No. 03-36038

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

SABIL J. MUJAHID,

Petitioner-Appellant,

v.

CHARLES A. DANIELS, Warden,
FCI Sheridan,

Respondent-Appellee.

Appeal from the United States District Court

for the District of Oregon

APPELLANT'S REPLY BRIEF

Stephen R. Sady
Chief Deputy Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner-Appellant

TABLE OF CONTENTS

Page

Table of Authorities iii

Introduction 1

A. As Held In *Johnson* And *Gunderson*, The Release Of A Prisoner To Supervised Release Does Not Moot A Section 2241 Habeas Corpus Petition Based On Over-Incarceration Because Section 3583(e) Allows For Reduction, Modification, Or Termination Of Supervised Release 2

1. The BOP's Burden Of Establishing Mootness Is A Heavy One, And Any Alternate Remedies Defeat A Claim Of Mootness 3

2. Contrary To The BOP's Claim, The Supreme Court Held In *Johnson* That Release To Supervised Release Does Not Render A Claim Moot 4

3. This Court's Authority, As Well As Precedent From Other Circuits, Establishes The Availability Of A Remedy For Over-Incarceration 6

4. The BOP Advocates A Position On Custody In Conflict With The Supreme Court's Holding In *Carafas* And This Court's Precedent In *Francis* 7

B. The BOP's Failure To Controvert Supreme Court Authority On Statutory Construction Regarding Intra-Statutory Consistency, Statutory Amendments, And Legislative History Establishes The Inapplicability Of *Pacheco-Camacho* 12

C. In An Effort To Rationalize Pages Of Complicated Computations, The BOP Argues The Validity Of A .148 Per Day Good Time Credit Found Nowhere In The Relevant Statute 15

D. The BOP's Substitution Of "Time Served" For "Term Of Imprisonment"

Violates The Express Terms Of The Statute16

E. The BOP Fails To Cite A Single Example Of "Term Of Imprisonment" Used As Anything Other Than The Sentence Imposed By The Trial Judge17

F. The Operation Of The Pre-1987 Good Time Statutes Supports The Availability Of 540 Days Of Good Time Credit On A Ten-Year Sentence19

G. The Rule Of Lenity Applies To Statutory Ambiguity, Not To Statutory Silence22

Conclusion 28

Brief Format Certification.....30

Certificate of Service 31

Appendix A

Appendix B

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

CIRCUIT COURT CASES

DISTRICT COURT CASES

STATE COURT CASES

U.S. CONSTITUTION

STATUTES AND RULES

UNITED STATES SENTENCING GUIDELINES

OTHER

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SABIL J. MUJAHID,	)	
	)	
Petitioner-Appellant,	)	CA No. 03-36038
	)	
v.	)	
	)	
CHARLES A. DANIELS, Warden, FCI Sheridan,	)	
	)	
	)	
Respondent-Appellee.	)	

APPELLANT'S REPLY BRIEF

Introduction

The bulk of the Bureau of Prisons (BOP) response asserts a position on mootness that has been rejected by the Supreme Court in *United States v. Johnson*, 529 U.S. 53, 60 (2000), and this Court in *United States v. Gunderson*, 268 F.3d 1149, 1153 (9th Cir. 2001). The remainder of the BOP's brief is notable for its failure to even address the rule of intra-statutory consistency, Congress's prior amendment to avoid the exact loss of good time at issue here, and the express legislative history that a prisoner on a ten-year sentence serve "at least 85% of that time -- 8.5 years, which is what the law mandates." Further, the BOP fails to provide a single example of the

statutory phrase "term of imprisonment" used in the sense of time served rather than the sentence imposed by the district court judge.

The BOP also advocates a view on the rule of lenity in conflict with Supreme Court authority by conflating penal statutes that are silent on a subject with ambiguous penal statutes. Because this case involves the first sentence, not the last sentence, of Section 3624(b), the BOP incorrectly asserts that the length of sentence is irrelevant to *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001), *cert. denied*, 535 U.S. 1105 (2002). The petitioner's arguments based on the statute and Supreme Court authority require that Mr. Mujahid be deemed eligible for 540 days of good time credit on a ten-year sentence (15% rather than only 12.8%).

A. As Held In *Johnson* And *Gunderson*, The Release Of A Prisoner To Supervised Release Does Not Moot A Section 2241 Habeas Corpus Petition Based On Over-Incarceration Because Section 3583(e) Allows For Reduction, Modification, Or Termination Of Supervised Release.

