Nos. 08-11034, 09-5201

IN THE SUPREME COURT OF THE UNITED STATES

ISMAEL TABLADA, PETITIONER

v.

J.E. THOMAS, WARDEN

MICHAEL GARY BARBER, ET AL., PETITIONERS

v.

J.E. THOMAS, WARDEN

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3624(b), which provides that a federal prisoner may receive credit toward the service of his sentence for exemplary conduct, requires the Federal Bureau of Prisons to calculate such credit on the basis of the sentence imposed rather than on the basis of the time served.

2. Whether Congress has delegated the interpretation of 18 U.S.C. 3624(b) to the United States Sentencing Commission rather than to the Federal Bureau of Prisons.

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OPINIONS BELOW

The opinion of the court of appeals in No. 08-11034 (Tablada App. A1-A16) is reported at 533 F.3d 800. The order of the court of appeals in No. 09-5201 (Barber App. 1-3) is not reported.

JURISDICTION

The judgment of the court of appeals in No. 08-11034 was entered on July 3, 2008. A petition for rehearing was denied on March 20, 2009 (Tablada App. C). The petition for a writ of certiorari was filed on June 18, 2009. The judgment of the court of appeals in No. 09-5201 was entered on April 20, 2009. The petition for a writ of certiorari was filed on July 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are former or current federal inmates convicted of various drug offenses. Pursuant to 28 U.S.C. 2241, they filed petitions for writs of habeas corpus to challenge the method used by the Bureau of Prisons (BOP) for calculating "good conduct time," i.e., credit against their sentences awarded for exemplary behavior (GCT credit). The district court ruled that the BOP's method is lawful and denied the petitions. Tablada App. B1-B8; Barber App. 13-14. The court of appeals affirmed. Tablada App. A1-A16; Barber App. 1-2.

1. Federal prisoners may receive credit toward their sentences for exemplary behavior while incarcerated. Their eligibility for such GCT credit is governed by 18 U.S.C. 3624(b)(1), which provides that

> 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. * * * [I]f 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. * * * 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.

Congress adopted Section 3624 as part of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, Title II § 212(a)(2), 98 Stat. 2008. Since that time, the BOP has interpreted Section 3624(b)(1) to allow up to 54 days of GCT credit for each year actually served. See 28 C.F.R. 523.20. The BOP memorialized that interpretation in an internal memorandum in November 1988, and later formalized it in Program Statement 5880.28 in February 1992. See Tablada App. A5. Then, in September 1997, the BOP published its interpretation for comment as an interim rule, 28 C.F.R. 523.20, which became final as revised in December 2005. See Tablada App. A5.

That regulation provides in pertinent part that "the Bureau will award 54 days credit towards service of sentence (good conduct time credit) <u>for every year served</u>." 28 C.F.R. 523.20(a) (emphasis added). In accordance with the regulation, BOP does not credit a prisoner with the first 54 days of GCT credit until after the

prisoner has completed a full year of incarceration. Tablada App. A6. Because the BOP calculates GCT credit on the basis of time actually served rather than on the basis of the sentence imposed, a prisoner's total potential credit is somewhat less than 54 days per year of the sentence originally imposed. Ibid.

The BOP's interpretation of Section 3624(b)(1) led to the filing of numerous lawsuits by federal prisoners.[1] Every court of appeals to consider the issue has held that the BOP's method of calculating GCT credit is consistent with Section 3624(b)(1). See, e.g., Wright v. Federal Bureau of Prisons, 451 F.3d 1231, 1235-1236 (10th Cir. 2006); Bernitt v. Martinez, 432 F.3d 868, 869 (8th Cir. 2005) (per curiam); Moreland v. Federal Bureau of Prisons, 431 F.3d 180, 186 (5th Cir. 2005), cert. denied, 547 U.S. 1106 (2006); Sash v. Zenk, 428 F.3d 132, 136-138 (2d Cir. 2005), as amended, 439 F.3d 61 (2006); Petty v. Stine, 424 F.3d 509, 510 (6th Cir. 2005); Brown v. McFadden, 416 F.3d 1271, 1272 (11th Cir. 2005) (per curiam); Yi v. Federal Bureau of Prisons, 412 F.3d 526,

[1] Those litigants claimed that Section 3624(b)(1) entitled them to their first 54 days of GCT credit before completing a full year of incarceration. On their approach, the BOP would have been required to subtract the first 54 days of GCT credit from the end-date of the first year of a prisoner's sentence. For example, a prisoner with model behavior who began serving his sentence on January 1 would finish his first year of service for purposes of GCT credit on November 7 (54 days before December 31). His second year of service for purposes of GCT credit then would commence at that time and continue until September 14 of the following year (54 days before November 7). In each successive calendar year, the prisoner would need to serve less actual time in order to earn the full 54 days of GCT credit. See Tablada App. A6.

