UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA 03-36038

SABIL J. MUJAHID,

Petitioner-Appellant,

v.

CHARLES A. DANIELS, Warden, FCI Sheridan,

Respondent-Appellee.

UPON APPEAL FROM THE
FINAL JUDGMENT OF NOVEMBER 4, 2003
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THE HONORABLE GARR M. KING

No. CV-02-1719-ST

ANSWERING BRIEF OF THE RESPONDENT-APPELLEE

KARIN J. IMMERGUT
United States Attorney
District of Oregon
CRAIG J. CASEY
Assistant United States Attorney
1000 S.W. Third Ave., Suite 600
Portland, OR 97204-2902
Telephone: (503) 727-1000

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STATEMENT OF JURISDICTION AND OF THE CASE

Petitioner-Appellant, Sabil Mujahid (hereafter, petitioner)[1], filed a ***pro se*** petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the District of Oregon on December 20, 2002. At petitioner's request, the District Court appointed the Federal Public Defender for the District of Oregon, on February 21, 2003. On the same date an amended petition was filed, also pursuant to 28 U.S.C. § 2241.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2241. This Court's jurisdiction is correctly invoked under 28 U.S.C. §§ 1291 and 2253.

The District Court (Magistrate Judge Janice Stewart) issued the Findings and Recommendation on August 22, 2003, recommending denial of the petition for writ of habeas corpus and dismissal of the proceeding. After objections were timely filed by counsel for petitioner and responded to, the Judgment in favor of respondent was issued on November 4, 2003, by U. S. District Judge Garr M. King. Petitioner timely filed his Notice of Appeal on November 5, 2003. Fed. R. App. P. 4(a)(1)(B).

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[1] Abbreviations frequently used herein are: Petitioner-Appellant referred to as petitioner; Respondent -Appellee referred to as respondent; Petitioner's Excerpts of Record as ER followed by page numbers; Petitioner's appellate brief as Pet.App.Brf.; United States Bureau of Prisons as BOP.

STANDARD OF REVIEW

The District Court's denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 is reviewed de novo. Hunter v. Ayers, 336 F.3d 1007, 1011(9th Cir. 2003).

STATEMENT OF ISSUES FOR REVIEW

1. Whether the case is moot because petitioner has been released from prison and the relief he was seeking is no longer available.

2. Whether the Bureau of Prisons was correct in interpreting the plain meaning of 18 U.S.C. § 3624(b) to require that a full year be served before an inmate may receive the full amount of credit. And, whether this Court's decision in Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001), cert. denied, 535 U.S. 1105, 122 S.Ct. 2313 (2002), is controlling of the matter under appeal.

3. Whether the Bureau of Prisons' interpretation of 18 U.S.C. § 3624(b) is inconsistent with or violates the legislative history of such statute.

4. Whether the rule of lenity should apply in this matter involving an agency's reasonable interpretation of 18 U.S.C. § 3624(b).

5. Whether it is premature now to consider petitioner's argument for an ***en banc*** hearing.

STATEMENT OF FACTS

The material facts are not in dispute. In 1995, Mujahid was convicted of being a Felon In Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 10 years in prison, followed by three years of supervised release. ER 64-65, 78, 170-171.

He arrived at FCI Sheridan on November 9, 1995, filed the petition for writ of habeas corpus while an inmate there, and remained there until his transfer to the lower security FCI Lompoc on January 9, 2003. At all times he was awarded good conduct time credits in accordance with the formula outlined in BOP Program Statement 5880.28, Sentence Monitoring Computation Manual (CCCA of 1984)(July 19, 1999)(PS 5880.28). ER 80-106. It is also not disputed that during the entire time petitioner was in the custody of the Bureau of Prisons, petitioner was awarded good conduct time credits in accordance with the procedures established by 28 C.F.R. § 523.20(a) and PS 5880.28. Petitioner's counsel states that petitioner has now been released from custody and has commenced supervised release. Pet.App.Brf. at fn.1.[2]

As also noted in the Findings and Recommendation, petitioner received good conduct time credit throughout his confinement in the Bureau of Prisons. ER 170.

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[2] We have independently confirmed that petitioner was released from confinement to supervised release on January 6, 2004, and returned to Alaska.

This was computed by awarding 54 days of good conduct time at the end of each year in custody. ER 179. Since the possible, and in petitioner's case actual, accumulated good time credit after eight years exceeded a year (365 days), petitioner did not have to serve his tenth year of imprisonment, and also did not have to serve a portion of his ninth year of imprisonment.[3] ER 179. An inmate earning the maximum good conduct time on a ten year sentence receives 470 days of good time credit along with incarceration over a period of fewer than nine full years. ER 179.

