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No. \_\_\_\_\_

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IN THE SUPREME COURT  
OF THE UNITED STATES

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SABIL MUJAHID,

Petitioner,

v.

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

Respondent.

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MOTION FOR LEAVE  
TO PROCEED *IN FORMA PAUPERIS*

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The petitioner, Sabil Mujahid, requests leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. § 3006A(d)(7). The petitioner was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals, and therefore no affidavit is required.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of January, 2006.

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Stephen R. Sady  
Attorney for Petitioner

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

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

“Term of imprisonment” is a phrase used throughout federal criminal statutes to mean the sentence imposed by the judge. The federal good time credit statute provides for a sentence reduction 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...” The 54 days represents 15% of each year ( $54 \div 365$  days) of the sentence imposed. The United States Sentencing Commission used the 15% formula to calibrate the Guidelines’ Sentencing Table, and judges, lawyers, and others involved in the federal criminal justice system have assumed the 15% rule applied. But the Bureau of Prisons’ rules require that the 54 days be credited against actual time served -- not the sentence imposed -- which results in a 2.2% annual loss of good time credit: on a ten-year sentence, instead of 540 available days of good time credit, the BOP allows only 470 days credit.

The Ninth Circuit, the first circuit court to face this question, held that “term of imprisonment” was ambiguous and, without independently construing the statute or applying the rule of lenity, deferred to the BOP interpretation. Three district courts have since analyzed the statute and concluded that the statute unambiguously means that the 15% rule is correct and that the BOP is misconstruing the statute. However, the circuits, for varying reasons, have followed the Ninth Circuit, which in the present case declined to reconsider its earlier ruling.

**The question presented, whether 18 U.S.C. § 3624(b) provides maximum good time credit of 15% of the sentence imposed, has two parts:**

**Whether 18 U.S.C. § 3624(b) unambiguously requires the 54 days of maximum good time credit to be calculated based on the sentence imposed, rather than time actually served, because the plain language, the statutory context -- especially the rule of intra-statutory consistency -- and the legislative history all support the 15% rule; and**

**Whether, if the statute is ambiguous, such ambiguity must be resolved in favor of the 15% rule because traditional rules of statutory construction, such as the rule of lenity and the doctrine of constitutional avoidance, favor the 15% rule and apply before any deference to the executive agency’s interpretation of this penal statute.**

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On Petition For Writ Of Certiorari To  
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For The Ninth Circuit

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The petitioner, Sabil Mujahid, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 17, 2005.

**1. Opinions Below**

The district court denied relief under 28 U.S.C. § 2241, adopting the findings and recommendation of a magistrate judge (Exhibit A, B). The Ninth Circuit Court of Appeals affirmed the judgment on June 27, 2005, in a published opinion reported as *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005) (Appendix C). Although the petitioner requested rehearing and suggested rehearing *en banc* on the grounds raised herein, the court denied rehearing on October 17, 2005 (Appendix D).

**2. Jurisdictional Statement**

This Court’s jurisdiction is invoked under 28 U.S.C. §1254(1).

**3. Constitutional and Statutory Provisions**

The federal good time statute, 18 U.S.C. § 3624(b), states:

**(b) Credit toward service of sentence for satisfactory behavior. --**

(1) Subject to paragraph (2), 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, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), 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 the service of the prisoner’s sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), 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) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

The BOP regulation states:

§ 523.20 Good conduct time.

(a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 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.

(b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

(c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will 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; or

(2) 42 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 not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, an alien who is subject to a final order of removal, deportation, or exclusion is eligible for, but is not required to, participate in a literacy program, or to be making satisfactory progress toward earning a General Educational Development (GED) credential, to be eligible for a yearly award of good conduct time.

(e) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see tables 3 through 6 in § 541.13 of this chapter).

The BOP program statement on application of the good time credit statutes is attached as Appendix E.

#### **4. Statement of the Case**

This case involves the application of the federal good time statute. The relevant facts include the implementation of the statute by the Bureau of Prisons and the calculation of Mr. Mujahid's good time credits.

##### **A. Mr. Mujahid Only Had Available 470 Days Of Good Time On His Ten-Year Sentence Instead Of 540 Days.**

Mr. Mujahid received a ten-year sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). After exhausting administrative remedies, he petitioned in the district court for relief on December 20, 2002, alleging the BOP's refusal to permit more than 470 days of good time credit, instead of the 540 days permitted by the statute, violated the good time credit statute.

Mr. Mujahid's case starkly presents the contrast between 54 days credit on a ten-year sentence, which would equal 540 days (or 85% of the sentence), and the BOP calculation that, on a ten-year sentence, allows only a maximum of 470 days credit, which requires service of 87.2% of the sentence. Mr. Mujahid's sentence was entered on a judgment and commitment order -- the same Administrative Office Form 245 (July 1990) used throughout the country. The form states that the defendant is to be "imprisoned for a term of" ten years. Because he was in Zone D on the Guidelines' Sentencing Table, the sentencing court imposed a "term of imprisonment" under U.S.S.G. § 5C1.1 ("Imposition Of A Term Of Imprisonment").