The BOP's mootness arguments depend on three fundamental errors: the BOP cites *Johnson* for the opposite of its holding; the BOP ignores directly controlling Circuit authority; and the BOP suggests a law of custody expressly rejected by this Court (*Francis v. Rison*, 894 F.2d 353, 354 (9th Cir. 1990)), and the Supreme Court (*Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)). Especially in the context of the heavy burden of establishing mootness, the Court should reject the suggestion that Mr.

Mujahid's case is moot.

1. The BOP's Burden Of Establishing Mootness Is A Heavy One, And Any Alternate Remedies Defeat A Claim Of Mootness.

The BOP's burden of establishing mootness is a heavy one. *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001); *Flagstaff Medical Center v. Sullivan*, 962 F.2d 879,884 (9th Cir. 1992). Mr. Mujahid has a personal stake in the outcome more than sufficient to establish the controversy constitutionally necessary for this Court's jurisdiction. "The question is not whether the precise relief sought at the time [the petition] was filed is still available . . . [but] whether there can be any effective relief." *Jerron West v. State Bd. Of Equalization*, 129 F.3d 1334, 1336 (9th Cir. 1997). Equitable remedies can provide sufficient potential relief. *Jerron*, 129 F.3d at 1337. "The available remedy . . . does not need to be 'fully satisfactory' to avoid mootness . . . even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996); *see Flagstaff Medical*, 962 F.2d at 884-85.

> It is the historic purpose of equity to secure complete justice. The courts will be alert to adjust their remedies so as to grant the necessary relief. . . . So long as the court may order relief responsive to the wrong alleged, the appeal is not moot.

United States v. Martinson, 809 F.2d 1364, 1368 (9th Cir. 1987) (citations omitted). As held in *Johnson* and *Gunderson*, the finding regarding over-incarceration is a

predicate to available remedies, such as modification, reduction, and termination of Mr. Mujahid's term of supervised release, that meet the constitutional requirement of a case or controversy.

2. Contrary To The BOP's Claim, The Supreme Court Held In Johnson That Release To Supervised Release Does Not Render A Claim Moot.

The Supreme Court has directly addressed the question of mootness in the context of over-incarceration under the federal habeas corpus statutes. In *United States v. Johnson*, 529 U.S. 53 (2000), the Court found that a habeas petitioner still had a remedy, even though he had been placed on supervised release following completion of a term of imprisonment that had been wrongfully aggravated by a Section 924(c) enhancement. The Court held that a remedy was still available by termination, modification, or reduction of the term of supervised release based on the unfairness of over-incarceration:

> There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term. The statutory structure provides a means to address these concerns in large part. The trial court, as it sees fit, may modify an individual's conditions of supervised release. § 3583(e)(2). Furthermore, the court may terminate an individual's supervised release obligations "at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." § 3583(e)(1). Respondent may invoke § 3583(e)(2) in pursuit of relief; and, having completed one year of supervised release, he may also seek relief under § 3583(e)(1).

Johnson, 529 U.S. at 60. The same remedy is available to Mr. Mujahid, who has suffered over-incarceration based on a wrongful interpretation of the good time credit statute.

The BOP claims *Johnson* stands for the proposition that "the excess portion of prison time improperly served may not be credited against the supervised release term" and that, therefore, "release from prison moots a case challenging the length of imprisonment." (Resp. Br. at 7). On the contrary, *Johnson* explicitly sets out the alternative remedies available to a released prisoner. *Johnson* only rejected the claim that, based on a hypothetical release date, the former prisoner was entitled as a matter of law to day-for-day reduction of supervised release. That claim is irrelevant to the availability of a discretionary remedy under Section 3583(e). If the BOP were correct about *Johnson*, the Supreme Court would have dismissed the claim as moot rather than remanding the case for further proceedings, as it did. *Johnson*, 529 U.S. at 60. The BOP miscites *Johnson*, the holding of which forecloses a determination that the present case is moot.

3. This Court's Authority, As Well As Precedent From Other Circuits, Establishes The Availability Of A Remedy For Over-Incarceration.

The Ninth Circuit applied the reasoning of *Johnson* to wrongful denial of eligibility for a BOP sentence reduction in *Gunderson.* In that case, the BOP determined a prisoner was ineligible for a reduction of "up to one year" for completion of the statutory treatment program under 18 U.S.C. § 3621(e) but that the petitioner could not receive an actual time cut. The Court squarely addressed and rejected the BOP's claim that the unavailability of an actual early release from custody rendered the case moot:

> Gunderson will not complete the final phase of the early release program until his scheduled release date. Therefore, it is not possible for the Department of Corrections to release Gunderson from physical confinement prior to his serving his full sentence even if he completes the drug program. However, *this fact does not render the case moot because there is a possibility of the court's reducing or modifying his supervised release under 18 U.S.C. § 3583(e)(2).*

268 F.3d at 1153 (emphasis added). Just as Mr. Gunderson had the potential for altered supervised release, Mr. Mujahid has the potential for an order affecting his supervised release based on a favorable ruling on his habeas corpus petition.