530-535 (4th Cir. 2005); O'Donald v. Johns, 402 F.3d 172 (3d Cir. 2005), cert. denied sub nom., Moreland v. Federal Bureau of Prisons, 547 U.S. 1106 (2006); Perez-Olivo v. Chavez, 394 F.3d 45, 48-54 (1st Cir. 2005); White v. Scibana, 390 F.3d 997, 1000-1003 (7th Cir.), cert. denied, 545 U.S. 1116 (2005); Pacheco-Camacho v. Hood, 272 F.3d 1266, 1268-1272 (9th Cir. 2001), cert. denied, 535 U.S. 1105 (2002).

2. Petitioner Ismael Tablada was convicted of conspiring to distribute and possess with the intent to distribute cocaine, in violation of 18 U.S.C. 846. On December 17, 1990, he was sentenced to 240 months of imprisonment, to be followed by ten years of supervised release. Tablada App. A3. At present, he has been released from prison and is serving his term of supervised release.

Petitioners Michael Barber and Tahir Jihad-Black are both currently incarcerated in an Oregon federal prison. Petitioner Barber was convicted of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. 846; attempted possession and possession of ephedrine with intent to manufacture methamphetamine, in violation of 21 U.S.C. 841; use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1); and possession of a firearm, in violation of 26 U.S.C. 5861. On November 4, 1994, he was sentenced to 320 months of imprisonment, to be followed by five years of supervised release. Petitioner Jihad-Black was convicted of possession of an unregistered firearm,

in violation of 26 U.S.C. 5861(d); and possessing a firearm after a conviction for a felony offense, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). On October 4, 1997, he was sentenced to 262 months of imprisonment, to be followed by five years of supervised release.

While all of the petitioners were incarcerated, they filed petitions for writs of habeas corpus pursuant to 28 U.S.C. 2241. Although they challenged the BOP's method of calculating GCT credit, they did so on the basis of a new theory: that when the BOP promulgated its regulation (28 C.F.R. 523.20(a)) interpreting the GCT credit statute (18 U.S.C. 3624(b)(1)), it violated the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), by failing to articulate a rational basis for its interpretation. Tablada App. A3-A4, A7-A8. They also claimed that the United States Sentencing Commission, not the BOP, had the authority to interpret Section 3624(b)(1) and had adopted a method of calculating GCT credit on the basis of the sentence imposed rather than time served. Id. at A13-A15. The district court rejected petitioners' arguments and denied them relief. Tablada App. B1-B8; Barber App. 3-4.[2]

[2] At the request of the parties, the district court incorporated the record, including the order and opinion, in petitioner Tablada's case into the record of petitioner Barber's case and petitioner Jihad-Black's case. Barber App. 3-4. On appeal, on the basis of its opinion in petitioner Tablada's case, the court of appeals summarily affirmed the judgments in petitioner Barber's case and petitioner Jihad-Black's case. Barber App. 1-2.

3. The court of appeals affirmed. Tablada App. A1-A16; Barber App. 1-2. Under its decision in Arrington v. Daniels, 516 F.3d 1106 (2008), the court held that the BOP was required to articulate the rationale for its GCT credit regulation in the accompanying administrative record. Tablada App. A8. The BOP conceded that it had not done that when promulgating 28 C.F.R. 523.20(a), id. at A9; the court held, however, that even in the absence of the regulation, it should defer to the internal BOP guideline that predated the regulation -- Program Statement 5880.28 -- under Skidmore v. Swift & Co., 323 U.S. 134 (1944). Tablada App. A10-A13; see id. at A11 ("Applying the factors articulated in Skidmore, we find that the methodology utilized in Program Statement 5880.28 is both persuasive and reasonable."). Finally, the court rejected petitioners' argument that the Sentencing Commission rather than the BOP is the agency charged with interpreting the GCT credit statute. Id. at A15.

ARGUMENT

Petitioners claim that this Court should grant certiorari to determine (1) whether 18 U.S.C. 3624(b) requires the BOP to calculate GCT credit on the basis of the sentence imposed rather than on the basis of the time served (Pet. 12-26, 30-33); and

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The court of appeals then consolidated all three cases for the purposes of filing a petition for a writ of certiorari. Because the petitions in No. 08-11034 and No. 09-5201 raise the same issues, the United States files this consolidated response.

(2) whether Congress delegated the interpretation of 18 U.S.C. 3624(b) to the Sentencing Commission rather than to the BOP (Pet. 27-30). With respect to each of those claims, the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As a threshold matter, petitioner Tablada's case is moot because he has been released from federal prison. The court of appeals held that his release "does not render his appeal moot because his sentence includes a term of supervised release," Tablada App. A3 n.1, and there is a "'possibility' that the sentencing court would use its discretion to reduce a term of supervised release," ibid. (quoting Mujahid v. Daniels, 413 F.3d 991, 994-995 (2005)). As the Third Circuit has reasoned, however, "[t]he possibility that the sentencing court will use its discretion to modify the length of [petitioner's] term of supervised release under 18 U.S.C. 3583(e), * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 2009 WL 1402275 (Oct. 20, 2009); see U.S. Br. in Opp., Burkey v. Marberry (No. 08-1428), 2009 WL 3006227, at *7-*15. Because petitioners Barber and Jihad-Black remain incarcerated in federal prison, their petitions are not moot.