SUMMARY OF RESPONDENT'S ARGUMENT

The case is moot. Petitioner filed the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, and subsequently an amended petition, when he was a prisoner awaiting transfer to a community corrections center (halfway house), and supervised release. Petitioner's counsel has informed us (Pet.App.Brf. at fn. 1) petitioner has now been released from custody and there is no custodial hold by respondent on him.[4] The respondent, Warden Charles Daniels, cannot grant him any

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[3] As noted above, the Findings and Recommendation were issued on August 22, 2003, when it was anticipated that petitioner would be released via good time credit on December 6, 2003. ER 173-177, 179.

[4] Pet.App.Brf. at 4, fn.1. The footnote also states that the BOP withdrew jurisdictional objections made in its initial response. As noted in fn.1 to the Response To Petition For Writ Of Habeas Corpus (ER 64-65), the petition was filed in the District of Oregon when petitioner was an inmate at FCI Sheridan. He was subsequently moved to FCI Lompoc, and then again elsewhere. Thus, initially

relief in this habeas corpus action. Prison time served which should not have been served may not be applied to shorten supervised release. Whether petitioner might obtain relief from his supervised release pursuant to 18 U.S.C. § 3583(e) from the sentencing court depends upon conditions first occurring. First, the sentencing court from which relief would be sought would presumably be the District Court of Alaska (J. Sedwick). ER 78. Second, even though the District Court of Oregon has ruled against petitioner with respect to good time credit, and we assume for argument's sake that this Court reverses, the District of Alaska may treat the fact of the reversal, given the termination of petitioner's prison custody, as advisory only. Third, the Alaska court may rule, as it has a right to do under Section 3583(e), to continue supervised release, as it will no doubt note that petitioner was involved in an infraction shortly after release to a halfway house. Finally, petitioner must assume he will prevail before this Court, which we believe also presumes that Pacheco-Camacho will be set aside or extremely limited in a manner we do not foresee as probable. Given the conditions and expectations extant, respondent submits that the possibility of reduction in supervised release is not a certainty, and is tenuous and speculative at best. In any event, reduction of supervised release is not the case

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respondent argued, among other arguments, that the court did not have jurisdiction over the proper respondent. This argument was withdrawn during oral argument. ER 172.

argued below, nor the case being argued in this Court. What is argued by petitioner now in this Court is moot.

If this Court finds that this case is not moot and the merits must be reviewed, the District Court properly held the Bureau of Prisons' interpretation of 18 U.S.C. § 3624(b) with respect to good time credit is reasonable and entitled to deference, and properly found the petitioner's arguments for a different interpretation based upon legislative history and the rule of lenity were rejected by this Court in Pacheco-Camacho. Therefore, this Court should again reject them and affirm the District Court.

ARGUMENT

1. Petitioner's claim is moot.

The status of the petitioner has caused this action to presently be moot because there is no relief available in this Court. The underlying habeas corpus action was intended to obtain 70 additional days of good time credit, ***i.e.*** 540 days versus 470 days. In either event, petitioner has served those good conduct time days he claims he should not have served in prison. He has moved on to Alaska to be on supervised release by the U.S. District Court in Alaska and his probation officer, who are not respondents in this case. And, should he have any possible claim, tenuous that it might be at this stage of the case, it is that he should have his lost good time

credit days applied to reduce his three-year period of supervised release. That claim is a new claim. The claim before the District Court is, therefore, completely moot now. Additionally, for the following reasons, the suggestion that time served which should not have been served may be deducted from supervised release time is incorrect on a number of scores.

The Supreme Court has decided, in United States v. Johnson, 529 U.S. 53 (2000), that the excess portion of prison time improperly served may not be credited against the supervised release term. Thus, release from prison moots a case challenging length of imprisonment. Johnson is clear that no matter how delayed a mistaken release was, the supervised release term is not affected.

Aside from the aforementioned prohibition, the adjudicatory power of a federal court depends upon "the ***continuing*** existence of a live and acute controversy." Steffel v. Thompson, 415 U.S. 452, 459, 94 S.Ct. 1209 (1974)(emphasis in original). "The role in federal cases is an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Steffel, 415 U.S. at 459, n.10 (citations omitted). See also, Munoz v. Rowland, 104 F.3d 1096, 1097-1098 (9th Cir. 1997)(Munoz had been released from a special housing unit (SHU), the primary relief he had sought in his habeas corpus petition, and because such relief could no longer be awarded, his claim had been mooted and

the appeal had to be dismissed); Johnson v. Moore, 948 F.2d 517 (9th Cir. 1991) (conditions-of-confinement case was moot after plaintiff was transferred and had no reasonable expectation of returning).

