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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2001

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FRANCISCO PACHECO-CAMACHO,

Petitioner,

v.

ROBERT A. HOOD, Warden, Federal Correctional  
Institution, Sheridan, Oregon,

Respondent.

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Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I.

IN CONSTRUING THE PHRASE “TERM OF IMPRISONMENT” IN THE FEDERAL GOOD TIME STATUTE, DID THE NINTH CIRCUIT ERR IN FINDING THE STATUTE AMBIGUOUS WHERE

- 1) ELSEWHERE IN THE SAME SUBSECTION OF THE STATUTE, THE PHRASE UNAMBIGUOUSLY MEANS THE SENTENCE IMPOSED BY THE TRIAL JUDGE, NOT TIME ACTUALLY SERVED;
- 2) “TERM OF IMPRISONMENT” IS USED THROUGHOUT THE FEDERAL CRIMINAL STATUTES TO MEAN THE SENTENCE IMPOSED; AND
- 3) LEGISLATIVE HISTORY DEMONSTRATES CONGRESS CONSCIOUSLY CHOSE THE PHRASE “TERM OF IMPRISONMENT” TO LINK GOOD TIME TO THE SENTENCE, NOT TIME ACTUALLY IN CUSTODY.

### II.

EVEN ASSUMING THE NINTH CIRCUIT CORRECTLY FOUND THE FEDERAL GOOD TIME STATUTE IS AMBIGUOUS, DID THE COURT’S APPLICATION OF ADMINISTRATIVE DEFERENCE, RATHER THAN THE RULE OF LENITY, VIOLATE THE HOLDING OF *BIFULCO v. UNITED STATES*, 447 U.S. 381 (1980), AND THE REASONING OF JUSTICE SCALIA’S CONCURRING OPINION IN *CRANDON v. UNITED STATES*, 494 U.S. 152 (1990), WHERE THE MORE SEVERE INTERPRETATION RESULTS IN SEVEN MORE DAYS INCARCERATION FOR EVERY YEAR OF EVERY FEDERAL SENTENCE GREATER THAN ONE YEAR AND LESS THAN LIFE.

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PETITION FOR WRIT OF CERTIORARI TO  
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FOR THE NINTH CIRCUIT

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The petitioner, Francisco Pacheco-Camacho, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 30, 2001.

**1. Opinions Below**

On November 29, 2000, the District Court sentenced Mr. Pacheco-Camacho to be

“imprisoned for a term of” a year and a day for being found in the United States after being deported, in violation of 8 U.S.C. § 1326 (Appendix A). After Mr. Pacheco-Camacho challenged the computation of his good time under 28 U.S.C. § 2241, the District Court found the good time statute to be ambiguous, but denied relief, on January 10, 2001 (Appendix B). The Ninth Circuit Court of Appeals affirmed the judgment on November 30, 2001, in a published opinion -- *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001) (Appendix C). The petitioner requested rehearing and suggested rehearing *en banc* on the grounds raised herein. The court denied rehearing on January 23, 2002 (Appendix D).

## **2. Jurisdictional Statement**

This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **3. Statutory Provisions**

The federal good time statute states in full:

(b) Credit toward service of sentence for satisfactory behavior.-

- (1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner’s life, may receive credit toward the service of the prisoner’s sentence, beyond the term served, of up to 54 days at the end of each year of the prisoner’s term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner’s sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making

satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b). The Bureau of Prisons (BOP) regulation ties calculation of good time credits to time actually in custody rather than to the length of the sentence imposed, stating in pertinent part:

Pursuant to 18 U.S.C. § 3624(b), . . . an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This time is prorated when the time served by the inmate for the sentence during the year is less than a full year.

