IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

APRIL MIZELL ESTES, ANTONIO RICO MADDEN, and SCOTTY SUMMERS,	*	
Plaintiffs,	*	Civil No.
vs.	*	Complaint and Petition for a Writ of Habeas Corpus
FEDERAL BUREAU OF PRISONS, 320 First Street, N.W., Washington, D.C. 20534;	*	Jury trial demanded
KATHLEEN HAWK SAWYER, Director, Federal Bureau of Prisons, 320 First Street, N.W. Washington, D.C. 20534, sued in her official capacity;	*	
R.E. Holt, Regional Director, Federal Bureau of Prisons, Southeast Regional Office 3800 Camp Creek Parkway, S.W., Building 2000, Atlanta, GA 30331-6226	*	
R.E. Holt, Community Corrections Manager Federal Bureau of Prisons, Southeast Regional Office, 3800 Camp Creek Parkway, S.W., Building 2000, Atlanta, GA 30331-6226	*	
Defendant.	*	

Plaintiffs April Mizell Estes, Antonio Rico Madden, and Scotty Summers, by and through their attorneys, bring this civil action and petition for a writ of habeas corpus for declaratory and injunctive relief under the United States Constitution and the Administrative Procedure Act against the above-named defendants, alleging the following:

Nature of the Case

1. This action arises out of the Federal Bureau of Prisons' recent proclamation of a new rule

prohibiting inmates from serving sentences of imprisonment a community confinement centers or halfway houses. The Federal Bureau of Prisons is applying this rule retroactively to some inmates, including the Plaintiffs herein, who have either been ordered to report to serve their sentences at halfway houses or community confinement centers or who have been prohibited from serving their sentences at halfway houses or community correction centers because of the new rule promulgated by the Bureau of Prisons. Those inmates with more than 150 days of their sentences remaining are being transferred to more restrictive federal facilities on or after January 24, 2003, whereas those inmates with less than 150 days of their sentences remaining will be permitted to complete their sentences at community confinement centers or halfway houses.

2. April Mizell Estes has been ordered by this Court to serve a sentence of 120 days with a recommendation that her sentence be served at the local community corrections center. Her sentence was originally 150 days but has been amended to 120 days by order of Court. Notwithstanding the fact that Ms. Estes has less than 150 days to serve on her sentence, and notwithstanding the fact that this Court has recommended placement at the Community Corrections Center, the Defendants continue to insist that she must report to prison. The local United States Marshal has requested an exception for the Plaintiff due to her special circumstances. Her special circumstances include the following facts: The Plaintiff was initially sentenced on August 27, 2002, to an imprisonment term of five (5) months with a recommendation that she be allowed to serve this sentence in the local Community Corrections Center in Spanish Fort, Alabama, and that she participate in the drug and alcohol abuse treatment program while confined. This judgment was entered September 4, 2002. The United States Marshal for the Southern District of Alabama received notice from the Defendants that she was to begin serving her sentence in November, 2002. However, due to a clerical error in the Marshal's office, the Plaintiff did not receive this notice, and she was subsequently instructed

to report on December 27, 2002. However, when she attempted to report, the Spanish Fort Community Corrections Center instructed her that they could not accept her because of the new Bureau of Prisons policy referenced herein. On motion of undersigned counsel and without objection from the Government, the Court amended her sentence to a 120 day sentence. Nevertheless, the Defendants have instructed the Plaintiff to report to prison on a date in the future to be selected by her.

3. Plaintiff Antonio Rico Madden has been sentenced to a five months term of imprisonment with a recommendation that he be allowed to serve his custody sentence at the local community confinement center in Spanish Fort, Alabama (Southern District of Alabama Criminal Action No. 02-00108-RV). Madden has been ordered to report to FPC Eglin on February 26, 2003, contrary to the Court's request.

4. Plaintiff Scotty Summers has been sentenced to a ten months term of imprisonment, which sentence was split, five months to be served in the Spanish Fort Community Confinement Center. At the time of sentencing, Judge Charles R. Butler, Jr., ordered that Summers be sentenced to Spanish Fort with a provision that he receive special drug and mental health treatment at The Shoulder, a drug, alcohol, and mental health treatment center located on the premises of Spanish Fort. However, the judgment and commitment order reflects that the sentence was a recommended placement at Spanish Fort. Summers has been ordered to report to FCI Yazoo City, Mississippi, on February 12, 2003. Summers has contacted Yazoo City, and he was told that he is coming to the wrong prison for mental health and drug treatment.

5. This action and petition challenges the validity of the Federal Bureau of Prisons' new rule, and its application to the Plaintiff, under the Due Process, Equal Protection, and Ex Post Facto clauses of the United States Constitution and under the Administrative Procedure Act.

Jurisdiction and Venue

6. This Court has jurisdiction over the Plaintiff's claims of violation of federal constitutional rights and federal law under 28 U.S.C. Section 1331.

7. Venue is proper in this District pursuant to 28 U.S.C. section 1391(e) in that the Plaintiff resides in this District and most of the events giving rise to the Plaintiff's claims occurred here.

Parties

8. The plaintiffs, April Mizell Estes, Antonio Rico Madden, and Scottie Summers are federal convicts who has been instructed by the Defendants to report to the United States Prison at Tallahassee, Florida, and Eglin, Florida, and Yazoo City, Mississippi, respectively. These facilities are located within the Federal Bureau of Prisons' Southeast Region.

9. Defendant Bureau of Prisons ("BOP") is a federal agency and is responsible for administering the federal prison system, including designating for each defendant sentenced to prison the facility where the sentence of imprisonment will be served. BOP currently has legal custody of the Plaintiff and is responsible for the both the new rule and the decision to apply it to the Plaintiff.

10. Defendant Kathleen Hawk Sawyer is the Director of the Federal Bureau of Prisons. Defendant Sawyer is responsible for the issuance and implementation of the new rule. She is sued in her official capacity.

11. Defendant R.E. Holt Is the Regional Director for the Southeast Region of the Federal Bureau of Prisons. Defendant R.E. Holt is responsible for administration of the new rule in the Southeast Region of the Federal Bureau of Prisons. He is sued in his official capacity.

12. Defendant R.E. Holt is the Community Corrections Manager for the Southeast Region of the Federal Bureau of Prisons. He is responsible for implementing the new rule in the Southeast

Region fo the Federal Bureau of Prisons. He is sued in his official capacity.

Facts

13. In March of 2002 the Plaintiff Estes was charged by indictment in the United States District Court for the Southern District of Alabama, Southern Division, with bank fraud in a one-count indictment. It was alleged that the Plaintiff acted alone in the activity underlying this indictment.

14. The Plaintiff Estes pled guilty to the only count in the indictment in violation of 18 U.S.C. § 1344.

15. The Plaintiff accepted responsibility for her criminal conduct and was awarded a two-level sentence reduction pursuant to U.S.S.G. § 3E1.1.

16. On August 27, 2002, the Plaintiff Estes was sentenced by the Honorable Charles R. Butler, Jr., Chief United States District Judge for the Southern District of Alabama, to a term of five (5) months in the custody of the Bureau of Prisons with a recommendation that she serve the sentence at the Spanish Fort, Alabama, Community Corrections Center. The Government concurred in this sentence. The Court further ordered the Plaintiff to participate in the drug and alcohol abuse treatment program while confined.

16. Plaintiff Estes delivered a child in May of 2002 and is currently pregnant with another child, due May of 2003. She has a daughter who is 4 years old in addition to these two children.

17. On November 6, 2002, Antonio Rico Madden was sentenced for violation of 21 U.S.C. 846, conspiracy to possess with intent to distribute ecstasy. Both Madden and his wife, Constance Madden, were sentenced the same date. Constance Madden received a sentence of home confinement. Antonio Rico Madden was sentenced to five months in the community confinement center. It was contemplated at the time of sentencing that the Plaintiff would continue to work,

which is possible with a halfway house sentence. Constance Madden is unemployed due to a medical condition (ruptured disc), for which she is undergoing a variety of tests, including MRIs and operations. When the district court fashioned Antonio Madden's sentence, it was contemplated that he would be allowed to serve his sentence at the community confinement center.