On this ten-year sentence, the BOP conceded that the maximum good time credit was 470 days and that the least time that could be served on a 10-year sentence is 8.7 years, not 8.5 years. During the course of this litigation, Mr. Mujahid was released on supervised release, served a 14 month supervised release violation sentence, and is now in state custody, the length of which may be affected by the calculation of his federal sentences.

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

The statute provides that prisoners may receive credit of up to 54 days for each year of the term of imprisonment. 18 U.S.C. § 3624(b). 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. § 523.20 (1989); P.S. 5880.28 at 1-48. Under the Program Statement, a prisoner sentenced to a 10-year term of imprisonment earns not 540 days of maximum good time credit, but only 470 days. P.S. 5880.28 at 1-48.

The BOP’s formulation explicitly rejects crediting good time against the sentence imposed. In its implementing regulation, the BOP substituted the phrase “for each year served” in place of the phrase used in the statute:

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.”

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. The BOP’s method -- covering 26 explanatory pages -- is an eight-step process that the BOP itself terms “arithmetically complicated” (Program Statement 5880.28 at 1-44). 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.

Program Statement 5880.28 at 1-44A to 45. 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.

## 5. Reasons For Granting The Writ

This case presents an extraordinarily important issue that only this Court can effectively resolve. The BOP's misconstruction of the federal good time credit statute increases the federal prison population by about 2.2%: a total of over 34,000 years of over-incarceration at the cost of over \$764 million. The distortion caused by the BOP's statutory error skews the most basic artifact of the modern sentencing era -- the Sentencing Table of the Guidelines upon which every federal sentence is graphed. When setting the potential penalties, the Sentencing Commission staff examined contemporary sentences and then added to the actual times served 15% based on the congressional grant of such good time against the sentence imposed. And the federal sentencing literature is rife with assumptions by judges, prosecutors, and defense lawyers that the 15% rule applies against the term imposed.

The issue is also extraordinarily important based on the need to follow this Court's instruction on statutory construction. In the first case addressing this issue, the Ninth Circuit expressly declined to provide an interpretation of the statute in the first instance, instead starting with agency deference: "our holding hinges on the deference due to the BOP, rather than on a fresh interpretation of the statute." *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1271 (9th Cir. 2001). This methodology is directly counter to the approach required by this Court: "[D]eference to [agency] interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Systems, Inc., v. Cline*, 540 U.S. 581, 583 (2004). When the most routine of statutory construction aids are applied, the statute unambiguously supports the petitioner's position, as found by three district courts.

The extraordinary importance of this issue is also reflected in the damage to the separation of powers inflicted by the Ninth Circuit's second step of analysis: the application of agency deference if the penal statute is ambiguous. The rule of lenity, based in protection of the individual against incarceration unless the lawmaker has clearly required it, does not permit the executive branch to construe an ambiguous penal statute to result in greater incarceration. The circuits' deference to the executive agency's interpretation of the penal statute turns "the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

The Court provides the only forum for orderly resolution of this question. The circuits following the Ninth Circuit have not adhered to this Court's clear precedent on statutory construction and have advanced varying rationales for rejecting the federal prisoners' claims. This Court's ruling correcting the misconstruction of the statute would bring a uniform approach and an easy remedy with a national recomputation of good time credit. This Court is uniquely positioned to resolve once and for all the multitude of prisoner administrative remedies, not to mention the massive uncertainty of prisoners, their loved ones, and their advocates, over the correct statutory interpretation of § 3624(b).

**A. The Question Is Of Exceptional Importance Because It Involves The Over-Incarceration Of Almost All Federal Prisoners.**

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. 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.

There are currently approximately 188,410 federal prisoners serving guideline sentences greater than one year and less than life. The mean sentence imposed is about 9.5 years. At seven days per year, the time involved is over 34,000 years ( $188,410 \times 7 \times 9.5 \div 365 = 34,326$ ). At \$22,265.00 per year for non-capital incarceration expenditures, the meager seven days on each year of a prisoner's sentence could amount to over \$764 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.

**B. The Question Is Of Exceptional Importance Because The Federal Guidelines' Sentencing Table Is Based On 15% Good Time Credit On The Sentence Imposed, Not The BOP's Construction Of The 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. To create the Sentencing Table, Sentencing Commission staff collected a large sample of sentences for a broad array of crimes and determined the actual time served as a baseline. Then, the Commission "adjusted for good time" by figuring out the longer sentence for which the actual time served would be 85%:

Prison time was increased by dividing by 0.85 good time when the term exceeded twelve months. This adjustment corrected for the good time (resulting in early release) that would be earned under the Guidelines. This adjustment made sentences in the Levels Table comparable with those in the Guidelines (which refer to sentences prior to the awarding of good time).