2. a. On the merits, petitioners argue that 18 U.S.C. 3624(b)(1) "unambiguously requires" that the BOP calculate GCT credit on the basis of the sentence imposed. Tablada Pet. 14 (emphasis omitted); see id. at 14-22; Barber Pet. 15-23. The courts of appeals have unanimously rejected that argument, see pp. 4-5, supra; and this Court has declined review in those cases, see, e.g., Moreland, 547 U.S. 1106 (2006) (No. 05-8268); ibid. (Stevens, J., respecting the denial of the petitions for writs of certiorari) ("The fact that 10 Courts of Appeals have either agreed with, or deferred to, the Government's interpretation provides a principled basis for denying these certiorari petitions."). There is no reason for a different result here.[3]

b. Petitioners contend (Tablada Pet. 32-34; Barber Pet. 32-34) that once the court of appeals set aside 28 C.F.R. 523.20(a) under the APA, it was not permitted to defer to Program Statement 5880.28. In construing Section 3624(b)(1), however, the court of

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[3] Although petitioners argue (Tablada Pet. 14-26; Barber Pet. 15-26) that their interpretation is consistent with the text of Section 3624(b)(1), its legislative history, and the rule of lenity, the courts of appeals have considered and rejected all of those arguments. See U.S. Br. in Opp., Petty v. Stine (No. 05-9782), 2006 WL 1644662, at *3; see also Wright, 451 F.3d at 1234-36; Moreland, 431 F.3d at 184-188; Sash, 428 F.3d at 134-138; Pacheco-Camacho, 413 F.3d at 1271-1272; Yi, 412 F.3d at 530-533; O'Donald, 402 F.3d at 174; Perez-Olivio, 394 F.3d at 53. Petitioners assert (Tablada Pet. 26; Barber Pet. 26) that the decision below conflicts with Dolfi v. Pontesso, 156 F.3d 696 (6th Cir. 1998), and Evans v. United States Parole Commission, 78 F.3d 262 (7th Cir. 1996), but neither of those decisions applies the rule of lenity in the interpretation of Section 3624(b)(1).

appeals properly considered whether the BOP's longstanding interpretation -- as set forth in pre-regulation Program Statement 5880.28 -- was entitled to deference under Skidmore. The court concluded that "[a]pplying the factors articulated in Skidmore, * * * the methodology utilized in Program Statement 5880.28 is both persuasive and reasonable." Tablada App. A11; id. at A11-13. Petitioners maintain (Tablada Pet. 23-26; Barber Pet. 23-27) that the rule of lenity should be applied before a court defers to an agency's construction, but that is not so. See Reno v. Koray, 515 U.S. 50, 61 (1995) (applying deference to a BOP Program Statement); id. at 64-65 (rejecting application of the rule of lenity). Nor does the court of appeals' decision conflict with any decision of this Court or of any court of appeals. Although the court of appeals deferred to the BOP's interpretation under Skidmore rather than Chevron, the fact remains that every court of appeals to consider Section 3624(b)(1) has held that it permits the BOP to calculate GCT credit on the basis of time actually served by federal prisoners.

3. Finally, petitioners argue (Tablada Pet. 27-32; Barber Pet. 27-32) that Congress has delegated the interpretation of Section 3624(b)(1) to the Sentencing Commission, which, they maintain, has endorsed their approach to calculating GCT credit. As the court of appeals noted, the evidence does not demonstrate that the Sentencing Commission actually disagrees with the BOP's

interpretation of Section 3624(b)(1). Tablada App. A15. Petitioners rely (Pet. 27) on a Supplementary Report published by the Sentencing Commission in June 1987 -- more than a year before the BOP issued an internal memorandum interpreting Section 3624(b)(1) to allow GCT credit for time served, and nearly five years before BOP formalized that interpretation in Program Statement 5880.28. Id. at A5, A15. Moreover, in the 17 years since the BOP issued Program Statement 5880.28 (which has included two notice and comment periods on the GCT credit regulation), the Sentencing Commission has never questioned the BOP's approach. Id. at A15.

In any event, the court of appeals correctly held that "the BOP is the agency charged with interpreting the good time credit statute." Tablada App. A15. As this Court has recognized, "[a]fter a district court sentences a federal offender, the Attorney General, through the Bureau of Prisons, has the responsibility of administering the sentence." United States v. Wilson, 503 U.S. 329, 334-335 (1992); see 18 U.S.C. 3612(a). That responsibility includes the authority to interpret Section 3624(b)(1). See, e.g., White, 390 F.3d at 1001 ("The Bureau's discretion to resolve ambiguities in the good-time statute is implicit in its statutory authority to determine and award good time and release prisoners when their sentences, as adjusted by the Bureau for good-time credit, have expired."). Thus, whatever the Sentencing Commission's understanding of Section 3624(b)(1), that

understanding does not control how the BOP interprets and administers the statute. Petitioners do not point to any decision holding to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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