18. Plaintiff Summers was sentenced September 27, 2002, for conspiracy to possess with intent to distribute ecstasy in violation 21 U.S.C. 846. He received a split sentence to serve 5 months in the Spanish Fort Community Corrections Center. Summers suffered from attention deficit disorder and was in need of special mental health treatment and drug abuse at The Shoulder, a residential private facility on the premises of Spanish Fort. It was contemplated when he was sentenced that he would serve his sentence at Spanish Fort in order to receive this treatment, not at FCI Yazoo City, a facility which does not offer this type of specialized treatment.

19. Prior to approximately December 20, 2002, the Bureau of Prisons had a long-standing, established practice of implementing court recommendations regarding designation of prisoners such as the one Judge Butler made in the Plaintiff's case.

20. Prior to December 20, 2002, during November of 2002, the Bureau of Prisons notified the United States Marshal for the Southern District of Alabama that the Plaintiff Estes should report to Federal Correction Institution Tallahassee during November. However, due to circumstances not within the control of the Plaintiff, she was not notified of this reporting requirement until after the promulgation of the new BOP regulation. Accordingly, when she attempted to report to the Spanish Fort Community Corrections Center on December 27, 2002, as directed, she was turned away and instructed to report instead to FCI Tallahassee.

21. Subsequently, through undersigned counsel, the Plaintiff Estes moved for an amendment of the judgment and for a reduction of her sentence so that the contemplated sentence could be

served as stated in the judgment at the Spanish Fort Halfway House. On January 22, 2003, Judge Butler amended the judgment and reduced the Plaintiff's sentence to four months and that the sentence be served at the Spanish Fort Community Corrections Center.

22. Notwithstanding the reduction of her sentence, the Bureau of Prisons, in contravention of its own announced policy, that any prison sentence in excess of 150 days would require imprisonment, has ordered Plaintiff Estes to report to FCI Tallahassee on a day of her choosing.

23. The Bureau of Prisons had authority to designate the Plaintiff to the Spanish Fort Community Corrections Center pursuant to 18 U.S.C. § 3621(b), which provides that "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility. . . That the Bureau determines to be appropriate and suitable."

24. Defendant Sawyer, on behalf of BOP, approved the issuance of the new rule ostensibly to comply with a recent pronouncement by the U.S. Department of Justice that individuals sentenced to terms of imprisonment may not be designated to community confinement centers or halfway houses. Neither advance notice of the proposed rulemaking nor any opportunity to participate in the rulemaking was provided.

25. According to a letter promulgated by BOP, the new rule will be applied prospectively, except that it will be applied retroactively to those currently designated to community confinement centers or halfway houses who have more than 150 days of their sentence still to serve. The Plaintiff has only four months (or approximately 120 days) of her sentence still to serve.

26. The Plaintiffs aver that they have exhausted their administrative remedies in this case by requesting from the Bureau of Prisons an exception to its policy that she serve her sentence in a prison facility. However, in order to ensure that administrative remedies are exhausted, on advice

of counsel, the Plaintiffs have signed and mailed a letter to Defendant Holt requesting an administrative review of the rulings in their case.

Claims for Relief

Count One

(Violation of Due Process, 28 U.S.C. § 1331(a), 28 U.S.C.§ 2241(a) & 5 U.S.C. §§ 702, 706(2)(b))

27. The plaintiffs hereby repeat each of the allegations previously set forth and incorporates them by reference.

28. The agency actions of the defendants in adopting and implementing the new rule violate the Due Process Clause of the Fifth Amendment of the United States Constitution in that the rule is arbitrary, contrary to law, and fundamentally unfair.

29. Such agency actions further violated the Due Process Clause in that they resulted in the deprivation of liberty and property interests of the plaintiff without fair warning and sufficient process.

Count Two

(Violation of Equal Protection, 28 U.S.C. § 1331(a), 28 U.S.C.§ 2241(a) & 5 U.S.C. §§ 702, 706(2)(b))

30. The plaintiffs hereby repeat each of the allegations previously set forth and incorporate them by reference.

31. The new rule draws an arbitrary distinction between those inmates with more than 150 days remaining on their sentences and those with less than 150 days remaining on their sentences.

32. The agency actions of the defendants in adopting and implementing the new rule therefore violate the Equal Protection Clause of the Fifth Amendment of the United States Constitution in that they treat the plaintiffs differently from similarly-situated convicts without any

rational basis for doing so.

Count Three
(Violation of Ex Post Facto, 28 U.S.C. § 1331(a), 28 U.S.C.§ 2241(a)
& 5 U.S.C. §§ 702, 706(2)(b))

33. The plaintiff hereby repeats each of the allegations previously set forth and incorporates them by reference.

34. The actions of the defendants in adopting and implementing the new rule violate the Ex Post Facto Clause of the United States Constitution in that the new rule retroactively increases the punishment to be imposed on the plaintiffs.

Count Four
(5 U.S.C. §§ 553, 702, & 706(2)(A) & , 18 U.S.C. §§ 3621 & 3622)

35. The plaintiffs hereby repeat each of the allegations previously set forth and incorporate them by reference.

36. The agency actions of the defendants in adopting and implementing the new rule violate the Administrative Procedure Act in that the new rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law governing the Bureau of Prisons' designation authority.

Count Five
(5 U.S.C. §§ 553, 702, & 706(2)(C) & , 18 U.S.C. §§ 3621 & 3622)

37. The plaintiffs hereby repeat each of the allegations previously set forth and incorporates them by reference.

38. The agency actions of the defendants in adopting and implementing the new rule violate the Administrative Procedure Act in that the new rule is in excess of statutory jurisdiction, authority, and limitations, and short of statutory right.

Count Six
(5 U.S.C. §§ 553, 702, & 706(2)(D))

39. The plaintiffs hereby repeat each of the allegations previously set forth and incorporate them by reference.

40. The agency actions of the defendants in adopting and implementing the new rule violate the Administrative Procedure Act in that the new rule was enacted without observance of procedure required by law.

Count Seven

41. The plaintiffs hereby repeat each of the allegations previously set forth and incorporate them by reference.

42. The Defendants are equitably estopped from implementing and adopting the new rule because of the violations set forth in Counts One through Six herein.

Injunctive Relief is Necessary

43. Injunctive relief is necessary to prevent the defendants from implementing their plan to transfer the plaintiffs from the Community Confinement Center to the Federal Correctional Institution at Tallahassee, Florida, Eglin, Florida, and Yazoo City, Mississippi, respectively, on February 12, 2003, February 26, 2003, and February 19, 2003, respectively. BOP has acknowledged that the plaintiffs will not receive relief through its administrative processes, making the only recourse available this request for judicial injunctive relief. The Plaintiffs aver that they will suffer irreparable harm without the issuance of injunctions prohibiting the Defendants from implementing their plan to imprison the Plaintiffs at Tallahassee Federal Correctional Institute and FCP Eglin, and FCI Yazoo City and enjoining the Defendants (with respect to Plaintiff Estes)to follow that portion of their newly-promulgated rule that allows inmates with less than 150 days

remaining on their sentences to serve them in community corrections centers. To the contrary, the Defendants will suffer little, if any, harm if they are required to enforce their new policy by allowing the Plaintiffs to enter the Spanish Fort Community Corrections Center Program. In fact, they will only be made to comply with their own new policy, since the Plaintiff Estes's sentence is less than 150 days. This is certainly in the public interest. Moreover, the Plaintiffs are likely to succeed on the merits because the Defendants are not complying with their own new policy, which policy clearly violates the Plaintiff rights under the Due Process Clause, the Equal Protection Clause, and the Ex Post Facto Clause of the United States Constitution. The Plaintiffs further averthat their remedy at law is inadequate to address the harms she will suffer by the failure of the Defendants to follow the court-mandated prison sentence of four (4) months at the Spanish Fort Community Corrections Center.

Requested Relief

WHEREFORE, the plaintiffs pray for the following:

44. That the agency actions and resulting new rule be adjudged and decreed to be unconstitutional under the Due Process, Equal Protection, and Ex Post Facto clauses of the United States Constitution;

45. That the agency actions and resulting new rule be adjudged and decreed to violate the Administrative Procedure Act;

46. That the defendants be enjoined from incarcerating the Plaintiffs at Tallahassee Federal Correctional Institution, FCP Eglin, and FCI Yazoo City and that, instead, they be enjoined to allow the service of their sentences, in accordance with their own new policy, at the Spanish Fort Community Corrections Center.

