

No. 05-8678

**IN THE SUPREME COURT
OF THE UNITED STATES**

SABIL MUJAHID,
Petitioner,

v.

CHARLES A. DANIELS,
Warden, FCI Sheridan, Oregon,
Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

**AMICUS BRIEF IN FAVOR OF CERTIORARI
FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION,
THE FEDERAL PUBLIC DEFENDER AND COMMUNITY
DEFENDER ORGANIZATIONS,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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INTEREST OF AMICI CURIAE

Amici curiae are individuals and organizations with great expertise and involvement in the federal criminal justice system.*

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization with 35,000 members and 30 chapters nationwide. FAMM does not oppose imprisonment, but urges that punishment be proportionate to the offense and the culpability of the offender. FAMM conducts research, promotes advocacy, assists prisoners with securing pro bono counsel, and educates the public regarding the excessive cost of mandatory sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the increasing reliance on lengthy periods of incarceration to the detriment of other responses to crime. FAMM is deeply interested in ensuring that prisoners spend no more time incarcerated than that authorized by law and that they be accorded correctly calculated credit for good conduct during incarceration. FAMM has received inquiries from hundreds of prisoners and their families about the Bureau of

*Both parties have consented to the filing of this amici curiae brief as indicated in the letters being filed with this Court.

No counsel for a party authored this amici curiae brief, in whole or in part, and no person or entity other than the amici, made a monetary contribution to the preparation or submission of this brief.

Prisons' interpretation of the good conduct statute.

The Federal Public Defender and Community Defender Organizations

were established to represent indigent defendants in federal court pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. As the institutional defenders for indigent defendants, these organizations have a unique interest in all issues of federal criminal law, and a unique perspective to off the Court concerning the correct calculation of good conduct time for federal prisoners. Because this issue significantly affects the vast majority of the Organizations' clients, every federal defender and community defender in the country, as listed in Appendix A, has signed on to this brief.

The **National Association of Criminal Defense Lawyers (NACDL)** is a non-profit corporation with subscribed membership of more than 13,000 national members, including public defenders, private practitioners and law professors, and an additional 35,000 state, local, and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in the House of Delegates. Among NACDL's objectives are ensuring justice and fair punishment for persons accused and convicted of crime. It has

appeared as amicus curiae numerous times in this Court.

REASON FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE, AFFECTING PRISONERS ACROSS THE COUNTRY, CONCERNING HOW GOOD-TIME CREDITS SHOULD BE CALCULATED

This cases presents an issue that involves almost every federal prisoner:

how “good time credits” are to be calculated. Specifically, the issue arises because the federal Bureau of Prisons (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. § 523.20 (1989); P.S. 5880.28 at 1-48. The BOP’s regulations reject crediting good time against the sentence imposed. *Id.*

This is in conflict with the express statutory language concerning good time credits for federal prisoners. The statute clearly states that good time credits must be based on the “term of imprisonment”:

[A] prisoner who is serving a *term of imprisonment* of more than 1 year other than a *term of imprisonment* for the duration of the prisoner’s life, may receive credit toward the service of the prisoner’s sentence, beyond the 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).

Although the statute speaks of good time credits being based on “the term of imprisonment,” 18 U.S.C. §3624(b), the BOP regulations substitute for this the phrase “for each year served.” 28 C.F.R. § 523.20(a)(1) (emphasis added).

Program Statement 5880.28 adopts the same approach, 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.”

This conflict between the federal statute and the BOP approach raises an urgent issue of national importance which only this Court can resolve. The BOP rule affects about 95% of federal prisoners sentenced since 1987, those serving sentences of more than a year and less than life. The BOP regulation means that every eligible federal prisoner is imprisoned seven days more per year than Congress intended. Over the course of a ten year sentence, it means an additional 70 days in prison. That is exactly what is presented by this case: whether Mr. Mujahid should receive 540 days of good time credit, as required by the statute, or 470 days, as determined by the BOP.

This case presents important issues of statutory construction. First, does the BOP approach which substitutes “for each year serviced” for the statutory language of “the term of imprisonment,” comport with this Court’s mandate that the plain meaning of a statute is controlling and must be followed? *See, e.g., United States v. Ron Pair Enters*, 489 U.S. 235, 242 (1989); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Federal Energy Regulatory Comm’n v. Martin Exploration Management Co.*, 486 U.S. 204, 209 (1988).

Second, assuming that there is ambiguity in the federal statute, can the BOP regulation be reconciled with the rule of lenity? This Court has been emphatic that the rule of lenity is “a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language.” *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 508 n. 10 (1992).