28 C.F.R. § 531.20. The BOP has promulgated a 265-page program statement implementing this regulation (Appendix E).<sup>1</sup>

#### **4. Statement Of The Case**

Mr. Pacheco-Camacho presents a question of federal statutory construction that affects about 95% of federal prisoners sentenced since 1987, those eligible for good time under 18 U.S.C. § 3624(b). Each well-behaved prisoner who is serving more than one year and less than life imprisonment loses seven days for every year of the sentence based on the BOP's misconstruction of the good time statute. Mr. Pacheco-Camacho raises the issue in its most pristine form: he is eligible for good time under the first phrase of Section 3624(b) because he is serving a "term of imprisonment" of over one year; but he is denied the 54 days specified in the statute because the BOP treats "term of imprisonment" later in Section 3624(b) as referring to time actually served, not the sentence imposed by the judge. Under the BOP's construction, a prisoner receives a maximum

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<sup>1</sup>Appendix E sets out the most pertinent parts of the program statement, the entirety of which is on the BOP website at [ww.bop.gov](http://ww.bop.gov). The BOP also promulgated another program statement following enactment of the Prison Reform Litigation Act that primarily adjusted the time of vesting. Program Statement 5884.01 (Sept. 29, 1997). When credits are vested is not at issue in this case.

of 47 days good time credit for each year of his sentence, as opposed to the 54 days mandated by Congress.

Both the District Court and the Ninth Circuit upheld the BOP interpretation by finding the statute to be ambiguous, then deferring to the agency. *Pacheco-Camacho*, 272 F.3d at 1270 (“Finding the meaning of ‘term of imprisonment’ as used in Section 3624(b), to be ambiguous,...”). There is no dispute that Mr. Pacheco-Camacho was both entitled to the maximum amount of good time allowed by statute and eligible for good time credit based on his sentence to a term of imprisonment of one year and a day. Before the Court is the purely legal question whether “term of imprisonment” in 18 U.S.C. § 3624(b) means the judge’s sentence to incarceration or time actually spent in custody.

## **5. Reasons For Granting The Writ**

Certiorari is extraordinarily appropriate in this case for two reasons. First, the Ninth Circuit failed to follow this Court’s statutory construction precedent, both in finding statutory ambiguity and in construing an ambiguous statute. Second, the misconstruction of the good time statute affects the actual time in custody of about 95% of prisoners sentenced under the federal guidelines, at a cost of about \$58 million every year.

In Section 3624(b), Congress directed in the statute that credit be calculated at 54 days per year for each year of a “term of imprisonment.” This Court’s precedent provides abundant bases for concluding Congress meant “term of imprisonment” to be the time imposed by the judge. The plain meaning, the use of the phrase elsewhere in the same subsection, as well as past statutory amendments, all support the prisoner’s construction. “Term of imprisonment” is used throughout the federal criminal and sentencing statutes, and it always means the sentence imposed, not time actually served.

Nevertheless, the BOP, both in its regulations and its program statement, substituted for “term of imprisonment” the phrase “for each year served.” 28 C.F.R. § 523.20(a); Program Statement 5880.28 at 1-48 (“It is essential to learn that [good time credit] *is not* awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served”) (emphasis in original). This interpretation is unambiguously wrong. Any statutory ambiguity in a penal statute, under this Court’s controlling precedent, should be resolved by the rule of lenity, not deference to the executive agency.

The BOP’s misconstruction of the good time statute has a significant effect on prisoners and the public fisc. The BOP agrees its method of calculation costs prisoners seven days for every year of a sentence. There are currently approximately 137,435 federal prisoners serving guideline sentences greater than one year and less than life.<sup>2</sup> The mean sentence imposed is about 9.5 years.<sup>3</sup> At seven days per year, the time involved is over 25,000 years ( $137,435 \times 7 \times 9.5 \div 365 = 25,039$ ). At \$22,174.00 per year for non-capital incarceration expenditures,<sup>4</sup> the meager seven days on each year of a prisoner’s sentence could amount to over \$554 million in taxpayer money that Congress did not intend or authorize to expend on incarceration for current prisoners, and over \$58 million more for each new year.

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<sup>2</sup>FEDERAL BUREAU OF PRISONS: QUICK FACTS (Jan. 2002); *available at* [www.bop.gov/fact0598.html](http://www.bop.gov/fact0598.html).

<sup>3</sup>Telephone interview with Jerry Gayes, Federal Bureau of Prisons, Office of Research (Apr. 15, 2002).

<sup>4</sup>Telephone interview with Sue Allison, Federal Bureau of Prisons, Office of Research (Apr. 15, 2002).