More recently, in Spencer v. Kemna, 523 U.S. 1, 118 S.Ct. 978 (1998), the mootness doctrine was again reiterated. In Spencer, a defendant was sentenced to 3 years' confinement. He was released after little more than a year and placed on parole. Parole was revoked 5 months later and he was returned to prison. He then filed a petition for writ of habeas corpus in both state and federal courts, seeking to invalidate the parole revocation. Before the District Court decided the merits, petitioner's sentence ended and he was released. The District Court dismissed the petition, as did the Eighth Circuit, due to mootness. The Supreme Court affirmed because the expiration of the petitioner's sentence caused the petition to be moot. It no longer presented an Article III case or controversy. Spencer, 523 U.S. at 7-18. Mootness deprives the court of its power to take action, and leaves nothing left to remedy. Once the sentence expired, to avoid mootness the prisoner had to show concrete and continuing injury other than the terminated incarceration. See also, Caswell v. Calderon, ___ F.3d ___ (9th Cir.), No. 02-17177, slip. op. at 3412-3414 (March 18, 2004) (this Court just restated and reaffirmed the same).

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It is true that a petitioner remains in "custody" for purposes of Section 2241 while on supervised release. Williamson v. Gregoire, 151 F.3d 1180, 1182-1183 (9th Cir. 1998), cert. denied, 525 U.S. 1081 (1999). And, while it is not contested that the Warden at FCI Sheridan was petitioner's custodian when the petition was filed , see Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992)(per curiam), when petitioner was released from prison to serve his supervised release somewhere, presumably in Alaska, Warden Daniels ceased to be petitioner's custodian for purposes of Section 2241. Presumably petitioner's supervisor is now the chief probation officer of the United States District Court for the District of Alaska. Cf. United States v. Johnson, 529 U.S. at 56-58; Feldman v. Perrill, 902 F.2d 1445, 1450 (9th Cir. 1990)("The District of Arizona administers [petitioner's] current parole, therefore - - convenient or not - - it is in that district that petitioner must proceed.").

Petitioner's Notice of Appeal was filed immediately after United States District Judge King issued his Judgment: and within just several weeks thereafter when the case was then in this Court, petitioner was released to serve his supervised release. The 70 extra days of good time credit to which he still claims credit have been served. At this point, petitioner seeks advice from this Court that his position in District Court was correct, that the rulings in the District Court were in error, and that this Court should set aside it decision in Pacheco-Camacho or severely limit it to a "year

and a day" only case; and should set the BOP straight on how to calculate good time credit.

Let us assume that petitioner was released to serve his supervised release before he appealed the adverse ruling to this Court. Because, as shown above, the respondent -Warden Daniels- would have lost custody to someone else who became petitioner's custodian to monitor supervised release, the District Court would no longer have had personal jurisdiction and could not have ordered a reduction in supervised release for petitioner. Where a court cannot order effective relief in a case, the case is moot. See Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001); Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244-1245 (9th Cir. 1988)(key question in mootness inquiry is whether there can be any effective relief). Thus, if before appeal the District Court decided that petitioner was entitled to that additional 70 days which had already been served, since the case had become moot for reasons just stated, the District Court would be left to issue only an advisory opinion. Such is the situation here and now, in this Court. It has long been settled law that federal courts do not issue advisory opinions. See Muskrat v. United States, 219 U.S. 346, 362, 31 S. Ct. 250 (1911); Scott v. Pasadena Unified Sch. Dist., 306 F.3d 646, 654 (9th Cir. 2002), cert. denied, ___ U.S. ___, 123 S.Ct. 2071 (2003); Thomas v. Anchorage Equal Rights Com'n, 220 F.3d 1134, 1138 (9th

Cir. 2000), cert. denied, 531 U.S. 1143 (2001); see also Flast v. Cohen, 392 U.S. 83, 96 n.14, 88 S.Ct. 1942 (1968)(rule against advisory opinions established as early as 1793).

Moreover, as suggested above, petitioner's sentencing court is under no obligation to reduce petitioner's term of supervised release in light of a change in the District Court's initial holding adverse to petitioner, or even this Court's opinion reversing the District Court's rejection of petitioner's theory. "Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." United States v. Johnson, 529 U.S. at 59, 120 S.Ct. 1114 (2000). It is entirely possible that the sentencing court, in light of the "rehabilitative ends" of supervised release, would decide that petitioner's supervised release should continue without modification so that petitioner may continue to receive the "post-confinement assistance" that supervised release provides. See Johnson, 529 U. S. at 59-60. The mere possibility that petitioner's sentencing court in Alaska might modify or terminate his supervised release in light of a favorable decision here does not extinguish the mootness. Cf. Spencer v. Kemna, 523 U.S. at 14-16 (case was moot where collateral consequences alleged by petitioner were possibility rather than certainty, or even a probability, and "purely a matter of speculation"); Wilson v. Terhune, 319 F.3d 477, 481 (9th Cir. 2003) (same).

