedy that generally accompanies it—credit for time at liberty. For example, the Third Circuit has recognized "the 'rule' or the 'doctrine' of credit for time at liberty." *Vega v. United States*, 493 F.3d 310, 315 (3d Cir. 2007).[36] Other courts do not even "refer to a specific 'doctrine' or 'rule'" in determining that "a prisoner can receive credit for time at liberty" following his mistaken release.[37] Regardless of the legal theory's nomenclature, or lack

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[35] *See, e.g.*, *White*, 42 F.2d at 789; *United States v. Miller*, 49 F. Supp. 2d 489, 495 (E.D. Va. 1999) ("where a prisoner has been mistakenly released early and the prison system then attempts to re-incarcerate the prisoner," he "is entitled to credit for the time he was at liberty"); *Little v. Holder*, 396 F.3d 1319, 1321 (11th Cir. 2005) ("some courts grant credit for time at liberty to prisoners who have been forced to serve their sentences in installments through a series of releases and reincarcerations").

[36] *See also Martinez*, 837 F.2d at 865 (in a case involving a delay in execution of the sentence, the Court stated that "[t]raditionally, the doctrine of credit for time at liberty has only been applied where a convicted person has served some part of his sentence and then been erroneously released"); *Dunne*, 14 F.3d at 336 (discussing the "common law rule" of credit for time at liberty); *Espinoza v. Sabol*, 558 F.3d 83, 88 (1st Cir. 2009) (finding that "the common law 'time at liberty' doctrine" continues to have "vitality, despite its lack of legislative recognition"); *Bataldo-Castillo v. Bragg*, No. 6:15-3717-RMG, 2016 WL 2771127, at *3, *3 n.1 (D.S.C. May 12, 2016) (using "rule" and "doctrine" interchangeably and referring to the "credit for time erroneously at liberty doctrine" and the "almost universal federal rule" of "day-for-day credit") (quotation omitted).

[37] *See Barfield*, 396 F.3d at 1147 n.1 (citing *Leggett v. Fleming*, 380 F.3d 232, 234-36 (5th Cir. 2004), which addressed a prisoner's request for "credit against his sentence for the time spent erroneously at liberty," but made no mention of a doctrine, rule, or theory; and

thereof, "nearly every circuit has recognized a federal common law rule awarding prisoners credit for time erroneously at liberty in appropriate circumstances." *United States v. Grant*, 184 F. Supp. 3d 250, 252 (E.D. Va. 2016).

A second line of cases has relied on the waiver of jurisdiction theory, which was first formally espoused by the Fifth Circuit in *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967). There, the Court held that the government's delay of more than 28 years to attempt to re-incarcerate a criminal defendant mistakenly released before completing his sentence "was equivalent to a pardon or commutation of his sentence and a waiver of jurisdiction" over the prisoner. *Shields*, 370 F.2d at 1006; *see also United States v. Mercedes*, No. 90-CR-450, 1997 WL 458740, at *2 (S.D.N.Y. Aug. 12, 1997) ("*Mercedes II*") (relying on *Shields* and other cases for the proposition that "a government's delay in executing a sentence may constitute a waiver of jurisdiction over an individual under an otherwise valid criminal sentence") (quotation marks omitted). The waiver doctrine prohibits the government "from reasserting

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White, 42 F.2d at 789 (same)); *see also Green*, 732 F.2d at 1400 (finding that the prisoner was entitled to "full credit for the time that he spent at liberty" without referring to a doctrine, rule, or theory) (quotation omitted).

jurisdiction over prisoners wrongfully released." *Schwichtenberg v. State*, 951 P.2d 449, 453 (Ariz. 1997) (quotation omitted).

"The waiver theory encourages responsibility and accountability on the part of the [government] to the extent that it deters the arbitrary exercise of [ ] power." *Shelton v. Ciccone*, 578 F.2d 1241, 1245 (8th Cir. 1978). Further, "the theory encourages the prompt rehabilitation of defendants." *Id*. Like the installment theory, the wavier of jurisdiction theory "is based on the philosophy that a defendant should be allowed to do his time, live down his past, and reestablish himself." *Id*. Allowing the execution of a sentence to be delayed "does not encourage rehabilitation." *Id*. (citing *White*, 42 F.2d at 789). As the Court explained in *Lanier v. Williams*:

> ***Once the state, through acts or omissions of its officials, has led a person, through no fault of his own, to believe that he is free of a prison sentence, and makes no attempt for a prolonged period of years to reacquire custody over him, that person should be able to rely on the state's action or inaction*** and assume that further service of the sentence will not be exacted of him. The state should not later be heard to assert a right of custody over the person whom it has so misled . . . .

361 F. Supp. 944, 947 (E.D.N.C. 1973), *declined to follow*, *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) (emphasis added).[38]

[38] The Court discusses *Hawkins* extensively later in this Order.

Waiver cases are rooted in the same principles—laden with considerations of equity and fairness—as installment cases; thus, not surprisingly, they often rely on installment cases.[39] The practical reality is that cases granting relief under the two different doctrines frequently have the same outcome: prohibiting the government from re-incarcerating the prisoner.

Installment cases are more common than waiver cases. Indeed, the relief that courts have most often considered in cases in which prisoners have been re-arrested following their erroneous release is day-for-day credit for the time spent at liberty, not waiver of the government's jurisdiction. But there is more to the story than meets the eye. In many cases, credit was precisely the relief the prisoner sought and, if granted, resulted in the prisoner discharging all or most of the remainder of his sentence. *Id*. ("in all the cases cited, credit was the relief sought by the prisoner, and in each case, the prisoner was entitled to release under the credit theory"). In such situations, the waiver theory had no relevance and may not even have been mentioned. However, when credit for time at liberty will not discharge a prisoner's sentence (or most of it), the waiver theory is arguably more consistent than the installment

[39] *See, e.g.*, *Shields*, 370 F.2d at 1006 (generally recognized as the seminal waiver theory case; there, the Court relied on *White*, 42 F.2d 788, the seminal installment case, and explained that "[a] prisoner cannot be required to serve his sentence in installments").

theory with the principle that a prisoner cannot be required to serve his sentence in increments, and must, instead, be afforded the opportunity to serve it continuously without interruption. *Id*.

In general, courts seem to employ the installment theory when the case is "not as extreme a case as those in which the government attempted to reincarcerate an erroneously released inmate after many years." *Schwichtenberg*, 951 P.2d at 453. Stated differently, waiver of jurisdiction, the most drastic remedy, is usually reserved for the most extreme cases involving prolonged delays between a prisoner's erroneous release and his re-incarceration.

Although *Shields* is widely viewed as the pioneer case on the waiver theory in erroneous release cases, the principles on which the theory is based were applied as early as 1912 in *Bugg*. *See Bugg*, 145 S.W. at 832-33. Indeed, *Shields* relied on *Bugg*. *Shields*, 370 F.2d at 1004-05 (citing *Bugg*, 145 S.W. at 833). In *Bugg*, the Court ordered a prisoner released before completing his sentences in two cases because there was concern that he was contracting tuberculosis. 145 S.W. at 831. The prisoner remained at liberty for almost three years before he was re-incarcerated to serve the rest of his sentences. *Id*. After concluding that the order releasing the prisoner was void, the Court set

out to determine his rights at the time of re-incarceration. *Id*. at 832. The Court declined to consider the sentence "in legal effect served" based on "the lapse of the time for which imprisonment was imposed" because the prisoner "was not technically in jail while he was in fact, at liberty." *Id*.[40] In other words, the Court did not opt to grant credit for time at liberty. Instead, the Court found that a temporal limitation to enforce the judgment was appropriate in some circumstances:

> We do not think that mere delay in the infliction of the punishment assessed is a sufficient reason for relieving the convicted party from the consequences of a judgment against him, ***unless the delay has been so great that society would derive no good from its enforcement; but when such delay has occurred without the fault of defendant, although with his consent, we should have no hesitancy in refusing to enforce the judgment.*** The criminal laws of this state are not based upon any idea of retaliation against the offender for the wrong he has done, but ***punishments are inflicted solely for the protection of society, and when the execution has, without the fault of defendant, been so long delayed that society can no longer have any interest in its enforcement, there would seem to be no good reason why its enforcement should be insisted upon.***

Id. at 833 (emphasis added).

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[40] The Court was "not disposed to follow" the Wisconsin Supreme Court's decision in *In re Webb*, 62 N.W. 177 (Wis. 1895). *Bugg*, 145 S.W. at 832. In *Webb*, the Court concluded that, even assuming the lower court had authority to suspend the defendant's sentence, "[n]o legal reason appears to have existed" for doing so "in whole or in part." 62 N.W. at 178. Therefore, "the period of [six-months] imprisonment . . . commenced . . . when the defendant was in custody and failed to pay the fine imposed against him, and he could not be lawfully imprisoned after [six months] had expired." *Id*. at 179.

a) Colorado

In *Brown v. Brittain*, the Colorado Supreme Court acknowledged that the "[t]wo theories [that] have been recognized to permit a prisoner who was mistakenly released through no fault of his own to receive credit against his sentence for the time he was at liberty" are the installment theory and the waiver theory. 773 P.2d 570, 572 (Colo. 1989).[41] Citing *White*, the Court explained that "a prisoner should not be required to serve his sentence in installments." *Id*. (citing *White*, 42 F.2d at 789). Citing *Shields*, the Court explained that the "failure to attempt to regain custody of the prisoner within a reasonable time constitutes a waiver of jurisdiction over the prisoner." *Id*. (citing *Shields*, 370 F.2d at 1004; and citing also *Lanier*, 361 F. Supp. at 947, a case involving a prisoner who obtained relief through the waiver theory after he was prematurely released and allowed to remain at liberty for five years).

Because the DOC's delay in attempting to regain custody of Brown was not "for an unreasonable time"—less than two months—the Court found that "the [waiver] theory for permitting Brown to receive credit for time at liberty

[41] While the Court in *Brown* spoke of the two theories utilized by a mistakenly released prisoner "to receive credit against his sentence for the time he was at liberty," the Court was clearly referring to the utilization of the theories by a mistakenly released prisoner ***to obtain relief from his re-incarceration.*** 773 P.2d at 572. Waiver of jurisdiction would not result in credit for time at liberty; it would result in the government being barred from compelling the prisoner to serve the remainder of his sentence.

[was] not present." *Id*.[42] As such, the only question before the Court was whether Brown was "entitled to credit for time at liberty under the [installment] theory." *Id*. Brown's request for credit ultimately failed because he continued his life of crime while erroneously at liberty. *Id*. at 575.

b) Summary

In sum, the installment and waiver theories can be analogized to the trunks of a double-trunk tree. They are separate, but they are coterminous, interconnected, and share a common central root system and canopy space. The waiver trunk provides shade on a very limited basis and much less frequently than the installment trunk. But the shade from the waiver trunk is typically much larger than the shade from the installment trunk. Thus, only when the shade from the installment trunk will not suffice is the shade from the waiver trunk needed.

3. Substantive Due Process

Against this historical backdrop, the Court considers substantive due process and how it interacts with the waiver theory. After all, waiver is a "common law doctrine[ ]." *Hurd*, 146 F. Supp. 3d at 65; *see also United States v.*

[42] Here, again, the Court referred to "receiv[ing] credit for time at liberty," but it clearly meant to refer to obtaining relief from re-incarceration. *Brown*, 773 P.2d at 572.

Nouri, Nos. 07Cr.1029(DC) & 15Civ.2052(DC), 2015 WL 3900436, at *4 (S.D.N.Y. June 24, 2015) (referring to "the common law doctrine theory of 'waiver'").[43] Unfortunately, this constitutional element only adds to the confusion and inconsistency in mistaken release jurisprudence. "[I]t is not always clear whether courts" have analyzed a prisoner's claim as a constitutional one or an equitable one, *Hurd*, 146 F. Supp. 3d at 65, or both, *see Ellsberry v. Director*, No. 6:11CV648, 2012 WL 4121159, at *5 (E.D. Tex. Aug. 9, 2012) (observing that mistaken release cases are grounded in both the Due Process Clause and equitable theories such as waiver and estoppel).

Why is substantive due process involved to begin with? In mistaken release cases, re-incarcerated prisoners complain that the government is unlawfully detaining them in violation of their constitutional rights. This is the stuff of due process. The Due Process Clause of the Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. It "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702,

[43] The installment theory is also a common law rule. *See, e.g.*, *Dunne*, 14 F.3d at 336; *Vega*, 493 F.3d at 317-18; *Melody*, 863 F.2d at 504; *Espinoza*, 558 F.3d at 88; *Martinez*, 837 F.2d at 864; *Hurd*, 146 F. Supp. 3d at 65-66; *Grant*, 184 F. Supp. 3d at 252.

719, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). It "also provides heightened protection against government interference with certain fundamental rights and liberty interests," including, but not limited to, "the specific freedoms protected by the Bill of Rights." *Id*. at 720, 117 S. Ct. 2258.

When viewed through this panoramic lens, it is not surprising that with the passage of time due process has gradually gained a more prominent role in erroneous release cases—both in court decisions and, correspondingly, in claims submitted by prisoners. This is particularly the case with respect to the waiver of jurisdiction theory. Most modern cases view the waiver theory as a mechanism available to provide relief in the extreme situation in which a prisoner's re-incarceration is so fundamentally unfair and violative of the Due Process Clause that the government should be deemed to have waived its jurisdiction over him. Consistent with this prevailing movement, Lima-Marin's waiver of jurisdiction request is grounded in his constitutional right to substantive due process.

In order to better understand how substantive due process coexists with the non-constitutional common law theory of waiver, the Court reviews the metamorphosis of due process considerations on the mistaken release canvas: from invisible, to shadows and highlights, to the all-important background

color. Because there was a change in the trend circa November 1999, the Court divides the discussion into cases decided before November 1999, including in Colorado, and after November 1999.

a) Cases Decided Before November 1999

The early mistaken release cases did not undertake a due process or constitutional analysis. For example, in *White*, where the installment or credit theory originated, the Court made no mention of the right to due process or constitutional law. *See generally* 42 F.2d 788. Likewise, in *Bugg*, the first case to place a temporal limit on the government's ability to compel an erroneously released prisoner to complete the remainder of his sentence, there was no mention of due process or the constitution. *See generally* 145 S.W. 831.

In 1967, in *Shields*, the case most consider at the forefront of the waiver theory, the Fifth Circuit did state that "[t]he due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice." 370 F.2d at 1004 (citing *Buchalter v. New York*, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492 (1943)). The Court added that the due process clause "exacts from the states a conception of fundamental justice." *Id*. However, Shields' habeas corpus petition specifically alleged that his continued

incarceration was inconsistent with "his rights under the due process clause." *Id*. Therefore, the Court was required to determine whether a due process violation had occurred. Even so, the Court did not undertake a constitutional analysis. Instead, it simply concluded that requiring Shields to complete the remainder of his sentence "constituted a denial of due process under the Fourteenth Amendment to the United States Constitution." *Id*. at 1006. The Court reasoned that "[t]he lack of interest in Shields by the State of Texas" during a period of time that exceeded 28 years "was equivalent to a pardon or commutation of his sentence and a waiver of jurisdiction." *Id*.

Six years later, in *Lanier*, the United States District Court for the Eastern District of North Carolina granted Lanier's request to be released from prison with almost no constitutional analysis: "to permit the state" to successfully "assert a right to custody over" a prisoner who was erroneously released and allowed to remain out of confinement for a prolonged period of time "offends the Due Process Clause of the Constitution." 361 F. Supp. at 947. Relying in part on *Shields*, the Court found that the State of North Carolina had "waived its right to any further jurisdiction and custody over [Lanier] in regard to [his] sentences." *Id*.

