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 OPENING BRIEF

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	)	
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	)	
	)	
Respondent-Appellee.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF ISSUES

I. WHETHER THE FEDERAL GOOD TIME STATUTE, WHICH PROVIDES FOR CREDIT OF "UP TO 54 DAYS AT THE END OF EACH YEAR OF THE PRISONER'S TERM OF IMPRISONMENT," IS VIOLATED BY BUREAU OF PRISONS RULES THAT ONLY PERMIT A PRISONER SERVING A 10-YEAR SENTENCE TO RECEIVE A MAXIMUM OF 470 DAYS, INSTEAD OF 540 DAYS, OF GOOD TIME CREDIT.

A. BECAUSE SUPREME COURT RULES OF STATUTORY CONSTRUCTION REQUIRE 540 DAYS OF GOOD TIME ON A TEN-YEAR SENTENCE, THIS COURT'S OPINION IN *PACHECO-CAMACHO* IS NOT CONTROLLING BECAUSE THE OPINION ONLY ADDRESSED PRORATION OF THE LAST YEAR

OR PORTION OF A YEAR ON A YEAR-PLUS-ONE-DAY SENTENCE.

B. IF *PACHECO-CAMACHO* IS DEEMED TO CONTROL THIS CASE, THE COURT SHOULD REVIEW THE ISSUE EN BANC FOR THREE REASONS CENTRAL TO THE ROLE OF SUCH REVIEW:

1. AS REFLECTED IN OPINIONS FROM THE SEVENTH CIRCUIT, THE *PACHECO-CAMACHO* COURT'S CONCLUSION THAT "TERM OF IMPRISONMENT" IS AMBIGUOUS IS IN CONFLICT WITH CONGRESS'S FREQUENT AND UNAMBIGUOUS USE OF THE PHRASE TO MEAN THE JUDGE'S SENTENCE.

2. EVEN IF "TERM OF IMPRISONMENT" WERE AMBIGUOUS, EN BANC REVIEW WOULD BE APPROPRIATE BECAUSE SUPREME COURT AND SIXTH CIRCUIT AUTHORITY REQUIRES APPLICATION OF THE RULE OF LENITY, NOT ADMINISTRATIVE DEFERENCE, TO THE GOOD TIME STATUTE.

3. AS REFLECTED IN JUSTICE KENNEDY'S PUBLIC EXPRESSIONS OF CONCERN REGARDING OVER-INCARCERATION, THE ISSUE IS ONE OF OUTSTANDING IMPORTANCE BECAUSE, IF THE STATUTE WERE CORRECTLY INTERPRETED, ALMOST ALL FEDERAL PRISONERS WOULD BE STATUTORILY ENTITLED TO UP TO 2.2% MORE GOOD TIME CREDITS, WHICH WOULD TOTAL ABOUT 28,000 YEARS OF PRISON TIME AT A SAVINGS OF OVER $628,000,000.00.

STATEMENT OF THE CASE

Nature of the Case

This is the direct appeal from the order denying habeas corpus relief under 28 U.S.C. § 2241 entered on November 3, 2003, by the Honorable Garr M. King, United States District Judge for the District of Oregon. The federal prisoner's petition asserts that the Bureau of Prisons (BOP) misinterprets the federal statute on good time credit by allowing a maximum of only 470 days, rather than 540 days, on a ten-year sentence.

Jurisdiction and Timeliness

This Court's jurisdiction is based on 28 U.S.C. §§ 1291, 2241, and 2253. Mr. Mujahid filed his timely notice of appeal on November 5, 2003 (ER 99).

Course of Proceedings

Mr. Mujahid was convicted of being a felon in possession of a firearm and sentenced to a ten-year term of imprisonment on June 6, 1995. On December 20, 2002, Mr. Mujahid filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2241 challenging BOP rules that did not permit him to earn the 54 days per year credit for good time stated in 18 U.S.C. § 3624(b), but limited his good time to 47 days for every year of his sentence (ER 1). Following appointment of counsel, the petitioner filed a memorandum in support of the petition on March 27, 2003 (ER 5). The BOP filed a response on April 17, 2003 (ER 63), to which Mr. Mujahid replied on June 16,

2003 (ER 110).

On August 18, 2003, Magistrate Judge Janice M. Stewart heard oral argument (ER 123). Two days later, the Magistrate Judge issued Findings and Recommendation denying relief (ER 169). On August 29, 2003, the petitioner filed objections to the recommendation, specifying five areas of inconsistency with the statute and Supreme Court authority (ER 181). The BOP filed its response to petitioner's objections on October 2, 2003 (ER 184), supplemented with citation to an unpublished order on October 10, 2003 (ER 184). Judge King adopted the Findings and Recommendation with one minor change on November 3, 2003, and entered judgment dismissing the case the following day (ER 196, 198). Mr. Mujahid filed a timely notice of appeal on November 5, 2003 (ER 199).

Custody Status

Mr. Mujahid recently completed his term of imprisonment and is currently on supervised release. [1]

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[1]Although Mr. Mujahid recently commenced supervised release, this case is not moot because a remedy is available for wrongful deprivation of good time credits through reduction or modification of supervised release. *Gunderson v. Hood,* 268 F.3d 1142, 1153 (9th Cir. 2001); *Bohner v. Daniels*, 243 F.Supp.2d 1171, 1174 (D. Or.

2003). The BOP initially raised, then withdrew, jurisdictional objections (ER 171-72).

STATEMENT OF FACTS

As the BOP conceded below, the material facts in this case are not in dispute (ER 64). In 1995, Mr. Mujahid was sentenced to a 10-year term of imprisonment, followed by three years of supervised release, upon his conviction for being a felon in possession of a firearm. While in prison, Mr. Mujahid earned good time credits, but under the BOP system of calculations, he could receive no more than 470 days, rather than 540 days, per year. The facts relevant to resolution of this appeal relate to the legal history of the good time credit statute.