The BOP has cited no case in which a released federal prisoner's claim of over-incarceration is deemed moot while adjusted supervised release is available. The Circuits have uniformly recognized the seriousness of over-incarceration and the availability of an equitable remedy through potential adjustment of supervised release under Section 3583(e). *See, e.g., Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir.

1995) (challenge to BOP's calculation of jail credit was not moot as to former prisoner on supervised release because "success for Dawson could alter the supervised release portion of his sentence"); *United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001) (citing *Dawson* for the proposition that the case was not moot because, if the defendant were to prevail, the success on appeal could alter the term of supervised release); *United States v. Eske*, 925 F.2d 205, 206 n.2 (7th Cir. 1991) (imminent commencement of supervised release did not moot sentencing appeal because of potential effect on supervised release term); *United States v. Montenegro-Rojo*, 908 F.2d 425, 431 n. 8 (9th Cir. 1990) ("If the district court decides to shorten the extent of its [upward] departure, the extra time Montenegro-Rojo spent in jail should, in fairness, be counted towards the year of supervised release. . . ."). Nothing in the uniform case law in this area warrants application of a different rule in the present case. The BOP advocates an unprecedented position on mootness that is contrary to controlling Circuit authority.

4. The BOP Advocates A Position On Custody In Conflict With The Supreme Court's Holding In Carafas And This Court's Precedent In Francis.

The BOP claims transfer to another district on supervised release affects jurisdiction (Resp. Br. at 9-11). The Supreme Court has held that subject matter jurisdiction under 28 U.S.C. § 2241 attaches when the petition is filed and is not

destroyed by subsequent events, such as a prisoner's transfer to another district or his release to post- prison supervision. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). The BOP recognized the District Court's jurisdiction in its response to Mr. Mujahid's initial petition. This jurisdiction continues to date. Although the available remedy has changed, the Court is empowered to fashion any relief "as law and justice require." 28 U.S.C. § 2243. The real question is not one of jurisdiction but of remedy.

The rule of *Carafas*, which the BOP ignores, has been applied to litigation involving the BOP. *Francis v. Rison*, 894 F.2d 353, 354 (9th Cir. 1990) (in habeas claim against federal warden, "jurisdiction attaches on the initial filing for habeas corpus relief, and it is not destroyed by a transfer of the petitioner and the accompanying custodial change") (quoting *Santillanes v. U.S. Parole Comm'n*, 754 F.2d 887, 888 (10th Cir. 1985)); *Bohner v. Daniels*, 243 F.Supp.2d 1171, 1173 (D.Or. 2003), *appeal docketed*, No. 03-35356 (9th Cir. Apr. 9, 2003); *Gavis v. Hood*, 2001 WL 34039136 at *1 (D. Or. Dec. 14, 2001) (where BOP erroneously denied eligibility for a sentence reduction, commencement of supervised release in a different district did not affect jurisdiction), *reversed on other grounds*, *Grier v. Hood*, 46 Fed. Appx. 433 (9th Cir. 2002). A prisoner who is released on parole remains in "custody" for the purposes of the federal habeas statutes. *Mabry v. Johnson*, 467 U.S. 504, 507 n. 3

(1984); *Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981); *Jones*, 371 U.S. at 240.[1]

In suggesting that Mr. Mujahid should litigate in Alaska, the BOP invokes the type of "stifling formalisms" and "arcane and scholastic procedural requirements" that have long since given way to the expansive modern view of continuing "custody" in federal habeas corpus cases. *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973). As the law stands now, any person who is "subject to restraints 'not shared by the public generally'" continues in custody for the purposes of invoking the federal court's jurisdiction. *Hensley*, 411 U.S. at 351 (citing *Jones*, 371 U.S. at 40). In fact, a contrary rule would force the judiciary, as the supervising agency over supervised release, to litigate on behalf of the BOP, a separation of powers anomaly which would

[1] In fact, the Ninth Circuit has found "custody" under the federal habeas corpus statutes where the petitioner was only sentenced to a 14- hour alcohol rehabilitation program (*Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993)), where an alien, out of custody, was subject to a deportation order (*Williams v. INS*, 795 F.2d 738, 744-45 (9th Cir. 1986)), and even, under extreme circumstances, where an alien has already been removed from the country (*Zegarra-Gomez v. I.N.S.,* 314 F.3d 1124, 1126-27 (9th Cir. 2003); *Singh v. Waters*, 87 F.3d 346, 349 (9th Cir. 1996)).

foreclose meaningful review.