*Id.*; see also U.S.S.G. Ch.1, Pt. A, § 3, para. 3 (2004) (“Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior.”).<sup>1</sup>

The issue’s exceptional importance is highlighted by proof that every federal prisoner sentenced to a term of imprisonment received a guideline sentence based on a 2.2% error that can only be corrected now by allocating good time credit based on 15% of the sentence imposed. The Sentencing Commission’s use of the 85% rule in formulating the Guidelines provides critical support for the petitioner’s reading of the plain meaning of the statute and that, if deference beyond the judiciary is appropriate, deference to the Sentencing Commission would be more appropriate than deference to the BOP to mitigate separation-of-powers issues.

**C. The Question Is Of Exceptional Importance Because The Lower Court Ignored This Court’s Governing Authority On Statutory Construction That Establishes That “Term Of Imprisonment” Unambiguously Means The Sentence Imposed.**

The statutory text, according to this Court’s rules of construction, unambiguously credits good time against the sentence imposed. The statute states in relevant part:

[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.

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<sup>1</sup>This Commentary should be considered authoritative in the absence of contradiction by the statute. See *United States v. Stinson*, 508 U.S. 36, 38 (1993) (“[C]ommentary in the Guidelines Manual . . . is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline.”). The cited language was added by amendment in 1990. U.S.S.G. App. C, amendment 307 (Nov. 1, 1990).

18 U.S.C. § 3624(b) (emphasis added). Congress used “term of imprisonment” each time to mean the sentence imposed given the ordinary meaning of the words, the rule of intra-statutory consistency, the statutory context, and the legislative history. The *Pacheco-Camacho* decision did not address, or gave only a “cursory nod” to, the rules of statutory construction. *Williams*, 351 F. Supp. 2d at 415. This Court requires application of the rules of construction before deferring to an agency: “deference to [agency] interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.” *General Dynamics Land System, Inc., v. Cline*, 540 U.S. 581, 600 (2004) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (citing *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 943 n.9 (1984))).

*1. The Ordinary And Natural Meaning Of “Term Of Imprisonment” Is The Sentence Imposed.*

The starting point for statutory construction is the language of the statute itself. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). Statutory language should be construed consistently with its natural and ordinary meaning. *Leocal v. Ashcroft*, 125 S. Ct. 377, 383 (2004). Where the trial judge sentenced Mr. Mujahid to “imprisonment for a term” of ten years, the natural and ordinary meaning of “term of imprisonment” is the judge’s sentence.

Practitioners and courts have long assumed that the 54 days is credited against the sentence imposed. *Williams v. DeWalt*, 351 F. Supp. 2d 412, 419 (D. Md. 2004); *see, e.g., United States v. Pate*, 321 F.3d 1373, 1375 n.1 (11th Cir. 2003) (“Actually, he would serve 85% based on the 15% reduction as provided in 18 U.S.C. § 3624(b)(1).”). In its publications, even the BOP itself uses an 85% rule against the sentence imposed. *Williams*, 351 F. Supp. 2d at 419-20. The common

understanding of “term of imprisonment” supports its plain meaning.

The use of “beyond the time served” in the same sentence reinforces the ordinary meaning of “term of imprisonment.” Congress used “beyond the time served” to indicate how the credit should be awarded, not how much credit is available. “Time served” means actual time in custody, and “term of imprisonment” means the sentence imposed. *Williams*, 351 F. Supp. 2d at 417 (“In drafting § 3624(b), Congress used the phrase ‘time served’ when it meant time served.”). Two different phrases should not have the same meaning in the same sentence. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002).

The plain meaning is supported by the use of “at the end of each year.” *Moreland v. Fed. Bureau of Prisons*, 363 F. Supp. 2d 883, 887 (S. D. Tex. 2005). The BOP position that the phrase shows a prisoner must serve a full year is “linguistically unsound, because it incorrectly interprets ‘at’ to mean ‘after.’” *Id.* Normal use of “at” conforms with the interpretation that one year of a “term of imprisonment” consists of 311 days actual time, plus 54 days of good time credit. *Id.*

2. *The Statutory Context, Especially The Rule Of Intra-Statutory Consistency, Establishes That “Term Of Imprisonment” Means The Sentence Imposed.*

The first two uses of “term of imprisonment” in the relevant sentence mean the sentence imposed. *White v. Scibana*, 314 F. Supp. 2d 834, 838 (W.D. Wisc. 2004). The rule of intra-statutory consistency provides that identical words appearing in different parts of the same act are intended to have the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). This presumption is “at its most vigorous when a term is repeated within a given sentence.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

“Term of imprisonment” cannot unambiguously mean the sentence imposed in the first two uses, then suddenly take on a different meaning in the third use. There is simply no reason to deviate from the rule of intra-statutory consistency:

