

# **SAMPLE MEMORANDUM IN SUPPORT OF 2241 PETITION**

## **Introduction**

Congress plainly stated in 18 U.S.C. § 3624(b) that federal prisoners serving more than one year “term of imprisonment” are to receive credit “beyond the time served” of up to 54 days at the end of each year of the “term of imprisonment.” “Term of imprisonment” is uniformly understood to mean the sentence imposed in the Judgment and Commitment Order. Thus, a 366-day (a year and a day) term of imprisonment, minus 54 credit for good time, equals 312 days incarceration. Despite this clear language, Mr. NAME has only been credited with \_\_\_\_\_ days of good time credit.

The Bureau of Prisons (BOP) made a fundamental error in applying the statute: the BOP administratively substituted “year served” for “term of imprisonment.” Rather than simply subtracting 54 days from the term of imprisonment of a year and a day, the BOP resorted to a circular series of mathematical computations that even the BOP describes as “arithmetically complicated” to reach the conclusion that 54 days good time credit, on a sentence to one year and a day, equals 46 days good time credit. This result is foreclosed by the plain meaning of the statute and other basic principles of statutory construction.

## **Procedural Background**

Mr. NAME was convicted in the District of STATE of OFFENSE, and received a sentence to \_\_\_\_\_ months incarceration on DATE OF SENTENCING, in *United States v. NAME*, CR CASE NUMBER. Mr. NAME is currently housed at the INSTITUTION in TOWN, STATE.

Mr. NAME was advised by the BOP that he would receive NUMBER days good time credit, based on a policy that allows a maximum of only 47 days for each year of the term of

imprisonment. Mr. NAME objected and informed the BOP that he believed that he should receive 54 days of good time credit as stated in 18 U.S.C. § 3624(b). [Mr. NAME filed a BP-9 , Request for Administrative Remedy. The BOP response was that its Program Statement 5880.28 called for a calculation that would result in 47 days good time rather than 54 days for each year of the term of imprisonment. Mr. NAME sought an additional regional and nation appeal. The Warden’s calculation was upheld. [Mr. NAME has fully exhausted his administrative remedies.] **OR** [Although Mr. NAME did not exhaust his administrative remedies, this Court may consider the merits of his petition because this case falls within the exceptions to the exhaustion doctrine. Because the BOP is bound by an incorrect policy, any administrative remedy would be futile.]

**I. The Plain Meaning of 18 U.S.C. § 3624(b)(1) Provides That Mr. NAME Should Receive 54 Days Credit On The “Term Of Imprisonment.”**

The statute governing the question of good time credits is 18 U.S.C. § 3624(b)(1). That statute provides in pertinent part:

[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.

Contrary to the statute’s use of “term of imprisonment” as the operative time, in Program Statement 5880.28, the BOP has established a procedure whereby a prisoner’s 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.” 28 C.F.R. § 523.20; PS 5880.28 at 1-48. Under the Program Statement, a prisoner sentenced to one year and a day term of imprisonment earns not 54 days of good time credit, but only 47 days.

The plain language of the statute compels the result Mr. NAME seeks. The statute itself

refers not to “time served” but to “term of imprisonment” as the basis for calculating good time credits. When a statute speaks with clarity to the issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished. *Pavelic & LeFlore v. Marvel Group*, 493 U.S. 120 (1989); *Rubin v. United States*, 449 U.S. 424, 430 (1981). As stated in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989):

Plain meaning of legislation should be conclusive, except in rare cases in which literal application of statute will produce result demonstrably at odds with intention of its drafters; in such cases, intention of drafters, rather than strict language, controls.

*See generally* Sutherland Stat. Const. §46.01 (5th Ed.).

Here there is no ambiguity. The statute clearly states that prisoners may receive 54 days good time credit for every year of their “term of imprisonment.” 18 U.S.C. 3624(b). The BOP’s policy of allowing good conduct credit for only the time actually “served” is contrary to the statute’s plain meaning.