**A. THE FEDERAL GOOD TIME STATUTE IS NOT AMBIGUOUS BECAUSE “TERM OF IMPRISONMENT” PLAINLY MEANS THE SENTENCE TO INCARCERATION IMPOSED BY THE JUDGE UNDER BASIC RULES OF STATUTORY CONSTRUCTION.**

The statute at issue expressly links calculation of good time to the “term of imprisonment”:

[A] prisoner who is serving a *term of imprisonment* of more than 1 year . . . may receive credit toward the service of the prisoner’s sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner’s *term of imprisonment*, beginning at the end of the first year of the *term* . . . [C]redit for the last year or portion of a year of the *term of imprisonment* shall be prorated and credited within the last six weeks of the sentence.

18 U.S.C. § 3624(b) (emphasis added). As reflected in Mr. Pacheco-Camacho’s judgment form, the trial judge sentenced him to be “imprisoned for a term of” a year and a day (Appendix A). Given the words in the judgment, the plain meaning of “term of imprisonment” is the period of incarceration to which the judge sentences a prisoner. *Barnhart v. Sigmon Coal Co.*, 122 S.Ct. 941, 950 (2002) (In all statutory construction cases, the “first step ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.’”) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); *United States v. LaBonte*, 520 US 751, 757 (1997) (“[W]e assume that in drafting this legislation, Congress said what it meant.”).

**1. The Ninth Circuit’s Opinion Contradicts This Court’s Controlling Authority By Giving “Term Of Imprisonment” Different Meanings In The Same Subsection Of The Same Statute.**

The Ninth Circuit’s opinion holds that “term of imprisonment” means different things in different parts of Section 3624(b). The BOP and the Ninth Circuit correctly treat “term of imprisonment” in the opening phrase of Section 3624(b), limiting good time eligibility to prisoners serving “a term of imprisonment of more than 1 year,” as unambiguously meaning the sentencing

court's judgment, not time actually served. See Program Statement 5880.28 at 1-45 ("the very shortest sentence that can be awarded [good time credit] is a sentence of at least 1 year and 1 day."); *Pacheco-Camacho*, 272 F.3d at 1267. In fact, Congress enacted a technical amendment to Section 3624(b) "to clarify that the good time credit can be earned for the first year of the term of imprisonment." Criminal Law And Procedure Technical Amendments Act, Pub.L. 99-646 16,100 Stat. 3595; H.R. Rep. 99-797 at 21, *reprinted in* 1986 U.S.C.C.A.N. at 6144. Mr. Pacheco-Camacho, with his year-and-a-day sentence, is undisputably eligible for good time credits. However, where the same language appears later in the same statute, the Ninth Circuit treated the same phrase, "term of imprisonment," as ambiguous and construed it to mean time actually served. *Pacheco-Camacho*, 272 F.3d at 1270.<sup>5</sup>

This Court has instructed that identical words -- such as "term" and "term of imprisonment" -- in different parts of the same act are intended to have the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Despite this instruction, and without addressing the unambiguous first use of "term of imprisonment" to mean the sentence of imprisonment, the Ninth Circuit gave the identical words "term of imprisonment" and "term," as they appear the second, third, and fourth times in the statute, the entirely different meaning of time actually served. Application of the *Sullivan* principle renders "term of imprisonment" unambiguous throughout the subsection. Because the words refer to the sentence imposed in the opening phrase of the subsection, the words should have the same meaning throughout the statute.

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<sup>5</sup>The Ninth Circuit explicitly found "the meaning of 'term of imprisonment,' as used in § 3624 (b), to be ambiguous," in several places in its opinion. *Pacheco-Camacho*, 272 F.3d at 1269-70.

The Ninth Circuit mentioned the principle of intra-statutory consistency and cited *Sullivan v. Stroop*, but only in connection with Section 3624(a), not the first use of “term of imprisonment” in Section 3624(b). *Pacheco-Camacho*, 272 F.3d at 1271. The Ninth Circuit noted that the use of “term of imprisonment” in Section 3624(a), a different subsection of the same statute, unequivocally refers to “term of imprisonment” as the judge’s sentence. *Pacheco-Camacho*, 272 F.3d at 1271. But the Ninth Circuit declined to reconcile this inconsistency based on *United States v. Johnson*, 529 U.S. 53 (2000). The Ninth Circuit’s reliance on *Johnson* to ignore subsection (a) is misplaced for three reasons: 1) *Johnson* involved construction of a statutory term this Court found to be unambiguous; 2) *Johnson* did not involve the same terminology and certainly not the word used in the same subsection; and 3) unlike *Johnson*, there is an express reference between the relevant statutory subsections -- Section 3624(a) sets the release date as the “term of imprisonment, less any time credited toward the service of the prisoner’s sentence as provided in section (b).”