47. That plaintiffs be granted such other relief as the case may require or may be deemed

just and proper by the Court.

Jury Demand

The plaintiff demands a trial by jury on all issues triable of right by a jury, pursuant to Federal Rule of Civil Procedure 38(b).

Dated: February 4, 2003

Respectfully submitted,

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APRIL MIZELL ESTES, ANTONIO RICO MADDEN, AND SCOTTY SUMMERS	*	
	*	**Civil No.**
v.	*	
FEDERAL BUREAU OF PRISONS, Et al.	*	
	*	
	*	

* * * * * * * * * * * * *

MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY **INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

The plaintiffs, by and through their attorneys, hereby moves this Honorable Court, pursuant to Federal Rule of Civil Procedure 65, for a temporary restraining order and preliminary injunction enjoining the defendants from incarcerating the Defendant at Tallahassee Federal Correctional Institution and FCP Eglin or any other Federal Correctional Facility other than the Spanish Fort, Alabama, Community Corrections Center on the basis of the Bureau of Prisons' new rule regarding imprisonment, which is the subject of this action. In support of this motion, the plaintiffs state the following:

Procedural History

As stated in the complaint and petition for writ of habeas corpus filed and served on February 5, 2003 the plaintiffs are putative federal prisoners, ordered to serve a term of four months (Estes)

and five months (Madden and Summers), respectively. The Federal Bureau of Prisons ("BOP") initially designated them to serve their sentences at the Spanish Fort Community Corrections Center. In response to a recent Department of Justice determination that terms of imprisonment may not be served at community confinement centers ("CCCs"), BOP announced a rule prohibiting the initial designation of prisoners to CCCs and requiring that all inmates it had assigned to CCCs who have more than 150 days remaining to serve be transferred to more restrictive facilities.

The plaintiff Estes received notice that she would not be allowed to serve her sentence at Spanish Fort Community Corrections Center on December 27, 2002, when she reported as directed. However, the U.S. Marshal for this district was notified of a November reporting date to Spanish Fort and failed to notify the Plaintiff in time for her to report. Accordingly, her reporting date was moved back to a date after the effective date of the new rule. Plaintiff Madden has been ordered to report to FPC Eglin on February 26, 2003. Plaintiff Estes' reporting date is February 19, 2002. Plaintiff Summers has been ordered to report to FCI Yazoo City on February 12, 2003.

Factual Background

The Plaintiff Estes was sentenced on August 27, 2002. The Court allowed a voluntary self-surrender. In November of 2002, BOP advised the United States Marshal for the Southern District of Alabama that the Defendant's reporting date would be in November. However, through no fault of the Plaintiff, neither the United States Marshal nor the Bureau of Prisons notified the Plaintiff of her reporting date. She was later notified to report to the Spanish Fort Community Corrections Center on December 27, 2002. When she reported as directed, she was told that she could not be accepted into that program but would be required instead to report to prison at Tallahassee Federal Correctional Institute. This was due to the new BOP ruly announced December 20, 2002.

The Plaintiff Estes is currently employed at First Southern Mortgage Company. Her

ability to work and pay restitution will not be affected by her participation in the Community Corrections Center program. Moreover, the Spanish Fort Community Corrections Center provides drug counseling and treatment through a treatment program called The Shoulder, which is located on the premises. On the other hand, her reporting to Tallahassee will severely restrict her ability to pay restitution and continue employment. The Plaintiff is divorced and has two children, one of whom who was born in May of 2002. She is expecting another child in May of 2003. Her oldest child is four years of age.

Plaintiff Madden was sentenced on November 6, 2002, to a recommended community confinement center sentence of five (5) months. Madden's wife is currently suffered from a ruptured disc and undergoing medical tests and procedures to treat this condition. His wife (Constance) was sentenced at the same time as Madden to a home confinement sentence.

Plaintiff Summers was sentenced on September 27, 2002, to a split sentence with 5 months to serve at the Spanish Fort Community Corrections Center. The district court at his sentencing ordered that his sentence be at Spanish Fort. However, the judgment and commitment order signed by Judge Butler reflects that the sentence is a recommended sentence. At the time of the sentencing, all parties, including the Court, recognized that Summers needed mental health and drug abuse treatment specifically at The Shoulder, a private residential facility located on the premises of Spanish Fort. FCI Yazoo City has acknowledged to Summers that FCI Yazoo City is not the right place for him to receive treatment as ordered by the court.

Legal Standard

Four factors must be considered in evaluating whether interim relief is appropriate: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the

plaintiff will succeed on the merits, and (4) the public interest. *See Suntrust Bank v. Houghton Mifflin Co.,* 268 F.3d 1257, 1265 (11th Cir. 2001); *Zardui-Quintana v. Richard*; 768 F.2d 1213, 1216 (11th Cir. 1985); *Canal Authority v. Callaway,* 489 F.2d 567, 573 (5th Cir. 1974). "The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant 'clearly carries the burden of persuasion' as to the four prerequisites." *Callaway*, 489 F.2d at 573. A preliminary injunction may be issued to protect the plaintiff from irreparable injury and to protect the district court's power to render a meaningful decision after a trial on the merits. *Id., citing Johnson v. Radford,* 449 F.2d 115 (5th Cir. 1971). The primary reason for the issuance of a preliminary injunction is the need to prevent the judicial process from being rendered futile by the Defendants' action or refusal to act. *Callaway,* 489 F.2d at 573; Wright & Miller, Federal Practice, Civil § 2947.

In evaluating the four factors, the Fourth Circuit applies a "hardship balancing test." *Direx Israel*, 952 F2d at 811. That test, originally established in *Blackwelder*, requires examination of the traditional four factors, but gives special weight to the likelihood of irreparable harm to the plaintiff. The primary inquiry for the Court is a balancing of the harm to the plaintiff if relief is not granted against the harm to the defendant if relief is granted. *See Blackwelder*, 550 F.2d at 195. If that balance "tips decidedly in favor of the plaintiff," relief should be granted, as long as the plaintiff has raised legal issues "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation . . . ." *Rum Creek*, 926 F.2d at 539 (internal quotations and citations omitted). As the balance tips away from the plaintiff, a stronger showing on the merits is required. *See id.*

Argument

- **The Balance of Hardships Favors the Plaintiff.**

"Although the decision to grant or deny interlocutory injunctive relief depends upon a flexible interplay among all the factors considered, it is clear that 'the two more important factors

are those of probable irreparable injury to the plaintiff without a decree and of likely harm to the defendant with a decree.'" *Maryland Undercoating Co., Inc. v. Payne*, 603 F.2d 477, 481 n.9 (4th Cir. 1979) (citing *Blackwelder*, 550 F.2d at 196). In this case, the balance of hardship favors the plaintiff.

- **The Plaintiffs Will Suffer Irreparable Harm if Incarcerated at Tallahassee.**

The Plaintiffs were initially ordered to report to Spanish Fort. Because of the new BOP policy, Spanish Fort refused to accept them. Their removal to Tallahassee, Eglin, and Yazoo City will prevent, at least temporarily, Estes's ability to make restitution. Estes continues to be employed and will be employed if allowed to serve her sentence at Spanish Fort. Moreover, the Plaintiff's late term pregnancy dictates that Spanish Fort is the more appropriate place for her to serve her sentence. She will be close to her family, particularly her mother, with whom she enjoys a very close relationship. Her removal to Tallahassee will require the birth of the child while in prison and will prevent her care of her other child, who is less than one year old.

Plaintiff Madden's removal to Eglin will prevent him from caring from his ailing wife and from supporting her while she convalesces. Plaintiff Summers will be precluded from receiving the treatment he needs at The Shoulder.