The Supreme Court has stated that where “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The first step of analysis under *Chevron* is a determination whether Congress has plainly stated its intent. *United States v. LaBonte*, 520 U.S. 751, 762 n.6 (1997); *McLean v. Crabtree*, 173 F.3d 1176, 1182-83 (9th Cir. 1999). Once that statute is found to be unambiguous, no deference is owed to the agency. *LaBonte, supra*; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (ordinary and obvious meaning is not to be lightly discounted); *Russello v. United States*, 464 U.S. 16, 23 (1983) (it is generally presumed that Congress acts intentionally and purposely in the language it chooses). Nor may an agency ignore

an unambiguous statutory definition in favor of its own preferred definition. *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433 (9th Cir. 1994) (regardless of policy justification, Secretary of Transportation may not exempt certain vehicles from clear statutory definition). Because Congress used the unambiguous phrase “term of imprisonment” in 18 U.S.C. Section 3624(b), the BOP is simply not permitted to substitute “for time actually spent in prison.”

The Program Statement’s confusion of year “served” for “term of imprisonment” is inconsistent with the statute. The relevant phrase, “term of imprisonment,” appears in numerous statutes and has a well-established meaning – the period of time imposed in the judgment, not actual time in custody. *United States v. Morales-Alejo*, 193 F.3d 1102, 1105-06 (9<sup>th</sup> Cir. 1999) (distinguishing between terms of imprisonment and detention); 18 U.S.C. §4101(b) (defining “imprisonment” as “a penalty imposed by a court under which the individual is confined to an institution”); 18 U.S.C. §3582 (“term of imprisonment” is determined by sentencing factors).

While Congress directed in the statute that credit be calculated at 54 days per year for each year of a “term of imprisonment,” the Bureau of Prisons, both in its regulations and its program statements, substituted the phrase “for each year served.” 28 C.F.R. 523.20(a), which discusses good conduct time, provides in pertinent part:

Pursuant to 18 U.S.C. 3624(b), as in effect for offenses committed on or after November 1, 1987 but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year . . .

\* \* \*

(a) When considering good conduct time for an inmate serving a sentence for an offense committed on or after April 26, 1996, the Bureau shall award:

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma . . . .

Thus, all prisoners are only given credit for time “served,” not on the “term of imprisonment.”

Program Statement 5880.28 makes the same fundamental error, establishing a formula for awarding the full 54 days of good conduct time “for each full year served on a sentence in excess of one year.” The BOP -- contrary to the plain dictate of the statute -- ignores the term of imprisonment: “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.” PS 5880.28 at 48.

The last sentence of 18 U.S.C. § 3624(b)(1) provides:

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.

The provision relates 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. The provision states that sentences will be both “prorated” for portions of the year of the sentence imposed. Critical to this analysis is Congress’s continued use of the “term of imprisonment.”

Prorated should be viewed as having its common dictionary definition. As set out in the American Heritage College Dictionary (3<sup>rd</sup> Ed.), prorate means “to divide, distribute, or assess proportionately.” *See also* BLACK’S LAW DICTIONARY (6<sup>th</sup> Ed.) (pro rate: to divide, share, or distribute proportionately, to assess or apportion pro-rata.). Congress specifically directed that the proration be based on the “term of imprisonment” imposed by the court, not the time served by the inmate.

In its regulations and program statements, the BOP persisted in the mistake, even

claiming that Congress's directive is "impossible." Program Statement 5880.28 at 1-45. The error by the BOP is apparent. Congress plainly and unambiguously directed that the calculation of good time credits be based on the "term of imprisonment." The BOP substituted distinct phrases related to the time actually "served." While the difference caused by the switch in terminology is not huge – approximately seven days – each day of incarceration is significant to the individual affected.

**II. The Plain Meaning Of The Statute Is Supported By The Legislative History, Which Demonstrates That Congress Specifically Intended To Reject The Complexities Of Calculating Good Time Credit Only For Actual Time Served Rather Than Basing Such Credit On The "Term Of Imprisonment."**

The history of the good time statute demonstrates that Congress consciously amended the statute to calculate good time against the judge's sentence. When Congress amends a statute, Congress intends its amendment to have real and substantial effect. *Stone v. INS*, 514 U.S. 386, 397 (1995). This basic rule of construction, approved by the Supreme Court, demonstrates the statute is not ambiguous.

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." Congress did so not to diminish the number of days a prisoner could earn but to address when the credit accrued. 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 is occurring now developed first in 1948: “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.” H.R. Report 86-935 (Aug. 18, 1959), *reprinted in* 1959 U.S.C.C.A.N. at 2519. To solve this problem, Congress, in 1959, deleted the time served language and returned to the methodology of crediting against the sentence, not time served. H.R. Report 86-935 (Aug. 18, 1959), *reprinted in* 1959 U.S.C.C.A.N. at 2519.