The phrase “term of imprisonment” appears three times in the first sentence . . . . On the first two occasions, the phrase undoubtedly means sentence imposed, as several courts have observed . . . . There is no evidence that Congress intended a different meaning the third time around. On the contrary, Congress used the phrase “time served” elsewhere within this same contested sentence, fully demonstrating its drafting ability to distinguish between the two terms when it chose to do so. . . . The Bureau’s interpretation not only renders the third instance of the phrase “term of imprisonment” inconsistent with its plain meaning in the two previous appearances, but also transforms its meaning to that of a contrary phrase within the same sentence. Sloppy draftmanship is not difficult to find in the U.S. Code, but the Bureau’s interpretation plumbs new depths of linguistic confusion.

*Moreland*, 363 F. Supp. 2d at 886 (citations and footnote omitted). Deviation from the rule of intra-statutory consistency, applied to the same phrase repeated within a single sentence of a penal statute, appears to be unprecedented.

“Term of imprisonment” is “a legal term of art that Congress had employed in dozens of statutes, many of which were part of the Comprehensive Crime Control Act of 1984, the same act in which § 3624 was included.” *White v. Scibana*, 314 F. Supp. 2d 834, 839 (W.D. Wisc. 2004). “Throughout these statutes, Congress has uniformly used ‘term of imprisonment’ as a synonym for ‘sentence.’” *Id.*, see also *Williams*, 351 F. Supp. 2d at 417-18 (throughout § 3624 and “throughout the criminal code ‘term of imprisonment’ is used as a term of art to mean sentence imposed, not time served”). This statutory context provides definitive meaning to statutory terms. *Tyler v. Cain*, 533 U.S. 656, 662 (2001); *Bailey v. United States*, 516 U.S. 137, 145 (1995).

Of the many dozens of times the phrase “term of imprisonment” means the sentence imposed, one deviation has been suggested: “term of imprisonment” as meaning time served in § 3624(d).

*Perez-Olivo v. Chavez*, 394 F.3d 45, 49 (1st Cir. 2005). But close reading of that statute demonstrates that the phrase means the sentence imposed: “[U]pon the release of a prisoner on the expiration of the prisoner’s term of imprisonment. . . .” The key word is “expiration.” The sentence imposed expires upon completion of time actually served plus good time credit.

3. *The History Of Good Time Statutes And The Legislative History Of § 3624(b) Establish That “Term Of Imprisonment” Means The Sentence Imposed.*

If questions remained from the text of the statute, the statute’s history would resolve any doubt in favor of the petitioner’s construction. Historically, Congress always credits good time against the sentence imposed.

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); *Moreland*, 363 F. Supp. 2d at 887. In fact, computing good time credit based on the imposed sentence 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 credit was not applied against the time actually spent in prison, but against the term of the sentence.

In 1948, Congress adopted new statutory language providing for the first time that the deduction be “credited as earned and computed monthly” to clarify when the credit accrued, not to diminish the amount of the credit. 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 and thousands of prisoners are experiencing first occurred and was corrected 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*; *Williams*, 351 F. Supp. 2d at 418. To solve this problem, Congress, in 1959, deleted the time-served language to restore the methodology of applying good conduct credit to the sentence, not time served. *Id*. “Congress’s long history of using an inmate’s sentence to calculate good-conduct time supports a conclusion that Congress would have been more explicit if it had intended to adopt a different policy.” *White*, 314 F. Supp. 2d at 840.

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 that applied good conduct time to the sentence, eschewing language such as “credited as earned and computed monthly,” using instead “term of imprisonment.” An earlier draft of the good time statute would have provided up to 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.<sup>2</sup>

Shortly after the passage of the bill, members of Congress characterized it as granting a fifteen percent reduction from the defendant’s “sentence,” not the time served. *See, e.g.*, 131 Cong. Rec. E37-02 (daily ed. Jan. 3, 1985) (statement of Rep. Hamilton) (“Now sentences will be reduced

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<sup>2</sup>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.

only 15% for good behavior.”); 131 Cong. Rec. E201-04(daily ed. Jan. 24, 1985) (statement of Rep. Mazzoli) (“a sentence could be shortened 15 percent for good behavior.”); 131 Cong. Rec. S4083-03 (daily ed Apr. 3, 1985) (statement of Sen. Kennedy) (under the Act, the “sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the defendant, with a 15 percent credit for ‘good time.’”).

The legislation’s author subsequently articulated his express intent to provide federal prisoners with up to 15% good time credits applied to the sentence imposed, when Congress considered encouraging States to adopt the federal approach to 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, 2349 (daily ed. Feb. 9, 1995) (statement of Sen. Biden) (emphasis added); *see also* 140 Cong. Rec. S12314-01, 12350 (Aug. 23, 1994) (statement of Sen. Biden) (“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.”) (emphasis added).<sup>3</sup>

The simplicity of the 15% rule provided part of the rationale for the legislation. Congress expressly referred to the need for change from “the complexity of current law” and the need to award

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<sup>3</sup>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 the sentence imposed” as a condition of federal assistance. 42 U.S.C. § 13704(a) (2000).