- **The Transfer Will Violate the Plaintiffs' Civil Rights.**

As discussed in more detail below, the BOP's adoption and enforcement of the new rule violates the plaintiff's rights under the Due Process, Equal Protection, and *Ex Post Facto* clauses of the United States Constitution. The United States Supreme Court has held on more than one occasion that a violation of constitutional rights constitutes irreparable injury warranting interim injunctive relief. *See Elrod v. Burns*, 437 U.S. 347 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). In *Elrod*, the Court held that "the loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. 347, 373. In approving injunctive relief, the Court stated that since constitutional injury was "either threatened or in fact being impaired at the time relief was sought," a preliminary injunction was appropriately granted to protect the plaintiffs from irreparable injury. *Id.* at 374; *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (upholding preliminary injunction in First Amendment challenge to statute and regulation prohibiting certain lewd entertainment).

Although this case does not raise First Amendment questions–which were the issue in *Elrod* and *Doran*–the rights at issue in this case are also rights "which must be carefully guarded against infringement." *See Elrod*, 427 U.S. at 373. Thus, it seems clear that a finding of irreparable injury should be made here, as well. *See Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417 (11th Cir. 1984) (housing discrimination constitutes irreparable injury); *Clemons v. Board of Education of Hillsboro, Ohio*, 228 F.2d 853 (6th Cir. 1956) (segregation constitutes irreparable injury); *Pathways Psychosocial v. Town of Leonardtown, MD*, 223 F. Supp. 2d 699 (D. MD 2002) (discrimination on the basis of disability is presumed to be irreparable injury); *Able v. United States of America*, 847 F. Supp. 1038 (E.D.N.Y. 1994) (discrimination on the basis of sexual orientation constitutes irreparable injury).

The rationale behind treating constitutional injuries as irreparable is that "no other form of redress appears available if the preliminary injunction is denied, and, later on the merits, a constitutional violation is found to have occurred." *Rum Creek Coal Sales*, 926 F.2d at 361. This is particularly true in cases, as here, in which the constitutional violation "might likely become permanent . . . due to the extended time necessary to complete the litigation." *Compare Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (granting preliminary injunction to protect Equal Protection rights of woman seeking to enroll at the Citadel).

- **The Transfer Places Plaintiff's Financial Solvency at Risk.**

The Plaintiff will present evidence that, if she is transferred to FCI-Tallahassee, she will lose her job and her ability to manage the family finances.

In *Doran*, the Supreme Court held that the threat of "substantial loss of business and perhaps even bankruptcy . . . sufficiently [met] the standards for granting interim relief, for otherwise a favorable final judgment might be useless." *Doran*, 422 U.S. at 932. Likewise, the Fourth Circuit has noted that "even where a harm could be remedied by money damages at judgment, irreparable harm may still exist where the moving party's business cannot survive absent a preliminary injunction . . . ." *Hughes Network Systems, Inc. v. Interdigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

The Transfer Will Cause Great Harm to Plaintiffs' Families.

Plaintiff Estes and her family will suffer great personal harm if the proposed transfer is permitted to occur. In considering whether injunctive relief is appropriate, assessment of harm to non-parties is appropriate. *See Ward v. Walsh*, 1 F.3d 873, 879-80 (9th Cir. 1993).

The plaintiff will present evidence that she will be removed from her children. The plaintiff also has a very close familial relationship with her mother. The harm that the family will suffer as a result is not compensable by money damages and therefore constitutes irreparable injury. *See* 13 *Moore's Federal Practice*, § 65.06[2] (Matthew Bender 3d ed.). Moreover, Estes is gainfully employed at First Southern Mortgage Company in Mobile and needs this employment to support her two children and one expected arrival in May of 2003. Her placement at Spanish Fort Community Corrections Center will not interfere with this employment.

Plaintiff Madden is in need of continuing employment, which is possible at Spanish Fort.

His wife is in need of support, both financial and emotional, while she convalesces from the medical procedures she is undergoing.

Plaintiff Summers is in need of continuing drug abuse and mental health treatment at The Shoulder.

B. The Defendants Will Suffer No Harm From the Granting of Injunctive Relief.

The rule at issue in this case was adopted in response to a legal opinion issued by the Department of Justice's Office of Legal Counsel. There is no suggestion in that opinion or elsewhere of any rationale for the rule other than a perceived inconsistency in the application of the law. Indeed, representatives of BOP have noted that enforcement of the rule is coming at great effort and cost for the agency because it requires the administrative expense of redesignation and the practical expense of transfer and housing at higher security institutions. Rather than imposing a burden, the entry of a temporary restraining order and/or preliminary injunction is likely to save the defendants time and money. Given this framework, the Court should find that the balance of the hardships weighs in favor of the plaintiff. *See Blackwelder Furniture Co.*, 550 F.2d at 196 ("[t]he decision to grant preliminary relief cannot be intelligently made unless the trial court knows how much the precaution will cost the defendant. If it costs very little, the trial court should be more apt to decide that the threatened injury is 'irreparable' for purposes of interlocutory relief.").

C. The Public Interest Weighs in Favor of the Plaintiff.

In considering the balance of the hardships, "the court should consider wherein lies the public interest, sometimes described as preserving the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court." *Maryland Undercoating Co.*, 603

F.2d at 481 (citing *Blackwelder*, 550 F.2d at 195). In addition to preserving the status quo–maintaining the plaintiff's designation to Spanish Fort CCC, the Court may consider a variety of other "public interests" which pertain in this case, including safeguarding constitutional rights, maintaining the integrity of the rulemaking process, fostering respect for the criminal justice system, preserving the family unit, and protecting small business. *See* 3 Moore's Federal Practice § 65.22[3] (Matthew Bender 3d ed.). All these interests weigh in favor of the plaintiffs.

- **The Plaintiffs Have Demonstrated a Likelihood of Success on the Merits.**
  - **Statutory Claims**.

As a statutory matter, the new BOP rule is invalid for three separate and independent reasons. First, Congress did not delegate to BOP the authority to impose any rule retroactively. Second, in enacting the new rule, BOP did not comply with the notice and comment provisions of the Administrative Procedure Act (the "APA"). Third, the substance of new rule is contrary to the statutes that govern B.O.P. designation. These statutory grounds for setting aside the new BOP rule are addressed below in turn.

1. The Retroactive Nature of the New BOP Rule

In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), the Supreme Court squarely held that an administrative agency cannot promulgate retroactive rules unless Congress has expressly authorized the agency to engage in retroactive rulemaking. *See id.* at 208. *Bowen* involved a Medicare reimbursement limit promulgated by the Secretary of Health and Human Services that expressly provided for retroactive application. However, although the governing statute generally authorized the Secretary to promulgate reimbursement rules, it did not specifically authorize him to give them retroactive effect. In the absence of such explicit

authorization, the Court held that Secretary exceeded his statutory authority in giving the reimbursement limit retroactive effect, and it declared the rule invalid. *See id.* at 209-216. Because "[r]etroactivity is not favored in the law," the Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 208.[1]

The new BOP rule at issue here is invalid under *Bowen.* It plainly is retroactive in nature insofar as it calls for the transfer of prisoners, like the plaintiff, who already have been designated to, and begun serving their sentences at, CCCs. At the same time, Congress has not authorized BOP to promulgate retroactive rules. Indeed, BOP's authority to promulgate rules derives from 18 U.S.C. § 4001(b)(1), which states:

> The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof . . .

18 U.S.C. § 4001(b)(1) (emphasis added).[2] This grant of authority does not even mention–much less authorize in express terms–the promulgation of retroactive rules. Under *Bowen*, BOP therefore exceeded its authority in giving the new rule in question retroactive effect, and the new rule must be declared invalid.

2. The Failure to Afford Notice and the Opportunity to Comment

It is undisputed that BOP is imposing the new rule in question without having provided

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[1] The holding of *Bowen* was applied to BOP in *Cort v. Crabtree*, 113 F.3d 1081 (9th Cir. 1997). In that case, the Ninth Circuit precluded the retroactive application of a BOP "change notice" that imposed new restrictions on eligibility for an early release program.

[2] Pursuant to 28 C.F.R. § 0.96(o), the Attorney General has delegated this authority to BOP.

public notice that it intended to promulgate the rule and without having provided opportunity for interested persons to participate in the rule making. For an agency such as BOP to enact a substantive rule, however, the APA requires that the agency provide such prior notice and opportunity to comment. *See* 5 U.S.C. § 553(b)-(d). If an agency fails to comply with these simple requirements, the resulting rule is invalid. *See National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001).