While the BOP concedes Mr. Mujahid is in custody (Resp. Br. at 9), the BOP ignores the uniform precedent holding that Section 2241 habeas corpus jurisdiction continues after the petitioner is released from imprisonment and is on parole. *Mabry, supra; Jones, supra*. As the Supreme Court found, "[i]t is not relevant that conditions and restrictions such as [parole conditions] may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones*, 371 U.S. at 242-43. "Such restraints are enough to invoke the help of the Great Writ." *Jones*, 371 U.S. at 243. Although Mr. Mujahid is currently serving his term of supervision, he, like Jones, remains in custody for the purposes of the original habeas jurisdiction.

In holding that the expiration of a habeas petitioner's sentence did not terminate federal jurisdiction, the Supreme Court held that Section 2241 "does not limit the relief that may be granted to discharge of the applicant from physical custody" but rather provides that the "'court shall dispose of the matter as law and justice require.'" *Carafas*, 391 U.S. at 238 (quoting 28 U.S.C. § 2243). The Court concluded that "under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of

proceedings on such application." *Id*. at 238.

The cases upon which the BOP relies are clearly distinguishable from the line of cases supporting jurisdiction (Resp. Br. at 8-11). The most obvious distinction is that Mr. Mujahid is on supervised release. In contrast, the petitioner in *Spencer v. Kemna*, 523 U.S. 1 (1998), completed a parole violation sentence and, therefore, was no longer on any supervision. Similarly, in *Caswell v. Calderon*, 2004 WL 527884 at *3 (9th Cir. Mar. 18, 2004), the prisoner's claim regarding a 1986 parole decision was mooted by a 1991 decision to rescind parole, leaving the Court without power to address the earlier superseded decision. *See also Feldman v. Perrill*, 902 F.2d 1445, 148-49 (9th Cir. 1990) (after California sentence expired, Arizona parolee challenged collateral effect of prior conviction). The BOP's reliance on prison disciplinary cases is misplaced because, unlike the present case, the proceedings did not result in any loss of good time or otherwise affect liberty. *Wilson v. Terhune*, 319 F.3d 477, 478 (9th Cir. 2003) ("The loss of 150 days good-time credits was later eliminated."); *Munoz v. Rowland,* 104 F.3d 1096, 1097-98 (9th Cir. 1997) (challenge to prison classification of petitioner as gang member); *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (challenge to conditions of confinement).

The cases cited by the BOP are irrelevant to the interests at issue in the present case, which are controlled by the availability of a potential remedy under Section

3583(e). Because actual days of incarceration are in issue, this case is not moot. At the time of filing, Mr. Mujahid was confined within the District of Oregon and filed his habeas petition in the District of Oregon as required by statute. Jurisdiction attached at the initial filing and continues to this day.

B. The BOP's Failure To Controvert Supreme Court Authority On Statutory Construction Regarding Intra-Statutory Consistency, Statutory Amendments, And Legislative History Establishes The Inapplicability Of *Pacheco-Camacho*.

The BOP's Response Brief is bereft of any response to three arguments, supported by Supreme Court authority, regarding rules of statutory construction that demonstrate "term of imprisonment" unambiguously means the judge's sentence, not time served: the rule of intra-statutory consistency regarding the first sentence of Section 3624(b) (Opening Br. at 23-24); the need for statutory amendments to have real and substantial effect (Opening Br. at 24-25); and the expressions of intent by the statute's author (Opening Br. at 25-27). The BOP's failure to respond is significant in two ways.

First, the BOP tacitly admits there is not a response to those arguments. *See United States v. Hale*, 422 U.S. 171, 176 (1975) (failure to contest an assertion is considered evidence of acquiescence if it would have been natural under the circumstances to object to the assertion in question); *see generally* 5 Weinstein's Federal Evidence, ¶ 801.31[3][d] at 801-57 (2d ed. 2004). There simply is no rational

explanation for the same term meaning different things in the same sentence. Further, the amendment dropping "time served" language demonstrates Congress's intent to avoid the same problem the BOP now recreates. And the statute's author's blunt and repeated reference to 85% as the minimum time to be served, rather than 87.2%, provides unequivocal evidence of what Congress intended. These points should be deemed admitted.