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. The 85% system best serves this purpose because it is so easy to calculate 15% of a sentence. On the other hand, the BOP program statement “which implements the ‘time served’ policy, is well-over 200 pages long, contains cumbersome and confusing formulas that even the Bureau describes as ‘arithmetically complicated,’ and which few, if any, prisoners could ever be expected to decipher.” *Moreland*, 363 F. Supp. 2d at 888-89.

**D. The Question Is Of Exceptional Importance Because, If “Term Of Imprisonment” Were Ambiguous, The Lower Courts Violated The Separation Of Powers Doctrine And This Court’s Precedent By Failing to Apply The Rule Of Lenity And The Doctrine Of Constitutional Avoidance Prior to Resort To The Executive’s Interpretation.**

Under this Court’s controlling authority, the application of traditional rules of statutory construction -- such as the rule of lenity and the doctrine of constitutional avoidance -- precedes *Chevron* deference. Contrary to this authority, the lower courts found that the rule of lenity did not come into play because the ambiguity was resolved by deference to and adoption of the agency’s interpretation.

1. *St. Cyr And Crandon Require Application Of The Rule Of Lenity To A Penal Statute Before Deferring To Executive Interpretation To Avoid “Replacing The Doctrine Of Lenity With A Doctrine Of Severity.”*

Respect for the legislative branch requires that a statute cannot be considered ambiguous until all aids to statutory interpretation are exhausted. *Cline*, 540 U.S. at 600; *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001). The “venerable” rule of lenity is a tool of statutory construction this Court

applies “to answer questions about the severity of sentencing” under the Sentencing Reform Act. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992). The lower courts’ premature resort to *Chevron* deference is contrary to this Court’s authority.

In *St. Cyr*, the Court rejected application of *Chevron* deference unless the statutes, after “applying the normal ‘tools of statutory construction,’ are ambiguous.” 533 U.S. at 320 n.45. In rejecting retroactive application of an immigration statute, the Court stated: “Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, . . . there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.” *Id.* Like the doctrine against retroactivity, the rule of lenity is a “tool of statutory construction” that renders the penal statute unambiguous for *Chevron* purposes.

Well before *St. Cyr*, this Court identified the constitutional perils of deferring to executive branch interpretation of a penal statute. In *Crandon v. United States*, 494 U.S. 152 (1990), the Court rejected the executive branch’s construction of a penal statute and, relying in part on the rule of lenity, concluded that the statute did not extend as construed by the agency. In a concurring opinion, Justice Scalia, joined by Justices O’Connor and Kennedy, drew a clear line between the roles of the executive branch and the judicial branch in interpreting criminal statutes: deference to executive branch interpretation of penal statutes “would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.” *Crandon*, 494 U.S. at 178 (Scalia, J., concurring).

Following *Crandon*, the Sixth Circuit declined to defer to the Parole Commission’s interpretation of a statute, stating: “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.” *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (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.*; *see also Evans v. United States Parole Com’n*, 78 F.3d 262, 265 (7th Cir. 1996) (“[W]e have substantial doubt that the judicial branch owes any deference to the executive branch when the question concerns the maximum term of imprisonment; certainly judges do not defer to the Attorney General’s interpretation of Title 18.”).

“To the extent there remains any ambiguity in the statute after considering its most natural linguistic meaning and the legislative history, the rule of lenity eliminates all doubt: good conduct time must be based on the sentence imposed, rather than time served.” *Moreland*, 363 F. Supp. 2d at 890.

2. *Leocal And Martinez Support Application Of Tools Of Statutory Construction Prior To Executive Deference.*

The Court followed *St. Cyr* and *Crandon*’s reasoning in *Leocal*, in which the immigration agency found an alien removable for having committed an aggravated felony. 125 S. Ct. at 377. In holding that drunk driving is not a “crime of violence” and thus not an aggravated felony, the Court utilized the rule of lenity. Citing *United States v. Thompson/Center*, 504 U.S. 505, 517-18 (1992), the Court found that any ambiguity would have to be construed in the alien’s favor under the rule of lenity, because the immigration statute had only one meaning in criminal and noncriminal contexts. *Leocal*, 125 S. Ct. at 384 n.8. The rule of lenity applied rather than the agency’s interpretation of the statute. Applied to the present case, *Leocal* favors interpretation of the good time statute to require the 15% rule, rather than the BOP’s harsher interpretation.