A couple of months after *Lanier*, the Fifth Circuit modified its stance on the waiver theory, placing more emphasis on due process in general and on the degree of fault by the government specifically. *See Piper v. Estelle*, 485 F.2d 245, 246 (5th Cir. 1973). Clarifying that *Shields* was never meant to become "a trap for unwary state officials," the Court announced a new legal standard:

> In cases based upon the principles of *Shields*, it is not sufficient to prove official conduct that merely evidences a lack of eager pursuit or even arguable lack of interest. Rather[,] the waiving state's action must be so affirmatively wrong or its 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. The *Piper* Court provided little analysis and cited no authority in support of its adoption of the "affirmatively wrong" or "grossly negligent" standard.[44] Nevertheless, the Fifth Circuit marked a conspicuous shift in its treatment of early release waiver cases—adding focus on due process in general and the degree of the government's blameworthiness specifically.

Approximately five years later, in 1978, the Eighth Circuit applied the waiver theory developed in *Shields* as revised in *Piper*. *Shelton*, 578 F.2d at

[44] "Nearly every court to have considered the rule of credit for time at liberty has required that the government's actions in releasing or failing to incarcerate the prisoner be negligent." *Vega*, 493 F.3d at 320. Thus, a lesser degree of governmental culpability appears to be required in the less extreme cases in which prisoners request credit for the time erroneously at liberty instead of a finding of waiver of jurisdiction.

1244. Because Shelton's allegations allowed inferences which, if proven to be true, would "constitute gross negligence or an arbitrary and unwarranted exercise of [ ] power[ ] by the U.S. Marshals," the Court reversed the district court's denial of the habeas corpus petition and remanded the matter for an evidentiary hearing. *Id*. at 1245-46. *See also Bailey*, 420 F. Supp. at 348 ("In order to apply [the waiver theory,] the Court would have to find that failure to file a detainer, and failure to apprehend and commit the [prisoner] for a period of less than thirteen months . . . constituted Government action so affirmatively wrong or . . . 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") (quotation omitted).

However, unlike the Eighth Circuit, some courts continued applying the initial standard announced by the Fifth Circuit in *Shields* even after *Piper* was decided. *See, e.g.*, *In re Messerschmidt*, 163 Cal. Rptr. 580, 581 (Cal. Ct. App. 1980) (based on the holdings in *White*, *Lanier*, and *Shelton*, the Court interpreted due process "to mean fundamental fairness and fair play" and to "govern[ ] situations in which the mistakenly released prisoner peacefully reestablishes himself as a productive member of the community only to have

his good works destroyed by reincarceration after many years"); *State v. Kline*, 475 So. 2d 1093, 1093 (La. 1985) (relying in part on *Shields* and *Lanier*, and finding that re-incarceration to serve the balance of the sentence "would be inconsistent with fundamental principles of liberty and justice;" however, the Court did not determine whether the government's conduct was "affirmatively wrong" or "grossly negligent").

Importantly, in *United States v. Merritt*, 478 F. Supp. 804, 807 (D.D.C. 1979), a leading case in the mistaken release field, the Court quoted *Piper*, but appeared to adopt a different standard. The *Merritt* Court acknowledged that a prisoner "will not be excused from serving [the remainder of] his sentence merely because someone in a ministerial capacity ma[de] a mistake" that resulted in his erroneous release. 478 F. Supp. at 807. "Several additional factors must be present" before the Court may grant relief: (1) the result must not be attributable to the prisoner; (2) "the action of the authorities must amount to ***more than simple neglect***;" and (3) "the situation brought about" by the prisoner's release and re-incarceration "must be 'unequivocally inconsistent with fundamental principles of liberty and justice.'" *Id.*

(emphasis added) (quoting *Piper*, 485 F.2d at 246).[45] Thus, while the *Merritt* Court's multiple-factor analytical formulation required some degree of fault by the government—more than simple neglect—it appeared to be lower than that embraced by *Piper*.[46]

Some waiver cases have relied on *Merritt* instead of *Piper*. For example, in *Derrer v. Anthony*, the Georgia Supreme Court applied the multi-factor test in *Merritt* instead of the affirmatively wrong or grossly negligent standard in *Piper*. 463 S.E.2d 690, 693-94 (Ga. 1995). Likewise, in *United States v. Mazzoni*, the Court cited *Merritt* and found that a hearing was necessary because the Court was required to consider the defendant's "behavior while on release"

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[45] *Merritt* was an installment case, not a waiver case. But the Court did not base its analysis on that distinction. To the contrary, the Court sensibly stated that, while "different courts have [ ] chosen different theoretical bases for their conclusions, these conclusions do not differ in practice." *Merritt*, 478 F. Supp. at 807. More critically, the Court acknowledged that the goal of the well-established installment theory is to prevent a mistakenly released prisoner from having to return to prison to serve the rest of his sentence: "when a prisoner is released prior to service or expiration of his sentence through no fault or connivance of his own, and the authorities make no attempt over a prolonged period of time to reacquire custody over him, he may be given credit for the time involved, ***and he will not be required at some later time to serve the remainder of his sentence***." *Id*. at 806 (emphasis added). The Court added that "courts have reached a similar result under . . . [the] waiver of jurisdiction theory." *Id*. Several courts have rejected efforts to limit the holding in *Merritt* to installment cases in which the only relief sought is credit for time while erroneously at liberty. *See, e.g.*, *Johnson*, 682 F.2d at 873 n.2; *Hurd*, 146 F. Supp. 3d at 66; *Mercedes II*, 1997 WL 458740 at *3.

[46] The Court in *Merritt* nevertheless concluded that the government's actions "may appropriately be characterized as affirmatively wrong." 478 F. Supp. at 807.

and to weigh "the government's interest in reincarceration against the defendant's interest in adjustment and progress in community life." 677 F. Supp. 339, 342 (E.D. Pa. 1987) (citing *Merritt*, 478 F. Supp. at 808).

Consistent with *Derrer* and *Mazzoni*, in *Johnson v. Williford*, the Court ruled that the government was prohibited from forcing Johnson, an erroneously released prisoner, to serve the remainder of his sentence. 682 F.2d 868, 872-73 (9th Cir. 1982). Although *Johnson* was primarily an equitable estoppel case, the Court there also found, based on the factors identified in *Merritt*, that due process considerations supported the prisoner's release. *Id.* at 873.[47]

i) Colorado

The Colorado Supreme Court did not apply *Piper*'s "affirmatively wrong or grossly negligent" standard in *Brown*. Rather, the Court simply stated that the installment theory and the waiver theory are both "grounded

[47] Interestingly, the *Johnson* Court seemed to equate the directive in *Merritt*, that the government's conduct must amount to "more than simple neglect," with the determination in *Piper*, that the government's conduct must be "affirmatively wrong" or "grossly negligent." 682 F.2d at 873. The Court in *Johnson* read *Merritt* as extrapolating from *Piper* "the relevant factors that determine whether the return of a former prisoner to prison would violate due process." *Id.* at 873 n.3. This Court disagrees with *Johnson*'s reading of *Merritt*. *Merritt* cited *Piper* not as support for ***all of the factors*** identified, but as support for the specific requirement within the last factor that re-incarceration must be "unequivocally inconsistent with 'fundamental principles of liberty and justice.'" *Merritt*, 478 F. Supp. at 807 (quoting *Piper*, 485 F.2d at 246).

in the due process requirement that state action must be consistent with 'fundamental principles of liberty and justice.'" *Brown*, 773 P.2d at 572 (quoting *Buchalter*, 319 U.S. at 429, 63 S. Ct. 1129).[48]

Significantly, in *Brown*, the Court drew substantial guidance from *Merritt*, observing that "*Merritt* . . . ha[d] provided perhaps the most cogent analysis to date for deciding whether the sentence of a prisoner who remained silent while being mistakenly released continues to run while the prisoner is at liberty." *Id*. at 573.[49] The Court then quoted with approval the multi-factor test announced in *Merritt*. *Id*. Because Brown had continued his life of crime while erroneously at liberty—a consideration required by the last *Merritt* factor—the Court found that "reincarceration would not be inconsistent with fundamental principles of liberty and justice." *Id*. at 575. Accordingly, Brown's request for credit for time at liberty failed. *Id*.

This Court's research reflects that the Colorado Supreme Court has applied the *Piper* standard only once, in a 1994 case. *See Crater v. Furlong*, 884 P.2d 1127 (Colo. 1994). In *Crater*, the Court rejected the prisoner's claim that

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[48] The *Brown* Court did not appear to distinguish between the installment theory and the waiver theory for purposes of a due process analysis. *See* 773 P.2d at 572.

[49] The *Brown* Court also relied on *Messerschmidt* and *Kline*, both waiver theory cases. *See id*.

Colorado had waived jurisdiction over him or that his sentence should be deemed pardoned or commuted. *Id*. at 1129-30. The Court did so on two grounds. First, re-incarceration was not "inconsistent with fundamental principles of liberty and justice" because the prisoner continued leading a life of crime while out of custody. *Id*. at 1129 (quoting *Brown*, 773 P.2d at 575). Second, the prisoner's confinement was interrupted "not by the state but by his own acts—his escape," thereby rendering *White*, *Lanier*, and other erroneous release cases "not comparable or applicable." *Id*. at 1129-30.

The *Crater* Court was unpersuaded by the prisoner's reliance on *Shields*, noting that *Piper* had distinguished and explained *Shields*. *Id*. at 1129. The Court then observed that the state had not engaged in "conduct that was so 'affirmatively wrong' or constituted 'inaction so grossly negligent' for due process to require" the "waive[r] [of] any interest in the [prisoner's] continued incarceration." *Id*. Since the prisoner had failed to allege "sufficient misconduct or inaction on the part of Colorado officials to constitute a waiver of jurisdiction over him," the Court ruled that his habeas corpus petition was properly dismissed without a hearing. *Id*. at 1130-31.

b) Cases Decided After November 1999

i) Background

The tide seemed to turn in November 1999 when the Fourth Circuit decided *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999). After *Hawkins*, almost all erroneous release claims grounded in the waiver theory have failed—usually based on a substantive due process analysis—and the few that have succeeded have ignored the United States Supreme Court's latest pronouncements on substantive due process.

The Fourth Circuit's analysis in *Hawkins* was largely guided by the United States Supreme Court's "most recent deliverances" on substantive due process: *Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, and *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). *Hawkins*, 195 F.3d at 738. Therefore, the Court examines *Glucksberg* and *Lewis* before discussing the decision in *Hawkins*.

ii) *Glucksberg*

In *Glucksberg*, a case involving a challenge to legislative action, the Court explained that its "established method of substantive-due-process analysis" has two main features:

> First, [the Court has] regularly observed that the Due Process Clause specially protects those fundamental rights and liberties

> which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, [the Court has] required . . . a careful description of the asserted fundamental liberty interest.

Glucksberg, 521 U.S. at 720-21, 117 S. Ct. 2258 (internal quotations and citations omitted). This Nation's "history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking . . . that direct and restrain [the Court's] exposition of the Due Process Clause." *Id*. at 721, 117 S. Ct. 2258 (internal quotations and citations omitted). As the Supreme Court has stated in the past, "the Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests ***at all***, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id*. (emphasis in original) (internal quotations omitted).

iii) *Lewis*

A year after *Glucksberg*, the Supreme Court examined substantive due process again, this time in *Lewis*. 523 U.S. 833, 118 S. Ct. 1708. Whereas *Glucksberg* dealt with a constitutional challenge against legislative action, *Lewis* addressed the constitutionality of executive action by the police. *Id*. at 836, 118 S. Ct. 1708. The question presented in *Lewis* was "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due

process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Id*. The Court answered the question in the negative, holding that in such circumstances deliberate or reckless indifference to life is insufficient; "***only a purpose to cause harm*** unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id*. (emphasis added).

The *Lewis* Court found that in a case involving a substantive due process claim challenging executive action, as distinguished from legislative action, "the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id*. at 847 n.8, 118 S. Ct. 1708. Hence, "where the asserted fundamental right or interest is allegedly denigrated by a specific act of a government officer, as opposed to a legislative enactment, the two-part analysis outlined in *Glucksberg* is not undertaken unless the executive abuse of power is so egregious that it shocks the conscience." *People v. Thompson*, No.

4609/99, 2009 WL 348370, at *8 (Sup. Ct. N.Y. Feb. 11, 2009) (internal quotations omitted).[50]

In the context of executive action, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense;" indeed, "the Due Process Clause was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." *Lewis*, 523 U.S. at 846, 118 S. Ct. 1708 (internal quotations omitted). For this reason, the Supreme Court has "spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Id*. The "lowest common denominator of customary tort liability" cannot serve "as any mark of sufficiently shocking conduct" because "the Constitution does not guarantee due care on the part of state officials," and "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id*. at 848-49, 118 S. Ct. 1708. Rather, conduct "at the other end of the culpability spectrum"—that is, "conduct intended to injure in some way unjustifiable by any government interest"—is "most likely to rise to the conscience-shocking level." *Id*. at 849, 118 S. Ct. 1708.

[50] *Lewis* did not overrule or depart from *Glucksberg*; rather, it added an "antecedent" condition to *Glucksberg*'s analysis in executive action cases. 523 U.S. at 847 n.8, 118 S. Ct. 1708.

iv) The Fourth Circuit—*Hawkins*

Circling back to *Hawkins*, there, the North Carolina Parole Commission discovered that it had mistakenly released Hawkins, a convicted habitual felon, some 20 months earlier; it immediately issued a certificate rescinding his parole and an arrest warrant that was executed the next day. 195 F.3d at 735, 737.[51] After his state court challenge failed, Hawkins brought a substantive due process claim seeking habeas corpus relief in federal court. *Id*. at 735. The district court rejected the constitutional claim and dismissed the habeas petition. *Id*. On appeal, a divided panel of the Fourth Circuit ruled in Hawkins' favor and ordered him released, finding that the State's action violated his right to substantive due process. *Id*. At the State's request, the Fourth Circuit vacated the panel's opinion, reheard the appeal *en banc*, and affirmed the district court's dismissal of the habeas action, concluding that the State had not violated Hawkins' constitutional right to substantive due process by revoking his parole and re-incarcerating him. *Id*.

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[51] In his underlying criminal case, Hawkins was convicted of selling and delivering cocaine, possession with intent to sell cocaine, and of being a habitual felon. 195 F.3d at 735. His habitual felon conviction was based on "previous felony convictions of rape and aggravated assault with intent to commit rape, and armed robbery." *Id*. On what constituted his fifth remand to prison, he received a 50-year sentence. *Id*. The Parole Commission released Hawkins after he had served 11 and a half years of his 50-year sentence based on its mistakenly assumed authority, which stemmed from its misreading of the law. *Id*. at 736.

The Court in *Hawkins* determined that *Lewis* applies to erroneous release claims. *See id*. at 738-40. It then observed that "pre-*Lewis* judicial decisions addressing constitutional challenges to th[e] seemingly invariable executive practice" of mistakenly releasing prisoners provide "little guidance for applying the threshold conscience-shocking test now mandated by *Lewis*." *Id*. at 743. *Hawkins* characterized those decisions as applying "a unique 'waiver of jurisdiction' theory." *Id*. Whether "unique" or not, this Court agrees that the analysis employed in those decisions "bears but scant resemblance to the rigorous substantive due process regime" under *Lewis* and *Glucksberg* "in both 'arbitrariness' and 'fundamental-interest' elements." *Id*. To be sure, none of those decisions applied the shocks-the-conscience standard. *Id*.[52]

The Fourth Circuit recognized that in its original form, the waiver theory seemingly required "nothing more than prolonged inaction by government to prove a due process violation (presumably 'substantive')." *Id*. at 744 (citing *Shields*, 370 F.2d 1003). It suspected that the reason the Fifth

[52] The *Hawkins* Court dismissed as irrelevant the "[m]any challenges [that] have been made and decided on non-constitutional common law grounds of governmental 'estoppel' or 'improper installment sentence.'" *Id*. at 743 n.5 (citations, including internal citation, omitted). Therefore, the Court "look[ed] only to decisions on constitutionally-grounded claims." *Id*. As this Order demonstrates, however, some courts have included a constitutional law component in their review of claims brought under common law theories like installment and waiver.