Second, the failure to respond leaves this Court completely at liberty to review de novo whether *Pacheco-Camacho* stands up to these new arguments. As stated in the Opening Brief, arguments not addressed in earlier rulings are not precedential against new arguments. *Texas v. Cobb*, 532 U.S. 162, 169 (2001). The de novo review of these rules has a constitutional dimension because *Pacheco-Camacho* found "term of imprisonment" to be "ambiguous." The Supreme Court has noted that respect for the Legislative Branch requires that a statute cannot be considered "ambiguous" until aids to statutory interpretation are exhausted. *General Dynamics Land Systems, Inc. v. Cline*, 124 S.Ct. 1236, 1248 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent") (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,

467 U.S. 837, 843 n. 9 (1984)); *United States v. R.L.C.* 503 U.S. 291, 305-306 (1992) ("we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute.") (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

Pacheco-Camacho never considered the arguments articulated here. Perhaps because of its focus on the last sentence of the statute, the Court only addressed, without resolving, intra-statutory consistency in different subsections of Section 3624. *Pacheco-Camacho*, 272 F.3d at 1271-72. The focus of this appeal is directly on the first sentence and the meaning of "term of imprisonment" in each usage in that sentence. The *Pacheco-Camacho* opinion did not mention the previous amendment to the good time statute that directly addressed the exact same loss of good time Mr. Mujahid suffered. And the Court did not address the repeated express statements from Senator Biden regarding Congress's intention that prisoners receive up to 15% good time credit, not only 12.8%.

The BOP's silence on compelling grounds of statutory construction, never previously addressed by this Court, tacitly admits their merit and supports reversal upon de novo review of the statutory interpretation question.

C. In An Effort To Rationalize Pages Of Complicated Computations, The BOP Argues The Validity Of A .148 Per Day Good Time Credit

Found Nowhere In The Relevant Statute.

The BOP argues for the first time on appeal that its computation is "straight forward and easily understood" (Resp. Br. at 15). In its program statement, the BOP calls its method of calculation "arithmetically complex" and requires pages of complex formulas to describe how the BOP provides only 470 days, not 540 days, good time credit on a ten-year sentence. Contrary to the BOP's new characterization, the BOP's method of calculating good time is "unduly complicated." *White v. Scibana*, 2003 WL 23171593, at *2 (W.D. Wis. Dec. 22, 2003). If Congress had intended a .148 formula, Congress would have said so.

Instead, Congress expressly linked the 54 days to "term of imprisonment," not time served: "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, ..." 18 U.S.C. § 3624(b). The BOP's new characterization of the process -- an "arithmetically complicated" way of estimating hypothetical good time that only "best conforms" to the statute -- is inconsistent with its previous admissions. No matter how it is characterized, the BOP's construction finds no support in the language of the good time statute itself.

D. The BOP's Substitution Of "Time Served" For "Term Of Imprisonment" Violates The Express Terms Of The Statute.

The BOP's argument regarding its calculation depends on its misreading of "term" and "term of imprisonment" as having a meaning other than the judge's sentence (Resp. Br. at 16). The reference to "year" in Section 3624(b) refers to years of the "term of imprisonment." The statute unambiguously requires, on a ten-year sentence, an opportunity to earn 54 days of good time credit ten times for a total of 540 days.

In arguing that *Pacheco-Camacho* addressed a part of the statute it ignored, the BOP questions whether "term of imprisonment" establishes the basis for calculating good time credits (Resp. Br. at 17). The BOP's argument lacks substance. The first sentence of Section 3624(b) unequivocally uses "term of imprisonment" in connection with the precise number of good time credits for which a prisoner can be eligible. The BOP appears to argue that "term of imprisonment" means different things in different parts of the statute (Resp. Br. at 17). Then, the BOP claims that the last sentence of the statute construed in *Pacheco-Camacho*, which relates to the end of the sentence, negates the substance of the statute, the first sentence upon which Mr. Mujahid relies (Resp. Br. at 18-19).

The BOP points to no statutory language permitting substitution of "time served" for "term of imprisonment." The petitioner's argument regarding the meaning

of "term of imprisonment" is direct, transparent, and supported by multiple aids to statutory construction.

E. The BOP Fails To Cite A Single Example Of "Term Of Imprisonment" Used As Anything Other Than The Sentence Imposed By The Trial Judge.

The BOP claims that Congress's use of "term of imprisonment" as a synonym for the sentence imposed by the trial judge finds "little support" in other uses in the federal statutes (Resp. Br. at 19-20). However, the BOP's examples each support the petitioner's argument, and Judge Crabb's finding, that "when Congress has used 'term of imprisonment' in other statutes, it generally does so as a synonym for 'sentence.'" *White, supra*, at *3 (citations omitted).

The first supposed deviation is the use of "term of imprisonment" "as the maximum penalty as enacted by Congress without regard to whether it is imposed in any actual case" (Resp. Br. at 20). Of course, the use of a maximum means that it need not always be imposed; however, when it is imposed, it is the term to which the trial judge sentences the defendant, not the actual time served. The use of "term of imprisonment" throughout the federal criminal statutes as the maximum sentence that a judge can impose for a "term of imprisonment" fully supports Mr. Mujahid's position.