There should be no doubt that a good time statute, such as §3624 is clearly penal because it is a statute that “imposes a punishment.” *See Weaver v. Graham*, 450 U.S. 24, 28, 31-32 (1981) (applying the Ex Post Facto Clause). Under this Court’s reasoning the statute is penal because it is “one determinant of [the inmate’s] prison term,” and because the inmate’s “effective sentence is altered once this determinant is changed.” *Id.* at 32; *see also Lynce v. Mathis*, 519 U.S. 433 (1997) (ex post facto); *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (habeas

corpus). The Supreme Court has consistently treated similar statutes administered by the Bureau of Prisons as statutes that affect the penalty and thus subject to the rule of lenity. *See Lopez v. Davis*, 531 U.S. 230, 244 n.7 (2001); *Reno v. Koray*, 515 U.S. 50, 56-60 (1995).

But the BOP regulation and approach conflict with this Court's requirements concerning the rule of lenity. This requires this Court to grant review to resolve the conflict.

Finally, what is the role of deference to the agency, where Congress did not delegate the matter to the agency and where different federal agencies have come to conflicting conclusions? The United States Court of Appeals for the Ninth Circuit based its decisions regarding calculation of good time credits, in part, on deference to the BOP. *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001). Such deference to agencies, of course, is based on this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

But Congress did not explicitly delegate the power to the BOP to determine the maximum amount of good conduct time credit that a prisoner could earn. Congress plainly thought that it had determined that question itself, and the BOP's interpretation is entitled to deference only by virtue of the supposed ambiguity of

its determination. Moreover, deference is proper only if ambiguity remains after application of the “normal tools of statutory construction,” *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001), and here there is no ambiguity because the statutory language is clear. Indeed, as explained above, if there is ambiguity in the statute, the rule of lenity requires that it be read as Petitioner Mujahid suggests.

Additionally, there is a conflict between the BOP’s interpretation of the statute and the way in which another agency, the United States Sentencing Commission has interpreted the same statute. The Sentencing Table, upon which all federal sentences are based, was calibrated on the assumption that well-behaved prisoners would receive 15% good time on the sentence imposed. United States Sentencing Commission, SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (June 18, 1987) at 23. This Court should grant review to resolve this conflict and determine the meaning of this statute which affects virtually every federal prisoner.

Conclusion

The BOP’s calculating good time credits based on time served, rather than following the clear statutory language determining good time credits based on the sentence imposed, creates a significant loss of human freedom and a great unnecessary monetary cost to the United States. This Court should grant review to

decide this issue of great national importance and determine whether the BOP approach is consistent with the federal statute's mandate.

Respectfully submitted,

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Appendix A

The following Federal Public and Community Defenders request that the Court grant certiorari to review the Bureau of Prisons' interpretation of the good time statute ** :

First Circuit:

Miriam Conrad, Federal Public Defender, Districts of Massachusetts, New Hampshire, Rhode Island, and Maine

Joseph C. Laws, Jr., Federal Public Defender, District of Puerto Rico

Second Circuit:

Thomas G. Dennis, Federal Public Defender, District of Connecticut

Leonard F. Joy, Federal Defender Division, Legal Aid Society, Eastern and Southern Districts of New York

Alexander Bunin, Federal Public Defender, Northern District of New York, District of Vermont

Joseph B. Mistrett, Federal Public Defender, Western District of New York

Third Circuit:

Penny Marshall, Federal Public Defender, District of Delaware

Richard Coughlin, Federal Public Defender, District of New Jersey

Maureen Kearney Rowley, Federal Court Division of the Defender Assn. of Philadelphia, Eastern District of Pennsylvania

James V. Wade, Federal Public Defender, Middle District of Pennsylvania

Lisa B. Freeland, Federal Public Defender, Western District of Pennsylvania

Thurston T. McKelvin, Federal Public Defender, District of Virgin Islands

Fourth Circuit:

**This list includes every Federal Public Defender in the United States as each has signed on to this brief and urges this Court to grant certiorari.