Circuit refined the *Shields* standard in *Piper* is because it must have "sens[ed] that if so understood the rule could not pass muster as one of constitutional stature." *Id*. But the Court concluded that even the *Piper* standard falls short of the *Lewis* methodology:

> [W]hile [the *Piper*] formulation surely moved in the direction of the conscience-shocking standard mandated in *Lewis*, it as surely fails to embody the full stringency of that standard's requirement that to be "conscience-shocking," "arbitrary in the constitutional sense," an executive act must be not only "wrong," but egregiously so by reason of its abusive or oppressive purpose and its lack of justification by any government interest.

Id. (citing *Lewis*, 523 U.S. 844-54, 118 S. Ct. 1708).

Applying *Lewis*, the *Hawkins* Court found that, while the Parole Commission's "conduct leading up to and including erroneous release on parole was bungling at every step, it could not be characterized as anything but simple negligence." *Id*. at 746. Thus, the Court concluded that the Parole Commission's actions could not be considered "shocking to the contemporary conscience" under the threshold requirement in *Lewis*. *Id.* According to the Court, "[t]o keep things in constitutional proportion," it needed "to see in [the Parole Commission's decision to prematurely release Hawkins] ***a mindless abuse of power, or a deliberate exercise of power as an instrument of oppression, or power exercised without any reasonable justification in the***

service of a legitimate government objective." *Id*. (emphasis added) (internal quotations and citations omitted).

v) Other Circuits (Post-*Hawkins*)

In 2005, the Eighth Circuit followed *Hawkins*' lead and applied the conscious-shocking standard announced in *Lewis* to a substantive due process claim stemming from a prisoner's delayed incarceration. *See Bonebrake v. Norris*, 417 F.3d 938, 943 (8th Cir. 2005). The *Bonebrake* Court agreed with *Hawkins*' determination "that a relatively high degree of culpability is required to shock the conscience in [the] context of delayed incarceration." *Id*.

In finding that the executive acts under challenge did "not rise to an egregious level that might qualify Bonebrake for relief under the Due Process Clause," the Eighth Circuit declined to "explore the nuances of the 'gross negligence' standard discussed in [its] waiver theory cases," including *Shelton*:

> The Due Process Clause of the Fourteenth Amendment was intended to prevent the government from abusing its power, or employing it as an instrument of oppression. No doubt there was negligence on the part of various county officials in this case, and perhaps even gross negligence as that nebulous term is defined in some jurisdictions. ***Lacking from the record, however, is a showing of mindlessly arbitrary or deliberately oppressive action by the State that might meet the rigorous standard of Lewis and the doctrine of substantive due process.*** We therefore conclude that our waiver theory cases, particularly when read in light of more recent Supreme Court precedent, do not support the granting of a writ.

Id. at 943-44 (emphasis added) (internal quotations and citation omitted). Given its finding on the "threshold question whether the executive action shocks the conscience," it was unnecessary for the Court to "consider whether Bonebrake could satisfy the second requirement" of the *Lewis* methodology, which stems from *Glucksberg*—that the government's conduct violated a deeply rooted fundamental right or liberty interest and that the infringement of that right or interest was narrowly tailored to serve a compelling state interest. *Id*. at 944 n.2; *Glucksberg*, 521 U.S. at 721, 117 S.Ct. 2258.

In 2007, the Third Circuit discussed the holding in *Lewis*, but concluded it was inapplicable because there was not "a concrete interest upon which to anchor the right to procedural [sic] due process in interrupted detention cases." *Vega*, 493 F.3d at 317. The Court explained that, even "[a]ssuming [ ] the reincarceration of a defendant after a period at liberty" shocks the conscience and satisfies the threshold question under *Lewis*, it was unable to determine "that credit for time at liberty is among those fundamental principles of liberty and justice which lie at the base of our civil and political institutions." *Id*. (quotation omitted). Therefore, the Court turned "to the common law" for its analysis. *Id*.

In 2015, in a case involving a delay in the execution of a sentence, the district court for the Southern District of New York noted that the Second Circuit has not applied *Lewis*' "conscious-shocking" standard "to claims of due process violations arising from delayed incarceration or re-incarceration following erroneous release from custody." *Nouri*, 2015 WL 3900436, at *4, 5. The Court in *Nouri* drew guidance from *United States v. Ray*, 578 F.3d 184 (2d Cir. 2009), where the Second Circuit acknowledged that "[a] delay in criminal proceedings that violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency, can, depending on the circumstances, constitute a violation of the Due Process Clause." *Id*. at *4 (quoting *Ray*, 578 F.3d at 199). Following *Ray*'s rationale, the Court weighed "the reasons for the delay" against "the prejudice to the accused." *Id*. at *5. In considering the reasons for the delay, however, the Court concluded that the government's conduct did not rise to the level of "gross negligence" or "outrageous or egregious" conduct, and did not "shock the conscience." *Id*. (quoting *Lewis*, 523 U.S. at 847 n.8, 118 S. Ct. 1708).[53]

[53] In unpublished decisions, the Ninth Circuit and the Tenth Circuit have applied *Lewis* to erroneous release claims. *See McPhearson v. Benov*, 613 F. App'x 645, 646 (9th Cir. 2015) (McPhearson failed to establish that his re-incarceration "shocks the conscience"

Notwithstanding the developments in mistaken release jurisprudence in the wake of *Lewis*, in 2015, the United States District Court for the District of Columbia, the same Court that decided *Merritt* 26 years earlier, stated that in analyzing whether re-incarceration of an inmate is so fundamentally unfair as to implicate his constitutional right to substantive due process, "modern cases apply the totality of the circumstances test adopted in *Merritt*." *Hurd*, 146 F. Supp. 3d at 66; *see also Bowling*, 2004 WL 538399, at *3 ("While the common law required a person to serve his/her sentence in its entirety, regardless of whether the sentence was served continuously or in installments, the current trend has moved toward examining the totality of the circumstances surrounding the delay in executing the sentence"). The *Merritt* factors, see supra at p. 72, "have generally been applied by courts with some consistency," *see Hurd*, 146 F. Supp. 3d at 66, and have evolved over time,

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and is "unequivocally inconsistent with fundamental principles of liberty and justice") (quotation omitted); *Hughes v. Oliver*, 596 F. App'x 597, 599 (10th Cir. 2014) (relying on *Hawkins* and concluding that "the standard that Hughes relie[d] upon fail[ed] to embody the full stringency of the *Lewis* standard[]") (quotation omitted). The First Circuit cited, but did not have occasion to apply, the *Lewis* standard in a case in which an escaped prisoner sought to shorten his re-incarceration under the common law doctrine of credit for time erroneously at liberty. *See Espinoza*, 558 F.3d at 87 ("Espinoza does not make any claims to release based on a constitutional provision"). Finally, the Eleventh Circuit in *Barfield* declined to decide whether to follow the Fourth Circuit's decision in *Hawkins* "because Barfield's due process claim fail[ed] even under the less stringent *Shields/Piper* standard." 396 F.3d at 1149 n.8.

compare Merritt, 478 F. Supp. at 807-08 *with Hurd*, 146 F. Supp. 3d at 66. In 2015, the Court in *Hurd* summarized them as follows: (1) the government's level of culpability in prematurely releasing the prisoner and allowing him to remain out of custody; (2) whether the prisoner contributed to the government's mistake or was aware of it; (3) the length of the prisoner's mistaken release; and (4) the prejudice, if any, of re-incarcerating the prisoner, "i.e., how well the prisoner has been reintegrated into society." *Hurd*, 146 F. Supp. 3d at 66 (citing *Merritt*, 478 F. Supp. at 807-08).

Some of the *Merritt-Hurd* factors are often inextricably intertwined. For example, the longer the prisoner's mistaken release, the more likely the government's culpability will exceed mere neglect. *Id*. This makes logical sense, since the government's level of culpability will usually be impacted by the amount of time it took to re-incarcerate the prisoner. Likewise, the shorter the prisoner's mistaken release, the less likely he will be prejudiced by his re-incarceration. This, too, is reasonable, since a prematurely released prisoner who is only erroneously at liberty for a day, a week, or a month before being re-incarcerated is very unlikely to be able to persuasively argue that he was seriously prejudiced by his release.

In *Hurd*, the Court denied the prisoner's due process claim based on the totality of the circumstances present. *Id*. at 66-70. However, the Court added that the claim also failed under the *Lewis* standard, as applied by the Fourth Circuit in *Hawkins*. *Id*. at 70-71.

vi) Summary

In the end, discerning whether the *Lewis* analytical framework applies to a mistaken release claim is a murky task because of the striking dissonance in the case law. Indeed, courts do not even seem to agree on when constitutional analysis is appropriate. Some courts have used phrases such as "shock the conscience" and "fundamental principles of liberty and justice," even though the prisoner did not advance a constitutional claim. *Id*. at 65 (citing *White*, 42 F.2d at 789, and *Merritt*, 478 F. Supp. at 808). Conversely, some courts have resolved constitutional claims based largely on the equitable doctrines of waiver and estoppel rooted in the common law. *Id*. (citing *Shields*, 370 F.2d at 1005, and *Johnson*, 682 F.2d at 872-73). Other courts have viewed erroneous release cases as grounded in both the Due Process Clause and common law theories such as waiver of jurisdiction and credit for time at liberty. *See*, *e.g.*, *Ellsberry*, 2012 WL 4121159, at *4-5. And in *Hurd*, the Court appeared to resolve the prisoner's claim under the common law, but then

added that it also failed when analyzed under the *Lewis* methodology. *Hurd*, 146 F. Supp. 3d at 70-71.

4. Test Adopted in this Case

The Court agrees with *Hawkins* that the *Lewis* framework applies to substantive due process claims brought by mistakenly released prisoners seeking relief from their re-incarceration. Because Lima-Marin's mistaken release claim is grounded in the Due Process Clause, the Court concludes that it is governed by the *Lewis* framework. However, the Court disagrees with the specific application of *Lewis* in *Hawkins*.

Hawkins rigidly required a demanding showing of arbitrary or mindless abuse of power, a deliberate exercise of power as an instrument of oppression, or the deliberate exercise of power without any reasonable justification in the service of a legitimate governmental objective. *Hawkins*, 195 F.3d at 746. It concluded that a high degree of culpability—a purpose or intent to cause harm unrelated to a legitimate government interest—is required for executive action to be arbitrary in the constitutional sense, namely, that which shocks the contemporary conscience. *See id*. at 738; *see also Bonebrake*, 417 F.3d at 943 ("We agree with the Fourth Circuit that a relatively high degree of culpability is required to shock the conscience").

Significantly, however, *Lewis* made clear that "[r]ules of due process are not [ ] subject to mechanical application in unfamiliar territory;" indeed, in some circumstances, "deliberately indifferent conduct" will suffice "to satisfy the fault requirement for due process claims." 523 U.S. at 850, 118 S. Ct. 1708. The concept of due process of law is "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," and "[i]ts application is less a matter of rule." *Id*. (quotation omitted). Because the "[a]sserted denial [of due process] is to be tested by an appraisal of the totality of facts . . . [t]hat which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Id*. (quotation omitted). The Supreme Court's "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." *Id*.[54]

[54] "The 'shock the conscience' test has been labeled 'admittedly imprecise,' 'virtually standardless,' 'somewhat amorphous,' and 'laden with subjective assessments.'" *People v. Gonzalez-Fuentes*, 607 F.3d 864, 880 (1st Cir. 2010) (citations omitted). Further, "[d]escriptions of what actions qualify as 'conscience-shocking' often descend into a morass of adjectives that are as nebulous as they are pejorative, including 'truly irrational,' 'extreme and egregious,' 'truly outrageous, uncivilized, and intolerable,' and 'stunning.'" *Id*. (citations omitted). On the other hand, "actions that have not been

To underscore how important the flexibility of the "shock the conscience" methodology is, the *Lewis* Court discussed "the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases." *Id*. at 851, 118 S. Ct. 1708. The stark contrast between these two factual scenarios shows "why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indifference as deliberate in the case of sudden pursuit)." *Id*.

As its name implies, the deliberate indifference standard "is sensibly employed only when actual deliberation[55] is practical"—for instance, "in the custodial situation of a prison," where "forethought about an inmate's welfare is not only feasible but obligatory" because the prisoner is unable "to exercise ordinary responsibility for his own welfare." *Id*. However, "just as the description of the custodial prison situation shows how deliberate indifference can rise to a constitutionally shocking level, so too does it suggest

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found to shock the conscience have still been described as 'despicable and wrongful.'" *Id*. (citation omitted). At least at the margins, courts are seemingly required "to split the hairs of opprobrium." *Id*. at 881. Fortunately, "some inroads toward a more concrete doctrine" have been plowed over the years: simple negligence is insufficient to shock the conscience; intent to injure, when unjustified by any government interest, is likely sufficient; and anything in between is "a matter for closer calls." *Id*. (quoting *Lewis*, 523 U.S. at 849, 118 S. Ct. 1708).

[55] In using the term "actual deliberation," the Court did "not mean 'deliberation' in the narrow, technical sense in which it has sometimes been used in traditional homicide law." 523 U.S. at 851 n.11, 118 S. Ct. 1708.

why indifference may well not be enough for liability in the different circumstances" of a police chase. *Id*. at 852, 118 S. Ct. 1708. Even when prison circumstances are involved, if the claim stems "not from normal custody but from response to a violent disturbance," like a prison riot, "a much higher standard of fault than deliberate indifference has to be shown for officer liability." *Id*. In such a situation, "liability should turn on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id*. at 853, 118 S. Ct. 1708 (quotation omitted). The same holds true in a situation involving a "sudden police chase[ ]." *Id*.

The *Lewis* Court's elucidation regarding why the shocks-the-conscience standard requires proof of harmful purpose in some circumstances, but proof of deliberate indifference in others, is instructive:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance . . . .
>
> To recognize a substantive due process violation in these circumstances when only midlevel fault has been shown would be to forget that liability for deliberate indifference to inmate

> welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. ***When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking.*** But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates the large concerns of the governors and the governed. Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case.

Id. (emphasis added) (quotations omitted); *see also Bonebrake* 417 F.3d at 942 (*Lewis* "allowed that 'mid-level fault,' such as deliberate indifference, recklessness, or gross negligence could be egregious enough to 'shock the conscience' in some contexts").

Hawkins ultimately adopted the higher-level fault standard *Lewis* declared best suited for prison riots and police chases, which lack opportunity for actual deliberation, repeated reflection, and unhurried judgments that are largely uncomplicated by the pull of competing obligations. But under *Lewis*, this purpose-to-cause-harm or intent-to-harm standard should be reserved for rapidly evolving, fluid, and dangerous situations during which government officials are unable to take advantage of calm and reflective deliberation, and must act hastily.

A typical erroneous release claim is more akin to a claim grounded in the government's alleged failure to provide for an inmate's welfare than it is to a claim emanating from a prison riot or a police chase. As in prison welfare cases, government officials in erroneous release cases: have no need to act quickly; are not called upon to make decisions in haste, under pressure, and without the luxury of a second chance; and are not asked to act decisively and to simultaneously show restraint. To apply a ***purpose-to-cause-harm or an intent-to-harm*** standard of review to substantive due process claims brought by prisoners who were prematurely released and allowed to remain out of custody for a prolonged period of time as a result of ***unintentional mistakes or errors*** by the government, as *Hawkins* did, necessarily precludes all such claims.[56]

Hawkins went a step further and erected a second barrier on a prisoner's path to relief: it concluded that the government's "bungling" conduct in erroneously releasing a prisoner and allowing him to remain at liberty for a period of time "ha[s] nothing to do" with his re-incarceration and, therefore, has "no real bearing upon" the shocks-the-conscience inquiry. 195 F.3d at

[56] In the numerous cases the Court researched, not a single one involved an early release as a result of the government's specific purpose or intent to harm the prisoner.