Petitioner relies on Gunderson v. Hood, 268 F.3d 1149, 1153 (9th Cir. 2001), in an attempt to counter mootness in this case. That case, however, is inapposite. Close examination of the "mootness" portion of the Gunderson opinion reveals that while the panel found, on the basis of a possible modification of the petitioner's supervised release, that the case was not moot, it contemplated that the same court (District of Oregon) would both decide the merits of the case in the petitioner's favor and then reduce his term of supervised release. See Gunderson, 268 F.3d at 1153. The panel had no occasion to consider the situation presented here, where this Court may at most render an advisory opinion on the merits of petitioner's District Court case because petitioner's current custodian is not the respondent herein and has no obligation to give effect to an advisory opinion.

Petitioner also relies on Bohner v. Daniels, 243 F. Supp.2d 1171, 1174 (D.Or. 2003), for the point that a person serving a term of supervised release is "in custody", a point not disputed here. The remainder of the case, however, is inapposite.

Because the instant case is moot as far as this Court is concerned, the appeal should be dismissed.

2. The Bureau of Prisons was correct in interpreting the plain meaning of 18 U.S.C. § 3624(b) to require that a full year be served before an inmate may receive the full amount of credit.

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The District Court correctly ruled that under the plain meaning of the statute an inmate may not accrue good conduct time credits until earning them through actual service of each year of the sentence and, therefore, the maximum good conduct time available on a judicially-imposed ten year sentence is 470 days. ER177. As in force at the time of petitioner's offense , the good conduct time statute stated:

> **(a) Date of release.**--A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). ...
>
> **(b) Credit toward service of sentence for satisfactory behavior.--**
>
> **(1)** A prisoner (other than a prisoner serving a sentence for a crime of violence) who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of the prisoner's life, shall receive credit toward the service of the prisoner's sentence, beyond the time served, of fifty-four 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, unless the Bureau of Prisons determines that, during that year, the prisoner has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. ... If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Credit that has not been earned may not later be granted. 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.
>
> **(2)** Credit toward a prisoner's service of sentence shall not be vested unless the prisoner has earned or is making satisfactory progress toward a high school diploma or an equivalent degree. ...

18 U.S.C. § 3624.[5]

The Bureau of Prisons computes the release date according to the plain meaning of the statutory language. If the sentence is greater than one year but less than life, the inmate is accorded good conduct time. Id. If the inmate has already earned a high school diploma, good conduct time vests when awarded at the end of each year served. Id. The good conduct time is awarded annually in amounts up to 54 days to the extent of satisfactory compliance with disciplinary regulations.[6] The

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[5] The current Section 3624 was enacted as part of the Comprehensive Crime Control Act of 1984 but has been amended since then in ways that do not directly affect the issue presented by this case. Petitioner's offense occurred on March 16, 1995 and he was sentenced on September 29, 1995. ER 78 This was after the September 13, 1994, effective date of the Violent Crime Control and Law Enforcement Act (VCCLEA) of 1994 but before the Prison Litigation Reform Act (PLRA) became effective on April 26, 1996. Hence, Petitioner is entitled to good conduct time under the statute as amended by the VCCLEA but is not subject to the more onerous provisions of the PLRA. If the crime were one of violence or the PLRA provisions applied, the standard for receiving good conduct time would be "exemplary" rather than "satisfactory" compliance with disciplinary regulations and none of the good conduct time would vest until release.

[6] Id. Petitioner does not dispute the application of the Bureau of Prisons' policy or those reductions. Since the challenge is to the policy, the parties have presented their arguments in this litigation as the statute would apply to petitioner as

good conduct time awards are credited against the remaining time to be served. In the petitioner's case by the time he completed eight years of his sentence, he had less than a year remaining. Pursuant to statute, petitioner received a prorated good conduct time award for the partial ninth year he served.

Contrary to petitioner's contention, the computation is straight forward and easily understood. ER 179. Each year that petitioner satisfactorily complied with disciplinary regulations, his unserved term of imprisonment was reduced by 54 days. A different calculation occurs only during the final portion of the sentence when the time remaining does not allow the inmate to serve a full year and thereby earn a 54 day reduction in the unserved portion of the sentence. That change follows from Congress' direction that the good conduct time for the final year or partial year be prorated. As this Court recognized in Pacheco-Camacho, 272 F.3rd at 1267-1268, this proration is accomplished by dividing the 54 days that could be earned for each year of service, by 365 days. The resulting 0.148 is the portion of a day of good conduct time that can be earned on a single day served in prison by satisfactorily complying with disciplinary regulations. The 0.148 figure allows the computation of the good conduct time which can be earned during the final partial year in custody. Based on the amount of good conduct time actually earned the inmate is released

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though he was awarded all available good conduct time. ER 179-180.

having completed the sentence of imprisonment. This process is now automated but the arithmetic computation with numerous examples is in Bureau of Prisons policy and reprinted in the record. ER 81-106.

