No. 12-_____

IN THE

Supreme Court of the United States

GEORGE H. EDWARDS, JR.,

Petitioner,

v.

STEPHEN DEWALT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a federal parolee violates his parole, he returns to prison to serve his original sentence, and his "street time" before revocation ordinarily counts toward the completion of that sentence. But if parole is violated by a new offense committed while on parole, some or all of his street time may be added to the end of his sentence. Section 4210(b)(2), Title 18, instructs that in such a case, the U.S. Parole Commission must "determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part" of the parolee's original sentence "shall run concurrently or consecutively with the sentence imposed for the new offense." Sections 4214(b) and (c) require that the parolee receive notice, counsel, and an opportunity to present his case. Parole Commission regulation 28 C.F.R. § 2.52(c)(2) says that when a parolee commits an offense while on parole, he forfeits his street time as an "automatic statutory penalty." The question presented is:

> Whether, when a federal parolee commits a new offense on parole, he is entitled to an individualized determination of whether the time spent from his parole to his revocation will count against his original sentence.

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PETITION FOR A WRIT OF CERTIORARI

George H. Edwards, Jr., respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals from which this petition is taken (Pet.App.1a-14a) is reported at 681 F.3d 780. The district court's opinion denying Petitioner's petition for a writ of habeas corpus (Pet.App.15a-28a) is unreported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2241. The court of appeals had appellate jurisdiction under 28 U.S.C. § 1291. The court of appeals entered its judgment and opinion on June 1, 2012. Petitioner applied to Justice Kagan for an extension of time until October 1, 2012, which was granted on August 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 4210(b) of Title 18, United States Code, provides in relevant part:

> Except as otherwise provided in this section, the jurisdiction of the [United States Parole] Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that—
>
> . . .
>
> (2) [when a parolee is convicted of a new offense while on parole that is punishable by imprisonment], the Commission shall determine, in ac-

> cordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

Section 2.52(c) of Title 28, Code of Federal Regulations, provides in relevant part:

> A parolee whose release is revoked . . . will receive credit on service of his sentence for time spent under supervision, except as provided below:
>
> . . .
>
> (2) It is the Commission's interpretation of 18 U.S.C. 4210(b)(2) that, if a parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by [imprisonment], forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty, and such time shall not be credited to the service of the sentence [whether or not the parolee is actually imprisoned on the new conviction]. . . . However, in no event shall the violator term imposed under this subsection, taken together with the time served before release, exceed the total length of the original sentence.

STATEMENT

Individuals sentenced under the criminal laws of the United States before November 1, 1987 were generally given prison sentences with the possibility of parole. The United States Parole Commission currently supervises nearly 2500 parolees from such sentences. U.S. Dep't of Justice, *FY 2013 Performance Budget*, *Congressional Submission, United States Parole Commission* 16 (Feb. 2012), *available at* http://www.justice.gov/jmd/2013justification/pdf/fy13-uspc-justification.pdf [hereinafter *FY 2013 Congressional Submission*].[1]

The aim of parole is rehabilitation, and it is the Commission's responsibility to help manage parolees' reintegration into society after prison. Before the Parole Commission was created, the federal government had experimented with several regimes to manage the lives and sentences of offenders. *See generally* U.S. Dep't of Justice, *History of the Federal Parole System* 1-2 (May 2003), *available at* http://www.justice.gov/uspc/history.pdf [hereinafter *History of Federal Parole*].

A. Background Law

The regime at issue in this case is the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) (codified at 18 U.S.C.

[1] Effective for crimes committed after November 1, 1987, of course, federal offenders are punished by determinate prison sentences, followed possibly by terms of supervised release. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, 98 Stat. 1976 (effective Nov. 1, 1987). Decisions regarding the conditions and revocation of supervised release are made by courts rather than the Parole Commission.

§§ 4201-4218), effective for sentences entered between March 15, 1976 and November 1, 1987.[2] In that statute, the old Board of Parole was restructured and renamed as the United States Parole Commission. More significantly, its responsibilities were expanded, including requirements that the Commission promulgate "explicit guidelines for parole decision-making and written reasons for parole denial" and institute "an administrative appeal process." *History of Federal Parole* at 1. The 1976 Act also made clear that the Commission was required to exercise its discretion in connection with certain types of decisions. *See, e.g.*, 18 U.S.C. §§ 4206-4208 (concerning parole determinations).