746.[57] Of course, this conveniently overlooks the fact that a prisoner's re-incarceration is only necessary because of the government's blunders in erroneously releasing him and allowing him to remain at liberty for some time. By excluding the government's "bungling" conduct from the analysis, while simultaneously requiring the prisoner to prove that the government acted with a purpose to cause harm or an intent to harm, *Hawkins* effectively and sweepingly sealed the fate of all erroneous release claims.

In essence, *Hawkins* installed an unopenable, impenetrable, titanium gate in front of the Due Process Clause that keeps all erroneously released prisoners out of the narrow relief zone recognized by the Supreme Court in *Lewis*.[58] Judge Murnaghan, the dissenting judge in *Hawkins*, expressed a similar concern about the effect of the majority's decision on future prisoners who are erroneously released: "the court appears to hold that the reincarceration of erroneously released prisoners with outstanding sentences" will never "shock the conscience." *Id*. at 761 (Murnaghan, J., dissenting).

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[57] As mentioned earlier, the *Hawkins* Court concluded that the government's "bungling" conduct amounted only to "simple negligence." 195 F.3d at 746. However, "more critically," it found that such conduct was irrelevant to its analysis. *Id*.

[58] No court has applied *Lewis*, as interpreted in *Hawkins*, to an erroneous release claim and ruled in favor of the prisoner.

The hypothetical example in Judge Murnaghan's dissenting opinion illustrates the point in more compelling fashion:

> A parolee is not eligible for parole until 2018, but is erroneously released on parole in 1992. The State does not become aware of the error until 2012. In the meantime, the parolee rebuilds his life during a successful twenty-year reintegration into society. He obtains a job, gets married, and has children. The State, upon learning of the erroneous release, drags the parolee back to prison. Under the majority's analysis, the parolee has no fundamental right to his continued freedom, nor does his reincarceration shock the conscience of the court. The parolee thus must return to prison for six years, leaving behind a life and family that he had built over twenty years.

Id. As in this extreme hypothetical example, during his time erroneously at liberty, Lima-Marin "obtain[ed] a job, [got] married, and ha[d] children." *Id*. Yet, almost six years after his mistaken release, the government "drag[ged] [him] back to prison." *Id*. This is precisely the type of result the Court in *Bugg* understood more than 100 years ago was repugnant. *See* 145 S.W. at 832-33. This Court does not read *Lewis* as intending to erase with the stroke of a pen (or a keyboard) jurisprudence that dates back over a century.

Colorado's Appellate Courts have not had occasion to decide how to apply the decision in *Lewis* to a due process claim brought by an erroneously released prisoner who is subsequently re-incarcerated. However, last month, a panel of the Court of Appeals applied the *Lewis* methodology in a different

factual context. *See Wiseman*, 2017 WL 1404213. There, eleven years after the sentencing hearing, Wiseman's case came to the trial court's attention "as part of [the] DOC and State Court Administrator's Office initiative to identify individuals with potentially illegal concurrent sentences when consecutive sentences were mandated by statute." *Id*. at *1, 6. This was the initiative mentioned earlier in this Order, which was prompted by Clements' murder in 2013, while Lima-Marin remained out of custody.

As was the case with Lima-Marin's original mittimus, the sentences reflected in Wiseman's mittimus "differed from [those] which [were] orally pronounced" by the judge during the sentencing hearing. *Id*. at *1. Among other things, Wiseman's mittimus failed to mention whether the sentences imposed in connection with two pattern of child sexual abuse counts were to be served concurrent with or consecutive to one another and to the other sentences. *Id*. While Wiseman was still incarcerated in the DOC, the district court ruled that the mittimus needed to be amended to reflect that "consecutive terms" were required by law on all four sentences. *Id*. "The effect of [this] was to increase Wiseman's sentence." *Id*.[59]

[59] The revised sentences, which were determinate sentences, were still illegal because they failed to account for the provisions in the Colorado Sex Offender Lifetime Supervision Act of 1998 ("SOLSA"), which require courts to sentence sex offenders to

The *Wiseman* Court determined that "the standard for assessing [Wiseman's] substantive due process claim [was] whether the governmental action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Id*. at *6 (quoting *Lewis*, 523 U.S. at 847 n.8, 118 S. Ct. 1708). Relying on *Gonzalez-Fuentes v. Molina*, 607 F.3d 864 (1st Cir. 2010), which relied in large part on *Hawkins*, the Court concluded that Wiseman's substantive due process claim failed. *Id*. at *7 (Wiseman's claim "is, in our view, resolved on the same grounds as those in *Gonzalez-Fuentes*").[60]

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prison for an indeterminate sentence of at least the minimum in the presumptive range for the level of the offense committed, and a maximum of the sex offender's natural life. *Wiseman*, 2017 WL 1404213, at *4. Therefore, "a remand for the imposition of [ ] 'legal' indeterminate sentence[s] under SOLSA [was] required." *Id*.

[60] In *Gonzalez-Fuentes*, after the Commonwealth of Puerto Rico determined that a group of prisoners "had been unlawfully admitted into an electronic supervision program," it re-incarcerated fourteen of them. 607 F.3d at 869. A second set of affected individuals brought a civil rights suit under 42 U.S.C. § 1983 to enjoin the Commonwealth from re-imprisoning them. *Id*. Meanwhile, the fourteen already imprisoned initiated a habeas corpus proceeding. *Id*. The district court granted both sets of individuals relief and the Commonwealth appealed both orders; the appeals were subsequently consolidated. *Id*. The First Circuit held that the revocation of the petitioners' participation in the electronic supervision program did not violate the Ex Post Facto Clause or the Due Process Clause of the Fourteenth Amendment. *Id*. at 870. The Court determined that the Commonwealth had "a fundamental interest in fidelity to legislative directives" and "'an interest in avoiding the precedential risk of acquiescing in irregular enforcement of state law.'" *Id*. at 882-83 (quoting *Hawkins*, 195 F.3d at 746). In light of these interests, and considering that substantive due process requires "something much worse—more blameworthy—than mere negligence, or lack of proper compassion, or sense of fairness, or than might invoke common law principles of estoppel or fair criminal procedure to hold the state to its error," the Court found that the decision to re-imprison the petitioners did not shock the conscience. *Id*. at 884.

Wiseman is not dispositive because it is factually distinguishable. That case involved a defendant whose sentence increased when it was corrected by the trial court while he was still in prison serving his sentence. By contrast, the crux of Lima-Marin's claim is that it was a violation of his constitutional right to due process to incarcerate him again in 2014: (1) after he was mistakenly released from custody in 2008; (2) without any contributing fault on his part and without his knowledge that his release was erroneous; (3) following a prolonged period of erroneous release of almost six years; (4) given his eminently successful completion of parole; (5) considering his model behavior in prison, as well as his law-abiding conduct, full rehabilitation, and complete re-integration into society while on erroneous liberty; (6) in light of the atrocious consequences of his significantly delayed re-incarceration on him and his family; and (7) given the impact of his re-incarceration on the community and society.

Judge Berger wrote separately in *Wiseman* to express his view, consistent with Judge Murnaghan's dissenting remarks in *Hawkins*, that "neither *Glucksberg* nor *Lewis* categorically precludes a successful substantive due process claim when a prisoner is erroneously released from custody and then later is reincarcerated when the error is discovered." *Id*. at *9 (Berger, J.,

concurring); *cf. Horton v. Suther*s, 43 P.3d 611, 622 (Colo. 2002) (Coats, J., specially concurring) ("Had the custodian simply released the defendant before completing his sentence as the result of mistake, either of fact or law, the prisoner's return to custody would not be barred but would depend upon the equities of the case") (citing *Brown*, 773 P.2d 570). Judge Berger discerningly observed that "[a] substantive due process claim for enforcement of an original, but unlawful, sentence is strongest when the defendant has been released from custody and has spent a substantial amount of time at liberty." *Wiseman*, 2017 WL 1404213, at *10 (citing *Hawkins*, 195 F.3d at 751 (Murnaghan, J., dissenting)). Hence, "[d]epending on the facts, an executive branch decision to seek reincarceration may meet the stringent requirements of the 'shock the conscience' test and require enforcement of an otherwise illegal sentence originally imposed." *Id*.

Like Judges Berger and Murnaghan, this Court declines to adopt an analytical framework that would categorically preclude all substantive due process claims brought by erroneously released prisoners who are re-incarcerated. The Court refuses to accept that there are no circumstances under which the prisoner in Judge Murnaghan's extreme hypothetical example—which, save for the length of his erroneous liberty period,

resembles Lima-Marin—can qualify for protection under the Due Process Clause umbrella. *Hawkins*, 195 F.3d at 761 (Murnaghan, J., dissenting). In the Court's view, "[f]undamental fairness requires judges to draw lines," for "if we do not draw them, the State has unfettered discretion to violate the liberties of the individual." *Id*. This Court draws the line that the majority in *Hawkins* was unwilling to draw.

Accordingly, this Court adopts a three-step test. First, contrary to the holding in *Hawkins*, but consistent with *Lewis*, the Court rules that, at a minimum, Lima-Marin must show that government officials acted with an intermediate degree of culpability: deliberate indifference that rises to a conscience-shocking level. Second, if Lima-Marin is able to satisfy this threshold requirement, he must next identify a deeply rooted and historically protected fundamental right or liberty interest infringed by the government, and he must show that such infringement was not justified by a compelling state interest. Third, Lima-Marin must demonstrate that the totality of the circumstances surrounding his mistaken release and delayed re-incarceration compel the conclusion that the government has waived its jurisdiction over him and cannot enforce the rest of his sentence.

The Court acknowledges that Lima-Marin is arguably entitled to relief under his substantive due process claim if he satisfies the first two steps of this test. However, since no erroneously released prisoner has been able to accomplish this feat—every court that has applied *Lewis* in the erroneous release context has followed *Hawkins*' dead-end analysis—it is unclear whether this is sufficient to find that the government has waived its jurisdiction to enforce Lima-Marin's sentence. Based on the case law discussed earlier, in step three the Court proceeds to examine whether the totality of the circumstances warrants application of the waiver theory. After all, dating back to *Shields* in 1967, most courts examining the waiver theory in erroneous release cases have included in their analyses both constitutional and non-constitutional common law considerations. The Court is also mindful that in *Brown* the Colorado Supreme Court adopted the multiple-factor methodology employed in *Merritt*.

Drawing guidance from *Brown*, *Merritt*, *Hurd*, *Vega*, and *Grant*, the Court considers multiple factors in its totality of the circumstances evaluation: (1) the nature of the underlying offense and the prisoner's criminal history; (2) the length of the sentence imposed, how much of the sentence the prisoner has served, and whether it would offend notions of justice to prevent the

government from enforcing the rest of the sentence; (3) the prisoner's behavior while in confinement; (4) whether the prisoner successfully completed parole; (5) the length of the erroneous release period and the prisoner's behavior while on erroneous release; (6) whether the prisoner in any way contributed to the government's mistake or was aware of it; and (7) the prejudice, if any, of re-incarcerating the prisoner—i.e., how well the prisoner has been re-integrated into society and the likelihood that compelling the prisoner to serve the rest of his sentence will undermine any re-integration efforts. No factor is dispositive, and the weight assigned to each factor "depends on the circumstances of [this] particular case." *Grant*, 184 F. Supp. 3d at 254.

The three-step, sequential test the Court adopts is essentially an updated version of the test announced in *Merritt* and later approved by the Colorado Supreme Court in *Brown*. Whereas the last *Merritt* factor required that the situation brought about by the prisoner's release and re-incarceration be unequivocally inconsistent with fundamental principles of liberty and justice, the first two steps of the test adopted by this Court require Lima-Marin to satisfy the demanding elements of the *Lewis* methodology. It is in these two steps that the Court discusses due process considerations—

including with respect to the government's level of culpability. Only if Lima-Marin succeeds at steps one and two does the Court move on to the third step—the common law component of the analysis. In the third step, the Court considers the remaining factors listed in *Merritt*. However, inspired by recent case law, the Court adds a few new factors.

As a whole, the Court's three-step test reflects the fact that, since *Shields*, the analysis of waiver of jurisdiction claims brought by erroneously released prisoners has generally included both equitable considerations under the common law and some form of substantive due process analysis, with the latter becoming much more prominent and a condition precedent to relief in the modern era.

B. Application

1. The Government Acted With Deliberate Indifference That Shocks the Contemporary Conscience

At the outset, the Court notes that it considers all of the pertinent acts and omissions of any government officials in the State of Colorado, "the imprisoning sovereign." *Vega*, 493 F.3d at 320.[61] This includes acts and

[61] "The Ninth Circuit has held that negligence on the part of any governmental entity is sufficient to allow credit for time spent at liberty, while the Fifth Circuit has held that a prisoner should not receive credit for time he is at liberty when his erroneous release is the mistake of an independent sovereign." *Id.* (internal citation omitted). In *Vega*, the

omissions by any official of the Colorado Judicial Branch, Lima-Marin's prosecutor, the DAO, the AGO, the DOC, and the Colorado State Parole Board ("the Parole Board").

The Court acknowledges that the error in Lima-Marin's mittimus was of a ministerial nature. However, the story does not end there. There are ten additional circumstances which, considered together and in conjunction with the error in the mittimus, lead the Court to conclude that the government acted with conscience-shocking deliberate indifference in re-incarcerating Lima-Marin in 2014 almost six years after improperly releasing him. The Court does not contemplate whether any single circumstance, alone, constitutes conscience-shocking deliberate indifference. Rather, the Court views all ten circumstances together. The Court finds that, ***considered together***, these circumstances establish deliberate indifference that is shocking to the universal sense of justice.

First, the Court looks at the frequency of erroneous releases from prison, how long such releases have been occurring, and the government's attitude about them. After all, the Court cannot consider the government's

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Third Circuit joined the Fifth Circuit. *Id*. Because the only sovereign involved in Lima-Marin's case is the State of Colorado and there is not "a sovereign that is independent of the imprisoning sovereign [that] was responsible for the erroneous release," *see id*. at 321, this is not an issue here.

degree of culpability in this case in a vacuum. *See generally Lewis*, 523 U.S. at 850, 118 S.Ct. 1708 (the Supreme Court's "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").

The Court's research revealed that a great number of state and federal cases—at least hundreds and perhaps more than a thousand—have addressed requests for relief by prisoners who were re-incarcerated after their mistaken release. Colorado has not been immune to such claims. *See, e.g.*, *Brown*, 773 P.2d 570; *Crater*, 884 P.2d 1127; *People v. Stark*, 902 P.2d 928 (Colo. App. 1995). *Brown*, *Crater*, and *Stark* all originated in this judicial district, the 18th Judicial District. In this judicial district, a single prosecution office (the DAO) is in charge of all felony prosecutions, the AGO is generally in charge of criminal appeals following a conviction at trial, the DOC is in charge of all prisoners, and the Parole Board makes all parole decisions.

The erroneous release of inmates from prison is evidently a widespread phenomenon in the United States that has been occurring for more than a century with much more frequency than the Court ever realized or cares to admit. True, there are multiple elements that no doubt contribute to the

complexities in this area: the overwhelming volume of criminal cases, the coexistence of numerous federal and state criminal justice and penal systems, and the inherent difficulties in communicating, coordinating, and effectuating sentences—especially when multiple sentences are imposed on a single defendant by different jurisdictions. But while these challenges help explain the situation, they do not make it tolerable, especially since it does not appear to have gotten the government's full attention yet. Unfortunately, the national case law reflects that the errors have continued to take place at a seemingly steady pace. There is no indication that this country's government officials have made adequate headway to eliminate the errors.