Petitioner argues that he should have been able to earn 54 days for each of the ten years included in his original sentence. To do this he would have the Bureau of Prisons award 54 days of good conduct time after service of 311 days of satisfactory behavior. ER 180. This would violate the clear direction in the statute that the Bureau may award the good conduct time unless the Bureau determines that, "during that *year*, the prisoner has not satisfactorily complied with [disciplinary regulations]". 18 U.S.C. § 3624, (emphasis added). Similarly, the award would not be at the end of each year of the term as required by statute. Instead, the award would be done after periods that would range from 311 days to 365 days depending on whether the full 54 days had been earned or not. In the case of those inmates, like petitioner, whose good conduct time is to be awarded within 15 days of the end of each year of the sentence and is vested once awarded, it would be impossible to comply with the statute rationally if petitioner's interpretation were adopted. This approach is not authorized by statute and would introduce great uncertainty and complexity into the process.

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a. This Court's decision in Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001), cert. denied, 535 U.S. 1105, 122 S.Ct. 2313 (2002), is controlling of the matter under appeal.

Petitioner argues that the federal statute providing credit for good conduct time plainly and unambiguously authorizes a total of 540 days on a judicially-imposed 10 year sentence. The petitioner's interpretation of the statute ignores its plain meaning and fails to acknowledge BOP's proper interpretation of a statute which it has been delegated to carry out. Pacheco-Camacho v. Hood, 272 F.3d as 1270.[7]

Petitioner disingenuously argues that the phrase "term of imprisonment" establishes the basis for calculating good time credits. As applied to petitioner, section 3624(b)(1) uses the phrase "term of imprisonment" three times. The first two times the phrase only determines which federal inmates are eligible to receive good time credit. Only those inmates who are serving a term of imprisonment of more than a year, but less than life, are eligible to receive good conduct time.

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[7] Petitioner goes to great lengths to distinguish Pacheco-Camacho based upon the duration of Pacheco-Camacho's sentence (one year and one day) versus the duration of petitioner's sentence (ten years). This distinction, however, is untenable and not supported by this Court's opinion. In Pacheco-Camacho, this Court upheld 1) the BOP's right to issue the regulations interpreting 18 U.S.C. § 3624(b), and 2) the application of those regulations to inmates in BOP custody. Although the Court did so within the context of Pacheco-Camacho's sentence, this factor does not affect the Court's reasoning in upholding the BOP's regulatory scheme. As such, duration of an inmate's sentence is not a material fact in this case, and Pacheco-Camacho is clearly controlling.

Finally, the phrase is used to set when the credit should be awarded at the end of each year of the term of imprisonment. The statute plainly states that this credit will be applied "toward the service of the prisoner's sentence." Therefore, the good conduct time is awarded at the end of each year the inmate is serving the sentence. The decision to use the term "service" or "serving" should not be ignored. The fact that an inmate must be "serving" for more than one year rather than just having been sentenced to a year indicates that the statutory language is focused on those individuals actually in custody. Pacheco-Camacho, 272 F.3d at 1270-1271 (holding that the BOP's regulatory scheme which adopts the term "served" rather than "sentence imposed" as the basis for proration was a reasonable interpretation of ambiguous statutory language, and was entitled to deference). More specifically, this Court held in Pacheco-Camacho:

> As we have held in the context of the doctrine of credit for time at liberty, "[i]t is the administrative responsibility of the Attorney General, the Department of Justice, and the Bureau of Prisons to compute sentences and apply credit where it is due." United States v. Martinez, 837 F.2d 861, 865-66 (9th Cir.1988) (quoting United States v. Clayton, 588 F.2d 1288, 1292 (9th Cir. 1979)). Other circuits have subsequently applied this observation in the context of section 3624. Thus, the Seventh Circuit has stated that "[t]he federal good time statute, 18 U.S.C. § 3624, makes it clear that it is the Bureau of Prisons, not the court, that determines whether a federal prisoner should receive good time credit." United States v. Evans, 1 F.3d 654, 654 (7th Cir.1993) (citing Gonzalez v. United States, 959 F.2d 211, 212 (11th Cir. 1992)). Similarly, the Eleventh Circuit has held that "[t]he Bureau of Prisons is

> ... responsible for computing the sentence and applying appropriate good time credit." Gonzalez, 959 F.2d at 212 (citing Martinez, 837 F.2d at 865-66). The BOP regulation that adopts the term served rather than the sentence imposed as the basis for the proration therefore falls within the implied statutory authority of the BOP. As such, this regulation is entitled to our deference, so long as its interpretation is "reasonable." Chevron, 467 U.S. at 844, 104 S.Ct. 2778.[8]

Pacheco-Camacho, 272 F.3d at 1270. The Court went on to hold that the Bureau's formula, ". . . comports with the statutory language of 18 U.S.C. § 3624(b), and does not subvert the statutory design. . ." Id. Therefore, the Bureau's regulations clearly fall within the implied statutory authority, and do not flout the intent of Congress in enacting 18 U.S.C. § 3624(b).