The second example also supports Mr. Mujahid -- the statute on concurrent and

consecutive sentences (Resp. Br. at 20). In 18 U.S.C. § 3584(c), Congress instructed the BOP to treat concurrent and consecutive terms as a "single, aggregate term of imprisonment" in administering the sentence. Thus, if a judge imposes a five-year sentence consecutively to a three-year sentence, the BOP is to administer the sentence as if the judge had imposed an eight-year term of imprisonment. Again, the use of "term of imprisonment" has nothing to do with time actually served. On the contrary, the only meaning of "term of imprisonment" in the concurrent and consecutive statute is as the sentence imposed by the trial judge.

Third, the BOP cites to 18 U.S.C. § 924(c), which also only refers to sentence imposed by the trial judge (Resp. Br. at 20-21). Contrary to the BOP's reading, the term means the precise same thing in each of its uses:

> [N]o *term of imprisonment* imposed on a person under this subsection shall run concurrently with any other *term of imprisonment* imposed on the person, including any *term of imprisonment* imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. § 924(c)(1)(D)(ii) (emphasis added). None of the usages involve time actually served; each involves the years imposed by the judge in the judgment and commitment order. As in the concurrent and consecutive statute, Congress is

providing direction to trial judges regarding whether they are to impose the "term of imprisonment" consecutively or concurrently with other terms of imprisonment imposed by that judge or other judges.

From these three examples, all of which support Mr. Mujahid, the BOP argues that it does not matter whether "term of imprisonment" refers to actual custody or the sentence imposed by the court (Resp. Br. at 21). On the contrary, the interpretation of "term of imprisonment" as the judge's sentence is critical because of the simple mathematical equation contained in the statute. If there is a ten-year term of imprisonment, and the prisoner is entitled to 54 days good time credit at the end of each year of his term of imprisonment, then the total credits for which he is eligible equal 540 days, not 470 days.

The petitioner, by asserting that "term of imprisonment" always means the judge's sentence, challenged the BOP to find a single use of "term of imprisonment" being anything other than a synonym for the judge's sentence. The BOP failed to find a single such use anywhere in the federal statutes.

F. The Operation Of The Pre-1987 Good Time Statutes Supports The Availability Of 540 Days Of Good Time Credit On A Ten-Year Sentence.

The BOP argues that the prior good time statutes indicate that good time was to be based on time served, rather than the length of the sentence (Resp. Br.

at 22-23). On the contrary, the prior statutes reinforce that Congress has always based the number of available good time credits on the length of the sentence imposed by the sentencing judge, unless the statute specifically refers to time served.

The petitioner has set out the legislative history demonstrating that, with the exception of a judicial interpretation corrected by Congress in 1959, Congress generally based statutory good time credits on the length of the judge's sentence (Opening Br. at 6-8). The previous system for statutory good time included six different rates for accumulating good time credits, all based on the length of the sentence. 18 U.S.C. § 4161 (repealed). Under the pre-1987 statutory good time provisions, prisoners serving a ten-year sentence could accumulate up to ten days per month of the sentence. Thus, the calculation of total available good time credits utilized the exact methodology advocated by Mr. Mujahid: 10 days x 12 months x 10 years = 1200 days maximum statutory good time. BOP Program Statement 5880.30, Ch. IV, page 2 (July 16, 1993).[2]

As previously argued, the use of the judge's sentence as a base line in

[2]The BOP's chapter on statutory good time, from the Sentence Computation Manual/Old Law, is attached as Appendix A.

previous good time statutes strongly supports 540 days on a ten-year sentence under the current statute. Statutory good time is always based on the sentence, not time served, under all the previous configurations of the good time statute. In 1959, when judicial interpretation created lost good time by counting good time against time actually served, Congress corrected the situation by eliminating time-served language. There is not a syllable in the current statute suggesting that Congress meant to change this basic operation of its good time statutes, nor does the BOP even attempt to suggest that the 1959 amendment means other than what the petitioner contends.

The BOP suggests that the Industrial Good Time Statute should have been discussed (Resp. Br. at 23). The obvious progenitor of the present statute is the part of the statute entitled Statutory Good Time, 18 U.S.C. § 4161 (repealed). In its argument, the BOP never calls Section 4162 by its proper statutory title: Industrial Good Time. Its name demonstrates its irrelevance: industrial good time depends on time spent in specific programs, not the base line of good time credits available to all prisoners serving a sentence more than a minimum and less than life.