As set forth below, this notice and comment requirement applies with full force and effect to BOP's imposition of the new rule in question. Because the BOP failed to comply with this requirement of the APA, the new rule is invalid on this ground as well.

a. *The APA applies to rules promulgated by the BOP.* As a general matter, the APA applies to all federal agencies. *See Harris v. Mutual of Omaha Cos.*, 992 F.2d 706, 712 (7th Cir. 1993) ("the APA applies to all actions of federal agencies unless explicitly prohibited by statute"). With regard to BOP, 18 U.S.C. § 3625 does impose some limits on the applicability of the APA, but these limits are in no way implicated here. *See Martin v. Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998) (section 3625 does not preclude application of APA to BOP rule making); *Lasora v. Spears*, 2 F. Supp.2d 550, 556 n.5 (S.D.N.Y. 1998) (same); *Wiggins v. Wise*, 951 F. Supp. 614 (S.D.W.V. 1996) (same); *see also* 1984 U.S.C.C.A.N. 3182, 3332 n.4 and accompanying text (section 3625 does not apply "promulgat[ion] of generally applicable regulations; thus the APA continues to apply to the regulation-making authority of the BOP").

Section 3625 states: "The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision or order" of BOP. As explained in *Wiggins* and in the provision's legislative history, however, this provision exempts from the requirements of the APA only "adjudications" of individual cases, not rule

making. *Id.*, at 618-69; S. Rep. 98-225, 149, 1984 U.S.C.C.A.N. 3182, 3332. Indeed, the plain language of the provision does not refer to the section of the APA governing rule making (§ 553). It refers only to the sections of the APA that govern individual adjudications (§§ 554 and 555). Moreover, it exempts only BOP "determination[s]," "decision[s]" and "order[s]"–terms that relate to adjudications, not rulemaking. *See Wiggins*, 951 F. Supp. at 618 n.2; 1984 U.S.C.C.A.N. 3182, 3332 ("The phrase 'determination, decision or order' is intended to mean adjudication of specific cases as opposed to promulgating of generally applicable regulations.").

Section 3625 therefore does not exempt the new BOP rule at issue here from the notice and comment requirements of the APA.

b. *BOP's new initiative is a "rule" for the purposes of the Administrative Procedure Act.* Even though the new BOP initiative is not published in the Code of Federal Regulations and has been presented by BOP in informal memorandum format, it nevertheless constitutes a "rule" under the APA. The APA defines the term "rule" broadly to encompass the "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4) . This broad definition does not require that the promulgation be formally designated as a rule or regulation, *see American Paper Institute v. E.P.A.*, 660 F.2d 954, 959 n.13 (4th Cir. 1981), and it has encompassed unlikely documents such as memoranda of understanding, *see Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669 (4th Cir. 1977).

The BOP initiative at issue here imposes a blanket restriction on the designation of all inmates sentenced to a term of imprisonment. It is plainly "an agency statement of general . . . applicability and future effect designed to . . . prescribe law or policy." It therefore is a "rule" under the APA and, as such, is subject to the APA's notice and comment requirement.

c. *The exception for interpretive rules, statements of policy, or rules of agency procedure do not apply.* The APA exempts from its notice and comment requirement "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The new BOP rule, however, is "substantive" (or "legislative") in nature and therefore is not subject to this exemption. *See Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995) (distinguishing between "substantive" or "legislative" rules and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

First, the BOP rule is not interpretive. A rule is substantive and not interpretive if it "effects a change in existing law or policy." *D.H. Blattner & Sons, Inc. v. Secretary of Labor*, 152 F.3d 1102, 1109 (9th Cir. 1998); *see also Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99-100 (1995) (exception for interpretive rule would not apply if agency "adopted new position inconsistent with . . . existing regulations"); *Wiggins*, 951 F. Supp. at 619-620 (BOP rule which changed eligibility for early release program and imposed new restrictions was legislative, not interpretive, even though change turned on new "interpretation" of statutory term). In addition, a rule is substantive and not interpretive if it does more than "simply state what the administrative agency thinks a statute means" and "remind affected parties of existing duties"–that is, if it actually "implement[s] the statute" and "has the force and effect of law." *Chen Zhou Chai*, 48 F.3d at 1340-41. By BOP's own admission, the new rule marks a change in BOP policy. And it most certainly does much more than simply state what a statute means; it actually implements the statute. Moreover, in true legislative fashion, it creates from whole cloth the 150-day rule–a rule which derives from no statute and therefore which could not possibly be "interpretive" in

nature.[3]

Second, the BOP rule is not a general statement of policy. "A rule is a general statement of policy if it does not establish a binding norm and leaves agency officials free to exercise their discretion." *Chen Zhou Chai*, 48 F.3d at 1341; *see also Lincoln v. Vigil*, 508 U.S. 182 (1993) (general statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power"). The BOP rule is the polar opposite; it imposes a *per se* rule prohibiting sentences of imprisonment from being served in full at CCCs. Thus, because the rule clearly establishes a binding norm and leaves agency officials no room to exercise discretion, it is not a general statement of policy exempt from the APA's notice and comment requirement.

Third, the new BOP rule is not a rule of agency organization, procedure, or practice. Rules of agency organization, procedure, or practice concern "the manner in which [] parties present themselves or their view-points to the agency." *RSM, Inc. v. Buckles*, 254 F.3d 61, 68-69 (4th Cir. 2001). They are not rules that "alter the rights or interests of the parties." *Id.* The BOP rule has nothing to do with how parties present themselves or their view-points to the agency; to the contrary, it alters the rights and interests of inmates. It therefore is not a rule or practice or procedure, but rather a substantive rule to which the notice and comment requirement of the APA applies.

For these reasons, the APA required BOP to provide notice and an opportunity to comment before promulgating the new rule. BOP's disregard of this requirement renders the rule

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[3] Although in *Reno v. Koray* the Supreme Court suggested in *dicta* that a particular BOP program statement was an interpretative rule, 515 U.S. 50, 61, other BOP program statements have been held to be substantive in nature. *See Wiggins*, 951 F. Supp. at 620 n.4 & accompanying text.

invalid.

3. The Substance of the New Rule is Contrary to Law.

The new BOP rule also is improper because it represents an improper application of the statutes which govern BOP. In conducting a review of an agency's application of a statute, a court must first determine whether "Congress has directly spoken to the issue." *Capitol Mortgage Bankers, Inc. v. Cuomo*, 222 F.3d 151, 155 (4th Cir. 2000) (quoting *Chevron U.S.A., Inc v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984). If the intent of Congress is clear, the court must give effect to it, and no deference is given a contrary agency interpretation. *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* Although, in determining whether a construction is permissible, great deference is to be given to agency actions subject to notice-and-comment rule making, a much lesser measure of deference is applied if the agency action was not subject to such constraints. *See Kimberlin v. D.O.J.*, 150 F. Supp.2d 36, 49 (D.D.C. 2001) (citing *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000).

No deference is warranted here because, as set forth, the new BOP rule contradicts the clear intent of Congress.

BOP's new rule is based on a recent finding by the U.S. Department of Justice's Office of Legal Counsel that BOP's practice of using community confinement centers as a substitute for imprisonment "contravenes well-established case law and is inconsistent with U.S.S.G. § 5C1.1." *See* Memorandum from Kathleen Hawk Sawyer to Federal Judges of 12/20/02 & attached Memorandum from M. Edward Whelan, III to Larry D. Thompson of 12/13/02. That legal opinion is in error.

The opinion rests on the faulty premise that BOP's decisions regarding designation of prisoners are constrained by the language of section 5C1.1 of the federal Sentencing Guidelines, which distinguishes, for purposes of sentencing decisions, between "community confinement" and "imprisonment." Although BOP's designation authority and the federal court's sentencing authority were both conferred by the Sentencing Reform Act of 1984, it is clear from the language of the statutes and the legislative history that Congress did not intend to limit BOP's designation discretion by authorizing promulgation of the Sentencing Guidelines.