3. The Bureau of Prisons' interpretation of 18 U.S.C. § 3624(b) is consistent with and does not violate the legislative history of such statute.

Petitioner's primary statutory argument involves the phrase "sentence of imprisonment". He contends it is a term of art that always means "the judge's

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[8] Contrary to petitioner's contention, it is well settled that Bureau of Prisons regulations such as the ones in question here are entitled to full Chevron deference. See Lopez v. Davis, 531 U.S. 230, 121 S.Ct 714 (2001)(Chevron deference applies to the BOP's interpretation of the statutes it administers); Pacheco-Camacho, 272 F.2d at 1271 (affording Chevron deference to the regulations in question herein). Petitioner's position that Crandon v. United States, 494 U.S. 152 (1990), requires any other outcome is without merit and should be rejected. Again, Pacheco-Camacho, which explicitly afforded *Chevron* deference to the regulations in question, is controlling and dispositive of this issue.

sentence, not actual time in custody" Pet.App.Brf. 21. A review of the statutory provisions relied upon by petitioner provides little support for this narrow interpretation of the statute. ER 54-62. For example, the phrase sometimes refers to the maximum penalty as enacted by Congress without regard to whether it is imposed in any actual case. See, 18 U.S.C. § 3142; 18 U.S.C. § 3156(a)(3); 18 U.S.C. § 3559; 18 U.S.C. § 3581(b). In other instances the statutory reference is directed to administration of the sentence by the Bureau of Prisons. For example, in 18 U.S.C. § 3584, involving multiple terms of imprisonment-- both concurrent and consecutive terms, are to be treated as a "single, aggregate term of imprisonment" for administrative purposes. It is the Bureau of Prisons that must combine consecutive, concurrent and partially concurrent sentences imposed at the same or different times and determine the length of that aggregate *term of imprisonment.*

An excellent example of how Congress uses the phrase to refer to either the sentence as imposed by the court or as served in the Bureau of Prisons is found in 18 U.S.C. § 924(c)(1)(D)(ii):

> [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. (Emphasis added.)

The phrase is used three times in the same sentence. While the first may be a direction to the sentencing court that the court should not order the sentence under this statute to run concurrently, it may also be read as a direction to the Bureau of Prisons as to how to compute multiple sentences. Whatever meaning is given to the first use of the phrase, the second and third uses refer to time actually in custody for other offenses. Even if one were to accept that the second and third uses of the phrase are referring to the court imposed sentence rather than actual custody, the result must be the same. The first referenced term of imprisonment commences immediately upon release from actual custody of the later mentioned term of imprisonment.

Likewise, whether the phrase "term of imprisonment" in section 3624(b)(1) is used to refer to actual custody or the sentence as imposed by the court, petitioner could only earn good conduct time as long as he was in custody. Fortunately, his behavior was good enough that he earned sufficient good conduct time to be released before he even started a tenth year in custody. He should not be heard to complain that having earned his release early, he should be awarded more good conduct time computed on periods he was not required to serve in custody.

The history of good conduct time in Federal sentencing supports the position of the Bureau of Prisons. Prior to the enactment of the Comprehensive Crime Control

Act of 1984, two types of good time were authorized by Congress. Petitioner focuses on that authorized by 18 U.S.C. § 4161 (repealed). That section entitled inmates to a good time credit of a fixed number of days per month multiplied by the total number of months in the sentence from the first day of the sentence. The number of days varied from five days per month if the sentence was at least six months but less than a year to ten days per month if the sentence was ten years or more. This good time did not vest and could be forfeited and later restored by prison officials. See 18 U.S.C. 4165 and 4166 (repealed). Petitioner uses this as the model on which he urges this Court to interpret the current statute. This is clearly inappropriate. In fact, it was this good time that the Sentencing Commission opined was rejected in the Comprehensive Crime Control Act of 1984. The Sentencing Commission noted in the Policy Statement that introduced the 1988 Sentencing Guidelines Manual, "...Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by "good time" credits."[9]

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[9] In 1990 and subsequent versions of this Policy Statement the Commission focused on the effects of parole decisions on indeterminate sentences rather than good time.

In addition to 18 U.S.C. 4161 (repealed), a second system of good time was authorized by 18 U.S.C. 4162 (repealed). Petitioner does not mention this statute but it contained elements that were retained when Congress adopted the current statute. Specifically, Section 4162 authorized up to 3 days credit per month of actual employment in an industry or camp for the first year of that status and up to 5 days thereafter. This was also available for exceptionally meritorious service. This "extra" good time vested when awarded and could not be awarded later if not awarded when earned. 28 C.F.R. § 523.17(q).