As a result, the Ninth Circuit misapplied controlling Supreme Court authority in failing to treat “term of imprisonment” as having the same meaning throughout the good time statute.

**2. The Ninth Circuit’s Opinion Is Inconsistent With The Use Of “Term Of Imprisonment” Throughout The Federal Sentencing Statutes To Mean The Trial Judge’s Sentence, Not Time Actually Served In Custody.**

The federal sentencing statutes consistently use “term of imprisonment” to refer to the judge’s sentence to imprisonment. In Title 18, Congress used “term of imprisonment” dozens of times in the Comprehensive Crime Control Act of 1984, of which the good time statute is a part, and always used it to mean the judge’s sentence, not actual time in custody (Appendix F).<sup>6</sup> Even under

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<sup>6</sup>Appendix F is a list summarizing references to “term of imprisonment” in Title 18 sentencing statutes.

the earlier parole statutes, “term of imprisonment” meant the entire sentence -- time in custody plus time on supervision. *See Raines v. U.S. Parole Commission*, 829 F.2d 840, 844 (9th Cir. 1987) (“Term of imprisonment includes time on parole”). The statutes authorizing the Sentencing Commission, and the federal sentencing guidelines themselves, refer to “term of imprisonment” as the sentence imposed by the judge. 28 U.S.C. § 994 (referring throughout to the incarceration ordered in a criminal case as involving a “term of imprisonment”); U.S.S.G. § 5C1.1 (Imposition Of A Term Of Imprisonment).<sup>7</sup>

When Congress chose “term of imprisonment,” no ambiguity was injected into the statute. Congress used words with a well-understood meaning. The Ninth Circuit’s claim to the contrary conflicts with this Court’s precedent that requires the courts to construe statutory terms “in their context and with a view to their place in the overall statutory scheme.” *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)); *see also Jones v. United States*, 527 U.S. 373, 389 (1999) (statutory language must be read in context); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (same).

**3. Congress’s Direct Expressions Of Its Intent On The Precise Issue Demonstrates The Meaning Of “Term Of Imprisonment” As The Sentence Imposed, Not Time Served.**

The Ninth Circuit’s opinion resorted to legislative history but overlooked critical and unequivocal indicia of Congress’s intent that “term of imprisonment” meant incarceration imposed in the judgment, not time served. *Pacheco-Camacho*, 272 F.3d at 1269.

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<sup>7</sup>Appendix G reproduces sections of Section 994 with the uses of “term of imprisonment” highlighted; Appendix H does the same for U.S.S.G. § 5C1.1.

a. *Section 3624(b)'s Authors Intended That The Credit Be Assessed Against The Term Of Imprisonment, Resulting In 85% Minimum Service.*

In 1996, Senator Joseph Biden declared the good time statute's 85% minimum -- 54/365 = 15% -- in no uncertain terms:

I was the co-author of that bill. In the Federal courts, if a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85 percent of that time - 8.5 years, which is what the law mandates. *You can get up to 1.5 years in good time credits, but that is all.* And we abolished parole. So you know you'll be in prison for at least 8.5 years.

141 Cong. Rec. S2348-01 (Feb. 9, 1996) (emphasis added). Contrary to Senator Biden's statement, the BOP never allows for less than 87.2% actual service on a term of imprisonment (Appendix I).<sup>8</sup> Instead of the 1.5 years good time on a ten-year sentence articulated by Senator Biden, the BOP never allows more than 1.28 years off.

Congress's intent that 85% be the minimum sentence is also demonstrated by the choice of 54 as the number for good time credits. As originally proposed, the number of good time credits per year was 36 days or -- as stated in the legislative history -- "approximately 10%." Sen. Rep. 28-225, *reprinted in* 1984 U.S.C.C.A.N. at 3329-30. The ten percent of 365 was increased by half -- to 54 or 15% -- by the time the statute was enacted (36 + 18 = 54).