BOP's authority to assign the location of imprisonment is firmly established by 18 U.S.C. section 3621(b), which provides that:

> The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate *any available penal or correctional facility* that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable . . . .(empahsis added).

There is no question that a community confinement center is a "penal or correctional facility." The adoption of the Sentencing Reform Act and promulgation of the United States Sentencing Guidelines did not change that fact.

The Department of Justice suggests in its legal memorandum advising adoption of the new rule that, because section 3621 was adopted at the same time as the Sentencing Reform Act, Congress intended to limit BOP's discretion in accordance with the Act. That plainly is not the case. Section 3621 is derived from 18 U.S.C. section 4082(a), which governed designation of prisoners prior to enactment of section 3621. The new law made two changes. First, it placed custody of federal prisoners directly in the Bureau of Prisons, rather than in the Attorney General.

Second, it provided a list of factors that BOP could consider in making designations. According to the Senate Report that accompanied the new law, "[t]he Committee, by listing factors for the Bureau to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the Bureau in any exercise of its existing discretion . . . ." S. Rep. No. 98-225 (1984) at 141-142. Thus, BOP retains its authority to designate prisoners to institutions as it sees fit.

The Supreme Court recognized this authority and its importance in *Reno v. Koray*, 515 U.S. 50 (1995). In *Koray*, the Court considered whether a federal prisoner is entitled to credit against his sentence under 18 U.S.C. section 3585(b) for time spent on pretrial release at a halfway house. In deciding that the respondent was not entitled to credit against his sentence, the Court emphasized that the determining factor was not the conditions of confinement, but whether the inmate was "subject to BOP's control" while residing at the halfway house. *Koray*, 515 U.S. at 58-59. The Court held that "[t]he phrase 'official detention facility' in § 3585(a) [] must refer to a correctional facility designated by the Bureau for the service of federal sentences, where the Bureau retains the discretion to 'direct the transfer of a prisoner from one penal or correctional facility to another.'" *Id.* at 58 (citing 18 U.S.C. § 3621(b)). Implicit in this holding is that CCCs are penal or correctional facilities to which BOP may properly designate inmates. Applied in this case, the holding in *Koray* yields the conclusion that the plaintiff is serving a term of imprisonment–whatever his location–as long as he remains subject to BOP's control.

Even if BOP were constrained to distinguish between "community confinement" and "imprisonment" in making designations, this would not prevent placement of those serving terms of imprisonment at halfway house facilities. 18 U.S.C. section 3622(c) explicitly grants BOP the authority to permit an inmate to "work at paid employment in the community while continuing in

official detention at the penal or correctional facility." Thus, the work release privilege offered at community confinement centers does not, of itself, distinguish between "community confinement" and "imprisonment."

Beyond work release, BOP treats much more restrictively those inmates at halfway houses who are serving terms of imprisonment than it does those serving terms of probation or supervised release, or even those who are completing terms of imprisonment and are at the halfway house pursuant to the "ten-percent rule." This approach assures severe punishment while still permitting BOP to consider in making designations "the nature and circumstances of the offense . . . the history and characteristics of the prisoner . . . and the purposes for which the sentence to imprisonment was determined to be warranted . . ." as mandated by 18 U.S.C. section 3621(b).

- **Constitutional Claims.**

BOP's new rule, as demonstrated below, violates several constitutional provisions which guard against retroactive governmental action. First, the rule violates the plaintiff's rights protected by the Due Process Clause. Second, the rule violates the plaintiff's right to Equal Protection under the law. Finally, the rule violates the constitutional prohibition against *Ex Post Facto* laws. Since the new rule violates these constitutional provisions, the court should enjoin the Bureau of Prisons from implementing this rule.

- **BOP's New Rule Violates the Plaintiff's Due Process Rights Under the Fifth Amendment.**

The BOP's new rule violates several specific guarantees protected the Due Process Clause of the Fifth Amendment. First, the Due Process Clause protects a defendant's rights to be sentenced on the basis of accurate information. Second, the Due Process Clause guarantees that

an individual will have fair notice of changes in the law which affect him. Third, the Due Process Clause protects a defendant's right to a legitimate expectation of finality in his sentence. The BOP's new rule runs afoul of these guarantees.

a. Retroactively Implementing the Bureau of Prisons Policy Violates the Defendant's Right to be Sentenced on the Basis of Accurate Information.

The Due Process Clause forbids reliance on inaccurate information in sentencing. *See Parks v. United States*, 832 F.2d 1244, 1246 (11th Cir. 1987) ("[d]ue process protects a defendant's right not to be sentenced on the basis of false information and invalid premises") *United States v. Inglesi*, 988 F.2d 500, 502 (4th Cir. 1993); *United States v. Lee*, 540 F.2d 1205, 1210-11 (4th Cir. 1976); *United States v. Roper*, 716 F.2d 611, 615 (1983); *Winslow v. Murray*, 836 F.2d 548 (Table), 1987 WL 30257 at *4 (4th Cir. 1987) (unpublished opinion) ("[r]eliance on materially inaccurate information or assumptions in sentencing violates the due process clause"). *See also United States v. Tucker*, 404 U.S. 443, 447 (1972) (vacating sentence imposed not "in the informed discretion of a trial judge, but . . . founded at least in part upon misinformation of a constitutional magnitude"); *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988) ("defendants, including those who plead guilty, have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information");; *United States v. Katzin*, 824 F.2d 234, 241 (3d Cir. 1987)("[s]entencing based on a mistaken factual assumption violates due process"); *Cf. United States v. Addonizio*, 442 U.S. 178 (1979)(holding that section 2255 did not authorize court to change sentence based on *accurate* information that later changed) (emphasis added).

At the time that the plaintiff was sentenced (and for many years prior to that time as well), the BOP permitted inmates to serve their sentences at CCCs. Consistent with this practice, Judge

Smalkin recommended that the Bureau of Prisons place the plaintiff in such a facility. In accordance with this recommendation, the Bureau of Prisons designated the plaintiff to serve his sentence at VOA. The BOP now claims that its practice was improper and that the designation is invalid.

The BOP's abrupt change in course has materially altered the plaintiff's sentence. Had the plaintiff proceeded to sentencing with an understanding that BOP would prohibit service of terms of imprisonment at CCCs, the plaintiff, the plaintiff's counsel and the court could have considered other options for accomplishing their sentencing goals. Based on the record at sentencing, it is clear that other options would have been pursued. As the Supreme Court has repeatedly recognized: "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Lynce v. Mathis*, 519 U.S. 433, 445-46 (1997), citing *Weaver v. Graham*, 450 U.S. 24, 32 (1981).

The fact that the court was not empowered to order that the plaintiff be designated to a particular facility does not defeat his claim. In *United States v. Hollenbeck*, 932 F. Supp. 53, 58 (N.D.N.Y. 1996), the BOP provided the court at the time of sentencing with misinformation about a defendant's eligibility for placement in a drug treatment program. In holding that the defendant's due process rights were violated, the court noted that the defendant was entitled to be sentenced based on accurate information "[n]otwithstanding any discretion the Bureau exercises." *Id.* The court further observed:

> In this case it does not appear that the Bureau intentionally misrepresented the truth to the court – more likely, one hand did not know what the other was doing. From the perspective of what process is due defendant under the Fifth Amendment however, the distinction between a mistake and a lie is of little moment. Suffice it to say that the argument that this court is without power to

> remedy a sentence it erroneously imposed in reliance on misinformation, whether innocent or not, originating from the executive branch of government cannot be sustained.

Id. at 58-59.

It would be fundamentally unfair to permit BOP to effectively alter the plaintiff's sentence based on a new rule about which the sentencing court had no knowledge.

In *Culter v. United States,* ___ F. Supp. 2d ___ (D.D.C. Civ. No. 03-0106), the court held that BOP was estopped on equitable and due process principles from enforcing its new rules and granted permanent injunctive relief.

b. Retroactively Implementing the BOP Policy Violates the Defendant's Right to Fair Notice of Changes in the Law.