James Wyda, Federal Public Defender, District of Maryland

Thomas P. McNamara, Federal Public Defender, Eastern District of North Carolina

Louis C. Allen III, Federal Public Defender, Middle District of North Carolina

Claire Rauscher, Federal Defenders of Western North Carolina, Inc., Western District of North Carolina

Parks N. Small, Federal Public Defender, District of South Carolina

Frank Dunham, Federal Public Defender, Eastern District of Virginia

Mary Lou Newberger, Federal Public Defender, Southern District of West Virginia

Fifth Circuit:

Virginia L. Schlueter, Federal Public Defender, Eastern District of Louisiana

Rebecca L. Hudsmith, Federal Public Defender, Middle and Western Districts of Louisiana

S. Dennis Joiner, Federal Public Defender, Southern District of Mississippi

George Patrick Black, Federal Public Defender, Eastern District of Texas

Ira R. Kirkendoll, Federal Public Defender, Northern District of Texas

Marjorie A. Meyers, Federal Public Defender, Southern District of Texas

Lucien B. Campbell, Federal Public Defender, Western District of Texas

Sixth Circuit:

Scott T. Wendelsdorf, Western Kentucky Federal Community Defender, Inc., Western District of Kentucky

Miriam L. Siefer, Legal Aid and Defender Assn. of Detroit, Eastern District of Michigan

Raymond S. Kent, Federal Public Defender, Western District of Michigan

Michael G. Dane, Federal Public Defender, Northern District of Ohio

S.S. Nolder, Acting Federal Public Defender, Southern District of Ohio

Elizabeth Ford, Federal Defender Services of Eastern Tennessee, Inc., Eastern District of Tennessee

Henry A. Martin, Federal Public Defender, Middle District of Tennessee

Stephen B. Shankman, Federal Public Defender, Western District of Tennessee

Seventh Circuit:

Richard H. Parsons, Federal Public Defender, Central District of Illinois

Terence F. MacCarthy, Federal Defender Program, Inc., Northern District of Illinois

Phillip J. Kavanaugh, Federal Public Defender, Southern District of Illinois

Jerome T. Flynn, The Northern District of Indiana Federal Community Defender, Inc., Northern District of Indiana

William E. Marsh, Indiana Federal Community Defender, Inc., Southern District of Indiana

James Walrath, Federal Defender Services of Eastern Wisconsin, Inc., Eastern and Western Districts of Wisconsin

Eighth Circuit:

Jenniffer Morris Horan, Federal Public Defender, Eastern and Western Districts of Arkansas

Nick Drees, Federal Public Defender, Northern and Southern Districts of Iowa

Scott Tilson, Acting Federal Public Defender, District of Minnesota

Lee Lawless, Acting Federal Public Defender, Eastern District of Missouri

Raymond C. Conrad, Jr., Federal Public Defender, Western District of Missouri

Jeffrey L. Viken, Federal Public Defender, District of North Dakota and District of South Dakota

David R. Stickman, Federal Public Defender, District of Nebraska

Ninth Circuit:

F. Richard Curtner III, Federal Public Defender, District of Alaska

Jon M. Sands, Federal Public Defender, District of Arizona

Maria Elena Stratton, Federal Public Defender, Central District of California

Quin A. Denvir, Federal Public Defender, Eastern District of California

Barry J. Portman, Federal Public Defender, Northern District of California

Ruben Cahn, Federal Defenders of San Diego, Inc., Southern District of California

John T. Gorman, Federal Public Defender, District of Guam

Peter C. Wolff, Jr., Federal Public Defender, District of Hawaii

Roger Peven, Federal Defenders of Eastern Washington and Idaho, Districts of Idaho and Eastern District of Washington

Anthony R. Gallagher, Federal Defenders of Montana, Inc., District of Montana

Franny A. Forsman, Federal Public Defender, District of Nevada

Steven T. Wax, Federal Public Defender, District of Oregon

Thomas W. Hillier III, Federal Public Defender, Western District of Washington

Tenth Circuit:

Raymond Moore, Federal Public Defender, Districts of Colorado and Wyoming

David J. Phillips, Federal Public Defender, District of Kansas

Stephen P. McCue, Federal Public Defender, District of New Mexico

Paul Brunton, Federal Public Defender, Eastern and Northern Districts of Oklahoma

Susan M. Otto, Federal Public Defender, Western District of Oklahoma

Steven Killpack, Federal Public Defender, District of Utah

Eleventh Circuit:

Christine Freeman, Federal Defender Program, Middle District of Alabama

Carlos Williams, Southern Federal Defender Program, Inc., Southern District of Alabama

R. Fletcher Peacock, Federal Public Defender, Middle District of Florida

Randolph P. Murrell, Federal Public Defender, Northern District of Florida

Kathleen M. Williams, Federal Public Defender, Southern District of Florida

Stephanie Kearns, Federal Defender Program, Inc., Northern District of Georgia

District of Columbia Circuit:

A. J. Kramer, Federal Public Defender, District of Columbia