The Court in *Hawkins* acknowledged that the erroneous release of prisoners has surprisingly been a recurring problem in the state and federal systems for an exceedingly long period of time. 195 F.3d at 742. Citing an academic comment, the Court noted that "over one hundred such cases running back to 1895" had been identified, and this figure "surely" represented "only a fraction of a much larger number of such occurrences," including those that do not result in litigated and reported cases. *Id*. (citing Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 Cath. U.L. Rev. 403 (1996)). Thus, the Fourth Circuit concluded that

the erroneous release of prisoners is, unfortunately, "not so unique an occurrence in general penal administration." *Id*. at 743.

While the *Hawkins* Court determined that the lack of uniqueness in Hawkins' premature release, alone, did not suggest the type of "arbitrariness" it concluded *Lewis* requires, this Court finds that the lack of uniqueness in Lima-Marin's premature release in April 2008 is a factor that weighs in favor of concluding that the government acted with deliberate indifference that shocks the conscience. In April 2008, the erroneous release of prisoners was clearly not a unique phenomenon, and yet the State of Colorado had done nothing to address it. As the United States Supreme Court has indicated, when "extended opportunities to do better" are accompanied by "protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853, 118 S. Ct. 1708. It was not until five years after Lima-Marin was erroneously released, following Clements' tragic death at the apparent hands of an erroneously released prisoner, that Colorado government officials finally took action.

Second, the Court considers the "[s]ignificant harm to individual and societal interests [that] may flow" from the government's acts and omissions. *Mercedes II*, 1997 WL 458740, at *3. This is important because the Court cannot

properly evaluate the level of fault in the government's conduct without placing it in proper perspective. It is one thing for government officials to be deliberately indifferent when such indifference cannot result in significant harm to an individual or to societal interests. It is quite another for government officials to be deliberately indifferent when such conduct can result in a fatality. Of all people, this should resonate with Raemisch, whose predecessor was evidently murdered by an erroneously released prisoner just a couple of months before Lima-Marin successfully completed his parole. The devastating loss of Clements is a constant reminder of the gravity of erroneously releasing prisoners due to the government's deliberate indifference.

Even when the government's erroneous release of a prisoner does not create a potential danger to anyone's life, it can nevertheless have severe, cruel, and appalling consequences. Lima-Marin's case highlights this point.

In *Mercedes II*, the Court eloquently spoke about "the human toll" of the government's deliberate indifference in erroneous release cases:

> Although some degree of error is inevitable in the administration of the overlapping state and federal criminal justice systems, ***Mercedes' odyssey illustrates the human toll exacted by bureaucratic indifference.*** Mercedes appears to have succeeded, where many others have failed, in adjusting to life after prison. He has been gainfully employed, living with and supporting his

> family and obeying the law. ***Returning Mercedes to prison after he has reestablished his roots in the community will result in severe, and unnecessary, prejudice to him and his family.***

Id. at *4. (emphasis added).

The *Mercedes II* Court identified another undesirable repercussion of the government's deliberate lack of care: the impact on society. As the Court explained:

> ***The public's interest in an effective criminal justice system is also ill-served by lapses such as this.*** The penological interest in rehabilitation is not advanced by returning Mercedes to jail. Moreover, the lack of communication with state authorities and irregularity of record checks revealed by this case invite potential threats to public safety in the future . . . .

Id. (emphasis added).

Unlike Mercedes, Lima-Marin did not have outstanding sentences in both the federal and state systems. But the *Mercedes II* Court's rationale nevertheless applies. Actually, Lima-Marin's case is even more compelling than Mercedes' case because: (1) Lima-Marin was only involved in the state system, so state officials did not face the challenges inherent in communicating and coordinating with the federal judicial and penal systems; (2) in *Mercedes II*, there were "[t]hree years of neglect on the part of the Government," whereas here it took the government almost six years (including five years on parole) before it discovered its erroneous release of

Lima-Marin and re-arrested him; (3) Lima-Marin had almost six years of successful rehabilitation, compared to three years for Mercedes; and (4) Lima-Marin married, adopted a child, and fathered a child during his time on erroneous release, and there is no indication that Mercedes enjoyed similar experiences while erroneously at liberty. *Id*.

Of course, as the *Mercedes II* Court acknowledged, there will always be mistakes—after all, human beings are fallible. But during most of the relevant timeframe in this case, between April 2008, when Lima-Marin was released on parole, and January 2014, when Lima-Marin was re-incarcerated, the State of Colorado was not doing anything to prevent those mistakes, much less to catch them and rectify them without undue delay. It was not until March 2013, when Ebel evidently killed Clements, that the government finally cared enough to start an initiative at the DOC that was followed by the implementation of some changes that remain in place today.

Perversely, *Hawkins* suggested that the rich history in erroneous release cases of the government not caring favored the government in the legal analysis because a phenomenon that is so routine does not shock the Court's conscience. *See* 195 F.3d at 743. It is precisely the routineness of erroneously releasing prisoners throughout the country, including in Colorado in April

2008, that, at least in part, is shocking to this Court's conscience. History teaches that something that is not unique may nevertheless be shocking to the universal sense of justice; in fact, something may be conscience-shocking ***because*** it is not unique.

Hawkins' reliance on the government's "routine, seemingly invariable, executive practice" of re-incarcerating an erroneously released prisoner whenever it gets around to discovering its blunders is equally misguided. *Id.* This enduring practice should not favor the government in the shocks-the-conscience analysis. To the extent it is present in an imprisoning sovereign, it simply shows an insufficient incentive to make changes in the handling of criminal defendants sentenced to prison. It reflects a callous attitude toward prisoners, victims, members of the community, the criminal justice system, and, by extension, American society as a whole. That callous attitude was clearly on display here and it resulted in the government mistakenly releasing Lima-Marin, erroneously allowing him to remain at liberty for almost six years, and subsequently uprooting him from his home, yanking him from the community, and dragging him back to prison as though it had done nothing wrong and time had stood still for the better part of a decade.

In effect, after its utter lack of care led to Lima-Marin's premature release and prolonged erroneous liberty, in January 2014 the government decided to compensate for its transgressions by swiftly turning back the clock and returning Lima-Marin to prison—not through the use of a magic wand or the invention of a time machine built out of a DeLorean, which might have transported him back to his life in April 2008, but through the simple issuance of an arrest warrant, which merely put him back in prison, disregarding everything that had transpired between April 2008 and January 2014. The government now opposes Lima-Marin's petition, arguing that he has no legal basis to complain because he received almost six years of undeserved freedom and such time will still count toward his sentence. The government's disgraceful attitude completely ignores the human toll of its deliberate indifference; as such, it is deserving of strong condemnation.

In *Mercedes II*, the Court wisely explained that granting Mercedes relief "may have the beneficial effect of encouraging the development of a more systematic means of monitoring state prisoners sentenced to a consecutive federal term and perhaps prevent the inadvertent release of a dangerous criminal in the future." 1997 WL 458740, at *4. This Court, too, believes that granting Lima-Marin relief may have the beneficial effect of incentivizing the

State of Colorado to continue to care to do better—to build on the steps it took in 2013. As this Order demonstrates, while some much-needed changes were implemented at the DOC following Clements' murder, there is still room for improvement.

The only hope to address this national problem lies with the courts. It is up to the courts to convey the message that in some extreme cases, such as this one, if a prisoner is prematurely released and erroneously allowed to remain at liberty for an extended period of time, the government may not be able to enforce the rest of the prisoner's sentence at some future date.

Third, the Court finds that the sentencing judge in the underlying criminal case should have exercised more care before signing Lima-Marin's mittimus. Had he reviewed Lima-Marin's mittimus carefully, he would have discovered that it contained a significant error that needed to be corrected. For multiple reasons, the error in Lima-Marin's mittimus was particularly regrettable: (1) the mittimus is less than two pages long, so a careful review of it would not have been time-consuming; (2) Lima-Marin was convicted of eight crimes of violence and was ordered to served 98 years in prison, so the sentencing judge had every incentive to review the mittimus carefully; (3) the sentencing judge should have set aside some time to carefully review the

mittimus because, as the discussion during the sentencing hearing reflects, Lima-Marin's sentencing was complicated; and (4) the error in Lima-Marin's mittimus was not difficult to detect, especially given the correct mittimus prepared in Clifton's case, which the same judge signed just less than a week later.

Fourth, the Court concludes that Lima-Marin's prosecutor was derelict in his duties by failing to check the mittimus prepared after the sentencing hearing. Lima-Marin's prosecutor should have checked the mittimus signed by the judge after the sentencing hearing to ensure it was accurate. Had Lima-Marin's prosecutor done so, he would have learned that the mittimus contained an important mistake that would result in an 82-year reduction in Lima-Marin's sentence.[62]

The Court accepts that the Judicial Branch is primarily responsible for mittimuses. But the other agencies involved in the criminal justice system cannot simply stand by and wash their hands of the matter. The prosecution—in this case the DAO—and defense counsel have compelling

[62] There is no indication that Lima-Marin's prosecutor checked the mittimus at all. The Court infers from the fact that the error in the mittimus was not corrected until almost 14 years later that he did not do so. In any event, to the extent that Lima-Marin's prosecutor checked the mittimus and missed the error, his level of fault is even higher.

interests in the accuracy of mittimuses. Yet, in this Court's experience, attorneys on both sides of the aisle generally fail to even think about the mittimus after a sentencing hearing—by and large, they treat mittimuses as unimportant.[63]

A mittimus is extremely important because it is the sentencing order; as relevant here, it is the piece of paper that communicates to the DOC the sentence imposed by the Court. It dictates what will happen with a defendant after the sentencing hearing is completed. As such, it can be likened to a medical prescription. Just as a pharmacy generally assumes that information on a prescription is accurate, the DOC, too, generally assumes that a mittimus is accurate. A pharmacy fills a prescription from a doctor just as the DOC enforces a mittimus from a judge. When there is a clerical error in a prescription, it can have severe consequences, including of a fatal magnitude. The same is true for clerical errors in mittimuses.

The Court understands that there may not be a policy or practice in effect in this judicial district or elsewhere in Colorado that requires a

[63] Because a substantive due process analysis centers on the government's actions, the discussion in this Order is not focused on Lima-Marin's counsel or defense attorneys in general.

prosecutor to check mittimuses after sentencing hearings.[64] But this unfortunate reality does not make it acceptable.

Prosecutors "are enforcers of the law" and "have higher ethical duties than other lawyers because they are ministers of justice, not just advocates." *People v. Pautler*, 35 P.3d 571, 579 (Colo. O.P.D.J. 2001); *see also* Colo. RPC 3.8 cmt. [1]. "They must also carefully carry out their duty to protect the public in the exercise of their prosecutorial responsibilities while maintaining the duties and responsibilities of professional conduct imposed upon them by [t]he Rules of Professional Conduct." *Pautler*, 35 P.3d at 579. The enhanced role that prosecutors have includes the duty to uphold the criminal system of justice. *Domingo-Gomez v. People*, 125 P.3d 1043, 1055 (Colo. 2005) (Bender, J., dissenting).

Additionally, prosecutors have responsibilities to the victims of the crimes they charge and litigate. The Victims' Rights Act ("VRA") imposes numerous duties on prosecutors. COLO. CONST. art. II, § 16a; § 24-4.1-303, C.R.S. (2016). This includes making "[a]ll reasonable attempts . . . to protect

[64] In the two decades the undersigned has worked on criminal cases in Colorado, he is not aware of any prosecution office in the State having a policy or practice that requires prosecutors to check mittimuses after sentencing hearings. To the extent such a policy or practice was in effect in this jurisdiction in 2000, Lima-Marin's prosecutor presumably violated it.

any victim or the victim's immediate family from harm . . . arising from . . . prosecution of a crime." § 24-4.1-303(5). There is no way to comply with all the provisions in the VRA without checking the accuracy of the mittimus prepared following a sentencing hearing.

The Court finds that Lima-Marin's prosecutor was required to check Lima-Marin's mittimus to ensure that it accurately reflected the sentences imposed. The volume of criminal cases, especially at the state level, is such that a system of checks and balances is indispensable. Having prosecutors check the mittimuses prepared after sentencing hearings is an important element in such a system.

Fifth, the sentence the government failed to continue enforcing in April 2008 was a 98-year sentence imposed on a man convicted of eight crimes of violence, including three class 2 felonies and five class 3 felonies, and the lesser non-included offense of theft by receiving. Lima-Marin had served less than ten years of his 98-year sentence when the government erroneously released him on parole. Further, Lima-Marin was allowed to be in the community while erroneously at liberty, either on supervised release or unsupervised release, for almost six years. Although these circumstances do not alter the clerical nature of the error that set the pertinent chain of events

into motion, they are nevertheless probative of the seriousness and potential dangerousness of the government's conduct. That Lima-Marin fortunately did not kill or otherwise harm anyone and, instead, completed his parole flawlessly, achieved full rehabilitation, and became a law-abiding and productive member of the community does not exonerate the government or minimize the magnitude of its inexcusable missteps.

Sixth, the Court looks at the government's extensive delay in re-incarcerating Lima-Marin. It took the government almost six years to figure out it had improperly released Lima-Marin—from April 24, 2008, when he was granted parole, until January 7, 2014, when he was detained again.[65] This is "greater than the durations typically deemed insufficient to violate due process." *Hurd*, 146 F. Supp. 3d at 66 (noting that Hurd "spent more than four years out of prison before being re-incarcerated," including "three [years] . . . on supervised parole," and citing cases that have found that 20 months, one year, 22 months, less than 18 months, 19 months, and 29 months of erroneous release were insufficient to violate due process).

[65] None of the myriad cases the Court came across in its research drew a distinction between a prisoner's erroneous release on parole and a prisoner's erroneous release without or after completing parole. The Court does not do so here either. Therefore, the Court considers the time both on and off parole to be part of Lima-Marin's erroneous release.

Compared to cases granting relief, Lima-Marin's 69 months erroneously at liberty, though much lower than the situation in *Shields* involving 28 years, certainly "fall comfortably within the range found troubling to courts." *Id*. (citing: *Merritt*, 478 F. Supp. at 806, which involved 33 months; *Bugg*, 145 S.W. at 832, which involved 36 months; and *DeWitt v. Ventetoulo*, 6 F.3d 32, 33 (1st Cir. 1993), where after eight months on parole, the court re-imposed part of the prison sentence it had suspended six years earlier because it concluded that the partial suspension was illegal). *See also United States v. Mercedes*, No. 90 Cr. 450 (RWS), 1997 WL 122785, at *5 (S.D.N.Y. Mar. 17, 1997) ("*Mercedes I*") ("the fact that Mercedes was at liberty for over three years evidence[d] a significant lack of diligence on the part of the Government in assuring that Mercedes [sic] federal sentence was carried out").[66]

What makes the substantial delay in re-incarcerating Lima-Marin even more egregious is that he came into contact with the DAO, the same office that prosecuted him in 1998CR2401, while on parole. He had a traffic

[66] *But see McPhearson*, 2014 WL 1794561, at *9 (the government's failure to re-incarcerate McPhearson for nearly 10 years, while amounting to more than simple neglect, did not suffice because this was not a case in which "the government repeatedly led [McPhearson] to believe he had been lawfully released" or provided him "active misadvice about the continuing validity of his unserved federal sentence;" nor could McPhearson have held "an honest and sincere belief that he was no longer required to serve the sentence imposed in his federal case").

misdemeanor case in 2012 (case number 2012T12446), which was prosecuted by the DAO in the same courthouse. Yet the DAO took no action in 2012 to re-arrest him in connection with 1998CR2401.

Seventh, in 2001, the government believed that Clifton's mittimus contained the exact error in Lima-Marin's mittimus that led to Lima-Marin's erroneous release. The AGO was the government agency handling the appeals filed by both Lima-Marin and Clifton. When it opined, albeit incorrectly, that Clifton's mittimus needed to be corrected to reflect that his sentences were to be served consecutively, not concurrently, the AGO should have checked the co-defendant's mittimus to make sure the sentencing judge had not made the same error there. By the time it filed its answer brief in Clifton's appeal, the AGO was very familiar with his case and, by extension, with Lima-Marin's case. At a minimum, the AGO clearly knew that Lima-Marin was Clifton's co-defendant, had been convicted of the same eight originally charged felonies, and had received the same sentences at a joint sentencing hearing. Yet the AGO did nothing about Lima-Marin's mittimus after it incorrectly concluded that a major error in Clifton's mittimus would only require Clifton to serve a 16-year prison sentence, instead of a 98-year prison sentence. In fact, there is no evidence that the AGO even bothered to

review Lima-Marin's mittimus. To the extent it did review Lima-Marin's mittimus and missed the error, its level of fault is even higher.