The Due Process Clause protects an individual's interest in "fair notice and repose that may be compromised by retroactive legislation: a justification sufficient to validate a statute's prospective application may not suffice to warrant its retroactive application." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994); *See also Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964)(finding due process violation based on an unforseeable judicial enlargement of a criminal statute). The reason retroactive governmental action is more problematic than prospective action is because it "can deprive citizens of legitimate expectations and upset settled transactions." *Landgraf*, 511 U.S. at 266 n. 18.

This is the case with the retroactive application of BOP's new rule regarding community confinement centers. This change in approach was in no way forseeable. As noted above, neither the plaintiff, his counsel, counsel for the Government, the court, nor even BOP itself was could have anticipated that the Department of Justice would, of its own initiative, suddenly declare that that the manner in which BOP had been designating prisoners for many years was

unlawful. The parties, especially the plaintiff, had a legitimate expectation that the BOP practice in effect at the time of the offense, the conviction, the sentencing, and the defendant's designation by the BOP, would remain in effect. BOP's new rule clearly deprived the defendant of a legitimate expectation, and it certainly upset the "settled transaction" of the plaintiff's designation.

As noted above, if the defendant, his counsel, or the court had been given fair notice of BOP's new rule, they could have conformed their actions in accordance with it by assessing different sentencing options. In this case, the parties were deprived of that opportunity. Accordingly, the requirement of fair notice inherent in the Due Process Clause dictates that BOP should not be permitted to retroactively implement the new rule.

c. Retroactively Implementing the BOP Rule Violates the Defendant's Right to an Expectation of Finality in his Sentence.

The Due Process Clause limits the Government's ability to enhance a defendant's sentence "after [a] defendant has served so much of [it] that his expectations as to its finality have crystallized and it would be fundamentally unfair to defeat them." *United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1985). In *Lundien*, the court inadvertently pronounced the defendant's sentence as two concurrent ten-year sentences. *See id.* at 983. Three days after the sentencing, the Government brought to the court's attention that it had intended to impose a total term of twenty years. *See id.* Two days later, the court corrected the sentence to conform with its original intention. *See id.* While the court recognized that the Due Process Clause placed limits on the court's ability to change the defendant's sentence, it found that the defendant's constitutional rights were not violated. *See id.* at 987. Specifically, it reasoned that "[o]n these facts we cannot say that [the defendant's] expectations as to the final length of his sentence had

crystallized to the extent that it would be unfair to defeat them by allowing the district court to correct an inadvertent mistake and effectuate the sentence that it plainly intended originally to impose." *Id.*

Unlike the defendant in *Lundien*, the sentencing judge intended the plaintiffs to serve their sentences at the community corrections center. In addition, this case is not on appeal (indeed the time for appeal either by the defense or the Government has lapsed)–a circumstance that could potentially undercut an expectation of finality. Under these circumstances, it would fundamentally unfair to defeat the legitimate expectation of finality the plaintiffs have with regard to his sentence. Accordingly, retroactively applying the new BOP policy to enhance the severity of the defendant's punishment may not be permitted under the Due Process Clause.

2. BOP's Different Treatment of Individuals Designated to CCCs Violates the Equal Protection Clause.

In treating defendants designated to community confinement centers who have more than 150 days remaining on their sentences differently than those with fewer than 150 days remaining to serve, BOP's new rule violates the Equal Protection Clause. This constitutional guarantee is a "direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleyburne Living Center*, 473 U.S. 432, 440 (1985)(citations omitted).

The Supreme Court's equal protection jurisprudence is well-established: unequal treatment of similarly situated individuals, in the absence of a suspect classification, cannot stand unless the Government establishes that such treatment is rationally related to a legitimate Governmental interest. *See id.* at 442 (striking down unequal treatment of mentally retarded individuals under rational basis standard). In the context of equal protection challenges by prisoners, the government's dissimilar treatment must bear a rational relationship to a legitimate

penal interest. *See Williams v. Lane*, 851 F.2d 867, 881 (7th Cir. 1988)(holding that inmates' equal protection rights were violated when programs and living conditions for protective custody inmates were unequal in comparison with general population and not justified by security concerns) (citing *Hudson v. Palmer*, 468 U.S. 517, 522-23 (1984)).

While the Government may permissibly treat some groups differently, it "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446; see also Faulkner v. Jones, 10 F.3d 226, 230 (4th Cir. 1993) ("[w]hen regulation undertakes to define a class . . . the criteria for defining the class must be related to the purpose of the regulation" and that a regulatory classification may violate the Equal Protection Clause when it "is made for a purpose unrelated to the purpose of the regulation or which is broader than that appropriate for the regulation . . . ." (emphasis in original)). As the Supreme Court observed in *Romer v. Evans*: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare." 517 U.S. 620, 633 (1996)(invalidating legislation under the rational basis standard of review)(citations omitted). The *Romer* Court further cautioned that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision [of Equal Protection]." Moreover, "where the [defendant's] interest is substantial and the government's interest in putting forth the policy in question is unquantifiable or de minimus, such a policy cannot withstand even rational basis review." *Dillingham v. INS*, 267 F.3d 996, 1009 (9th Cir. 2001)(invalidating INS decision not to recognize foreign expungements for drug offenses on equal protection grounds under rational basis standard) (citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

Applying these well-established constitutional principles to this case reveals that the BOP's new policy violates the Equal Protection Clause. The policy creates two classifications: those currently designated to CCCs who have more than 150 days remaining on their sentences and those similarly situated who have less than this amount of time remaining on their sentences. The Government has offered no justification–much less one rationally related to a legitimate penal interest–in support of the different treatment of these two groups.

The "150 day rule" is wholly arbitrary–precisely the result decried by the Supreme Court in its Equal Protection jurisprudence. The classification is not based on nature of an inmate's offense of conviction, the severity of an inmate's criminal record, nor an inmate's compliance BOP and/or CCC regulations. In fact, the classification creates the anomalous result that those convicted of more severe offenses or sentenced to a longer period of confinement will remain in community confinement if less than 150 days remain on their sentences while those convicted of less serious offenses or even sentenced to a shorter period of confinement would be transferred to a prison for the remainder of their sentences. In addition, individuals who have abided by all BOP and facility rules who have more than 150 days remaining their sentences would be transferred to a more restrictive prison but those who previously have been disciplined (but not expelled) for violating applicable regulations would be permitted to remain in community confinement if less than 150 days remain on their sentences.

The only apparent justification for the 150-day aspect of the new rule is administrative efficiency: it allows BOP to avoid redesignating all inmates serving sentences at CCCs. As a matter of constitutional law, however, the Government's interest in administrative convenience is an inadequate justification, even under the rational basis standard. *See Dillingham v. INS*, 267 F.3d 996, 1010 (9th Cir. 2001). *Dillingham* involved an Immigration and Naturalization Service

("INS") rule that refused to recognize expungements of foreign convictions while recognizing expungement of national or local convictions because of the alleged administrative difficulty in verifying valid foreign expungements. The court recognized the INS' interest in administrative efficiency, but concluded that such a minor interest could not overcome rational basis review. *See id.* at 1009.

Of course, even if administrative convenience could justify dissimilar treatment for equal protection purposes, it should not support the Government's proposed action in this case. Under the rule, BOP is expending considerable resources to determine which inmates are eligible for transfer, to redesignate them, to transfer them to more restrictive correctional facilities, and then to transfer them back as they approach the end of their sentences. Applying the new rule to those with more than150 days remaining to serve on their sentences requires more, not fewer, resources than maintaining the status quo and applying the new rule prospectively.

In this case, the equal protection violation is even more egregious because BOP is not following its own newly-announced rule with respect to Estes. Estes's sentence of 120 days falls under the 150 day limitation announced by BOP in its new rule. Notwithstanding this lower sentence, BOP insists that Estes serve her time in prison, not community confinement center. Thus, BOP is imposing upon her more stringent requirements than others similarly situated, those with less than 150-day sentences, who are serving time in community confinement centers. If the Court allows the BOP policy to stand, it cannot retreat from applying the policy equally to all who come under its umbrella.