One new feature of the 1976 Act was the way it dealt with "street time"—the colloquial term for the time a parolee spends on parole prior to a Commission decision revoking that parole. Under the law before 1976, it was automatic that any parolee who violated his parole and went back to prison got no credit for the time he had spent on parole—he "lost" or "forfeited" his street time, meaning in effect that his time remaining to be served would be increased by an

[2] The 1976 Act continues to apply to sentences for crimes committed during this time period, even though it was repealed by the 1984 Act. On the advice of the Attorney General, Congress has repeatedly determined, most recently in 2011, that the role still played by the Parole Commission justifies continuing its existence as a separate, decision-making body. *See, e.g.*, Pub. L. No. 101-650, Title III, § 316, 104 Stat. 5115 (1990) (extending effective date from 5 years after Nov. 1, 1987 to 10 years after Nov. 1, 1987); Pub. L. No. 112-44, § 2, 125 Stat. 532 (2011) (extending to 26 years after Nov. 1, 1987).

equal amount. 18 U.S.C. § 4205 (1970) ("[T]he time the prisoner was on parole shall not diminish the time he was sentenced to serve."); *accord* 18 U.S.C. § 723c (1946).

Compared to this automatic forfeiture of street time, the 1976 Act took "exactly the opposite" approach, *United States ex rel. Del Genio v. U.S. Bureau of Prisons*, 644 F.2d 585, 587 (7th Cir. 1980), by creating a general rule that all street time would be credited. "[T]he jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced." 18 U.S.C. § 4210(b) This general rule is subject to an exception, at § 4210(b)(2), applicable where parole is revoked because there has been a new criminal conviction, in which event the Commission is to "determine . . . whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense . . . ." 18 U.S.C. § 4210(b)(2).

This statutorily required "determin[ation]" of concurrent or consecutive service of the old and new sentences must be made "in accordance with the provisions of section 4214(b) or (c)." *Id.* Section 4214(b) requires that a parolee be given notice, counsel, and a chance to make a written submission; it governs the review of a warrant placed against a parolee as a detainer. Section 4214(c) requires notice, counsel, and a chance to appear and testify; these hearings govern parole revocation.

The Parole Commission has issued several sets of regulations interpreting § 4210(b)(2). The emergency regulations promulgated immediately upon passage

of the Act recognized the discretion called for by the requirement of a "determin[ation]," stating that "[i]f the parolee has been convicted of a new offense committed subsequent to his release on parole . . . , the Commission *may* order the forfeiture of the time from the date of the parolee's original release to the date of execution of the warrant." 28 C.F.R. § 2.52(c)(2) (1976) (emphasis added); Paroling, Recommitting and Supervising Federal Prisoners, 41 Fed. Reg. 19,327 (May 12, 1976). Two years later, however, the Commission replaced this discretionary language with a mandatory requirement that "forfeiture" of street time "*shall* be ordered, and such time shall not be credited to service of the sentence." 28 C.F.R. § 2.52(c)(2) (1978) (emphasis added); Paroling, Recommitting and Supervising Federal Prisoners, 42 Fed. Reg. 39,808, 39,821 (Aug. 5, 1977). Since 1988, the governing regulation has provided that "the Commission's interpretation of 18 U.S.C. 4210(b)(2)" is that parolees convicted of crimes forfeit their street time as "an *automatic statutory penalty*." 28 C.F.R. § 2.52(c)(2) (emphasis added); Paroling, Recommitting and Supervising Federal Prisoners, 53 Fed. Reg. 47,186, 47,187 (Nov. 22, 1988).

This "interpretation" of the statute's language has met with a mixed reception in the courts of appeals. *See* Section I, *infra*. As a result, for more than twenty years, the Commission has applied different legal rules, depending on a parolee's location. Its regulations have required an exercise of discretion in "revocation hearing[s] conducted within the Ninth Circuit," while automatically ordering forfeiture of street time with regard to parolees located in the circuits comprising the other forty-one states. *See* 28 C.F.R.

§ 2.52 App.; Modification of Procedures for Forfeiture of Time Under Parole Supervision, 55 Fed. Reg. 42,184, 42,185 (Oct. 18, 1990); Section II, *infra*.