The good conduct time provisions adopted in the Comprehensive Crime Control Act of 1984 as implemented by the Bureau of Prisons, adhered to the Congressional directive that the benefit be earned through obedience to institutional disciplinary regulations. Also, pursuant to the statute, and similar to 18 U.S.C. § 4162, the good time is awarded as earned and vests at fixed points in time during the sentence. Unlike the good time found in 18 U.S.C. § 4161 (repealed) there is no initial or other award of an amount determined by applying a multiplier to the sentence length set by the Court.[10] Congress rejected that approach in 1984 in favor

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[10] The Bureau of Prisons computes a projected release date for each inmate. Sentence Computation Manual (CCCA of 1984) (PS 5880.28). This projected release date allows the institution and the inmate to plan for his or her eventual release. For example, an accurate projected release date is necessary for the inmate to complete substance abuse treatment in a timely manner in order to receive the early release

of the current system which was correctly applied to Mujahid. The petitioner argues that the legislative history of 18 U.S.C. § 3624(b)(1) supports his interpretation of the statute and reveals that Congress intended to simplify the method of awarding good time. This Court, however, correctly noted that:

> While Congress intended the new system to be simpler than that under the previous law, it did not eliminate the proration of good time credits during the last year of the sentence. If Congress's sole goal had been simplicity, it could have chosen not to award ***any*** good time credits during the last year of imprisonment (as it does for sentences of a year or less), or to award the full fifty-four days regardless of whether or not the prisoner serves the full year in prison. Instead, Congress chose to tolerate the additional complexity in order to arrive at a more equitable result. Far from mandating Pacheco's interpretation, congressional desire to strike a balance between simplicity and fairness, as evidenced by legislative history, lends additional support to the BOP's regulation.
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> Pacheco-Camacho, 272 F.3d at 1269-70.

4. The rule of lenity should not apply in this matter involving an agency's reasonable interpretation of 18 U.S.C. § 3624(b).

The petitioner asserts that if a statute is ambiguous, if it is a criminal statute affecting the penal interest of the petitioner, and if petitioner's interpretation of

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incentive. See 18 U.S.C. § 3621(e)(2)(B). The projected release date computed using the sentence computation methods described in this brief is not the same as the "expected length of incarceration" described by petitioner. Pet.App.Brf. at 12, footnote 4. The "expected length of incarceration" is made by community corrections staff to aid in the initial designation of place of confinement. Security Designation and Custody Classification Manual (PS 5100.07).

the statute is plausible, the rule of lenity should be applied in his favor. Petitioner concludes, therefore, that he should have prospectively received 540 days of good time credit because the term of imprisonment to which he was sentenced was ten years, and under Section 3624(b) he may receive up to 54 good time credit days per year.

The rule of lenity has been a subject of judicial interpretation at the highest level of our judiciary. In Albernaz, et al. v. United States, 450 U. S. 333, 101 S.Ct. 1137 (1981), the subject involved consecutive sentencing for offenses arising from a single agreement or conspiracy having dual objectives (here, "distribution" and "importation" of marijuana). With respect to the petitioner's claim the rule of lenity should apply, the Supreme Court stated at pp. 342-343:

> . . . Last term in Bifulco v. United States, 447 U. S. 381 (1980), we recognized that the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Quoting Ladner v. U. S., 358 U. S. 169, 178 (1958), we stated: 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' 447 U.S. at 387.

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The Court recognized that the touchstone of the rule of lenity is statutory ambiguity, and reiterated that it had stated:

> Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent. Ibid. Lenity thus serves only as an aid for resolving ambiguity; it is not to be used to beget one. The rule comes into operation "at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. citing Callahan v. United States, [364 U.S. 587(1961)] at 596.

Again, in Taylor v. United States, 495 U. S. 575, 110 S.Ct. 2143 (1990), the question before the Court was the meaning of "burglary" in the federal statute, Section 1402 of Subtitle I (the Career Criminals Amendment Act of 1986) (18 U.S.C. § 924(e)). It contains a sentence enhancement provision under certain circumstances, e.g., conviction of 18 U.S.C. § 922(g) (unlawful possession of a firearm) and 3 prior convictions for certain offenses, including "burglary". Convictions for "burglary" under the various states' laws defining burglary raised the issue of the meaning of "burglary" for the purposes of the intended sentence-enhancement. With respect to petitioner's argument that the narrow, archaic common law definition of burglary was properly applied to the federal statute's use of the term, and that that would comport with the rule of lenity, the Supreme Court stated at p. 596: ". . . This maxim of

statutory construction, however, cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term. See Perrin v. U. S., 444 U. S. [37] at 49, n.13 [(1979)]". In other words, the Court held that limiting construction of the term "burglary" is not dictated by the rule of lenity. Taylor, 495 U. S. at 598.