3. The BOP's New Rule Violates the *Ex Post Facto* Clause of the Constitution.

BOP's new rule also must be invalidated because it violations the *Ex Post Facto* Clause

of the Constitution. This constitutional safeguard prohibits the Government from retroactively imposing or increasing punishment. *See California Dept. of Corrections v. Morales*, 514 U.S. 499, 504-505 (1995); *United States v. De La Mata*, 266 F.3d 1275, 1286 (11th Cir. 2002)(holding that *ex post facto* clause required reversal of one conviction and stating general rule that *ex post facto* clause prohibits the enactment of statutes which ". . . (2) make more burdensome the punishment for a crime after its commission. . .") Specifically, Article 1, Section 9 of the Constitution provides in relevant part: "No . . . *ex post facto* Law shall be passed." However, this constitutional provision is not merely a limit on the legislative branch, it applies to an agency engaged in administrative rulemaking, as well. *See United States v. Ellen*, 961 F.2d 462, 465 (4th Cir. 1992).

Judge Motz's decision in *Knox v. Lanham*, 895 F. Supp. 750 (D. Md. 1995), *aff'd* 76 F.3d 377 (4th Cir. 1996), 1996 WL 37201, is instructive in determining whether an agency action constitutes a law for *ex post facto* purposes. In *Knox*, prisoners serving life sentences challenged two rules: a Maryland Division of Correction Directive which removed them to higher security facilities and an unwritten Parole Commission policy which required prisoners to be on active work release (and therefore in lower security facilities) before receiving parole recommendations. *See id.* at 753-54. Judge Motz concluded, based on the principles set forth by the Fourth Circuit in *Ellen*, that both measures were laws for purposes of the *Ex Post Facto* Clause. With regard to the Division of Correction Directive, he noted that it was a rule promulgated pursuant to legislatively delegated authority and it left no discretion with any prison administrator or the Parole Commission. With regard to the unwritten Parole Commission policy, he noted that the policy left no discretion to the parole commissioners; rather, it was "entirely inflexible in its operation." *Id.* at 756. In reaching his conclusion that the rules should be treated as laws for

purposes of *Ex Post Facto* analysis, Judge Motz observed: "Law is not sophistry; constitutional mandates cannot be avoided and individual rights violated by exalting form over substance." *Id.* at 756.

Like the measures in *Knox*, the BOP rule at issue in this case is a law for *Ex Post Facto* purposes. There can be no credible claim that the rule is merely a guide that could be "discarded where circumstances require."[4] Indeed, the Government seeks to enforce the new rule without regard to an individual's circumstances. It is intended to be entirely inflexible in its operation. Accordingly, it is not exempt from the challenges under the *Ex Post Facto* Clause of the Constitution.[5]

Simply stated, "a law violates the *Ex Post Facto* Clause when it is retrospective–i.e., when it applies to events predating its enactment–and it disadvantages those to whom it applies." *Plyer v. Moore*, 129 F.3d 728, 734 (4th Cir. 1997) (citation omitted). An individual is "disadvantaged" within the meaning of the *Ex Post Facto* Clause by "any provision which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission or which deprives one charged with crime of any defense available according to law at the time when the act was

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[4] Of course, the label the Government gives the rule is not controlling for *Ex Post Facto* purposes. *See Smith v. Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000). If this were the case, an agency could immunize itself from *Ex Post Facto* scrutiny by referring to new rules as mere guides.

[5] In *Warren v. Baskerville*, 233 F.3d 204 (4th Cir. 2000), the Fourth Circuit held that the Virginia Parole Board did not violate the *Ex Post Facto* Clause by revoking previously earned good time credits when it revoked parole. The court cited with approval its earlier *Ex Post Facto* analysis in *Ellen*, but concluded that the Virginia Parole Board's actions did not have the force and effect of law. *Id.* at 207. Apart from federalism concerns which were central to its decision, *see id.* at 208, the court noted that the provision at issue put the defendant on notice that he could, at the Board's discretion, be reincarcerated for the unserved portion of the term of imprisonment originally imposed. *See id.* at 207-08. No such factors are present in this case.

committed." *Id.* (citation omitted). The BOP rule at issue here violates the *Ex Post Facto* Clause because it makes more burdensome the punishment for a crime after its commission.

With regard to measures that retroactively make punishment more burdensome, the ultimate inquiry is whether a changed procedure "produces a sufficient risk of increasing the measure of punishment" for which an individual was sentenced. *Morales*, 514 U.S. at 509. For example, in *Morales*, the Court addressed an *ex post facto* challenge to an amendment to California's parole regulations, which increased the time between parole hearings from one year to three years. The Court rejected the *ex post facto* challenge because the changed regulations created only a "speculative and attenuated" risk of prolonging an inmate's imprisonment.

In contrast, in *Lynce v. Mathis*, 519 U.S. 443 (1997), the Supreme Court held that retroactive cancellation of early release credits which had the effect of returning a parolee to prison violated the *Ex Post Facto* Clause. The Court reasoned that since the changed procedures "prolonged his imprisonment," he was, unlike the inmate in *Morales*, "unquestionably disadvantaged." *Id.* at 446-47. *See also Plyer,* 129 F.3d at 735 (holding that retroactive application of new supervised release furlough statute to inmates who had more than six months remaining on their sentences violated *Ex Post Facto* Clause because amendment increased length of incarceration). *United States v. Parriett,* 974 F.2d 523 (4th Cir. 1992)(holding that amendment to supervised release statute violated *ex post facto* clause because it constituted "*post hoc* alteration of the punishment for an earlier offense"). In addition, in *Lynce*, the Court noted that the provision at issue which altered the petitioner's sentence "did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely; rather in made ineligible for early release a class of prisoners who were previously who were previously eligible – including some, like [the] petitioner, who had actually been

released." 519 U.S. at 898 (emphasis in original).

Based on these principles, the BOP's new rule violates the *Ex Post Facto* Clause. First, it applies retrospectively to events predating its enactment. At the time of her offense of conviction, the date of conviction, the time of sentencing, at the time she was first ordered to report, the BOP's practices authorized service of a sentence of imprisonment in community confinement. The new BOP rule prohibits service of a sentence of imprisonment in community confinement, and proposes transfer of those with recommendations of community confinement at CCC's to more restrictive facilities.

Second, the individuals affected by the new BOP rule are unquestionably disadvantaged– they are more than simply "at risk" of being subject to an increased measure of punishment–they will be forced to serve their CCC-contemplated sentences in prison facilities. Thus, the "risk" is actually a certainty in Ms. Estes' case. Of course, incarceration at a federal correctional institution clearly constitutes more burdensome punishment than imprisonment at a community corrections center.[6]

In addition, the Supreme Court has noted that the lack of fair notice is a critical element to the constitutional prohibition against *ex post facto* laws. *See Weaver v. Graham*, 450 U.S. 24, 30 (1981); *see also Smith*, 223 F.3d at 1195-96 (holding that the new Oklahoma Department of

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[6] There can be no claim that the new BOP rule does not constitute more burdensome punishment within the meaning of the *Ex Post Facto* Clause. Indeed, the Supreme Court has repeatedly held that "retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the *Ex Post Facto* Clause because such credits are 'one determinant of petitioner's prison term. . .and. . .[the petitioner's] effective sentence is altered once this determinant is changed. . . . [T]he removal of such provisions can constitute an increase in punishment, because a 'prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decisiion to plea bargain and the judge's calculation of the sentence to be imposed." *Lynce*, 519 U.S. at 898, citing *Weaver,* 450 U.S. at 32.

Corrections regulation which disadvantaged prisoner violated *Ex Post Facto* Clause because it was not forseeable). There can be no contention that the Government gave fair notice as to this new policy. Certainly, it was not forseeable to the defendant, his attorney, or the sentencing judge.

For these reasons, BOP's new rule is invalid as a violation of the *Ex Post Facto* Clause.

CONCLUSION

Wherefore, for the foregoing reasons and any others than may appear after a hearing on this motion, the Plaintiffs respectfully request that this Honorable Court enter a temporary restraining order and preliminary injunction preventing Defendants from ordering them incarcerated at FCI Tallahassee, FPC Eglin, or FCI Yazoo City, or any other federal prison instead of Spanish Fort Community Corrections Center on the basis of the new rule.

REQUEST FOR HEARING

Plaintiffs respectfully request a hearing on this motion as provided by the local rules and standing orders of this Court and pursuant to Fed. R. Civ. P. 65.

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