Good time credits are days counted against service of the sentence imposed in addition to time actually spent in custody. Mathematical calculations lead to fewer good time credits on a sentence to imprisonment if the good time is credited against actual time served, rather than against the sentence imposed by the judge. The good time credit 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.

18 U.S.C. § 3624(b)(1). The analysis of this statute depends on the statute's history, the BOP's implementation of the statute, and prior litigation on the statute's

interpretation.

A. Historically, Good Time Credit Has Been Counted Against The Sentence Imposed By The Trial Judge, Not Time Actually Served.

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. § 710 (1902) (repealed 1944). In fact, this method of computation may have even earlier provenance, since the original statute became law in 1875. *See Story v. Rives*, 97 F.2d 182, 183-84 & n.1 (D.C. Cir. 1932) (setting forth legislative history). The time was not credited against the time actually spent in prison, but against 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. Some courts construed this language "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. 2518, 2519. The precise problem Mr. Mujahid is experiencing developed first over 40 years ago: "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, in 1959, deleted the time served to assure the methodology of crediting against the sentence, not time served. *Id.*

Prior to 1987, the good time allowance varied depending on the length of the sentence imposed:

> **Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:**
>
> **Five days for each month, if the sentence is not less than six months and not more than one year.**
>
> **Six days for each month, if the sentence is more than one year and less than three years.**
>
> **Seven days for each month, if the sentence is not less than three years and less than five years.**
>
> **Eight days for each month, if the sentence is not less than five years and less than ten years.**
>
> **Ten days for each month, if the sentence is ten years or more.**

18 U.S.C. § 4161 (repealed 1984). The current good time statute was part of the Comprehensive Crime Control Act of 1984 (CCCA). Congress continued the pre-1948 and post-1959 formulation, eschewing language such as "credited as earned

and computed monthly," using instead "term of imprisonment." In an earlier version of the good time statute, Congress allowed 36 days of good time credit against the term of imprisonment, "approximately 10 percent." Sen. Rep. 28-225, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3329-30. The final version simply added 5% to the maximum available good time credits.

The legislation's author expressly articulated the intent to provide federal prisoners with up to 15% good time credits. **Senator Biden stated in direct reference to Section 3624(b):**

> 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 (daily ed. Feb. 9, 1995) (statement of Sen. Biden) (emphasis added); *see also* 140 Cong. Rec. S12314-01, 41230 (Aug. 23, 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) (emphasis added).[2] Although the

[2]The statute to which Senator Biden was referring, in five different places, required the States to demonstrate that state prisoners "serve not less than 85 percent of

Senate Report does not directly address the question beyond using "term of imprisonment," **Congress expressly referred to the need for change from "the complexity of current law" and the need to award 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. Congress believed Subsection (b) to "be considerably less complicated than under current law in many respects." 1984 U.S.C.C.A.N. at 3329.**

Shortly before the statute's effective date, Congress enacted a technical amendment to Section 3624(b) "to clarify that *the good time credit* can be earned for the first year of a 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. 6138, 6144 (emphasis added). **The use of "the" in this context referred to the 54 days specified in the statute.**

B. The BOP Implemented The Statute In A Manner That Expressly Rejected Crediting Good Time Against The Sentence Imposed, Thereby In Practice Allowing No More Than 47 Days Of Good Time Credit Against The Sentence Imposed By The Trial Judge.

The BOP does not award good time credit on the basis of the length of the sentence imposed, but rather on the number of days actually "served." 28 C.F.R. §

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the sentence imposed" as a condition of federal assistance. 42 U.S.C. § 13704(a) (2000).

523.20 (1989); P.S. 5880.28 at 1-48 (ER 37). Under the Program Statement, a prisoner sentenced to a 10-year term of imprisonment earns not 540 days of good time credit, but only 470 days. P.S. 5880.28 at 1-48 (ER 37).

The BOP's formulation explicitly rejects crediting good time against the sentence imposed. In its implementing regulation, the BOP substituted for "term of imprisonment" the phrase "for each year served":

> **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 . . . .**

28 C.F.R. § 523.20(a)(1) (emphasis added). Program Statement 5880.28 adopts the same reasoning, 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" (ER

27).

The BOP explicitly instructs its personnel to ignore the sentence imposed by the trial judge: "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." P.S. 5880.28 at 48 (ER 37). The BOP's method -- covering 26 explanatory pages -- is an eight-step process that the BOP itself terms "arithmetically complicated" (ER 27-52) (Program Statement 5880.28 at 1-44) (ER 31). According to the BOP's Sentence Computation Manual, the following formula must be applied in computing good time credits:

> **The GCT formula is based on dividing 54 days (the maximum numbers of days that can be awarded for one year in service of a sentence) into one day which results in the portion of one day of GCT that may be awarded for one day served on a sentence. 365 days divided in 54 days equals *.148.* Since .148 is less than one full day, no GCT can be awarded for one day served on the sentence. Two days of service on a sentence equals .296 (2 x .148) or zero days GCT; three days equals .444 (3 x .148) or zero days GCT; four days equals .592 (4 x .148) or zero days GCT; five days equals .74 (5 x .148) or zero days GCT; six days equals .888 (6 x .148) or zero days**

GCT; and seven days equals 1.036 (7 x .148) or *1* day GCT. The fraction is always dropped.

(ER 32-33). As applied to the 10-year sentence in the present case, the BOP admitted that the most good time credits an ideal federal prisoner could ever earn is 470 days.

BOP's counsel stated that "you've got 470 days good time that this perfect prisoner [serving a ten-year sentence] will have been given when he gets out." (ER 130). Counsel elaborated that the least time that could be served on a 10-year sentence is 8.7 years, not 8.5 years:

> **If you take our numbers, which are 3,650 days, minus the good time served for good time earned, in other words, which is 470 days, you get 3,180 days. And divide that by 365, and you get 8.7 years.**

(ER 150). The maximum of 470 days good time is also reflected in the BOP chart attached to the Findings and Recommendation (ER 179).[3] The BOP does not claim that its "arithmetically complicated" formula meets the statutory language -- the BOP formula only "best conforms" to the statute. Program Statement

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[3]The chart also reflects that, on a 10-year sentence, the statutory language of receiving 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*" does not result in 10 "end[s] of each year" but eight "end[s] of each year" plus change. *See also* ER 129.