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<sup>8</sup>Appendix I is a demonstrative exhibit that the BOP agreed correctly reflected the net effect of the maximum good time on sentences as amounting to about 47 days per year.

b. *By Amending The Statute To Eliminate Time-Served Language, Congress Manifested Its Intent To Credit Time Against The Sentence Imposed, Rather Than Time Actually Served.*

The history of the good time statute demonstrates that Congress consciously rejected calculation of good time against time actually served, rather than against the judge's sentence. Between 1902 and 1948, federal good time statutes allowed a well-behaved prisoner to serve less time by receiving credit for good time against "the term of his sentence." 18 U.S.C. § 701(1944). The time was deducted not from the time actually spent in prison, but from the term of the sentence in increments dependent upon the length of the term.

In 1948, Congress adopted new statutory language: "to be credited as earned and computed monthly." This language "was interpreted as requiring good time to be computed on the basis of actual time served rather than on the basis of the term of the sentence as imposed by the court." H.R. Report 86-935 (Aug. 18, 1959), *reprinted in* 1959 U.S.C.C.A.N. at 2519. The precise problem that developed before is now occurring: "The effect of this interpretation is to require well-behaved prisoners to serve longer periods of confinement than they would under the method of computation which had been used through half a century." *Id.* To solve this problem, Congress deleted the time served language and returned to the methodology of crediting against the sentence, not time served. *Id.* This is the precise methodology advocated by the petitioner (Appendix I).

In the current good time statute, Congress continued the pre-1948 and post-1959 formulation, eschewing language such as "credited as earned and computed monthly" and substituting "term of imprisonment." Thus, Congress specifically considered the loss of good time resulting from calculating against time actually served and rejected that method. When Congress amends a statute,

this Court presumes Congress intends its amendment to have real and substantial effect. *Stone v. INS*, 514 U.S. 386, 397 (1995). The Ninth Circuit’s construction adopts the time-served language rejected by Congress and rejects the length-of-sentence language adopted by Congress.

*c. Congress Intended Simplicity In Good Time Calculations, A Goal Which Is Thwarted By The BOP’s Methodology.*

The legislative history demonstrates that the Comprehensive Crime Control Act of 1984, of which Section 3624(b) is a part, purposefully sought simplification and predictability in the service of sentences. Congress specifically referred to the need for change from “the complexity of current law” and the need for good time credit at an “easily determined rate.” Senate Report No. 98-225, *reprinted in* 1984 U.S.C.C.A.N. at 3329-30. The formula of  $311 + 54 = 365$  is simple, predictable, and comprehensible, both by the public in general, and by the prisoner whom it most affects. Congress clearly intended Subsection (b) to “be considerably less complicated than under current law in many respects.” 1984 U.S.C.C.A.N. at 3329.

The use of “time served” rather than the “term of imprisonment” requires complicated and virtually incomprehensible calculations. The BOP’s method -- covering dozens of explanatory pages and an eight-step process that the BOP itself terms “arithmetically complicated” (Program Statement 5880.28 at 1-44) -- is the type of complexity Congress sought to avoid (Appendix J). The BOP does not even claim that the eight-step formula meets the statutory language -- the BOP formula only “best conforms” to the statute. Program Statement 5880.28 at 1-44-44A.

The only reason for resorting to this mathematical complexity is the error of keying the calculation to time “served,” not to the “term of imprisonment.” The actual calculations for individual prisoners depends on systems that are not generally or easily accessible to prisoners or the

public. The BOP's methodology thwarts Congress's intent to simplify good time calculations. *LaBonte*, 520 U.S. at 757 (agency interpretation must give way to Congress's intent).

*d. When Congress Means Time Served, Congress Says Time Served.*

When Congress means time actually served, Congress says "time served," not "term of imprisonment." In Section 3624(b), the phrase "time served" is only used to specify that the 54 days is credited "beyond the time served." Prisoners should receive 54 days credit against terms of imprisonment of over one year, based on 311 days in custody, plus 54 days "beyond the time served," to equal each year (365 days) of the sentence imposed by the judge. As reflected in Appendix I, the BOP's mathematical formula results in only 47 days for every year of a term of imprisonment.