B. Procedural History

In 1985, Edwards was convicted of distributing cocaine and sentenced to 15 years in prison followed by a 10-year term of special parole. Pet.App.3a. Special parole is a mandatory penalty for pre-Guidelines federal drug crimes, imposed by the sentencing judge rather than the Parole Commission. *See* 21 U.S.C. § 841(c) (1970). Any violation of special parole causes the parolee to automatically forfeit his street time. *Id.* Edwards began his special parole term in February 2000.

Edwards's special parole was revoked on July 26, 2001, and his street time was automatically forfeited. Pet.App.4a. He was reparoled in December 2001, with just over nine years remaining on his sentence. *Id.* In January 2007 Edwards was arrested and jailed; in July 2007 he pleaded guilty to wire fraud, 18 U.S.C. § 1343. In December 2007, when his wire-fraud confinement was due to expire, the Commission executed a parole violator warrant against him to keep him in federal custody. Pet.App.4a; *see* 28 C.F.R. § 2.47. On April 14, 2008, the Commission revoked his parole. Pet.App.17a.

As a result, the time to be served on Edwards's original prison sentence was automatically increased by the five years and one month he spent on the street, and by eleven additional months for the time he spent in prison for wire fraud. Rather than being eligible for release in 2011, he was ineligible until 2017. The Commission claimed Edwards automatically forfeited his street time because he was still on

special parole, which Edwards disputed.[3] *Id.* In 2008, Edwards was transferred to a federal prison in Lexington, Kentucky. From there, he petitioned the U.S. District Court for the Eastern District of Kentucky for a writ of habeas corpus, *pro se*, under 28 U.S.C. § 2241, arguing that he should not have automatically forfeited his street time because he was not on special parole. Pet.App.5a.

The district court agreed that he was not on special parole, but denied his habeas petition, holding that 28 C.F.R. § 2.52(c)(2) made the error harmless because Edwards would have forfeited his street time even if he were not on special parole. Pet.App.23a-24a.

Now represented by counsel, Edwards appealed to the U.S. Court of Appeals for the Sixth Circuit, where he again argued that he was not on special parole, and that the error was not harmless because 28 C.F.R. § 2.52(c)(2) was contrary to the underlying statute, 18 U.S.C. § 4210(b)(2). He also argued that if the statute were ambiguous, the rule of lenity prevented a court from accepting the Commission's interpretation.

The Sixth Circuit refused to reach the special parole issue but affirmed the denial of Edwards's habeas petition. It reasoned that the Commission could determine street-time forfeiture universally by rule as well as by an individualized determination.

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[3] Edwards exhausted his administrative remedies with the Commission. Pet.App.16a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE SPLIT IN THEIR INTERPRETATION OF THE FEDERAL STATUTE GOVERNING THE EFFECT OF A NEW CONVICTION ON AN EXISTING TERM OF PAROLE.

The courts of appeals are divided in their answer to the question of whether the U.S. Parole Commission may "determine" the forfeiture of street time by a uniform regulation, or whether 18 U.S.C. § 4210(b)(2) requires an individualized determination.

"Street time" is parolee slang, not statutory language. As a practical matter, it refers to the period of time beginning when a parolee is released on parole and ending when parole is revoked. As the facts of this case illustrate, all street time is not necessarily spent on the street. It could be spent in a federal or state prison as punishment for a different offense.[4] Because the courts of appeals have interpreted the statute differently to address street time spent on the street and street time spent in prison, this petition will refer to "true street time" separately from "prison street time."

With respect to the question presented by this petition, there are two distinct splits. On the question of whether prison street time may be automatically forfeited, the courts of appeals are split one in favor and two against. On the question of whether true street

[4] In these cases, "street time" refers to the period of time beginning when a parolee is released on parole and ending with the execution of a parole-violator warrant at the end of the new sentence. *See* 28 C.F.R. § 2.47.

time may be automatically forfeited, the split is 4-1, with the majority upholding the practice.

A. The decision below creates a new circuit split on whether "prison street time" may be automatically forfeited.

Three courts of appeals (the Sixth, Ninth, and Tenth Circuits) have considered arguments against the validity of 28 C.F.R. § 2.52(c)(2) with respect to prison street time.

Shortly after the regulation was enacted, the Tenth Circuit rejected the approach taken in the regulation. In *Harris v. Day*, 649 F.2d 755, 760 (10th Cir. 1981), that court held that the Commission's "regulation cannot contradict the statute and thereby deprive a parolee of his statutory right to an individualized determination of the matter. That is, the Parole Commission must determine on a case to case basis whether the sentence should run concurrently or consecutively."

Appellant Harris had been released on parole in 1974 with "1,474 days remaining to be served on his original sentence" and in 1976 pleaded guilty to a state charge of grand larceny. *Id.* at 756. A warrant was held against him as a detainer; that warrant was executed in October 1977; and his parole was revoked in December 1977. *Id.* "[N]o credit was given for the time [Harris] had spent on parole or for time that he had served in [state prison]." *Id.* The Tenth Circuit reversed on this point, as noted above, and required "a determination" to be made whether the rest of a parolee's original sentence "is to be served again concurrently or consecutively with the time spent serving the second sentence." *Id.* at 760.

In 1990, the Ninth Circuit likewise concluded that prison street time could not be forfeited without individualized process. *Rizzo v. Armstrong*, 921 F.2d 855, 861 (9th Cir. 1990). It held that 28 C.F.R. § 2.52(c)(2) was "an unreasonable interpretation of § 4210(b)(2)" and so "invalidate[d]" it. *Rizzo*, 921 F.2d at 861. Without differentiating between true and prison street time, the Ninth Circuit held that the Commission must "determine" "whether the unexpired term will run concurrently or consecutively" with the new sentence, and agreed with the Tenth Circuit that prison street time required an individualized determination.[5] *Id.* at 860.

The court below in this case is the first and only court to rule otherwise with regard to forfeiture of prison street time. It held that prison street time may be forfeited by regulation without an individualized determination. *See* Pet.App.9a-12a. Ignoring the statutory language referring to the procedures of 18 U.S.C. §§ 4214(b) and (c), the court in this case reduced the question to whether the word "determine" requires an individualized determination or whether it may instead be decided by regulation. Reasoning that agencies may "rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority," it upheld the regulation. Pet.App.10a (quoting *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991)).

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[5] The Ninth Circuit's remand included an instruction to consider the 20 days Rizzo had spent in prison for intervening offenses. *Rizzo*, 921 F.2d at 857 & n.1, 858, 861.

B. The courts of appeals are now split 4-1 on whether "true street time" may be automatically forfeited.

With regard to the forfeiture of true street time, there is a different division in the circuits, because additional courts have addressed the issue and one court treated prison street time and true street time differently. Five courts of appeals (those above, and the Fifth and Seventh Circuits) have ruled on challenges to the automatic forfeiture of true street time.

As noted above, the Ninth Circuit in *Rizzo* announced a categorical rule that discretion must be exercised in all cases where street time may be forfeited due to a later conviction. *Rizzo*, 921 F.2d at 861. It held that the Commission must "determine" "not only whether the unexpired term will run concurrently or consecutively" with the new sentence, "but also how much—if any—of the term will run concurrently or consecutively." *Id.* at 860.

The Tenth Circuit in *Harris*, however, read the statute to automatically forfeit true street time. 649 F.2d at 759-60. It reasoned that because the statute refers to "the unexpired term being served at the time of parole," this means that upon conviction of a new offense, the parolee's sentence becomes equal to the amount of time remaining on his sentence "at the time of parole." *Id.*

Likewise, the decision below held that a determination could be made by a categorical regulation, and that it would be just as applicable to true street time as to prison street time. *See* Pet.App.8a-13a.

Similarly, in *Del Genio*, 644 F.2d at 586, the Seventh Circuit held the statute to be "ambiguous" on

the question of true street time, but deferred to the Commission's interpretation of the Act. *Id.* at 588. It also noted that the interpretation was consistent with the Act's legislative history, and thus upheld 28 C.F.R. § 2.52(c)(2) as a "reasonable" "interpretation of the statute . . . consistent with the intent of Congress." *Id.*

And in *Munguia v. U.S. Parole Commission*, 871 F.2d 517, 521 (5th Cir. 1989), where the Fifth Circuit faced a situation where the parolee stood only to lose true street time, it found it "well settled in this circuit" that "a parole violator automatically forfeits his street time when he is convicted of a new offense punishable by imprisonment committed subsequent to his release on parole." *Munguia* did not, however, explicitly assess the validity of 28 C.F.R. § 2.52(c)(2).

II. THE QUESTION PRESENTED MERITS THE ATTENTION OF THIS COURT BECAUSE IT AFFECTS THOUSANDS OF PAROLEES, WHOSE TREATMENT IS DETERMINED BY WHICH JUDICIAL CIRCUIT THEY HAPPEN TO BE RESIDING IN.

There are nearly 5400 individuals under the jurisdiction of the U.S. Parole Commission and subject to control under the regulation at issue in this case—2500 are currently on parole, with another 2900 in prison on sentences imposed before November 1, 1987. *FY 2013 Congressional Submission* at 16. Therefore, there will be thousands of such parolees for years to come.

This population of parolees is, as explained above, governed by at least three different legal rules depending on where they reside. Those in the Fifth, Sixth, and Seventh Circuits automatically forfeit all

street time; those in the Tenth Circuit automatically forfeit true street time but not prison street time; and those in the Ninth Circuit automatically forfeit neither.

The Parole Commission itself has issued different rules to govern cases according to the split. After the Ninth Circuit's decision in *Rizzo*, the Commission enacted a "policy statement" to serve as an appendix to 28 C.F.R. § 2.52, requiring discretion in the crediting or forfeiting of street time, but only in the Ninth Circuit. Modification of Procedures for Forfeiture of Time Under Parole Supervision, 55 Fed. Reg. 42,184, 42,185 (Oct. 18, 1990). It has not issued a policy statement for parolees residing in the Tenth Circuit, despite the distinct legal rules that govern such individuals. Therefore parolees in the Tenth Circuit may be forced to resort to the courts if the Commission fails to recognize in practice what it has failed to recognize in its regulations.

Such a sharp conflict among the courts of appeals—which has here been manifested in *de jure* distinctions in regulations based on geography—is an "important matter" that deserves the attention of this Court. Sup. Ct. R. 10(a); *see, e.g.*, *Bressman v. Farrier*, 498 U.S. 1126, 1127 (1991) (White, J., dissenting from the denial of certiorari) (noting the "confusion and divergence of opinion . . . in the Courts of Appeals, and the fact that this Court has not ruled definitively" as reasons to grant certiorari).

The troubling implications of this situation go beyond the fact that three different sets of rules apply to federal parolees based solely on geographic location. It is particularly troubling in the context of "a national prison system" that "routinely transfers in-

mates between correctional facilities located in different judicial circuits." Drew S. Days, III, *No Striped Pants And Morning Coat: The Solicitor General in the State And Lower Federal Courts*, 11 Ga. St. U. L. Rev. 645, 650 (1995). Indeed, that the Bureau of Prisons may arbitrarily transfer a prisoner for any reason or for no reason, *see* 18 U.S.C. § 3621(b), and therefore affect his substantive rights is particularly objectionable. This exacerbates the ordinary concern that a lack of "uniform legal rules" could lead to the absurd result of federal prisoners "being released at different times because of . . . conflicting court rulings." Days, *supra*, at 650.

III. THE CASE BELOW WAS WRONGLY DECIDED.

In departing from the analysis of the only two prior court of appeals decisions to consider prison street time, the court below disregarded the plain language of the statute.

The decision below disregards the plain language of the statute, unlike the two prior decisions that considered prison street time. Whereas the statute calls for the Commission to "determine, in accordance with the provisions of section 4214(b) or (c)," the Sixth Circuit found the Commission to have acted properly when it determined only once, by a rulemaking applicable to all cases.

The authority cited by the Sixth Circuit in favor of its novel reading of administrative law is not to the contrary. The court below invoked *American Hospital Association*, 499 U.S. at 612, Pet.App.10a, to show that even language such as "'in each case' does not prevent the Board from supplanting the original discretionary chaos with some degree of order." This is true, but the permissibility of making "classifications,

rules, principles and precedents" to aid the exercise of agency discretion did not in that case sanction a regime in which no agency judgment would be exercised in specific cases. *Id.* What was at issue was an NLRB rule that employees at "acute care hospitals" could be represented by "eight, and only eight" distinct bargaining units. *Id.* at 608. But that rule had three exceptions, including a catch-all exception for "extraordinary circumstances." *Id.* That is not remotely analogous to the situation in this case, where the Parole Commission's rule has no exceptions at all.

The other cases cited by the Sixth Circuit, Pet.App.10a-11a, are no more on point. *Heckler v. Campbell*, 461 U.S. 458, 467 (1983), allowed the Secretary of Health and Human Services to "resolve certain classes of issues" by "rulemaking." This allowed it to resolve at once issues that were "not unique to each claimant," such as "the types and numbers of jobs that exist in the national economy." *Id.* at 468. There is no analogue in this case, because there are no issues "not unique to each claimant" that will present themselves repeatedly.

Similarly, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956), and *FPC v. Texaco, Inc.*, 377 U.S. 33, 41-44 (1964), concerned rulemaking that dealt with broad issues of general applicability to regulated bodies. In *Storer*, the FCC set radio- and television-station-ownership guidelines to exclude certain applicants, which it determined to be in the public interest. 351 U.S. at 193-95 & n.1. Applicants for new licenses whose ownership interests exceeded these guidelines would not automatically receive a hearing, but were instead required to submit

an application explaining why the rule should not apply. *Id.* at 201-02 & n.10.

In *Texaco*, the FPC enacted a rule prohibiting independent producers of natural gas from including escalation clauses in their contracts; such contracts would be automatically rejected without a hearing. 377 U.S. at 34-37. But "as in *Storer*, there [wa]s a procedure provided in the regulations whereby an applicant c[ould] ask for a waiver of the rule complained of." *Id.* at 40 & n.11.

Before the Parole Commission, a parolee convicted of a new offense does not receive a "determin[ation], in accordance with the provisions of section 4214(b) or (c)." 18 U.S.C. § 4210(b)(2). Instead, he forfeits his street time without a hearing as "an automatic statutory penalty." 28 C.F.R. § 2.52(c)(2).

Further, the rules upheld by this Court in *American Hospital Association*, *Storer*, and *Texaco* each concerned an application of an agency's rulemaking power only to a narrow set of circumstances carved out from the much broader category of situations addressed under the statute. By narrowing the coverage of the announced rule, the agency was exercising discretion within its broader power conferred by statute. Thus, in *American Hospital Association*, the NLRB made a rule for bargaining units in acute care hospitals, but the statute at issue governed "the unit appropriate for the purposes of collective bargaining" generally. 29 U.S.C. § 159(b); *see American Hospital Association*, 499 U.S. at 608-09.

In *Storer*, the FCC made a rule governing ownership of radio and television stations, but the statute called for granting licenses when the "public interest,

convenience, and necessity would be served." 47 U.S.C. § 309; *see* 351 U.S. at 194-95 & n.5.

And in *Texaco*, the FPC made a rule restricting natural gas contracts to a set of permissible clauses, but the statute called merely for "just and reasonable" rates. 15 U.S.C. § 717c(a); 377 U.S. at 34-36. The Sixth Circuit, by contrast, called for automatic forfeiture of street time in *every case* that a parolee committed a new offense on parole.

The Commission's requirement for automatic forfeiture, supported by the decision below, further cannot be squared with the final phrase of § 4210(b)(2), which states that "in no case shall" the unexpired term, "together with such time as the parolee has previously served in connection with" the original offense, "be longer than the maximum term for which he was sentenced in connection with such offense." While this language does not prohibit the Commission from denying credit for a parole violator's street time, it is phrased in a manner that sets an outer limit to the discretion the Commission might exercise. Under the Commission's reading of the statute, this phrase is surplusage.

Finally, the statute's requirement of a "determin[ation]" is at least ambiguous on the question of whether an actual judgment or choice must be made in each case, and an ambiguous statute governing punishment should be interpreted according to the rule of lenity, rather than the rule of deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Indeed, an ambiguous penalty provision "is strictly construed against the state," *Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction*

§ 59:3, n.15 (7th ed. 2008).[6] Thus, when interpreting an ambiguous criminal statute, the executive's position "is not even deserving of any persuasive effect," *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). "[G]iv[ing] persuasive effect to the Government's" interpretation of a punitive statute "would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Id.* at 178; *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (applying the rule of lenity and citing *Crandon*) (three-justice plurality opinion, but joined on this point by two additional justices; *see* 504 U.S. at 519 (Scalia, J., concurring)).

The Sixth Circuit's inappropriate analysis and reliance on several cases of this Court aggravate the problems that its decision creates, and further the case for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] Parole statutes are criminal because they govern the specific conditions of punishment. This was recognized in the Sixth Circuit. *See Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998).

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