5880.28 at 1-44-44A (ER 31-32).[4]

C. Previous Good Time Litigation Found Ambiguity In The Last Sentence Of The Statute, Which Addresses Proration And Credits "Credit For The Last Year Or Portion Of A Year Of The Term Of Imprisonment" In The Context Of A Sentence To One Year Plus One Day.

This Court has previously addressed Section 3624(b) in the context of a prisoner

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[4]In the policy statement on projecting prisoners' release date, the BOP abandons its tortuous calculation for the simple 15% formula envisioned by Senator Biden:

> Expected length of incarceration . . . shall reflect the total number of months remaining from the inmate's sentence, *less 15%* (for sentences over 12 months), and credit for any jail time served.

Program Statement 5100.07 Ch. 6 at 8 (emphasis added).

who received a sentence of a year and a day. *United States v. Pacheco-Camacho*, 272 F.3d 1266 (9th Cir. 2001). In that case, the BOP argued Mr. Pacheco-Camacho was eligible for good time credits under the opening phrase of the statute: "a prisoner who is serving a term of imprisonment of more than 1 year." 272 F.3d at 1268. Nevertheless, the BOP argued Mr. Pacheco-Camacho could only receive 47 days of good time credit based on proration of the last year or part of a year. 272 F.3d at 1268. The *Pacheco-Camacho* panel recognized that a single-year sentence is significantly different than a multi-year sentence. 272 F.3d at 1268-69.

After noting that a prisoner sentenced to a year and a day would never be incarcerated to a full calendar year, and thus the award of credit could not be based on time actually served, the *Pacheco-Camacho* panel concluded that "term of imprisonment" was ambiguous. 272 F.3d at 1269-70 ("Finding the meaning of 'term of imprisonment,' as used in section 3624(b), to be ambiguous . . ."). To resolve the perceived ambiguity, the Court deferred to the agency's construction rather than the rule of lenity. *Pacheco-Camacho*, 272 F.3d at 1270.

Without resort to traditional rules of statutory interpretation, the District Court found that the statute unambiguously credited good time to time actually served, not the term of imprisonment (ER 174). The court focused on when credit should be awarded without consideration of the ordinary meaning of "term of imprisonment" (ER

174-75). Although distinguishing *Pacheco-Camacho*, the court extended its reasoning regarding the last year of a single-year sentence to a multi-year sentence (ER 176-77).

SUMMARY OF ARGUMENT

Mr. Mujahid received a 10-year federal sentence. The math for calculating good time could not be simpler: "beyond the time served," Mr. Mujahid should be able to earn up to 54 days of good time credit "at the end of each year" of his "term of imprisonment." 54 x 10 = 540 days of good time credit. Instead, the BOP only allows up to 470 days of good time credit on a 10-year sentence. The deprivation of 70 days good time credit violates the statute under the basic rules of statutory construction.

The Supreme Court has adopted a series of rules that must be applied in interpreting a statute to assure that the legislature -- rather than the executive or judiciary -- writes the criminal law. This Court must follow these rules and, as applied to the federal good time statute, the rules require a single result: reversal of the District Court.

First, the construction of "term of imprisonment" must consider the context in which it was used. The federal criminal code, and especially the CCCA, uses "term of imprisonment" over one hundred times. "Term of imprisonment" always means the sentence imposed by the judge. The District Court violated Supreme Court rules and usurped the legislative function by concluding that, in this single context, "term of

imprisonment" means "actual time served."

Second, the BOP concedes that "term of imprisonment" in the first phrase of the first sentence of Section 3624(b) means the judge's sentence, not time actually served. The conclusion that the identical term means something entirely different -- actual time served -- later in the same sentence runs afoul of the basic rule requiring intra-statutory consistency. The judiciary simply cannot conclude that Congress was so capricious as to use the same term of art to mean different things in the same sentence.

Third, Congress actually and expressly considered the precise discrepancy in good time credits when credited against actual time served rather than the sentence imposed. In 1959, Congress deleted language that had been added to the statute that, due to judicial interpretation, reduced the credits prisoners could receive. The amendment, which is consistent with the current statute's omission of "actual time served" language, must be given meaning by the judiciary in interpreting the statute.

Fourth, the author of the good time credit statute -- Senator Joseph Biden -- explicitly addressed the good time to be credited on a 10-year sentence. Senator Biden said that prisoners like Mr. Mujahid would "go to prison for at least 85 percent of the time -- 8.5 years, which is what the law mandates." Instead, the BOP requires that even the ideal prisoner must serve 8.72%, or 8.72 years, disregarding Senator Biden's statement and other indicia that Congress intended a simple 15% formula against the

sentence imposed by the judge.

Fifth, apart from any ambiguity, the penal statute must be strictly construed against deprivation of freedom.

The District Court correctly did not treat *Pacheco-Camacho*, which only dealt with the last sentence of the statute on a year-and-a-day sentence, as directly controlling. However, the court erred in extending the case to multi-year sentences by ignoring binding rules of statutory construction.

If *Pacheco-Camacho* is deemed controlling, the Court should rehear this case en banc to bring the case in line with controlling Supreme Court authority on statutory construction. En banc review is especially appropriate to harmonize this Court with opinions in the Seventh Circuit on the 15% construction and, if the statute is considered ambiguous, to reconcile conflicting Supreme Court and Sixth Circuit authority that requires application of the rule of lenity, rather than deference to the prosecution's interpretation. The issue also merits this Court's closest attention because of the unprecedented importance and consequences of the BOP's misinterpretation: thousands of years of over-incarceration and hundreds of millions of dollars of wasted taxpayers' money.