Congress used the obvious way of communicating time actually served. Instead of using "term served," Congress deliberately used the "term of imprisonment." This Court refrains from concluding that differing language -- here "time served" and "term of imprisonment" -- "has the same meaning in [two subsections]. . . . We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Barnhart*, 122 S.Ct. at 952 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The use of contrasting terms in the same subsection demonstrates the terms have different meanings. Congress intended that the time actually in custody, plus the credit of up to 54 days, would mark the completion of the first year of a term of imprisonment. Therefore, the end of the first year of the prisoner's term, assuming the maximum good time under the statute, would be 311 days, plus 54 days "beyond the time served," to equal the first year of the "term of imprisonment."

e. *The Credit For The Last Year Or Portion Of A Year Is Assessed By Prorating The 54 Days Based On The Term Of Imprisonment.*

The last sentence of Section 3624(b) provides for assessment of the last percentage of 54 days in time to complete release programming: “Credit for the last year or portion of the year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.” This sentence relates primarily to the time at which good time will be credited to an inmate and recognizes that sentences are not imposed solely in full year increments. Most importantly, Congress once again employed “term of imprisonment” as the basis for computation, not time served. Contrary to the Ninth Circuit’s view, the 54 days is Congress’s determination of the maximum credit against a “term of imprisonment,” not a “bonus” or “windfall in the last year.” *Pacheco-Camacho*, 272 F.3d at 1269.

The language of Congress is easily applied by prorating the good time over the term of imprisonment (*e.g.*, 54 days on one year; 27 days for six months; 9 days for two months). The proration is subject to a simple mathematical formula:<sup>9</sup>

$$\frac{\text{daysleft}}{365} = \frac{x}{54} \quad \text{OR} \quad X = \frac{54 \times \text{daysleft}}{365}$$

Congress specifically directed that the proration be based on the “term of imprisonment” imposed by the court, not the time served by the inmate. The BOP’s “eight-step method by which the proration occurs,” which is set out in Appendix J, has no basis in Section 3624(b): the statute makes no

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<sup>9</sup> In counting parts of a day, “The fraction is always dropped.” Program Statement 5880.28 at 1-45.

reference to proration against time served, but rather specifically discusses proration in the context of “term of imprisonment.”

The last sentence of the statute is intended to require that the calculation be performed, and the time be credited, with adequate opportunity to plan for the projected release date. The proration is simple: after previous good time is credited, the last year or part of a year of the term of imprisonment is subject to credit of a proportion of 54 days up to the full amount, depending on the amount of the term remaining and the conduct of the prisoner. In this case, the last portion of a year is  $1/365$ , which limits good time to 54 days, not 47 days.

**B. EVEN ASSUMING THE NINTH CIRCUIT CORRECTLY FOUND THE FEDERAL GOOD TIME STATUTE TO BE AMBIGUOUS, THE COURT’S APPLICATION OF ADMINISTRATIVE DEFERENCE, RATHER THAN THE RULE OF LENITY, VIOLATES THE HOLDING OF *BIFULCO v. UNITED STATES*, 447 U.S. 381 (1980), AND THE REASONING OF JUSTICE SCALIA’S CONCURRING OPINION IN *CRANDON v. UNITED STATES*, 494 U.S. 152 (1990), WHERE THE MORE SEVERE INTERPRETATION RESULTS IN SEVEN MORE DAYS INCARCERATION FOR EVERY YEAR OF EVERY FEDERAL SENTENCE GREATER THAN ONE YEAR AND LESS THAN LIFE.**

Even assuming that “term of imprisonment” is ambiguous, the Ninth Circuit’s construction of the phrase should be rejected because this Court’s controlling precedent requires the application of the rule of lenity in construing an ambiguous penal statute. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Deference to the BOP’s administrative construction of an ambiguous penal statute “would turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with the doctrine of severity.” *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring). The Ninth Circuit erred in relying on administrative law principles that apply to statutory silence, rather than criminal law jurisprudence that controls statutory ambiguity in penal laws.

**1. Under This Court’s Controlling Precedent, Section 3624(b) Is A Penal Statute To Which The Rule Of Lenity Must Be Applied.**

The rule of lenity applies where reasonable doubt persists about a penal statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute. *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992); *Bifulco*, 447 U.S. at 387.<sup>10</sup> In *Bifulco*, this Court addressed statutory ambiguity in the punishment provisions of a federal drug statute. The defendant asserted that the drug conspiracy statute did not provide for a special parole term. The Court held that the rule of lenity “must” inform construction of ambiguous criminal statutes, and the rule of lenity “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.” 447 U.S. at 387.