Moreover, the Industrial Good Time Statute demonstrates that, when Congress wants credits to be based on actual time, Congress says so:

> **A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days *for each month of actual employment* in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.**
>
> **In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.**
>
> **Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and *without regard to length of sentence*.**

18 U.S.C. § 4162 (repealed) (emphasis added). Unlike statutory good time, the industrial good time, which the BOP also calls "extra good time," necessarily depends on the length of time in a particular program and has a quite complex calculation system in Chapter XIII of the Sentence Computation Manual.[3]

The current good time statute does not depend on actual time in a program but, like statutory good time, depends on the length of the sentence. Section 4161 is the correct analogy because it is consistent in tying the amount of good time credits to the length of the sentence.[4]

---

[3]The BOP's chapter on extra good time, from the Sentence Computation Manual/Old Law, is attached as Appendix B.

[4]The use of "term of imprisonment" for "sentence" was necessitated by the CCCA's abolition of parole and substitution of "term of imprisonment" plus "term of

G. The Rule Of Lenity Applies To Statutory Ambiguity, Not To Statutory Silence.

In a footnote, the BOP asserts that it is "well settled" that BOP regulations are entitled to full *Chevron* deference, citing *Lopez v. Davis*, 531 U.S. 230 (2001). As the Supreme Court has repeatedly held, *Chevron* does not even come into play until all other means of statutory interpretation are exhausted. *Supra* at 13-14. Further, the BOP presents no reasoning why the Supreme Court's decision in *Crandon v. United States*, 494 U.S. 152 (1990), which holds that the rule of lenity trumps the executive branch's interpretation of an ambiguous penal statute, is not controlling.

---

supervised release" to comprise the temporal components of the sentence.

The BOP's misunderstanding of *Lopez* is reflected in its explanatory comment, where the BOP claims deference for "interpretation" of statutes it administers (Resp. Br. at 19 n.8). *Lopez* says no such thing. In *Lopez*, the Supreme Court accorded deference to BOP *administration* of the statute in an area in which the penal statute was silent; *Crandon* dealt with the interpretation by the executive branch of a penal statute that was textually *ambiguous*.[5] *Lopez* does not involve "interpretation" of an ambiguous statute.

Mr. Mujahid is not asserting that the BOP must exercise lenity in its administration of penal statutes in areas left to its discretion. However, as far as the interpretation of statutory language, any ambiguity -- and only ambiguity -- is controlled by the rule of lenity. The sheer number of cases in which the Supreme Court has applied the rule of lenity to federal statutes relating to punishment demonstrates the BOP's unauthorized deviation from controlling authority in applying

[5]In *Lopez*, the Court agreed with the BOP that the statute demonstrated that Congress "did not address how the Bureau should exercise its discretion within the class of inmates who satisfy the statutory prerequisites for early release." *Lopez*, 531 U.S. at 240. In contrast, the BOP purports to do no more than award the statutory good time credits authorized under Section 3624(b).

Chevron deference, in the criminal context, to textual ambiguity. ***See, e.g., United States v. Granderson*, 511 U.S. 39, 54 (1994);** *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992); ***Hughey v. United States*, 495 U.S. 411, 422 (1990); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406-07 (1980); *Whalen v. United States*, 445 U.S. 684, 694-99 (1980);** *Simpson v. United States*, 435 U.S. 6, 14-15 (1978); ***Commissioner v. Acker*, 361 U.S. 87, 91 (1959);** *Ladner v. United States*, 358 U.S. 169, 177-78 **(1958);** *Prince v. United States*, 352 U.S. 322 (1957); ***Bell v. United States*, 349 U.S. 81, 83 (1955)**.

The BOP's later discussion of the rule of lenity, properly understood, supports the petitioner (Resp. Br. at 24-27). In summary, the cases stand for the proposition that the rule of lenity only applies to ambiguous statutes, and that statutes can only be determined to be ambiguous when all other means of statutory interpretation are exhausted.

The BOP's citations to U*nited States v. Rivera*, 996 F.2d 993 (9th Cir. 1993), and *Pacheco-Camacho* (Resp. Br. at 27-29), do not salvage its position. *Rivera* involved the express congressional delegation to the Sentencing Commission of the definition of the predicate offenses for career offender treatment. The court discusses "lenity" only in the context of the express instruction from Congress regarding the drafting of the sentencing guidelines. *Rivera*, 996 F.2d at 997 ("Section 994 is a part

of the Act of Congress which established the Sentencing Commission and it directs the Commission to 'promulgate and distribute' the Sentencing Guidelines."). The present case involves no express or implied delegation; the only question is statutory interpretation of the maximum amount of available good time credits. *Rivera* is irrelevant to this case.