Similarly, the Court rejected the immigration agency's construction of the post-removal detention statute in *Clark v. Martinez*, 125 S. Ct. 716 (2005). The Court emphasized that the doctrine of constitutional avoidance is a canon of statutory construction. *Martinez*, 125 S. Ct. at 724-25. Since the doctrine only applies to ambiguous language, this is another example of how "tools of statutory construction" -- including the rule of lenity and the doctrine of constitutional avoidance -- are applied before the first prong of *Chevron's* determination of ambiguity. *Id.* (citing *Leocal* for the proposition that "if a statute has criminal applications, 'the rule of lenity applies.'").

3. *The Lower Court Misplaced Reliance On Sweet Home Because That Case Involved Delegation Of Regulatory Authority, Not Resolution Of Statutory Ambiguity.*

The Ninth Circuit confused the BOP's statutory authority to administer the good time credit statute with the judiciary's responsibility for statutory interpretation of the statutes the BOP administers. 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 distinction between delegated duties and interpretation of ambiguous statutory terms is illustrated in a footnote in *Babbitt v. Sweet Home*, 515 U.S. 687, 704 n.18 (1995), which is cited in *Mujahid*, 413 F.3d at 998. The critical distinction is that in *Sweet Home*, there was no statutory ambiguity -- the only question involved the facial validity of administrative regulations well within the scope of statutory delegation. The case involved only notice, not the rule of lenity's separation of powers protection of Congress's prerogative to write the laws on punishment.

The footnote upon which the Ninth Circuit relied addressed a supplemental argument that the rule of lenity applied to "facial challenges to administrative regulations whenever the governing

statute authorizes criminal enforcement.” *Sweet Home*, 515 U.S. at 704 n.18. *Sweet Home* expressly distinguished its facts from the normal application of the rule of lenity to ambiguous criminal statutes, citing *Thompson/Center Arms Co.*, 504 U.S. at 517-18 and n.9. Because the Court in *Sweet Home* did not address application of the rule of lenity to an ambiguous penal statute, the case is of no precedential value on this issue.

**E. Certiorari Should Be Granted To Resolve The Analytic Disarray Among The Circuits.**

Three District Courts, having reviewed circuit court authority, concluded those courts’ reasoning lacked support in the basic rules of statutory construction (Appendices F, G, H). The sense that something is very wrong with the BOP’s construction of the good-time statute is reinforced by the glaring analytic inconsistencies among the circuits that have upheld the BOP’s interpretation. Review by this Court is necessary to establish a coherent and consistent analytic framework because the circuit courts that have ruled on this question either found the statute ambiguous and deferred to the agency,<sup>4</sup> deferred to the agency because the good time statute is not penal,<sup>5</sup> or decided that the statute is unambiguous as the agency construed it.<sup>6</sup>

*Pacheco-Camacho*, the first case addressing Section 3624(b), arose in the context of a prisoner who received a sentence of a year and a day. While finding that the first occurrence of

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<sup>4</sup>*Bernitt v. Martinez*, 2005 WL 3534188 \*1 (8th Cir. Dec. 28, 2005); *Brown v. McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 233-34 (4th Cir. 2005); *O’Donald v. Johns*, 402 F.3d 172, 174 (3d Cir. 2005); *Perez-Olivio v. Chavez*, 394 F.3d 45, 51-53 (1st Cir. 2005); *White v. Scibana*, 390 F.3d 997, 999-1003 (7th Cir. 2004).

<sup>5</sup> *Perez-Olivio v. Chavez*, 394 F.3d 45, 53-54 (1st Cir. 2005); *Sash v. Zenk*, 428 F.3d 132, 134-35 (2nd Cir. 2005); *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005); *Brown v. McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005).

<sup>6</sup>*Moreland v. Federal Bureau of Prisons*, 431 F.3d 180, 186 (5th Cir. 2005).

“term of imprisonment” in the first phrase of the statute referred to the sentence imposed (272 F.3d at 1268), the *Pacheco-Camacho* court held that the later occurrence of “term of imprisonment” in the same sentence was “ambiguous.” 272 F.3d at 1269-70. To resolve the perceived ambiguity, the Court deferred to the agency’s construction rather than apply traditional rules of statutory construction, such as the rule of lenity, to try to resolve the statutory meaning. *Pacheco-Camacho*, 272 F.3d at 1270-71.