The credit for good time law is a penal statute located in the criminal sentences section of Title 18. This Court has found that good time statutes are penal in several contexts. *See Lynce v. Mathis*, 519 U.S. 433 (1997) (*ex post facto*); *Weaver v. Graham*, 450 U.S. 24 (1981) (same); *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (*habeas corpus*). Under this Court’s well-established precedent, the federal good time law is a penal statute to which the rule of lenity applies.

**2. Chevron Deference Does Not Apply Under Justice Scalia’s Reasoning In Crandon.**

The Ninth Circuit erred in applying principles from civil administrative law regarding statutory silence or ambiguity under *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Because *Chevron* does not apply to ambiguous criminal statutes, any statutory ambiguity must be resolved in favor the of the prisoners under the rule of lenity. This Court addressed the

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<sup>10</sup>In *R.L.C.*, Justice Scalia, joined by Justices Kennedy and Thomas, stated that legislative history should not be used to resolve textual ambiguity in a criminal statute against a defendant. 503 U.S. at 307-10 (Scalia, J., concurring).

conflict between administrative construction of criminal statutes and the rule of lenity in *Crandon*.

In *Crandon*, several private executives, who accepted government positions, received payments from their private employer to compensate them for financial loss from their transfers to public employment. The Court had to decide whether a criminal code prohibition on supplemental compensation to government employees barred the payments. The Court ultimately concluded the statute did not prohibit the payments, partly based on the rule of lenity. *Crandon*, 494 U.S. at 168.

In a concurring opinion, Justice Scalia, joined by Justices O'Connor and Kennedy, addressed the weight to be accorded the executive branch's interpretation of the penal statute. The concurring Justices drew a clear line between the executive branch's duty to implement its interpretation of the statute and the judicial branch's function to interpret criminal statutes. 494 U.S. at 177 ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). The concurrence concluded that the executive's construction of a penal statute "is not even deserving of persuasive effect" because it "would turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with the doctrine of severity." *Crandon*, 494 U.S. at 178.

The Sixth Circuit has applied the *Crandon* concurrence to hold that the rule of lenity, rather than administrative deference, applies to statutory ambiguity regarding punishment. *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998). In declining to defer to the Parole Commission's interpretation of a statute, the Sixth Circuit stated that the agency's invocation of *Chevron* "overlook[s] a crucial distinction between criminal and civil statutes." *Dolfi*, 156 F.3d at 700. In criminal statutes, *Chevron* does not apply because the judicial branch, not the executive branch, is

entrusted with interpretation of the criminal code:

Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases. . . . The rule of lenity requires a stricter construction of “ambiguity in a criminal statute,” not deference . . . . When the Department of Justice made a similar argument in *Crandon v. United States*, 494 U.S. 152, 177-78, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990), Justice Scalia pointed out in a concurring opinion that *Chevron* does not require the judiciary to defer to executive interpretations of the criminal code.

*Dolfi*, 156 F.3d at 700 (citations omitted). The Ninth Circuit is now in conflict with the Sixth Circuit’s implementation of the *Crandon* concurrence.

While the BOP has certain tasks delegated to it by Congress, the maximum amount of good time on a term of imprisonment is not so delegated. The agency does not purport to lower the maximum good time; the regulation and program statement only claim to implement the good time statute. The federal courts, not the agency, are the arbiters of the meaning of ambiguous criminal statutes, and executive interpretation under *Chevron* “is not even deserving of any persuasive effect.” *Crandon*, 494 U.S. at 177 (Scalia, J., concurring). Interpretation of Section 3624(b) does not involve any executive expertise to which the courts should defer. *Dolfi*, 156 F.3d at 700 (“Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts.”). Any ambiguity in the criminal statute establishing the maximum good time credits should be resolved based on the rule of lenity, not the executive branch’s tendency toward severity in the treatment of its prosecutorial targets.