ARGUMENT

I. THE FEDERAL GOOD TIME STATUTE, WHICH PROVIDES

FOR CREDIT OF "UP TO 54 DAYS AT THE END OF EACH YEAR OF THE PRISONER'S TERM OF IMPRISONMENT," IS VIOLATED BY BUREAU OF PRISONS RULES THAT ONLY PERMIT A PRISONER SERVING A TEN-YEAR SENTENCE TO RECEIVE A MAXIM OF 470 DAYS, INSTEAD OF 540 DAYS, OF GOOD TIME CREDIT.

The District Court correctly acknowledged the "superficial appeal" of concluding that "54 days of good time credit per year for 10 years should equate to 540 days over the span of a 10-year sentence" and that *Pacheco-Camacho* is not controlling. The District Court went on, however, to fail to adhere to controlling Supreme Court methodology on statutory analysis and to extend *Pacheco-Camacho* to approve the agency interpretation that only allows 470, not 540, days of good time credit on a 10-year sentence. Under the Supreme Court's rules on determining congressional intent, the federal good time credit statute can only mean that, in the context of a 10-year sentence, the prisoner is able to earn up to 540 days of good time credits -- or 15% of his prison term.

A. Because Supreme Court Rules Of Statutory Constructio n Require

540 Days Of Good Time On A Ten-Year Sentence, This Court's Opinion In *Pacheco-Camacho* Is Not Controlling Because The Opinion Only Addressed Proration Of The Last Year Or Portion Of

A Year Of A Year-And-A-Day Sentence.

Punishment for crime is determined solely by the legislative branch of government. The Supreme Court has articulated a number of methods for determining the meaning of statutes: the rules of statutory construction. The good time statute has not previously been interpreted applying the methods required by the Supreme Court. This Court, reviewing *de novo* the District Court's failure to do so, should apply the following rules required by the Supreme Court:[5]

- plain meaning -- in the context of the legislation, the phrase "term of imprisonment" has a plain and unambiguous meaning because the phrase is used to mean the judge's sentence in all its other uses in the CCCA and the accompanying Sentencing Guidelines.
- intra-statutory consistency -- the phrase "term of imprisonment" is conceded to be the judge's sentence in the opening phrase of the first

[5]This Court reviews *de novo* the District Court's interpretation of a statute. *United States v. Kaluna*, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc).

sentence; therefore, it must be the same in the middle phrase of the same sentence, "54 days at the end of each year of the prisoner's term of imprisonment."

- statutory amendments must have meaning -- Congress demonstrated its intent by dropping language in 1959 that had been construed to require credit against "time served" and never reverted to that usage.
- legislative intent -- the direct expression of Senator Biden on this particular case -- a 10-year federal sentence -- as well as other legislative indications of the desire for a simple 15% formula, demonstrate "term of imprisonment" means the judge's sentence.
- narrow construction of penal statutes -- even without ambiguity, statutes involving potential loss of human freedom are narrowly read.

Neither *Pacheco-Camacho* nor the District Court addressed a single one of these fundamental rules of construction. *Pacheco-Camacho* is not controlling because it addresses a different part of the statute and because, as the Supreme Court has noted, a case that does not address a specific controlling argument does not bind a subsequent court. *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

1. In The Context Of The Crime Control Act Of 1984, "Term Of Imprisonment" Always Means The Sentence Imposed By The Judge, Which Would Require That Mr. Mujahid Receive Up To 540 Days Credit On A 10-Year Sentence.

Under governing Supreme Court authority, good time credits depend on the length of sentence, not the time actually served, because "term of imprisonment" means the sentence imposed by the judge. Section 3624(b) 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). **The Supreme Court requires that statutory**

terms be construed "'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, 388-89 (1999) (statutory language must be read in context); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (same); *see United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("[W]e assume that in drafting this legislation, Congress said what it meant."). "Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words ... in search of an intention which the words themselves did not suggest." *United States v. Gonzales,* 520 U.S. 1, 8 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95- 96 (1820) (Marshall, C.J.)).

"Term of imprisonment" is one of the most often used phrases in the federal criminal lexicon. The federal sentencing statutes consistently use "term of imprisonment" to refer to the judge's sentence to imprisonment. 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 (ER 54-56) (summary of Title 18

statutes that use "term of imprisonment" as the sentence imposed).[6] 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") *see* ER 58-62 (copy of Section 994 with "term of imprisonment" highlighted throughout); U.S.S.G. § 5C1.1 (Imposition Of A Term Of Imprisonment).

Whether viewed standing alone or in the context of federal sentencing law, "term of imprisonment" is unambiguous. In every judgment and commitment order entered in federal court, the trial judge sentences the defendant to be "imprisoned for a term of" whatever the guidelines demand in the particular case. Administrative Office Form 245 (July 1990) (Judgment in a Criminal Case). In resolving questions regarding the commencement of the term of supervised release, both the Supreme Court and this Court have read "term of imprisonment" in 18 U.S.C. § 3264(a) and (e) as actual incarceration plus good time credits. *See Johnson v. United States*, 529 U.S. 53, 58-59 (2000); *United States v. Morales-Alejo*, 193 F.3d 1102, 1105-06 (9th Cir. 1999); *United States v. Blake*, 88 F.3d 824, 825 (9th Cir. 1996). Even under the earlier parole

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[6]Throughout Title 18, "term of imprisonment" is used about one hundred times in setting out statutory maximum punishments (ER 54).

statutes, "term of imprisonment" meant the entire sentence -- time in custody plus time on supervision. *Raines v. U.S. Parole Commission*, 829 F.2d 840, 844 (9th Cir. 1987) ("Term of imprisonment includes time on parole.").

As Congress well knew, the words "term of imprisonment" have a well-understood, unequivocal meaning. "Term of imprisonment" is unambiguous in its myriad uses and is not ambiguous in the application of 54 days credit against each year of a multi-year sentence.

2. Under The Rule Of Intra-Statutory Consistency, The Concession That "Term Of Imprisonment" Means The Judge's Sentence In The First Phrase Of The First Sentence Means The Phrase Has The Same Meaning In The Rest Of The Sentence.