After *Pacheco-Camacho*, three federal district court judges expressly rejected its reasoning and found, applying this Court’s rules of statutory construction, that the BOP is misconstruing the good time statute because “term of imprisonment” unambiguously means the sentence imposed: *White v. Scibana*, 314 F. Supp. 2d 834 (W.D. Wis. 2004) (Appendix F); *Williams v. DeWalt*, 351 F. Supp. 2d 412 (D. Md. 2004) (Appendix G); and *Moreland v. Fed. Bureau of Prisons*, 363 F. Supp. 2d. 882 (S.D. Tex. 2005) (Appendix H). The circuit courts, however, have upheld the BOP’s interpretation in a number of analytically flawed opinions, two of which are the subject of pending petitions for a writ of certiorari.<sup>7</sup>

The major error is reflected in those circuits that, contrary to *Chevron*’s dictate, defer to agency interpretation before independently construing the statute. This error is most clearly apparent in *Pacheco-Camacho*, which other circuits followed: “Given that our holding hinges on the deference due to the BOP, rather than on a fresh interpretation of the statute in question, we need not decide the meaning of ‘term of imprisonment.’” 272 F.3d at 1271. Similarly, the First Circuit began its *Chevron* step-one analysis by determining whether the BOP’s interpretation was feasible, not

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<sup>7</sup>Petitions for certiorari have been filed in *Moreland v. Fed. Bureau of Prisons*, No. 05-8268 (filed Dec. 8, 2005), and *O’Donald v. Johns*, No. 05-8504 (filed Jan. 3, 2006).

whether the statute could be independently construed. *Perez-Olivio*, 394 F.3d at 48; *see also Petty v. Stine*, 424 F.3d 509, 510 (6th Cir. 2005) (citing *Brown v. Hemingway*, 53 Fed. Appx. 338, 339 (6th Cir. 2002) (“The Bureau’s interpretation is reasonable in light of the statutory language.”)). The Second and Seventh Circuits went one step further by finding that the BOP’s interpretation of § 3624(b) was entitled to full deference before undertaking an independent examination of the statute. *Sash*, 428 F.3d at 134-35; *White*, 390 F.3d at 1000-01.

While the Third Circuit began with an independent analysis of the statutory language, rejecting both the petitioner’s and the BOP’s construction, it failed to employ any tools of statutory construction before deferring to the agency’s interpretation. *O’Donald*, 402 F.3d at 174. The Fourth Circuit created an interim step in the *Chevron* analysis by first determining that the statute was ambiguous based on the four corners of the statute, then looking to context and legislative history to resolve the ambiguity. *Yi*, 412 F.3d 533. The Fourth Circuit then declared that *Chevron* deference was a tool of statutory construction employed to resolve ambiguity, obviating the second prong of *Chevron*. *Yi*, 412 F.3d at 534.

In determining whether the statute is ambiguous, the rule of intra-statutory consistency was either ignored or downgraded. One Circuit rejected its application because it was only a presumption that does not apply where “term of imprisonment” must mean “time served” (*White*, 390 F.3d at 1002). Another said the rule does not apply where the statutory language does not unambiguously compel an interpretation that the same phrase is given the same meaning throughout the statute (*Yi*, 412 F.3d at 531). The Fifth Circuit dismissed the canon as an “original sin.” *Moreland*, 431 F.3d at 188. And the significant history of good time laws and statutes of legislative intent were disregarded. *Sash*, 428 F.3d at 137-38 (“Whether or not legislative history may be appropriately

used in the first step of a *Chevron* analysis, the legislative history of § 3624(b) offers nothing that could usefully guide us here.”); *Perez-Olivio*, 394 F.3d at 51 n.2 (“we need not reach the issue of whether we would accept the legislative history as conclusive evidence of Congress’ intent to interpret ‘term of imprisonment’ if it were contrary to the BOP’s interpretation”).

Only the Fifth Circuit found that the statute was unambiguous concluding, that “[u]sing a phrase unambiguously in one part of a statute, then using it differently, but unambiguously in another part, does not dictate that its use in the statute is ambiguous.” *Moreland*, 431 F.3d at 189. Judge Stewart, concurring in the result, disagreed with the *Moreland* majority’s conclusion that the statute was unambiguous, but followed *Pachecho-Camacho* after determining “‘term of imprisonment’” to be ambiguous. 431 F.3d at 190. Even though the First Circuit found that “the phrase ‘term of imprisonment’ is plainly used to mean ‘time served,’” a finding that would ordinarily preclude further *Chevron* analysis, the court found the text ambiguous, and deferred to the agency’s interpretation.

Nor was there consensus among the circuits as to what language in the statute created the ambiguity. The First, Fourth, and Ninth Circuits found that the proration language in the last sentence of the statute rendered the statute ambiguous. *Perez-Olivio*, 394 F.3d at 50-51; *Pachecho-Camacho*, 272 F.3d at 1268-69; *Yi*, 412 F.3d at 533. The Second and Seventh Circuits focused on the phrases “during the year” and “beyond the time served.” *Sash*, 428 F.3d at 137; *White*, 390 F.3d at 1001. The Sixth Circuit, without discussion, deferred to the BOP’s interpretation because the “language of the statute uses 54 days as the basis for credit, not the 15% figure [used by the petitioner]. *Petty*, 424 F.3d at 510 (citation omitted). The Eighth and Eleventh Circuits, without discussion, merely agreed with the other circuits that the statute was ambiguous. *Bernitt*, 2005 WL

3534188 at \*1; *Brown*, 416 F.3d at 1272-73.