The Ninth Circuit’s error lies in its confusion of statutory ambiguity and statutory silence. Statutory ambiguity requires application of the rule of lenity. On the other hand, statutory silence permits the agency to fill the void as it sees fit within reason. *See, e.g., Lopez v. Davis*, 531 U.S. 230, 242 (2001). The BOP in the present case purports to be doing no more than construing the statute;

therefore, *Chevron* deference must give way to the rule of lenity.<sup>11</sup>

### 3. The Ninth Circuit's Reliance On *Sweet Home* Is Misplaced.

In avoiding application of the rule of lenity to this penal statute, the Ninth Circuit relied on a footnote in *Babbitt v. Sweet Home*, 515 U.S. 687 (1995). *Pacheco-Camacho*, 272 F.3d at 1271. The reliance is misplaced. The critical distinction is that the sentence in *Sweet Home* applies to “facial challenges to administrative regulations,” not “statutory ambiguity” as claimed in the Ninth Circuit’s opinion.

In *Sweet Home*, the plaintiffs sought a declaration that administrative regulations exceeded their statutory authorization. After analyzing the statute, the Court upheld the regulations as within the statute’s authorization without finding statutory ambiguity. *Sweet Home*, 515 U.S. at 703. The footnote upon which the Ninth Circuit relied addressed a supplemental argument that the rule of lenity applied to “facial challenges to administrative regulations,” where the regulations were unquestionably within the statute’s purview. *Sweet Home*, 515 U.S. at 704 n.18.

*Sweet Home* expressly distinguished its facts from the normal application of the rule of lenity to ambiguous criminal statutes, citing *United States v. Thompson/Center Arms*, 504 U.S. 505, 517-18 (1992). Thus, *Sweet Home* does not apply to the present case. There was no statutory ambiguity in that case -- the only question involved the facial validity of administrative regulations. Because the Court in *Sweet Home* did not address application of the rule of lenity to an ambiguous penal statute, the case is of no precedential value on that issue. *See Texas v. Cobb*, 532 U.S. 162, 169 (2001)

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<sup>11</sup>The Ninth Circuit further confused this point by reference to the BOP’s uncontested discretion to deny good time to undeserving prisoners. *Pachecho-Camacho*, 272 F.3d at 1270. But the BOP is not claiming discretion to lower the available good time, only to decide whether the prisoner’s conduct has been good. Whether a prisoner *should* receive the statutory credit is distinct from the amount set by statute, which the BOP has not purported to change.

(precedential weight is not accorded to opinions that did not address the question at issue).

In contrast to *Sweet Home*, Section 3624(b) is solely penal, and the petitioner only invoked the rule of lenity in the event the court found -- as it did -- that the statute was ambiguous. Any statutory ambiguity is therefore controlled by the line of cases, including *Thompson/Center* and *Bifulco*, requiring application of the rule of lenity to ambiguous penal statutes.

## **6. Conclusion**

This case presents a simple application of the rule of law. Yet it has tremendous consequences for individual prisoners, the separation of powers, and the public fisc. The failure to review this statutory misconstruction, and to carry out Congress's intent, will have far-reaching ramifications. This issue affects an extraordinary number of federal prisoners, delay in deciding the question will result in irreparable harm to prisoners who are completing their sentences every day, and grant of the writ will spare other Circuits years of litigation as other federal prisoners challenge the Ninth Circuit position. The Court should save both the expense and human toll of over-incarceration and implement Congress's sentencing statute as written.

DATED this \_\_\_\_ day of April, 2002.

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Stephen R. Sady  
Attorney for Petitioner

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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2001

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FRANCISCO PACHECO-CAMACHO,

Petitioner,

v.

ROBERT A. HOOD, Warden, Federal Correctional  
Institution, Sheridan, Oregon,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE AND MAILING

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I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on the counsel for the

respondent by depositing in the United States Post Office, in Portland, Oregon on this April \_\_, 2002,  
first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Timothy Simmons	Theodore Olson
Asst. U.S. Attorney	Solicitor General
1000 SW Third, Suite 600	Department of Justice,#5614
Portland, OR 97204	10th & Constitution, N.W.
	Washington, D.C. 20530

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this April \_\_, 2002, with first-class postage prepaid.

DATED this \_\_\_\_ day of April, 2002.

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Stephen R. Sady  
Attorney for Petitioner

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of April, 2002.

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Notary Public of Oregon