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.” Congress made its intent clear by using 54 days -- which is 15% of 365 days. As Senator Biden, a sponsor of the amendment, explained:

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); *see also* 140 Cong. Rec. S12,349 (1994) (“So my Republican friends in a compromise we reached on the Senate floor back in November . . . said no State can get any prison money unless they keep their people in jail for 85 percent of the time just like we do at the Federal level in a law written by yours truly and several others.”) (statement of Sen. Biden). Although the 85% rule has been universally recognized by federal lawyers and sentencing judges as the measure of good time, the rule is not honored. No federal prisoner, no matter how virtuous, ever serves less than 87.2% of the sentence imposed. Thus, Congress specifically considered the loss of good time resulting from calculating against time actually served and rejected that method.

Contrary to congressional intent and the plain meaning of “term of imprisonment,” the BOP explicitly rejects crediting good time against the sentence imposed. Instead, and without authority, 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). By only giving credit against actual time served, the calculation must be based on a complex formula, described by the BOP as “arithmetically complicated,” that reduces the good time by seven days a year. Program Statement 5880.28 at 1-40 to 61B (July 19, 1999).<sup>1</sup> The BOP’s formulation cannot be reconciled with the clear Congressional intent that good time credit be as easily calculated as a 15% tip. Congress clearly showed its intent to require 85% by the number itself: 54 is 15% of 365. In an earlier version of the good time statute, Congress used 36 days, “approximately 10%.” Sen. Rep. 28-225, *reprinted in* 1984 U.S.C.C.A.N. at 3329-30. The final version simply added 5% to the maximum term.

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<sup>1</sup> For example, in the pristine case of a sentence to a year and a day, the BOP maximum award of good time is 47 days. The BOP’s short form of the eight-step formula is as follows:

$$\begin{aligned}
 365 \div 54 &= .148 \\
 366 \times .148 &= \mathbf{54.168} \quad (366 + 54 = 420) \\
 366 - 54 = 312 \times .148 &= \mathbf{46.176} \quad (312 + 46 = 358) \\
 366 - 46 = 320 \times .148 &= \mathbf{47.36} \quad (320 + 47 = 367) \\
 366 - 47 = 319 \times .148 &= \mathbf{47.212} \quad (319 + 47 = 366)
 \end{aligned}$$

Program Statement 5880.28 at 1-40 to 61B (July 19, 1999). In contrast, the statute calls for 54 days at the end of each year of the term of imprisonment ( $311 + 54 = 365$ ).

### **III. Even If The Statute Were Ambiguous, Supreme Court Authority Requires Application Of The Rule Of Lenity To This Penal Statute, Not Deference To An Executive Agency.**

The Ninth Circuit found that the statute was ambiguous, and deferred to the BOP's interpretation under *Chevron*. *Pacheco-Camacho*, 272 F.3d at 1269-70. Even assuming that "term of imprisonment" is ambiguous, the Supreme Court, especially Justice Scalia, provides clear authority pointing to the error of the Ninth Circuit's ways. The rule of lenity must be used 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. 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. In *Bifulco*, the Supreme Court addressed statutory ambiguity in the punishment provisions of a federal drug statute. 447 U.S. at 382-83. 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. The Supreme 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 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.***

In upholding the BOP’s interpretation, the Ninth Circuit applied principles from civil administrative law regarding statutory silence or ambiguity under *Chevron*. 467 U.S. 837 (1984). Because *Chevron* does not apply to ambiguous criminal statutes, any statutory ambiguity must be resolved in favor of the prisoners under the rule of lenity. The Supreme Court addressed the 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>2</sup> The statute must be read to allow for 54 days of good time credit for each year of the term of imprisonment.

## CONCLUSION

For all the reasons set forth herein, Mr. NAME respectfully requests that the Court grant

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<sup>2</sup>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.

his petition for writ of habeas corpus and direct the Federal Bureau of Prisons credit Mr. NAME  
with 54 days' good time on his sentence and release Mr. NAME on DATE.

RESPECTFULLY SUBMITTED this DATE.