The Supreme Court has instructed that identical words -- such as "term" and "term of imprisonment" -- appearing in different parts of the same act have the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). The BOP agrees that "term of imprisonment" means the sentence imposed by the judge in the first phrase of Section 3624(b) (ER 33) ("the very shortest sentence that can be awarded [good time credit] is a sentence of at least 1 year and 1 day"). Under the

rule of intra-statutory consistency, "term of imprisonment" means the same thing in the same sentence.

Despite the BOP's agreement that "term of imprisonment" in the very first phrase of the first sentence of the statute means the judge's sentence, the agency ascribes a different meaning thereafter. Where the exact same words -- "term" and "term of imprisonment" -- are used later in the statute, the BOP claims the same words mean "time actually served." On the contrary, "term of imprisonment" and "term," in their second and third appearances in the same sentence of the statute, mean the exact same thing as in the first unambiguous usage. The principle of intra-statutory consistency renders "term of imprisonment" unambiguous in its later uses.

When Congress means time served, Congress says "time served," not "term of imprisonment." In Section 3624(b), the phrase "time served" is used to specify that the 54 days is credited "beyond the time served." Instead of using "term served," Congress deliberately used "term of imprisonment." The Supreme Court refrains from concluding that differing language "has the same meaning in [two subsections] . . . We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Under

controlling Supreme Court authority, the BOP's reading of the statute is simply untenable. Congress did not intend that "term of imprisonment" mean different things in the same sentence, one of which means the same as "time served," even though that exact expression is used to convey that concept in the same sentence.

3. Congress Specifically Amended The Good Time Statutes To Use The Sentence The Judge Imposed, Not The Actual Time The Defendant Served, As The Basis For Good Time Credit.

When Congress amends a statute, Congress intends its amendment to have real and substantial effect. *Stone v. INS*, 514 U.S. 386, 397 (1995). In 1959, Congress consciously amended the statute to calculate good time against the judge's sentence, not on time served. The basic rule of construction, approved by the Supreme Court, demonstrates the statute's relevant use of "term of imprisonment' is not ambiguous.

Despite specific citation, the District Court simply ignored the 1959 amendment that deleted "time served" from the good time statute to cure the precise problem that is losing Mr. Mujahid 70 days of good time credits. The deletion eliminated the "effect" -- the same effect in this case -- that required

"well-behaved prisoners to serve longer periods of confinement" than when good time is credited against the sentence imposed. ***Supra*** **at 6-7.**

The present good time credit statute preserves the distinction drawn by the 1959 amendment. Credit is not accrued based on actual time served. Instead, Congress preserved language to credit the good time against the judge's sentence. By ignoring the amendment, the District Court ignored Supreme Court direction on how to determine the intent of Congress.

4. Express And Tacit Expressions Of Legislative Intent Demonstrate That "Term Of Imprisonment" Means The Sentence Imposed.

The present case involves an extraordinarily vivid expression of legislative intent: Senator Joseph Biden used a prison term identical to the sentence in Mr. Mujahid's case to illustrate the effect of the good time statute. The author of the good time statute stated:

> 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 (daily ed. Feb. 9, 1995). **Senator Biden, and other federal**

statutes, expressly refer to the rate of good time as 85%. *Supra* at 8-9. In contrast, the BOP requires actual service of 87.2% of the 10-year sentence, or 8.7 years.

In addition to Senator Biden's express statements of a 15% formula, the use of the number 54 -- which is 15% of 365 days -- demonstrates intent. The 1986 technical amendment reinforces the tie between 54 days and the term of imprisonment imposed by the judge. Contrary to Senator Biden's expectation, the BOP is only giving Mr. Mujahid 1.28 years in good time, not 1.5 years, on a ten-year sentence.[7] The BOP rule allows only 47 days credit for each year of the sentence imposed, requiring no less than 87.2% of the sentence to be actually served, rather than the 85% envisioned by the statute's authors. No federal prisoner, no matter how virtuous, ever serves less than 87.2% of the sentence imposed.

The 15% formula also advances the purpose of simplifying calculation of good time credits. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997) (agency interpretation must give way to Congress's intent). The legislative history demonstrates that the Comprehensive Crime Control Act of 1984, of which

[7]Under the BOP's formulation, the maximum good time on a 10-year sentence is 471 days, which works out to about 12.8%.

Section 3624(b) is a part, purposefully sought simplification and predictability in the calculation of sentences. *Supra* at 9. The use of "time served" rather than the "term of imprisonment" thwarts this intent because it requires complicated and virtually incomprehensible calculations. The only reason for resorting to this mathematical complexity is an attempt to give effect to the erroneous designation of "time served" as the baseline. The underlying calculations for individual prisoners are not easily accessible to prisoners or the public. The BOP's methodology frustrates Congress's intent to simplify good time calculations.

5. Penal Statutes Must Be Narrowly Construed.

Apart from any question of ambiguity, a criminal statute must be strictly construed. *Scheidler v. NOW*, 537 U.S. 393, 408-09 (2003). As a statute in Title 18 that dictates how much real time a federal prisoner must serve, Section 3624(b) is a criminal statute covered by this rule of construction. *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (parole statute is controlled by rules related to narrow construction of criminal statutes).[8] The District Court, despite the "superficial appeal"

[8]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).

of the plain meaning of the statute, utterly disregarded the Supreme Court's instruction to construe narrowly statutes affecting human freedom.

6. The District Court Improperly Extended The Pacheco-Camacho Reasoning Relating To The Last Year In Its Analysis.

Instead of applying the Supreme Court's rules of statutory construction, the District Court improperly extended this Court's reasoning in *Pacheco-Camacho* to Mr. Mujahid's 10-year sentence. The *Pacheco-Camacho* opinion focused on the unique problems surrounding the timing of credit in the last sentence of the statute in the context of a year and a day sentence:

> The counting gets a bit tricky during the last year--or portion of a year--of the prisoner's sentence, because he obviously can't wait until the year's end to receive his credit. Recognizing this, the law provides that "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."