Some circuits also found ambiguity, arguing that the award of 54 days for each year of the term of imprisonment would allow credit toward time never spent in prison -- granting a supposed “windfall” to prisoners. *Pacheco-Camacho*, 272 F.3d at 1268, *White*, 390 F.3d at 1001-02; *O’Donald*, 402 F.3d at 174. The most apparent flaw in this conclusion is that all good time credit -- whether 47 or 54 days -- is by definition credit toward the service of a sentence that is not spent in prison. As the district court *Moreland* noted, this “windfall” is “purely a matter of bookkeeping.” 363 F. Supp. 2d at 894. The court reasoned that no windfall occurs when the evaluation date (determining whether the prisoner has earned the good time) must be adjusted each year to take into account the good time credit already earned. “When this is done, it is readily seen that the model prisoner has fully earned 54 days credit for each 311 days served, no windfall is occurring in the last year of imprisonment. The real problem here is that the Bureau’s current practice does not permit an annual adjustment of the ‘good time action date.’” *Moreland*, 363 F. Supp. 2d at 894.

Most remarkably, two circuits refused to apply the rule of lenity because the good time statute -- despite the fact that it is codified in the subchapter entitled “Imprisonment” in Title 18 of the United States Code -- is not a penal statute. *Perez-Olivio*, 394 F.3d at 53; *Sash*, 428 F.3d at 134. The Fourth Circuit recognized that the statute was a penal statute, but argued that “[r]ather than apply a presumption of lenity to resolve ambiguity, *Chevron* requires that we *defer* to the agency’s reasonable construction of the statute.” *Yi*, 412 F.3d at 532 (emphasis as in original). As the *Moreland* district court found, and the BOP conceded in that case, the good time statute is plainly penal under this Court’s precedent. 363 F. Supp. 2d at 889-90 (citing *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Leocal v. Ashcroft*, 125 S. Ct. 377, 384 n. 8 (2004); *United States v.*

*Thompson/Center Arms*, 504 U.S. 505, 518 n. 10 (1992)).

The fundamental flaws in the circuits' analyses demonstrate the need for this Court's intervention.

**F. The Question Is Of Exceptional Importance Because The Sentencing Reform Act's Utilitarian Approach Is Undermined By Hidden Over-Incarceration.**

Misconstruction of the good time statute undermines the Sentencing Reform Act's utilitarian approach to sentencing. The rule of parsimony -- a statutory analog to the rule of lenity -- requires that the sentencing court impose a sentence sufficient but not greater than the sentencing goals require. 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply" with the listed purposes of sentencing). No legitimate sentencing goal is accomplished by reducing the amount of available good time. No individual or group can be deterred by a requirement of serving 87.2% of a sentence when "courts and practitioners have commonly understood that federal inmates are eligible for a reduction of up to 15% of their sentence, through earning of good time credits." *Williams*, 351 F. Supp. 2d at 419. At huge additional expense, society obtains no meaningful deterrent effect for massive over-incarceration.

The SRA also presupposes that the legislature, not executive, determines the maximum amount of good time credit. The statute permits the agency to make individual decisions regarding the awarding of credit up to the maximum, but never delegated the determination of the maximum rate for good time credit. Consistent with the separation of powers doctrine, the legislature must unambiguously announce the penalty a criminal faces. *United States v. Bass*, 404 U.S. 336, 348 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955). "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); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES 92 (“A man cannot suffer more punishment than the law assigns, but he may suffer less.”). Punishment -- the actual period of custody less good time credit -- is the province of the legislative branch, and added incarceration by the executive branch, in a manner not unequivocally permitted by statute, undercuts the requirement that the people, through their representatives, set the rules for punishment.

**6. Conclusion**

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 the crystal-clear intent of Congress, and the alternate resolution of the question by application of the rule of lenity, the Court should grant certiorari.

DATED this \_\_\_\_ day of January, 2006.

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Stephen R. Sady  
Attorney for Petitioner

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No. \_\_\_\_\_

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IN THE SUPREME COURT  
OF THE UNITED STATES

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SABIL MUJAHID,

Petitioner,

v.

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

Respondent.

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

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CERTIFICATE OF SERVICE AND MAILING

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I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3 service has been made of the within MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon on this January \_\_, 2006, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Ken Bauman  
Assistant U.S. Attorney  
1000 SW Third, Suite 600  
Portland, OR 97204

Paul Clement  
Acting Solicitor General  
Department of Justice, #5614  
10th & Constitution, N.W.  
Washington, D.C. 20530

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this January \_\_, 2006, with first-class postage prepaid.

DATED this \_\_\_\_ day of January, 2006.

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Stephen R. Sady  
Attorney for Petitioner

SUBSCRIBED AND SWORN to before me this \_\_ day of January, 2006.

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Notary Public of Oregon