In a decision of this Court in 1993, United States v. Rivera, 996 F.2d 993 (9th Cir. 1993), the rule of lenity was rejected in a case involving the question whether the Sentencing Guidelines were consistent with a Congressional mandate in allowing prior state convictions to serve as bases for career offender status. This Court said, with respect to the statute (28 U.S.C. § 994) establishing the Commission and directing that Guidelines be promulgated:

> . . .Thus, as in Nelson[11], we are asked to decide whether the Sentencing Commission's interpretation of its charge is "sufficiently reasonable": "In reviewing an agency's interpretation of a statute, the appellate court makes a narrow inquiry into whether the agency's construction is 'sufficiently reasonable.' The agency's interpretation need not be the only reasonable one." Nelson, [919 F.2d] at 1382 (internal citation omitted.) We do not substitute our view of the statute for that of the Commission.

Rivera, 996 F.2d at 997.

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[11] United States v. Nelson, 919 F.2d 1381 (9th Cir. 1990).

Thus, application of the rule of lenity was rejected both because the agency's interpretation of the statute in question was reasonable and the Sentencing Guideline in question (involving definition of "prior felony conviction') was not ambiguous. Id.

This Court clearly held the rule of lenity does not apply in the present circumstance as advocated by petitioner Mujahid. In Pacheco-Camacho, this Court stated in pertinent part:

> While arguing that his interpretation of the statute is clear from the text and supported by legislative history, Pacheco also suggests, in the alternative, that his interpretation is plausible and should be preferred to that of the BOP because of the rule of lenity. The rule of lenity ensures that the penal laws will be sufficiently clear, so that individuals do not accidentally run afoul of them and courts do not impose prohibitions greater than the legislature intended. See United States v. Bass, 404 U.S. 336, 347-48, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). The rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). The rule of lenity, however, does not prevent an agency from resolving statutory ambiguity through a valid regulation. See Babbitt v. Sweet Home Chapter of Cmtys., 515 U.S. 687, 704 n. 18, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995). In such a case, the regulation gives the public sufficient warning to ensure that nobody mistakes the ambit of the law or its penalties. **To the extent that there is any ambiguity in section 3624(b), the BOP has resolved it through a reasonable**

> **interpretation, and the rule of lenity does not apply.** See Lopez v. Davis, 531 U.S. 230, 242, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (recognizing that Chevron deference applies to the BOP's interpretation of the statutes that it administers).

Pacheco-Camacho, 272 F.3d at 1271-1272 (emphasis added). In the instant case the District Court correctly noted that this Court also rejected petitioner's argument urging reliance on the rule of lenity, and concluded on that basis the petition should be denied. ER 177. Thus, the rule of lenity is inapplicable here.

5. Petitioner's request that should the assigned panel affirm the District Court, the matter should automatically then be reviewed ***en banc*** is premature and not contemplated by applicable appellate rules.

Respondent recognizes that a party may seek an initial hearing ***en banc***, or a rehearing ***en banc***. Fed. R. App. P. 35 and 40. Petitioner has not petitioned for an initial ***en banc*** hearing under the terms of Rule 35 because he conditions the need for ***en banc*** review on this Court's decision that Pacheco-Camacho is controlling in this case. Respondent submits that the extent and nature of any discussion about Pacheco-Camacho in the instant case which leads to the conclusion that the District Court should be affirmed is a condition precedent to deciding whether a petition for rehearing ***en banc*** is justified. If a petition for rehearing ***en banc*** does seem to be justified to the petitioner, an answer thereto is not allowed unless the Court invites

one. Fed. R. App. P. 40. Ordinarily if the Court fails to request an answer a rehearing will not be allowed. Id. Respondent therefore submits that if respondent prevails herein, and if petitioner then deems it appropriate to petition for rehearing ***en banc*** and does so, and if this Court then directs respondent to answer, the respondent's attorneys in the Department of Justice and other counsel can reach a more considered opinion concerning the propriety of a rehearing, and the issues to be addressed. What petitioner suggests now is not contemplated by Rules 35 and 40, and is premature.

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CONCLUSION

This case is moot. Petitioner has been released from confinement and no longer has a custodial relationship with the named respondent, Warden Charles Daniels. No definite case or controversy exists and the appeal should be dismissed. If not, on the merits this Court should affirm the holding of the District Court in all respects and make clear the reasoning in this Court's Pacheco-Camacho decision is equally applicable in the instant multiple-year sentence case.

Dated this 23 day of March, 2004.

Respectfully submitted,

KARIN J. IMMERGUT
United States Attorney
District of Oregon

CRAIG J. CASEY
Assistant United States Attorney
OSB #68026
(503) 727-1000