Eighth, Lima-Marin's motion to dismiss his own appeal should have raised red flags for the AGO. Lima-Marin's motion to dismiss was extremely rare. In fact, it was "unheard of" to receive such a motion from a defendant who stood convicted of eight crimes of violence, including three class 2 felonies and five class 3 felonies, and was sentenced to 98 years in prison.

Crucially, Lima-Marin's motion to dismiss was filed four days or less[67] before the AGO formed the belief that Clifton's mittimus incorrectly indicated that his sentences were to be served concurrently, instead of consecutively. Stated differently, in the same week that Lima-Marin filed his "unheard of" motion to dismiss his appeal, the AGO filed its answer brief in Clifton's appeal setting forth its belief that the mittimus in that case incorrectly stated that Clifton's sentences were to run concurrently. Somehow the AGO did not put two and two together.

[67] The Court refers to four days "or less" because four days after Lima-Marin's motion to dismiss was filed, the AGO stated in its answer brief in Clifton's case that Clifton's mittimus needed to be corrected. However, it is possible that the AGO formed this belief before filing its answer brief.

The Court finds that under the circumstances present the AGO should have checked Lima-Marin's mittimus to determine whether it stated that his sentences were to be served consecutively. Here, the AGO failed to do so. This omission is unacceptable.

Had the AGO reviewed Lima-Marin's mittimus, it would have realized that it stated "ALL SENTENCES CONCURRENT" in the "ADDITIONAL REQUIREMENTS" section. Even if the AGO had missed this comment on page 2 of Lima-Marin's mittimus, as it surprisingly missed the comment on page 2 of Clifton's mittimus indicating that the sentences were to be served consecutively, it presumably would have drawn the same conclusion it did with respect to Clifton's mittimus: that Lima-Marin's mittimus needed to be amended because it failed to expressly indicate that all of the sentences were to be served consecutively.

That the AGO's belief that Clifton's mittimus needed to be corrected proved to be wrong hardly absolves the AGO. The AGO held this erroneous belief for years, communicated it to the Court of Appeals more than once, relied on it to convince the Court of Appeals to grant unnecessary relief more than once, expressed it in its response to Lima-Marin's petition, repeated it at the December 21 hearing, and continues to hold it today even as the Court

drafts this Order. Had someone at the AGO during the last 17 years read Clifton's mittimus ***carefully and completely***, he or she would have quickly figured out that it did not contain an error that needed to be corrected. Regardless, however, what is important for this analysis is that the AGO ***believed*** in March 2001 that Clifton's mittimus needed to be corrected; such belief, whether ultimately proven correct or not, should have prompted the AGO to check Lima-Marin's mittimus, especially considering the extremely rare and puzzling motion filed by Lima-Marin to dismiss his own direct appeal.

Ninth, the DOC failed to realize the error in Lima-Marin's mittimus, even though he was in its custody for eight years, between April 2000 and April 2008. Critically, the changes effectuated by the DOC following Clements' murder conclusively show that the DOC reasonably could have, and should have, been doing more in April 2008 (and long before April 2008) to prevent the erroneous release of prisoners. There is no reason why the DOC could not have implemented in April 2008 (or earlier) the measures it quickly put into practice in 2013 in the aftermath of Clements' murder.[68] The

[68]As mentioned earlier, as a result of the changes implemented by the DOC in 2013, the DOC regularly contacts Colorado trial court judges with mittimus inquiries—for example: when the issue of concurrent/consecutive sentencing is in the discretion of the

Court is convinced that, had the DOC done so, Lima-Marin's premature release would have been averted.

Finally, Lima-Marin was under the supervision of the Parole Board for five years, but the Parole Board never realized that he had only served about ten years of his 98-year sentence when he was released on parole. *Cf. Mercedes I*, 1997 WL 122785, at *5 ("[T]he fact that Mercedes was under the supervision of the state parole authorities during the delay in execution of his federal sentence reinforces the conclusion that the federal authorities should have known of Mercedes' erroneous release, since it is reasonable to expect" that federal authorities would coordinate and communicate with state authorities). Moreover, before being placed on parole, Lima-Marin's case was presumably carefully reviewed by the Parole Board.[69] Yet the Parole Board did not catch

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trial court judge, but the mittimus fails to clearly state whether a sentence is to run consecutive to or concurrent with another sentence or other sentences; or when a mittimus indicates that a sentence is to be served concurrent with a second sentence or fails to include a concurrent/consecutive designation, but the applicable statutory authority requires that the sentences be served consecutively. *See also Wiseman*, 2017 WL 1404213, at *6 (mentioning the 2013 "DOC and State Court Administrator's Office initiative to identify individuals with potentially illegal concurrent sentences when consecutive sentences were mandated by statute").

[69] *Cf.* § 17-2-201(4)(a), C.R.S. (2016) (before releasing an inmate on parole, the Parole Board is required to determine that he "has served his . . . minimum sentence, less time allowed for good behavior, and [that] there is a strong and reasonable probability that [he] will not thereafter violate the law and that release of such person from institutional custody is compatible with the welfare of society").

the error in Lima-Marin's mittimus. True, the Parole Board had a copy of Lima-Marin's incorrect mittimus, but, as Raemisch acknowledges, the sentence imposed by the trial court judge was accurately reflected in multiple other documents in Lima-Marin's court file. Response at pp. 4, 26. At the very least, given the number and serious nature of Lima-Marin's convictions, the number of sentences imposed, and other information about his case,[70] his release after approximately ten years should have given the Parole Board pause that something was amiss in the mittimus, especially since Clifton's parole eligibility date was decades away. The Parole Board should be required to investigate and resolve reasonable questions about the accuracy of a mittimus before making the important decision to release a prisoner on parole.

In short, based on an "exact analysis" of all of the circumstances present, *see Lewis*, 523 U.S. at 850, 118 S. Ct. 1708, the Court concludes that the government acted with deliberate indifference and that such indifference is shocking to the contemporary conscience. That the government's deliberate

[70] The DOC's Admission Data Summary from June 5, 2000, which is part of the Court file in case number 1998CR2401, includes a list of Lima-Marin's convictions and sentences in that case. Further, it contains a narrative of the criminal conduct that resulted in those convictions and sentences. The narrative mentions that Clifton was Lima-Marin's co-defendant. The Parole Board presumably had access to the DOC records, including this summary.

indifference is shocking to the universal sense of justice is confirmed by the Colorado General Assembly's unanimous approval of a resolution urging the Governor to grant Lima-Marin clemency. John Frank, *Colorado governor faces more pressure to grant clemency to Rene Lima-Marin*, THE DENVER POST (May 4, 2017, 4:01 PM), http://www.denver post.com/2017/05/04/rene-lima-marin-clemency-john-hickenlooper/.

Therefore, the Court continues to step two of the analysis (the second part of the *Lewis* methodology, which incorporates the holding in *Glucksberg*). At step two, the Court examines whether the government's conduct violated a fundamental right or liberty interest that is deeply rooted in this Nation's history, legal traditions and practices, as well as implicit in the concept of ordered liberty; and if so, whether the infringement was narrowly tailored to serve a compelling state interest. The Court answers "yes" to the first part of this two-part inquiry, and "no" to the second part.

2. The Government Infringed Two Deeply Rooted and Historically Protected Fundamental Rights, and No Compelling State Interest Justifies the Infringement

a) Two Deeply Rooted and Historically Protected Fundamental Rights

The evolution of substantive due process jurisprudence "has been a process whereby the outlines of the 'liberty' specially protected by the

Fourteenth Amendment," though never fully clarified and perhaps incapable of full clarification, "have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722, 117 S. Ct. 2258; *see also Hawkins*, 195 F.3d at 758 n.6 (Murnaghan, J., dissenting) ("I realize that the description of fundamental rights is an area of continual turmoil in American jurisprudence"). The Court in *Glucksberg* acknowledged that it has always been reluctant to break new ground and expand the concept of substantive due process by extending constitutional protection to a new asserted right or liberty interest. 521 U.S. at 720, 117 S. Ct. 2258. There are two concerns underlying this cautious approach: (1) the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended;" and (2) bringing an additional right or liberty interest within the substantive due process protective canopy, to a large extent, places "the matter outside the arena of public debate and legislative action." *Id*. (quotation omitted).

The issue presented in *Glucksberg* was whether a state statute banning the commission of suicide with another's assistance offended the Fourteenth Amendment. *Id*. at 706, 724, 117 S. Ct. 2258. In finding that the "liberty" specially protected by the Due Process Clause does not encompass the right to

commit suicide, "which itself includes a right to assistance in doing so," the Court explained that it was "confronted with a consistent and almost universal tradition that has long rejected the asserted right . . . even for terminally ill, mentally competent adults." *Id*. at 723, 117 S. Ct. 2258. To hold that the challenged prohibition violated the Due Process Clause, the Court would have been required "to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Id*. Because "[t]he history of the law's treatment of assisted suicide in this country has been . . . one of the rejection of nearly all efforts to permit it," the Court concluded "that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." *Id*. at 728, 117 S. Ct. 2258.

This Court infers from Lima-Marin's petition that he is asserting that at least two of his fundamental rights were infringed by the government: (1) his right to liberty or to be free from incarceration, *see* Petition at pp. 14-27; and (2) his right to preserve settled expectations of freedom and finality, *see id*. at pp. 14, 24-27.[71] The Court analyzes each right in turn. Because the Court

[71] Lima-Marin included the assertion of his right to preserve settled expectations of freedom and finality under the double jeopardy section of his petition, where he objects to his 2014 re-incarceration on the ground that it constituted "[r]e-imposition of [his]

agrees with Lima-Marin that each of these rights is a fundamental right that was infringed when he was re-incarcerated, it considers whether the infringement was narrowly tailored to serve a compelling state interest. The Court concludes that it was not.

i) The Right to Liberty or to be Free From Incarceration

In *Hawkins*, the Fourth Circuit rejected Hawkins' asserted right to "freedom from unjust incarceration" as an "issue-begging generalization[] that cannot serve the inquiry" under the second prong in *Lewis*. 195 F.3d at 747. It then *sua sponte* reframed Hawkins' asserted fundamental right as "that of a prisoner to remain free on erroneously granted parole so long as he did not contribute to or know of the error and has for an appreciable time remained on good behavior to the point that his expectations for continued freedom from incarceration have crystallized." *Id*.

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sentence" or "resentencing" in the underlying criminal case, in violation of the Double Jeopardy Clause. Petition at pp. 12-13. Although the Court does not address any claim attacking the sentence in the underlying criminal case, it nevertheless considers Lima-Marin's assertion of his right to preserve settled expectations of freedom and finality. It would be unreasonable and unfair to disregard this assertion simply because of the location in the petition where it was advanced, especially since Lima-Marin did not know when he filed the petition that the Court would not consider any claim challenging the sentence in the underlying criminal case. In any event, though not expressly, the discussion in the petition related to Lima-Marin's substantive due process claim relies in part on the right to protect settled expectations of freedom and finality. *See id*. at pp. 24-27.

This analysis conflates identifying a fundamental right with determining whether a fundamental right extends to the situation in question. *Id*. at 758 n.6 (Murnaghan, J., dissenting) ("With respect, I believe that the majority's formulation of the fundamental right confuses what is needed to take advantage of the fundamental right with the right itself"). In this Court's view, the revised asserted right, not the originally asserted right, was the issue-begging proposition in *Hawkins*: under the Court's emendation, Hawkins could only identify a fundamental right if he could show that he was entitled to relief under the very specific circumstances of his case. Had Hawkins been able to establish that a prisoner has a fundamental and deeply rooted right to remain free following his erroneous release on parole—through no fault of his own and without his knowledge—so long as he has remained on good behavior for such an appreciable period of time that his expectations for continued freedom from incarceration have crystallized, there would have been little need for further analysis.

Even if the government had erroneously released Hawkins and allowed him to remain at liberty for 30 years with the specific intent to re-arrest him in order to harm him, the Fourth Circuit presumably still would have required him to establish that the revised asserted right, not the right to be free from

incarceration, was a fundamental and deeply rooted right. Given the Fourth Circuit's ultimate conclusion that the revised asserted right was not a fundamental right, this hypothetical claim would have failed notwithstanding some of the most egregious, purposeful, conscience-shocking conduct imaginable by the government. As Judge Murnaghan aptly observed, the majority in *Hawkins* "appear[ed] to hold that reincarceration of erroneously released prisoners with outstanding sentences ***never*** implicates a fundamental liberty interest." 195 F.3d at 761 (Murnaghan, J., dissenting) (emphasis added). There is no indication that this is what the Supreme Court envisioned in *Lewis*.

Raemisch reminds the Court that *Lewis* demands "a 'careful description' of the asserted liberty right or interest that avoids overgeneralization in the historical inquiry." Response at pp. 36-37. The *Hawkins* Court seemed to rely on the same language in unilaterally revising Hawkins' asserted right. *Hawkins*, 195 F.3d at 747-48. However, the Court in *Hawkins* then determined that the revised asserted right failed because it had an "amorphous, heavily subjective nature." *Id*. Thus, after *sua sponte* reformulating the right originally asserted by Hawkins, the Court concluded that it was too subjective to qualify

as a fundamental right. *Id*. In effect, the Court in *Hawkins* conjured up a strawman and then knocked it down.

It is true that in *Glucksberg* the United States Supreme Court discussed its "tradition of carefully formulating the interest at stake in substantive-due-process cases." *Glucksberg*, 521 U.S. at 722, 117 S. Ct. 2258. This Court understands the important reasons for this tradition; however, the Supreme Court alluded to it in the context of determining whether an asserted right that has never before enjoyed protection as a fundamental right should be elevated to that status and recognized as deeply rooted in this Nation's history, legal traditions, and practices. *Id*. at 721, 722-23, 117 S. Ct. 2258. Recall that the concerns behind the Supreme Court's cautious approach are: (1) the dearth of useful guidelines in unexplored territory; and (2) the fact that fitting an additional right or interest within the coverage of the Due Process umbrella largely places the matter outside the arena of public debate and legislative action. *Id*. at 721, 117 S. Ct. 2258.

As it relates to his first asserted right, Lima-Marin is not asking the Court to venture into uncharted territory and bestow "fundamental" status for the first time on an asserted right. His asserted right is one of the most fundamental and deeply rooted rights in our Nation's history, legal traditions,

and practices: the right to liberty—that is, the right to be free from physical restraint in general and incarceration specifically. This is part of the tapestry of American culture and is embedded in the core of the Due Process Clause: "[no] person shall . . . be deprived of life, ***liberty***, or property, without due process of law." U.S. CONST. amend. XIV (emphasis added). The United States Supreme Court has acknowledged as much: "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process Clause] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

A brief look at some of the limitations on the right to be free from imprisonment highlights the inherent flaw in the Fourth Circuit's rationale in *Hawkins*. The United States Supreme Court has recognized that the right to be free from detention, which is a form of imprisonment, cannot be successfully invoked when the detention is "ordered in a criminal proceeding with adequate procedural protections, . . . or, in certain special and narrow nonpunitive circumstances" involving "harm-threatening mental illness." *Id.* (quotations omitted). In *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), for example, the Court referred to the right to

"[f]reedom from bodily restraint," which is encompassed within the "right to liberty," and then acknowledged that there are narrow circumstances when it provides no protection, such as when conduct is criminalized, a mentally ill individual is suitably confined, or a person who poses a danger to others is properly placed in limited custody. *Id*. Contrary to the suggestion in *Hawkins*, however, each of these different sets of circumstances does not require the right to be free from incarceration to be reformulated into a fact-specific right that has never before been treated as fundamental. The fundamental right remains constant: the right to liberty. What is in flux is whether it applies in each different factual scenario.