Pacheco-Camacho, 272 F.3d at 1267. The Court reasoned that because "credit for the last year . . . of the term of imprisonment shall be *prorated*," **awarding credits based on a year and a day sentence rather on the actual time served would give the prisoner disproportionate good time credits merely because their sentence**

happens to be equal to a year and a day. *Pacheco-Camacho,* 272 F.3d at 1268 (emphasis in original). Thus, the portion of the statute construed in *Pacheco-Camacho* pertains only to the last year. Since a single, last, and only year sentence must be prorated, the Court found the last sentence of Section 3624(b) to be ambiguous. *Pacheco-Camacho*, 272 F.3d at 1266 ("As the language of section 3624(b) does not make clear whether the sentence imposed or the time served should be used as the basis of *proration*, we consider whether legislative history removes the ambiguity") (emphasis added).

In upholding the BOP's faulty interpretation, the District Court held that, although awarding 54 days for each year of the term of imprisonment has a "superficial appeal," the plain meaning of the statutory phrase "each year of the term of imprisonment" meant not the sentence imposed, but time actually served. On the contrary, the "superficial appeal" is simply the plain meaning of the statute.

First, the court failed to adhere to the Supreme Court's well-established canons of statutory interpretation. **Second, after correctly concluding that *Pacheco-Camacho* does not control, the court** improperly extended the construction of the ambiguous last sentence of the statute to the plain and unambiguous first sentence of 18 U.S.C. § 3624(b), eliding parts of the statute.[9] **Finally, the District Court's**

[9]The District Court's construction was distorted by the elision of the italicized

conclusion that "good time credits must be earned before they accrue" confused the question at issue here, which is not when good time credits accrue, but at

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words from the statute:

> ***. . . 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 to 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, subject to determination by the Bureau of Prisons that, during that year,*** **the prisoner has displayed exemplary compliance with the institutional regulations.**

(ER 174-75).

what rate.[10]

Because the present case involves the previous ten years of sentence, not a single year, *Pacheco-Camacho* is not controlling. The windfall about which the Court was concerned simply does not apply to a multi-year sentence. In fact, by finding a disparity between a single year sentence and a multiple year sentence, the Court implicitly found that there was no commensurate ambiguity in the statute. Unlike Mr. Pachecho-Camacho, Mr. Mujahid is serving a multiple year sentence. In the context of a multi-year sentence, under traditional canons of statutory construction,

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[10]Under either interpretation, as a practical matter, the BOP awards good time credit prospectively when it calculates a prisoner's projected release date upon arrival at the institution. The projected release date is calculated by establishing the full term date -- *e.g.*, 10 years from the date of sentencing on a ten year term of imprisonment, less any jail time credits, minus the possible amount of good time that could be awarded over the term of the sentence. Should a prisoner misbehave and be sanctioned with a loss of good time credit, the projected release date is retarded by the number of lost good time days. This practice of prospectively awarding good time credit is not affected, whether the rate of good time is 54 days per each year of the term of imprisonment, or 47 days.

"term of imprisonment," or "term," in the first three uses in Section 3624(b), means the sentence imposed by the sentencing court, not the time actually spent in prison. By calculating credits against the sentence imposed, Mr. Mujahid is entitled to 54 days against each year of his sentence, not the 47 days allowed by the BOP.

This Court should limit *Pacheco-Camacho* to its reasoning, which depends on the statutory language regarding a single year of incarceration. As to a multi-year sentence, the Supreme Court's basic rules of statutory construction require relief.

B. If *Pacheco-Camacho* Is Deemed To Control This Case, The Court Should Review The Issue En Banc For Three Reasons Central To The Role Of Such Review.

Based on the Supreme Court's rules of statutory construction, this Court should not extend *Pacheco-Camacho* to multi-year sentences. If the Court concludes that *Pacheco-Camacho* controls this case, the Court should review this question en banc, both to reconcile Ninth Circuit law with Supreme Court and other Circuit authority, and to address the massive, immoral, and expensive over-incarceration of federal prisoners.

1. As Reflected In Opinions From The Seventh Circuit, The Pacheco-Camacho Court's Conclusion That "Term Of Imprisonment" Is An Ambiguous Statutory Term Is In Conflict With Congress's Frequent And Unambiguous Use Of The Term As Meaning

The Judge's Sentence.

Well before *Pacheco-Camacho*, one of the most scholarly and prolific federal appellate judges looked at the good time credit statute and concluded it meant what it said in the CCCA: **Congress had reduced available good time credits to a maximum of 14.7% of the sentence (54/365 without rounding off).[11] The Seventh Circuit addressed the question in the context of the 1984 statutes that allowed judges to impose a *de facto* life sentence, by means of a term of years, without adhering to the statutory protections for a *de jure* life sentence. *United States v. Prevatte,* 66 F.3d 840 (7th Cir. 1995). In a concurring opinion, Judge Richard Posner stated:**

> **With parole abolished and (another innovation of the Sentencing Reform Act) *good-time credits reduced to a maximum of 14.7 percent of a sentence* of more than four years (see 18 U.S.C. § 3624(b)(1)), a judge could--if we allowed him--use a sentence to a term of years to imprison a defendant for his natural life, thus circumventing the requirement in 18 U.S.C. § 34 of a jury recommendation for a life sentence.**

***Prevatte*, 66 F.3d at 846-47 (Posner, J., concurring) (emphasis added).**

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[11] 54 ÷ 365 = 14.7945.