The BOP refers to *Pacheco-Camacho*'s statement approving the BOP action as reasonably resolving statutory ambiguity (Resp. Br. at 28-29). The key analytic error is in confusing 1) *Chevron* deference where the statute -- expressly or implicitly by silence -- delegates authority to the agency to fill in statutory gaps with 2) the judicial function of defining a statutory term, the interpretation of which means the difference between more or less incarceration. The former situation is governed by cases such as *Lopez* and *Rivera*. The latter situation, the one this Court now faces, is governed by *Crandon* and the consistent Supreme Court authority specifying that statutory ambiguity in criminal cases must be resolved by resort to the rule of lenity, not the agency's "doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring).

The analysis of the rule of lenity in the statutory construction of penal statutes is aided by considerations of the separation of powers. In *R.L.C.*, two wings of the Supreme Court debated whether resort to legislative history was permissible before applying the rule of lenity. *Compare* 503 U.S. at 305-06 (Souter, J., plurality opinion)

(resort to interpretive devices including legislative history prior to applying the rule of lenity) *with* 503 U.S. at 308-10 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring) (legislative history, by its nature, cannot provide the certainty necessary to allow longer incarceration). However, both the plurality and the concurring justices agreed with the concern that only the "lawmaker" -- the legislative branch -- is to set the punishment. Each opinion cited to *United States v. Bass*, 404 U.S. 336, 347-48 (1971), for the proposition that the rule of lenity is rooted in the "instinctive distaste against men languishing in prison unless *the lawmaker* has clearly said they should." *Bass*, 503 U.S. at 305, 309, 309-10 (emphasis added).[6]

The Supreme Court unequivocally requires that the rule of lenity govern the resolution of textual ambiguity in penal statutes. *Chevron* deference is a civil law concept that only applies to penal statutes where Congress has expressly or impliedly delegated to the agency the responsibility for filling statutory silence. Where delegation is at issue, the rule of lenity does not necessarily apply. Where the only question is the meaning of an ambiguous statutory term, the rule of lenity, and only

[6] *See also Bell*, 349 U.S. at 83 ("When Congress leaves to the Judiciary the task of imputing to Congress an undisclosed will, the ambiguity should be resolved in favor of lenity.").

the rule of lenity, applies. Any other rule is not only contrary to controlling Supreme Court authority, but it is a violation of basic separation of powers by allowing the Executive Branch, rather than the Legislative Branch, to prescribe the degree of punishment a prisoner endures.

The distinction between delegated duties and ambiguous statutory terms is illustrated in a footnote in *Babbitt v. Sweet Home*, 515 U.S. 687, 704 n.18 (1995), which is cited in *Pacheco-Camacho*. 272 F.3d at 1271-72. The critical distinction is that *Sweet Home* applies to "facial challenges to administrative regulations," not "statutory ambiguity."

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 *Pacheco-Camacho* relied addressed a supplemental argument that the rule of lenity applied to "facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *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 Co., 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 well within the scope of statutory delegation. 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.

In contrast to *Sweet Home*, Section 3624(b) is solely penal, and the petitioner only invokes the rule of lenity in the event the statute is found to be ambiguous. Congress never delegated to the BOP the power to decide the maximum amount of available good time credits, and the BOP has never claimed such a delegation. 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.

Conclusion

For the foregoing reasons, and those stated in the Opening Brief, this Court should reverse the District Court and grant the writ based on the statutory interpretation that, pursuant to the first sentence of Section 3624(b), a prisoner serving a ten-year sentence is eligible for up to 540 days of good time credit. In the alternative, if the Court finds *Pacheco-Camacho* to be determinative, the Court should

recommend that the case be reheard en banc.

RESPECTFULLY SUBMITTED this ___ day of April, 2004.

Stephen R. Sady
Attorney for Petitioner-Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SABIL J. MUJAHID,	)	
	)	
Petitioner-Appellant,	)	CA No. 03-36038
	)	
v.	)	
	)	
CHARLES A. DANIELS, Warden, FCI Sheridan,	)	
	)	
	)	
Petitioner-Appellee.	)	

BRIEF FORMAT CERTIFICATION
PURSUANT TO RULE 32(a)(7)(C)

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that the APPELLANT'S REPLY BRIEF is proportionately spaced, has a typeface of 14 points or more and contains 6,582 words.

DATED this May 4, 2004.

Stephen R. Sady
Attorney for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT'S REPLY BRIEF on Assistant U.S. Attorney Craig Casey by hand-delivering on May 4, 2004, two true, exact, and full copies thereof addressed to him at: 600 United States Courthouse, 1000 SW Third, Portland, Oregon.

Christine Moore

(O:\CLIENT\Sady\Mujahid\Appeal\reply.br)