This Court determines that the right to be free from incarceration is a fundamental right that is deeply rooted in our Nation's history, legal traditions, and practices. Further, the Court rules that the right to be free from incarceration is also a right that is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, the Court concludes that Lima-Marin has asserted a fundamental right or liberty interest that satisfies the first part of the second step in the *Lewis* methodology, and that such right or liberty interest was infringed by the government when it re-incarcerated him in January 2014.

ii) The Right to Preserve Settled Expectations of Freedom and Finality

A division of the Colorado Court of Appeals has recognized that "a defendant may [ ] develop[] an expectation of finality regarding the sentence or a portion thereof." *People v. Bassford*, 343 P.3d 1003, 1008 (Colo. App. 2014); *cf. People v. Castellano*, 209 P.3d 1208, 1209-10 (Colo. App. 2009) (addressing an expectation of finality in a sentence, but stating that "[a] defendant can have no legitimate expectation of finality in a sentence that, by statute, is subject to further review and revision") (alteration in original). Both *Bassford* and *Castellano* were decided after *Glucksberg* and *Lewis*.

"Other courts also have concluded . . . that such ***an expectation of finality might require enforcement of a previously imposed, yet unlawful, sentence***." *Wiseman*, 2017 WL 1404213, at *10 (Berger, J., concurring) (emphasis added). For example, in *United States v. Watkins*, the Eleventh Circuit noted that it was "mindful that a defendant's due process rights may be violated when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them." 147 F.3d 1294, 1298 n.5 (11th Cir. 1998) (quotation omitted); *see also United States v. Davis*, 112 F.3d 118, 123 (3d Cir. 1997) ("It is only in an extreme case that a later upward

revision of a sentence is so unfair that it is inconsistent with the fundamental notions of fairness found in the due process clause"); *United States v. Tolson*, 935 F. Supp. 17, 21 (D.D.C. 1996) ("[A] district court is free to correct a defect in the original sentence in order to bring it into compliance with the statute, but the Court cannot increase the sentence where the defendant has a legitimate expectation of finality and is not otherwise on notice that the sentence may permissibly be increased").

The Court is aware that the majority in *Wiseman* found that "Wiseman could have no legitimate expectation of finality in his illegal sentence" because "an illegal sentence is correctable at any time . . . and every person is generally presumed to know the law." 2017 WL 1404213, at *4 (internal quotations and citation omitted); *see also id*. at *6 ("Wiseman has no fundamental right to avoid serving a lawful sentence of which he should have been aware"). But the Court in *Wiseman* was concerned strictly with the finality expectations of a defendant who is still serving a prison sentence when the sentence is corrected by the district court. *Id*. at *3. As the concurring judge adroitly observed, "when a defendant is resentenced while still in custody, . . . it is virtually impossible to meet the 'shocks the conscience' test prescribed by the Supreme Court in *Lewis*." *Id*. at *10 (Berger,

J., concurring) (citing *Lewis*, 523 U.S. at 847 n.8). Indeed, a substantive due process claim for enforcement of an original, albeit unlawful, sentence is "strongest" when, as here, "the defendant has been released from custody and has spent a substantial amount of time at liberty." *Id*. (citing *Hawkins*, 194 F.3d at 751 (Murnaghan, J., dissenting)).

In his dissenting opinion in *Hawkins*, Judge Murnaghan understood Hawkins' asserted liberty interests to include the right to protect settled expectations of freedom and finality. 195 F.3d at 758, 758 n.6 (Murnaghan, J., dissenting). Given the lack of historical data regarding the erroneous release of prisoners—"probably because [it] is largely a function of the growth of the administrative state in the late twentieth century"—Judge Murnaghan analyzed instead how this asserted liberty interest is viewed in this Nation's legal tradition. *Id*. at 758. He concluded that the asserted liberty interest in preserving settled expectations of freedom and finality "is fundamental to our system of justice." *Id*. at 759. "To ***take advantage*** of this fundamental right, a parolee must remain on good behavior while out of prison." *Id*. at 758 n.6. (emphasis in original). If the parolee fails to do so, the state has "a compelling interest in reincarceration that would trump the parolee's fundamental right." *Id*.

Borrowing heavily from Judge Murnaghan's lucid opinion, this Court concludes that different areas of the law, including several constitutional provisions, serve as the underpinnings of Lima-Marin's asserted right to preserve crystallized expectations of freedom and finality. Therefore, the Court finds that this asserted right is deeply rooted in this Nation's legal tradition and is a fundamental right protected by the Due Process Clause.

First, the right to protect settled expectations of freedom and finality finds support in the Double Jeopardy Clause of the United States Constitution. The main goal of the Double Jeopardy Clause is "to preserve the finality of judgments." *Hawkins*, 195 F.3d at 758 (Murnaghan, J., dissenting) (quotation omitted). "[T]he public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation." *Id*. (quotations omitted). Hence, a defendant may not be resentenced when he "has developed a ***legitimate expectation of finality*** in his original sentence." *Id*. at 759 (emphasis in original).

Second, the federal Constitution's Ex Post Facto Clause corroborates Lima-Marin's asserted right to preserve settled expectations of freedom and finality. The Ex Post Facto Clause "operates to preserve settled expectations."

Id. The United States Supreme Court has acknowledged "that the retroactive removal of a prisoner's 'good time credits' violates the Ex Post Facto Clause, in part, because it defeats ***the defendant's expectation as to the probable length of his sentence*** when he pleads guilty to an offense." *Id*. (emphasis in original).

Third, the presumption against the retroactive application of new laws showcases the need for settled expectations of freedom and finality. *Id*. The United States Supreme Court has explained that "[a]pplication of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id*. (quoting *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). Perhaps no other jurist has articulated this concept as eloquently as Justice Harlan: "[n]o one, not criminal defendants, not the judicial system, not society as a whole[,] is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Id*. (quoting *Mackey v. United States*, 401 U.S. 667, 691, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971) (Harlan, J., concurring in part and dissenting in part)).

Other areas of the law recognize the widespread need to protect crystallized expectations of freedom and finality. "Statutes of limitations, the equitable doctrine of laches, waiver, and estoppel exist to cut off the State . . . from defeating the expectation interests of an opposing party." *Id*.[72] In fact, the need to preserve settled expectations of freedom and finality extends to the prohibition against "the correction of admitted errors of constitutional dimension after time and circumstances have intervened." *Id*.

Here, the Court determines that Lima-Marin's expectations of freedom and finality had crystallized before his re-incarceration in January 2014. The Court makes this determination on three grounds.

First, although Lima-Marin had served only about ten years of his 98-year sentence at the time of his erroneous release, his erroneous release lasted almost six years, an exceedingly extensive period of time, and his life underwent drastic changes during that timeframe. While on erroneous release, Lima-Marin completed five years of mandatory parole with flying colors and became fully rehabilitated. More specifically, he married, adopted his wife's son, fathered a son, was consistently and gainfully employed, started a successful career as a glazier, purchased a home, supported his

[72] Waiver of jurisdiction is the very doctrine on which Lima-Marin relies in this habeas case.

family, and became a spiritual man, as well as a productive, respected, well-liked, and valued member of the community. In other words, Lima-Marin did what the government required him to do: he re-integrated himself into the community.

Second, Lima-Marin did not leave town or go into hiding. Nor did he attempt to conceal his identity. He lived openly in the very community in which he had lived before his 1998 arrest. These are not the actions of a man who knows his release was erroneously granted and, consequently, lives in fear of being re-incarcerated. Rather, these actions reflect that Lima-Marin's expectations of freedom and finality had crystallized when he was re-arrested in January 2014. There was no reason for Lima-Marin to even suspect that his liberty could be taken away by the government based on the offenses charged in the underlying criminal case almost sixteen years earlier.

Third, as mentioned, Lima-Marin came into contact with the DAO, the same office that prosecuted him in 1998CR2401, when he was on parole. While prosecuting him for a 2012 traffic misdemeanor case (2012T12446) in this courthouse, that office took no action to re-incarcerate him in connection with 1998CR2401. Such inaction necessarily conveyed to Lima-Marin that

there was no reason for him to question, much less be concerned about, his freedom and the finality of the proceedings in 1998CR2401.

In sum, following Judge Murnaghan's able and perspicacious opinion, this Court finds that "the right to preserve settled expectations and the need for finality are fundamental to our system of justice" and are implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *See id*. As Judge Murnaghan reasoned, there comes a point after which "even acknowledged errors must be overlooked to protect settled expectations in the interest of fairness and ordered liberty." *Id*. Therefore, the Court concludes that Lima-Marin has asserted a second fundamental right or liberty interest—his right to preserve crystalized expectations of freedom and finality. The Court further rules that Lima-Marin's expectations of freedom and finality had crystallized in January 2014 and that his re-incarceration infringed his fundamental right to protect those expectations.

b) Raemisch Has Not Asserted Any State Interest, and No State Interest Survives Strict Scrutiny

The Court must next determine whether the government's violation of Lima-Marin's fundamental rights was narrowly tailored to serve a compelling

state interest.[73] Raemisch does not assert a state interest that justifies the government's infringement. Instead, relying in part on *Hawkins*, he avers that "Lima-Marin is unable to meet the threshold requirement" in *Lewis* that the government's conduct was "conscience-shocking in the constitutional sense." Response at pp. 32-33, 36. In the alternative, and again relying in part on *Hawkins*, Raemisch urges the Court to declare "that a criminal defendant who remains free for an extended period of time and maintains good behavior after an erroneous release does not have an expectation or right to such continued freedom." *Id*. at p. 39. On the record before it, the Court finds that Raemisch has asserted no state interest for the Court to balance against the infringement on Lima-Marin's fundamental rights.

Even if Raemisch had advanced the state interests that have been asserted in other erroneous release cases addressing due process claims, it would not alter the Court's conclusion. To be sure, the state interests in correctly applying the law and regularly enforcing sentences legally imposed,

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[73] When no fundamental right is involved, strict scrutiny does not apply and the infringement need only be rationally related to a legitimate state interest. *Glucksberg*, 521 U.S. at 728, 117 S. Ct. 2258 (because the asserted right to assistance in committing suicide is not a fundamental liberty interest, Washington's ban on assisted-suicide was only required to be "rationally related" to legitimate government interests). The Due Process Clause provides heightened protection only against government interference with fundamental rights and liberty interests. *Id*. at 720, 117 S. Ct. 2258.

keeping the community safe, deterrence, and ensuring proper punishment and rehabilitation for convicted defendants are generally compelling. However, under the specific circumstances present in this case, at least some of those interests are less than compelling. Regardless, the infringement of Lima-Marin's fundamental rights to be free from incarceration and preserve settled expectations of freedom and finality was not narrowly tailored to serve those interests.

The dissenting opinion in *Hawkins* is instructive here as well:

> The State's interest in general or specific deterrence cannot survive strict scrutiny. ***It is not likely that any individual will be less deterred from committing a crime because he believes that, if he is caught, convicted and sentenced, the Parole Commission may erroneously parole him too early, and thereafter he will not be rearrested.*** The rearrest of Hawkins is not narrowly tailored to serve any compelling interest in general or specific deterrence.
>
> ***The State does not have a compelling interest in reincarcerating Hawkins for rehabilitative reasons.*** The State, by paroling Hawkins, found that Hawkins was unlikely to engage in further criminal conduct; twenty months of law-abiding behavior confirmed the State's assessment. The State's interest in rehabilitation therefore is weak.

Hawkins, 195 F.3d at 757 (Murnaghan, J., dissenting) (emphasis added). The Court adopts this rationale and concludes both that the state interests in deterrence and rehabilitation are weak in this case and that the infringement

of Lima-Marin's fundamental rights was not narrowly tailored to serve those interests.

Further, the government lacks a compelling interest in re-incarcerating Lima-Marin for punishment purposes under the circumstances of this case. By the time the government re-incarcerated Lima-Marin in January 2014, he had already been fully rehabilitated and successfully re-integrated into society. Any additional punishment is now being imposed on a fully rehabilitated individual who has already been successfully re-integrated into the community. And this additional punishment is necessarily deferred or piecemeal—the very type of punishment courts have universally rejected as improper. In any event, three years and four months after his re-incarceration, Lima-Marin has discharged the equivalent of a 32-year prison sentence. The government's interest in punishing him has been sufficiently fulfilled.

Moreover, just as in *Hawkins*, where "the State's interest in the consistent enforcement of its sentencing provisions" would have been better served by "competent determination of when Hawkins was eligible for parole in the first place," *see id.*, here, too, the government's interest in correctly applying the law and regularly enforcing sentences legally imposed would

have been better served by competence on the part of the government. Following the significant sentencing error in the mittimus, the sentencing judge, Lima-Marin's prosecutor, the DAO, the AGO, the DOC, and the Parole Board all contributed to Lima-Marin being released improperly and remaining erroneously at liberty for almost six years. Such acts and omissions, which the Court has found establish conscience-shocking deliberate indifference, "were not at all well-tailored to the consistent enforcement of [the government's] sentencing provisions." *Id*.

Lastly, the government cannot genuinely assert that it has an interest in re-incarcerating Lima-Marin to protect the community. Had the government believed that Lima-Marin was dangerous to the community, it presumably would have taken more (or even some) steps to prevent his erroneous release and his subsequent lengthy hiatus at liberty. At any rate, Lima-Marin's admirable conduct during the 69 months he was erroneously at liberty resoundingly confirms that he is not a risk to the community.

Under the circumstances present here, the Court finds that the re-incarceration of Lima-Marin infringed his fundamental rights, and that the infringement was not narrowly tailored to serve any compelling state interest. The government's conduct "preclude[s] it from asserting a compelling interest

in reincarcerating [Lima-Marin] that would justify interference with [his] fundamental right[s] . . . ." *Id*. To hold otherwise would be to blindly effectuate the State's interests at the expense of Lima-Marin's substantially weightier and much more compelling fundamental rights.

3. The Totality of the Circumstances Warrants Application of the Waiver of Jurisdiction Theory

Relying on *Brown*, *Merritt*, *Hurd*, *Vega*, and *Grant*, the Court considers multiple factors in assessing whether the totality of the circumstances warrants application of the waiver of jurisdiction theory in this case. None of these factors is dispositive, and the weight the Court accords each factor is based on the circumstances of this particular case. *See*, *e.g.*, *Grant*, 184 F. Supp. 3d at 254 (addressing a request for credit while erroneously at liberty). The Court omits constitutional considerations from its list of factors because such considerations were addressed in the first two steps of the analysis; thus, none of the factors relates to the government's level of blameworthiness.

The Court analyzes seven factors and concludes that application of the waiver of jurisdiction theory is warranted under the totality of the circumstances present here. Therefore, the government is deemed to have waived its jurisdiction to compel Lima-Marin to serve the rest of his sentence.

First, the Court considers the nature of the underlying offense in 1998CR2401 and Lima-Marin's criminal history. This factor is relevant because in an erroneous release case in which principles of equity are at play, the Court would be much less likely to grant relief to a serial killer.

Lima-Marin and Clifton were convicted of robbing two video stores in a span of approximately 15 hours. In each instance, they were armed with a single rifle, which was stolen, although it is unclear whether the rifle was loaded or unloaded. In the first robbery, they broke into the store before it opened and ordered the assistant manager who was in the store to move to the room where the safe was located and to open the safe. They took a similar approach in the second robbery, except that they entered that store shortly before closing time, and, instead of an assistant manager, they found two employees working. Lima-Marin and Clifton took $6,766 from the first store and $3,735 from the second store. There were no injuries or shots fired in either robbery.