In a recent District Court decision from the Seventh Circuit, the Honorable Barbara B. Crabb found that a prisoner serving a 10-year sentence -- identical to Mr. Mujahid -- raised a substantial issue regarding the BOP's misinterpretation of the good time credit statute and issued an order to show cause. *White v. Scibana*, 2003 WL 23171593, at *1-3 (W.D. Wis. Dec. 22, 2003). First, the court recognized the plain logic of the prisoner's position that he should be eligible for up to 54 days for each of the ten years of his term of imprisonment:

> **Seizing on the reference in the statute to "54 days," petitioner argues that the amount of good time to which he is entitled should be determined by multiplying 54 by 10 for a total of 540 days. Petitioner's argument makes sense on its face. He is subject to a ten-year term of imprisonment; he should receive a credit of 54 days for each year of that term.**

White, supra **at *1. Then, the court made its way through the complex formula described in the BOP's Sentence Computation Manual, noting that it seems "unduly complicated":**

> **Petitioner complains not without good reason that the bureau's method of calculating good time is unduly complicated. However, the bureau is not necessarily required to employ a simple method so long as the method it applies is consistent with the language of § 3624. The key clause of § 3624 provides that an inmate receives 54 days of credit "at the end of each year of the prisoner's term of imprisonment." This raises the threshold question whether the bureau is interpreting "term of imprisonment" correctly to mean *time served* rather than the *sentence imposed.* Neither the Supreme**

> **Court nor the Court of Appeals for the Seventh Circuit has addressed this issue. *But see United States v. Prevatte,* 66 F.3d 840, 846 (7th Cir. 1995) (Posner, J., concurring) (interpreting statute as using sentence imposed rather than time served as basis for good time credit calculation).**

***White, supra* at *2 (emphasis in original). The court then noted the *Pacheco-Camacho* position on ambiguity and rejected it based on two factors argued but not addressed in the present case: the need to construe "term of imprisonment" as meaning the same thing throughout the statute; and the consistent use of "term of imprisonment" as a "synonym for 'sentence'" throughout Title 18.**

> **It is arguable that the phrase "term of imprisonment" is ambiguous; it could be construed reasonably to mean either the term sentenced or the amount of time served. *Pacheco-Camacho v. Hood,* 272 F.3d 1266, 1268-69 ([9]th Cir. 2001). However, a "time served" construction becomes less plausible when the statute is read as a whole. The first clause of § 3624(b)(1) states that the statute applies to any "prisoner who is serving a term of imprisonment of more than 1 year." In this context, "term of imprisonment" must refer to the sentence imposed. It would be impossible to determine whether an inmate qualified for good time credit by looking at how much time he would serve *after* his good time was taken into account. Courts presume that Congress intends to give the same meaning to the same term used in different parts of a statute. *Belom v. National Futures Association,* 284 F.3d 795, 798 (7th Cir. 2002). In addition, when Congress has used "term of imprisonment" in other statutes, it generally does so as a synonym for "sentence." *See, e.g.,* 18 U.S.C. § 506(b)(3); 18 U.S.C. § 844(h); 18 U.S.C. § 924(c)(1)(D)(ii); 18 U.S.C. § 1503(a); 18 U.S.C. § 3143(b)(1); 18 U.S.C. § 3551(b)(3); 18 U.S.C. § 3553(c); 18 U.S.C. § 3559; 18 U.S.C. § 3621(a); 18 U.S.C. § 4014.**

***White, supra* at *3 (emphasis in original). Finding that the BOP had no discretion to construe an unambiguous statute, the court directed the BOP to show cause**

why the writ should not issue on Mr. White's claim that the BOP "is calculating his good time credits in violation of 18 U.S.C. § 3624(b)(1)." *Id.*

Consistent with these opinions from the Seventh Circuit, Congress had only one meaning in mind when the phrase "term of imprisonment" was used in criminal statutes.[12] This intent is required by the Supreme Court's rules of statutory construction. Under basic separation of powers doctrine, neither the government nor the judiciary can increase the severity of punishments set by Congress. To bring this Court's precedent into conformity with the statute as written, this Court should grant en banc review.

2. Even If "Term Of Imprisonment" Were Ambiguous, En Banc Review Would Be Appropriate Because Supreme Court And Sixth Circuit Authority Require Application Of The Rule Of Lenity, Not Administrative Deference.

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[12]**The record in the present case includes excerpts of the laws enacted as the CCCA and the accompanying Sentencing Guidelines in which "term of imprisonment" is consistently and unwaveringly used to mean the sentence**

imposed by the sentencing judge (ER 54-62).

Assuming that *Pacheco-Camacho* correctly determined that "term of imprisonment" is ambiguous, this Court should review en banc *Pacheco-Camacho*'s ruling that administrative deference, rather than the rule of lenity, permitted a harsher interpretation of the statute. *Pacheco-Camacho* is in conflict with controlling Supreme Court authority and with Sixth Circuit precedent, which follows the Supreme Court in refusing to apply what Justice Scalia calls a "doctrine of severity."

In *Pacheco-Camacho*, the Court resolved the ambiguity of the statutory term not by applying the rule of lenity, but by deferring to the executive branch's interpretation of the penal statute, citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). **The Supreme Court in *Crandon v. United States*, 494 U.S. 152 (1990), expressly rejected such deference to an executive agency in the construction of a criminal statute.** In *Crandon,* the Supreme Court had to decide whether a criminal prohibition on supplemental compensation to government employees barred certain payments. The executive branch's agency construed the statute to apply to the employees. Despite the executive branch's construction, the Court interpreted the penal statute, relying in part on the rule of lenity, to ultimately conclude that the statute did not prohibit the payments. *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 and the judicial branch in interpreting criminal statutes. "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.*" *Crandon*, 494 U.S. at 177 (emphasis added). 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.[13]

The Sixth Circuit has applied *Crandon* 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

[13]The *Pacheco-Camacho* panel apparently confused the BOP's statutory authority to administer the good time credit statute with the courts' responsibility for statutory interpretation of the statutes the BOP administers. 272 F.3d at 1266. While Congress delegates certain tasks to the BOP, it by no means delegates the determination of the maximum amount of good time on a term of imprisonment. The agency does not purport to lower the maximum good time credits; the regulation and program statement only claim to implement the good time credit statute.

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 . . . (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). "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." *Id.*

The *Pacheco-Camacho* court never addressed *Crandon* or the Sixth Circuit's holding regarding statutory ambiguity, as opposed to the statutory silence, thus creating a conflict that should be resolved en banc. Any ambiguity in the criminal statute

establishing the maximum good time credits must be resolved based on the rule of lenity, not the executive branch's tendency toward severity in the treatment of its prosecutorial targets.

Application of the rule of lenity has deep roots in morality beyond the rule of law and rules of construction. Human freedom is at issue. The rule of lenity grew out of the most ancient sources of American constitutional law. As Chief Justice John Marshall recognized, "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). **The English common law took lenity in the construction of criminal statutes as a given.** 1 WILLIAM BLACKSTONE, COMMENTARIES 92 ("A man cannot suffer more punishment than the law assigns, but he may suffer less."). **Even in Biblical times, the law recognized the immorality of exceeding the lawful punishment.** *Compare* 2 *Corinthians* 11:24 *with Deuteronomy* 25:1-3 (to ensure against exceeding legal punishment, the persecutors of Saint Paul limited punishment to thirty-nine lashes in conformance with the tradition of stopping one short of the law's maximum of forty).

This Court should grant en banc review to bring its precedent into conformance with governing Supreme Court authority, to avoid conflict with the Sixth Circuit, and to purge the wrongfulness of punishment beyond what is

certain that Congress intended.

3. As Reflected In Justice Kennedy's Public Expressions Of Concern Regarding Over-Incarceration, The Issue Is One Of Outstanding Importance Because, If The Statute Were Correctly Interpreted, Almost All Federal Prisoners Would Be Statutorily Entitled To Up To 2.2% More Good Time Credits, Which Would Total About 28,000 Years Of Prison Time At A Savings Of $628,000,000.00.

The legal issue underlying this case is extraordinarily important in the real world. The BOP rule affects about 95% of federal prisoners sentenced since 1987, those serving sentences of more than a year and less than life. 18 U.S.C. § **3624(b). Despite the express intent of Congress to apply good time credits to the "term of imprisonment" imposed by the sentencing judge, the BOP applies good time only to time actually served. This means that every eligible federal prisoner is imprisoned seven days more per year than Congress intended.**

The BOP formula multiplies the misery for every year of the prisoner's sentence.

There are currently approximately 154,805 federal prisoners serving guideline sentences greater than one year and less than life.[14] The mean sentence imposed is about 9.5 years.[15] At seven days per year, the time involved is over 28,000 years (154,805 x 7 x 9.5 ÷ 365 = 28,204). At $22,265.00 per year for non-capital incarceration expenditures,[16] the meager seven days on each year of a prisoner's sentence could amount to over $628 million in taxpayer money that Congress did not intend or authorize to expend on incarceration for current prisoners, and over $66 million more for each new year. The human costs of this over-incarceration defy quantification.

At the same time this incredible waste of material and human resources is seeping through the floors of this Nation's prisons, over-incarceration is a social evil beyond prison walls. Justice Anthony Kennedy, addressing the American Bar Association convention last summer, stated: "And in my view our resources are being misspent, our punishments are too severe and our sentences are too long." Justice Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html. The rule of severity that the BOP imposes, in light of "ambiguity" in the good time credit statute, violates basic legal principles at tremendous costs:

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[14]FEDERAL BUREAU OF PRISONS: QUICK FACTS (Feb. 2004); *available at* www.bop.gov/fact0598.html.

[15]Telephone interview with Jerry Gayes, Federal Bureau of Prisons, Office of Research (Apr. 15, 2002).

[16]Telephone interview with Dan Dunn, Federal Bureau of Prisons, Office of Public Affairs (Feb. 9, 2004).

The door is locked against the prisoner and he goes to live in a hidden world. If you were to enter that world you should be startled by what you see.

In the United States today we have 2.1 million people behind bars. In this state, even as we meet, the state of California alone, excluding federal prisons, has over 160 thousand prisoners.

Forty percent of the prisoners nationwide are African Americans. The highest rate of incarceration for any ethnic group are young men in their mid to late twenties. And in the United States one in 10 African Americans in that age group are behind bars.

Our incarceration rate in the US, per capita, is about eight times as high as that of England, France or Germany. Their per capita incarceration rate is about 1 in 1,000. Ours is one in 143.

It's the human costs that count. But we get some insight into that if we look at raw economic costs. It costs 26 thousand dollars a year in the state of California and in many other jurisdictions to keep one prisoner.

To compare this with school costs is like apples and oranges, in a sense, schools do not have the responsibility for custody, feeding and medical care. Still, when the disproportion to the cost of incarceration and the cost of educating the young people who soon will be charged with keeping the social compact is as great as it is, something is wrong.

***Supra*. This over-incarceration is directly at play in the federal system. *Supra* ("The Federal Sentencing Guidelines should be revised downward. . . . In too many cases, mandatory minimum sentences are unwise and unjust.").**

Even if there were only a distant possibility that federal sentences are being

over-served by 2.2%, this Court's time and energy would be well-spent reviewing this critical question. In light of what appears to be the crystal-clear intent of Congress, and in view of the rule of lenity if there were ambiguity, the Court should review *Pacheco-Camacho* en banc to carry out its responsibility as a check on an executive branch that is distorting Congress's good time credit statute to over-punish, over-incarcerate, and over-tax the people.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court and order the District Court to grant the writ and require the BOP to calculate good time based on the judge's sentence, not time served. In the alternative, the Court should recommend that the case be reviewed en banc.

RESPECTFULLY SUBMITTED this ___ day of February, 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,	)	
	)	
	)	
Respondent-Appellee.	)	

CERTIFICATE OF RELATED CASES

I, Stephen R. Sady, undersigned counsel of record for petitioner-appellant, SABIL J. MUJAHID, state pursuant to the Ninth Circuit Court of Appeals Rule 28-2.6, that I know of no other cases that should be deemed related.

DATED: May 4, 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 OPENING BRIEF is proportionately spaced, has a typeface of 14 points or more and contains 9,737 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 OPENING 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\aob)