Lima-Marin and Clifton were very young at the time—twenty years old and nineteen years old respectively—and were best friends. In fact, they had been best friends since they were young boys. At the time of the robberies,

both lived together in an apartment. Although each had a juvenile adjudication history, this was their first adult felony conviction.

Lima-Marin was convicted of: three counts of kidnapping of a victim who was also a victim of a robbery, a class 2 felony; three counts of aggravated robbery, a class 3 felony; and two counts of first degree burglary, a class 3 felony. His only other adult criminal history is a felony conviction for the class 4 felony robbery of a video store on September 5, 1998, eight days before the aggravated robberies involved in 1998CR2401. After being sentenced to 98 years in 1998CR2401, Lima-Marin pled guilty in the case related to the September 5 robbery and was ordered to serve a five-year prison sentence concurrent with the sentence he had already received in 1998CR2401. There were no injuries or shots fired in the September 5 robbery either.

Second, the Court looks at the length of the sentence, how much of the sentence Lima-Marin has served, and whether it would offend notions of justice to prevent the government from enforcing the rest of the sentence. Lima-Marin received a 16-year prison sentence on each of the three kidnapping counts (one for the assistant manager in the first store and two for the two employees in the second store), a ten-year prison sentence on each of

the two first degree burglary counts (one for each store), and a ten-year prison sentence on each of the three aggravated robbery counts (one for the assistant manager in the first store and two for the employees in the second store). Because Colorado law required the Court to order the sentences to be served consecutively, the total term of imprisonment imposed was 98 years. There was also a mandatory period of parole of five years.

Lima-Marin remained in confinement between September 1998, when he was initially arrested, and April 2008, when he was released on parole. Therefore, he spent a little less than ten years in confinement before he was released on parole. He then successfully completed five years on parole, and was successfully discharged from parole in April 2013.

Even when the Court includes in its confinement calculation the five years of parole Lima-Marin successfully completed, as Raemisch has conceded the Court should do, that would still only add up to about 15 years in prison. Including the three years and four months since Lima-Marin's re-incarceration raises the number to about 18 years. That number gets closer to 19 years when, pursuant to Raemisch's agreement, the Court includes the eight and a half months during which Lima-Marin enjoyed unconditional liberty. In total, Lima-Marin has served at most 19 years of his 98-year

sentence. As such, this factor, at least at first blush, would appear to compel a finding that it would offend notions of justice to release Lima-Marin at this time. However, there are other circumstances which lead the Court to conclude that it would not offend notions of justice to release Lima-Marin.

In the Court's experience, a 98-year prison sentence, while within the statutory sentencing range, is an extremely lengthy sentence given the circumstances present. This is not to downplay the nature of Lima-Marin's conduct or convictions. The Court is patently conscious of the seriousness of Lima-Marin's offenses. But Lima-Marin had no adult criminal history, was not yet twenty-one years of age, robbed the two video stores in question with his best friend within a span of 15 hours, and no shots were fired and no one was injured during either incident. Yet Lima-Marin received what is essentially a life sentence.

Not surprisingly, the sentencing judge expressed his displeasure with the prosecution's charging decisions, which took away his discretion and required him to sentence Lima-Marin to prison for a minimum term of 98 years and a maximum term of 304 years: "I am not comfortable, frankly, with the way the case is charged, but that is a District Attorney executive branch

decision that I find that I have no control over." 4/13/00 Tr. at p. 460.[74] The undersigned should not be understood as echoing the sentencing judge's criticism of the charging decisions by the DAO. The undersigned quotes the sentencing judge's remarks here simply because the sentencing judge, too, seemed to realize that Lima-Marin's mandatory minimum sentence was an exceedingly long sentence under the circumstances.

Equally significant, Lima-Marin has already served the amount of time he would have served had he received a 32-year prison sentence. As indicated, he has spent a total of approximately 19 years in custody. Given that Lima-Marin served approximately 60% of what the DOC believed was a 16-year sentence, he has now essentially discharged the equivalent of a 32-year prison sentence (60% of 32 is 19.2). A 32-year prison sentence is very much in line with the range of sentences—and likely the high end of the range—that the Court has seen imposed in Colorado for the type of conduct involved here when committed by a young defendant appearing on his first adult felony conviction.

Under the circumstances present, the Court finds that, although most of Lima-Marin's sentence remains unserved, he has sufficiently paid his debt to

[74] The plea bargain offer extended by Lima-Marin's prosecutor included a stipulated sentence of 75 years in prison. 4/13/00 Tr. at p. 12.

society. More specifically, the Court concludes that it would not offend notions of justice to release Lima-Marin at this time. The Court wishes to be clear that it does not second-guess the appropriateness of the 98-year sentence Lima-Marin received. It simply rules that releasing Lima-Marin would not constitute an affront to principles of justice.

Third, the Court considers Lima-Marin's behavior while in confinement. Lima-Marin was a model inmate during the decade he was in custody. *See generally* Hearing. Further, Lima-Marin appeared to take advantage of the opportunities available while in confinement to work on his rehabilitation. *Id*.

Fourth, the Court examines whether Lima-Marin completed parole successfully. Lima-Marin not only completed parole, he completed the longest period of parole allowed under Colorado law at the time he was sentenced, five years, and did so with flying colors. There is no evidence that Lima-Marin received a violation while on parole. To the contrary, the record reflects that he took advantage of this opportunity to better himself and to work toward rehabilitation. As he was required to do by the government, he achieved full rehabilitation and re-integrated himself into society.

Fifth, the Court looks at the length of the erroneous release period and Lima-Marin's behavior while on erroneous release. As the Court noted

earlier, Lima-Marin's erroneous release lasted five years and nine months or 69 months, a long period of time. Compared to cases granting relief, Lima-Marin's sixty-nine months certainly "fall comfortably within the range found troubling to courts." *Hurd*, 146 F. Supp. 3d at 66.

Lima-Marin made the most of his time while on erroneous release. He: was consistently employed and eventually started a successful career as a glazier; purchased a home; reunited with his girlfriend and married her; adopted his wife's child from another relationship; fathered a child; supported his family; became a man of faith who actively participated in church activities and provided guidance to young people; reached full rehabilitation; and transformed himself into a productive, respected, well-liked, and valued member of the community. Prison did for Lima-Marin exactly what courts hope it will do for most defendants sentenced to incarceration: turn them from a life of crime to a productive life in the community.

Sixth, the Court considers whether Lima-Marin contributed to the government's mistake or was aware of it. The Court earlier made a factual finding that Lima-Marin did not contribute to his erroneous release and that he was not aware of the mistake the government made in his mittimus.

Raemisch does not dispute that Lima-Marin did not contribute to the government's mistake. However, at the hearing, Raemisch was incredulous when Lima-Marin testified that he did not know his mittimus contained an error. The Court found Lima-Marin credible and his testimony reliable.

Mounteer advised Lima-Marin that the judge had reduced his sentence to 16 years. He had no reason to reject or question that information. This is particularly the case given that his case manager at the DOC subsequently confirmed that the sentence was only 16 years. Inasmuch as Mounteer told Lima-Marin that all they were going to be requesting on appeal was a reduction of his sentence to 16 years, her advice to dismiss his appeal made logical sense, since "there was no point to continuing the appeal." *See generally* Hearing. Lima-Marin's attorney presented him with a fait accompli.

Raemisch attempted to attack Lima-Marin's credibility by having him concede that he never returned to court or went before a judge to have his sentence reconsidered. Lima-Marin admitted as much, but explained, credibly, that he was not trained in the law and did not fully comprehend the inner workings of the criminal justice system. He had no reason to question the legality of the process the trial court had followed in reducing his sentence

without a hearing or his appearance. The Court found Lima-Marin's testimony on this point credible.

Finally, the Court examines the prejudice of compelling Lima-Marin to serve the rest of his sentence. There is no question that Lima-Marin will be heavily and unfairly prejudiced if he is forced to remain incarcerated until he discharges his 98-year sentence. He already completed parole successfully and has been fully rehabilitated and successfully re-integrated into society. There is a 100% likelihood that refusing to release Lima-Marin now will undermine the extensive efforts he has undertaken toward rehabilitation and re-integration. Indeed, requiring Lima-Marin to serve the rest of his sentence will result in his incarceration for the majority of his life.

A few courts have opined that a prisoner who is re-incarcerated after being erroneously released should be grateful that his sentence was interrupted by a period of liberty. *See, e.g.*, *Commonwealth v. Blair*, 699 A.2d 738, 743 (Pa. Super. Ct. 1997). That was the prosecution's attitude in the post-conviction litigation in Lima-Marin's underlying criminal case following his re-incarceration. *See* Vol. 2, Part 3.2, at p. 382 (quoting Lou Gehrig's July 4, 1939 speech: "I consider myself the luckiest man on the face of the Earth"). The prosecution asserted that Lima-Marin "has been very lucky," "[l]ucky in

the extreme," "[a]bsurdly lucky," and "[l]ucky to the nth degree." *Id*. This assertion, while rich in synonyms, misses the mark because the Court cannot turn back the clock.

The choice for the Court is not between: on the one hand, having Lima-Marin serve his sentence in full and uninterrupted starting in April 2000—without marrying his best friend, adopting a child, fathering a child, successfully starting a new career as a glazier, and being fully rehabilitated and successfully re-integrated into society; or, on the other, releasing him early after continuously, and without interruption, serving approximately the first 19 years of the 98-year sentence imposed in 2000. The choice is between: on the one hand, forcing Lima-Marin to serve the rest of his 98-year sentence, even though, as a result of the government's conscience-shocking deliberate indifference, he was improperly released in April 2008, and before being re-incarcerated almost six years later, he married his best friend, adopted a child, fathered a child, successfully started a career as a glazier, and attained full rehabilitation and complete re-integration into society; or, on the other, releasing him after serving approximately 19 years of his 98-year prison sentence because, as a result of the government's conscience-shocking deliberate indifference, he was improperly released in April 2008, and before

being re-incarcerated almost six years later, he married his best friend, adopted a child, fathered a child, successfully started a career as a glazier, and attained full rehabilitation and complete re-integration into society.

Stated differently, as a result of the government's conscience-shocking deliberate indifference, Lima-Marin will be treated either worse or better than the sentencing judge intended in April 2000, but he can never be treated exactly as the sentencing judge intended. The punishment imposed on April 13, 2000—a 98-year continuous, uninterrupted prison sentence—is no longer available and will never be available again.[75]

[75] The same rationale applies to any argument that granting Lima-Marin the relief he requests would be improper because it would result in treating him more favorably than Clifton. Denying Lima-Marin's requested relief would not result in equal treatment either. Treating Lima-Marin and Clifton equally is no longer an option for the Court because the Court cannot turn back the clock to April 2008 when the government improperly released Lima-Marin. Regardless, there is no request from Clifton before the Court. Nor does a criminal defendant have the right to request the same outcome in his co-defendant's case. Sometimes cases for similarly situated co-defendants have a different end result. Indeed, if Lima-Marin's jury had found him not guilty of all the charged offenses or guilty of less than all the charged offenses, it would not have entitled Clifton to challenge the validity of his jury's verdicts finding him guilty of all the charged offenses. In any event, Lima-Marin and Clifton are no longer similarly situated. The evidence overwhelmingly shows that Lima-Marin has been fully rehabilitated and re-integrated into society, whereas the record is barren of any such evidence with respect to Clifton. To the contrary, Lima-Marin and his counsel suggested during the hearing that Clifton has had behavioral issues in prison. Moreover, forcing Lima-Marin to serve the rest of his sentence will result in collateral punishment to him and his family, and neither Clifton nor his family will be subjected to such punishment.

It is true that if Lima-Marin is released now, he will not serve his 98-year prison sentence in full—or even most of it. But if the Court requires Lima-Marin to serve the rest of his sentence, the Court will, in effect, be imposing additional punishment not only on him but on his family. His wife will lose her husband, will be forced to raise their children alone, will have to pay for the house they purchased together, and will be required to be financially independent. His children will be forced to grow up without their father. In fact, the child Lima-Marin and his wife had together never would have been born if the government had not erroneously released Lima-Marin and allowed him to remain at liberty for almost six years.

The Court has authority to punish a man by sentencing him to prison; the Court has no authority to, in addition, punish a man and his family the way Lima-Marin and his family will be punished if the Court forces him to serve the remainder of his exceedingly lengthy sentence. The shade from the canopy of the waiver tree trunk must spread sufficiently wide to shelter Lima-Marin and his family from this type of unsanctioned, unwarranted, and unintended punishment that is shocking to the universal sense of justice.

Of course, this says nothing about the community's loss. As part of his complete rehabilitation and re-integration into society, Lima-Marin became a

productive, respected, well-liked, and valued member of the community. He became a role model to the youth in his faith community. The outpouring of support he received before and during the December 21 hearing speaks volumes about how the community views him and appreciates him. If the Court denies his petition for habeas corpus relief, the Court would be inflicting harm on the community.

Society's interest in an effective and reliable criminal justice system is also ill-served by the denial of Lima-Marin's petition because Lima-Marin's re-incarceration perpetuates the nonchalant outlook by state and federal authorities throughout the country on the types of errors and significant delays that allow prisoners to be erroneously released and to improperly remain at liberty. Courts, as the champions of justice, must find a way to stem the tide in erroneous release cases. Even in Colorado, where the DOC made some long-overdue changes in 2013, granting Lima-Marin's requested relief can only help incentivize the government to care to do better, to implement a system of checks and balances, to look for other appropriate preventative measures, and to continue to view the premature release of prisoners with the seriousness, caution, and urgency it deserves. The steps taken by the DOC with the Judicial Branch's assistance constitute a good start, but, as this Order

reflects, there is still ample opportunity for other necessary, equally significant, enhancements.

Considering the totality of the circumstances, the Court concludes that Lima-Marin is entitled to take advantage of the waiver of jurisdiction theory. Accordingly, the government is deemed to have waived its jurisdiction to compel him to serve the remainder of his sentence.

II. Relief Granted

Having found that Lima-Marin's substantive due process claim has merit, the Court grants the requested habeas corpus relief. Therefore, the Court orders Raemisch to release Lima-Marin.

CONCLUSION

At the end of the day, the Court concludes that it would be utterly unjust to compel Lima-Marin, at this juncture, to serve the rest of his extremely long sentence. The government—not Lima-Marin, his family, the community, and society—should bear the brunt of the consequences of its conscience-shocking deliberate indifference.

Some judges have suggested that erroneous release cases may be more appropriate for the Governor to consider pursuant to a petition for

clemency.[76] *See*, *e.g.*, *Hawkins*, 195 F.3d at 750 ("If recourse from this regrettably frequent occurrence in penal system administration is to be had by state convicts, it must be found, as frequently it has been, by courts applying state common law and equitable principles, or by executive clemency"); *Bonebrake*, 417 F.3d at 944 (Lay, J., concurring) ("I strongly agree with the State that Ms. Bonebrake should seek clemency from the Governor"). The Court disagrees. The Judicial Branch, not the Executive Branch, is charged with the daunting responsibility of doing justice—lest mercy be confused with justice. To be sure, this case presents a rather difficult and complicated issue that places the Court in a catch-22 mousetrap. But that does not mean the Court should punt to the Executive Branch. There is a way for the Court to dispense justice in this case: by ordering the release of Lima-Marin. Therefore, the Court orders Raemisch, as Director of the DOC, to release Lima-Marin.

Dated this 16th day of May of 2017.

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[76] On May 5, 2017, the undersigned received an email from the Office of Executive Clemency ("the OEC"). Attached to the email was a request for clemency submitted to the Governor by Lima-Marin pro se. The OEC is seeking feedback from the sentencing judge or, if he is unavailable, from the undersigned. The sentencing judge is unavailable because he retired in 2006. However, given the pendency of Lima-Marin's petition for habeas relief, the undersigned did not read the request for clemency or respond to the OEC's email. After this Order is issued, the undersigned will forward a copy of it to the OEC.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge