No. 12-408

In the Supreme Court of the United States

GEORGE H. EDWARDS, JR., PETITIONER

v.

STEPHEN DEWALT, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether 28 C.F.R. 2.52(c)(2), which provides that in cases where a federal prisoner released on parole is convicted of a new offense, "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," is a valid exercise of the United States Parole Commission's rulemaking authority.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 12-408

GEORGE H. EDWARDS, JR., PETITIONER

v.

STEPHEN DEWALT, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 681 F.3d 780. The opinion of the district court (Pet. App. 15a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2012. On August 15, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 1, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1985, petitioner was convicted in the United States District Court for the Southern District of Illinois on charges of distributing a controlled substance, in violation of 21 U.S.C. 841(a). Pet. App. 3a, 16a. The district

court sentenced petitioner to 15 years of imprisonment, to be followed by a ten-year term of "special parole." *Id.* at 3a. On February 8, 2000, after serving his entire prison term, petitioner was released on special parole. *Id.* at 4a. In July 2001, after petitioner violated the terms of his parole, the United States Parole Commission revoked petitioner's parole and he was returned to prison. *Ibid.* In December 2001, the Parole Commission placed petitioner back on special parole. *Ibid.* In March 2008, after petitioner finished serving a federal prison term for a wire-fraud conviction, the Parole Commission again revoked petitioner's parole and ordered that he be imprisoned for 34 months. *Ibid.*; Gov't C.A. Br. 7-8.

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241, contending that when he was reparoled in December 2001, his term of special parole should have been converted to a term of regular parole and that as a regular parolee he was entitled to an individualized determination of whether the time he previously spent on parole should be credited toward his sentence. The district court denied petitioner's motion. Pet. App. 15a-28a. The court of appeals affirmed. *Id.* at 1a-14a.

1. Before November 1, 1987, federal criminal defendants were sentenced under a sentencing regime administered jointly by federal courts and the Parole Commission. Under that regime, the Parole Commission had the authority to release a prisoner to parole after a designated portion of his sentence, provided his release would not "depreciate the seriousness of his offense," "promote disrespect for the law," or "jeopardize the public welfare." 18 U.S.C. 4206(a)(1) and (2).[1] That

[1] Sections 4201-4218 of Title 18 of the United States Code (1982) were repealed by the Sentencing Reform Act of 1984 (1984 Act), Pub.

sentencing regime also mandated that a term of "special parole" be imposed on certain drug offenders. 21 U.S.C. 841(b). Unlike regular parole, which allows release before the end of the term of imprisonment, special parole follows the term of imprisonment.

Under 21 U.S.C. 841(c), if a term of special parole is revoked, "the original term of imprisonment shall be increased by the period of the special parole term." Furthermore, the prisoner receives no credit toward that sentence for the time he previously spent on special parole, *i.e.*, he forfeits his "street time." Gov't C.A. Br. 7. ("[T]he resulting new term of imprisonment shall not be diminished by the time which was spent on special parole."). Furthermore, "[a] person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment." 21 U.S.C. 841(c); see also 28 C.F.R. 2.57(c).

For prisoners on regular parole, "the jurisdiction of the [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." 18 U.S.C. 4210(b). If a parolee is convicted of a new crime while on parole, however, "the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexp[i]red 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).

The Parole Commission issued an interpretive regulation stating that "[it] is the Commission's interpreta-

---

L. No. 98-473, Tit. II, ch. 2, § 218(a)(5), 98 Stat. 2027. Section 841(c) of Title 21 of the United States Code (1982) was also repealed by the 1984 Act, Pub. L. No. 98-473, Tit. II, ch. 2, § 224(a)(6), 98 Stat. 2030. All references to those sections refer to the 1982 United States Code.

tion 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, * * * 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." 28 C.F.R. 2.52(c)(2). The Parole Commission further issued a regulation providing that, in most cases, an offender's parole-violator term (the time left on his original prison sentence when he was most recently paroled) should run consecutively to the sentence for his new offense. See 28 C.F.R. 2.47(e)(2); 46 Fed. Reg. 35,635-35,637 (July 10, 1981).

2. a. In 1985, petitioner was convicted in the United States District Court for the Southern District of Illinois on charges of distributing a controlled substance, in violation of 21 U.S.C. 841(a). Pet. App. 3a, 16a. The district court sentenced petitioner to 15 years of imprisonment, to be followed by a ten-year term of "special parole." *Id.* at 3a. On February 8, 2000, after serving his entire prison term, petitioner was released on special parole. *Id.* at 4a.

b. Seven months later, petitioner had already violated the terms of his special parole by shoplifting, failing a drug test, and failing to disclose his personal and business finances to his parole officer. Pet. App. 4a. On July 26, 2001, the Parole Commission revoked petitioner's special parole and he was returned to prison. *Ibid.* Because special parole violators do not receive credit for time spent on parole, petitioner was statutorily required to serve his entire ten-year term of special parole in prison, unless the Parole Commission decided to reparole him. 21 U.S.C. 841(c). In December 2001, the Parole Commission exercised its discretion to place

petitioner back on special parole. Pet. App. 4a. The nine months he had spent in custody between March 2001 (when he was taken into custody for the parole violations), and December 2001 were credited against his ten-year sentence. *Ibid.*

c. Over the next several years, petitioner repeatedly violated his special parole by assaulting his daughter and failing drug tests. Gov't C.A. Br. 6. The Parole Commission exercised its discretion not to revoke petitioner's special parole. *Ibid.* On April 23, 2007, petitioner pleaded guilty to one count of wire fraud, in violation of 18 U.S.C. 1343, in connection with his scheme to defraud a professional athlete out of money and property. 4:07-cr-00051 Docket entry No. 38 (E.D. Mo.); Pet. App. 4a, 16a. He was sentenced to 12 months and one day of imprisonment, to be followed by four years of supervised release. Gov't C.A. Br. 7. The Parole Commission issued a violator warrant—a form of detainer—to ensure that petitioner would be returned to its custody after petitioner finished his prison term for the wire-fraud conviction. *Ibid.*

On March 20, 2008, after petitioner finished serving his wire-fraud sentence, the Parole Commission again revoked petitioner's special parole. Pet. App. 4a; Gov't C.A. Br. 7-8. The Parole Commission gave petitioner no credit toward his ten-year sentence for the time he previously spent on parole from December 2001 to December 2007, when the violator warrant was executed. Pet. App. 4a. The Parole Commission further determined that petitioner should spend 34 months in prison before being reparoled. Gov't C.A. Br. 8.

3. Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the United States District Court for the Eastern District of Kentucky (the

district of his confinement). Petitioner claimed that he was being illegally detained because, in his view, when he was reparoled in December 2001, his term of special parole should have been converted to a term of regular parole. According to petitioner, if he had been on regular parole when his parole was again revoked in 2008, he would have been entitled under 18 U.S.C. 4210(b) to an individualized determination of whether his previous time spent on parole should be credited against his ten-year sentence. Pet. App. 15a-18a.

The district court denied the petition. Pet. App. 15a-28a. The court agreed with petitioner that, under circuit precedent, "[t]he Commission [did] not have authority under Section 841(c) to impose a new term of special parole" following the 2001 revocation of petitioner's initial term of special parole. *Id.* at 23a (citing *Dolfi* v. *Pontesso*, 156 F.3d 696 (6th Cir. 1998)). In *Dolfi*, the court of appeals held that, once revoked, a term of special parole may not be reimposed by the Parole Commission. 156 F.3d at 698-701.

The district court concluded, however, that "converting the 2001-2007 special parole term to a regular term of parole does not benefit the petitioner." Pet. App. 23a-24a. The court explained that if petitioner had been on a term of regular parole when his parole was revoked in March 2008, all of his previous street time would nevertheless have been forfeited under 28 C.F.R. 2.52(c)(2), which requires forfeiture of previous time spent on parole "if the parolee [has been] convicted of a new crime," which petitioner was. Pet. App. 24a.

4. The court of appeals affirmed. Pet. App. 1a-14a.

a. On appeal, the government argued that the circuit precedent on which the district court had relied to conclude that the Parole Commission could not impose a

new term of special parole after petitioner's special parole had been revoked (see *Dolfi* v. *Pontesso*, *supra*) was no longer good law in light of this Court's decision in *Johnson* v. *United States*, 529 U.S. 694 (2000). In *Johnson*, the Court held that an analogous provision of the supervised release statute, 18 U.S.C. 3583(e)(3), did not preclude the reimposition of supervised release following revocation of an original term of supervised release. 529 U.S. at 712-713.

The court of appeals declined to answer that question, explaining that "[r]egardless of *Dolfi*'s continuing vitality, [petitioner] suffered no harm from the reimposition of special parole." Pet. App. 8a. The court explained that under 18 U.S.C. 4210(b)(2), "the Parole Commission is empowered to determine how to award credit for street time following a parole violation," and pursuant to that statute, the Parole Commission promulgated 28 C.F.R. 2.52(c)(2), "which provides that a parolee forfeits all street time if he is convicted of a new offense punishable by any term of imprisonment." Pet. App. 8a-9a.

The court of appeals rejected petitioner's argument that the regulation is invalid because it is "contrary to the express terms" of 18 U.S.C. 4210(b)(2). Pet. App. 9a. That statute provides that where a parolee commits an offense punishable by imprisonment while on parole, the Parole Commission shall "determine * * * whether all or any part of the unexp[i]red 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). Petitioner contended that under that language, "the Parole Commission is statutorily bound to conduct case-by-case hearings with notice to the parolees and an opportunity to be heard." Pet. App. 10a.

The court of appeals concluded that the statute "does not mandate such case-by-case determinations." Pet. App. 10a. The court explained that "[e]ven where Congress uses such language as 'in each case,' the Supreme Court has repeatedly reaffirmed that 'the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.'" *Ibid.* (quoting *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991)). The court concluded that the statutory language the "Commission shall determine" permits the Parole Commission "to make its determination on an across-the-board basis, if in its discretion it decides to do so." *Id.* at 11a.

The court of appeals recognized that the Ninth Circuit reached a different conclusion in *Rizzo* v. *Armstrong*, 921 F.2d 855 (1990). Pet. App. 11a. The court explained that the Ninth Circuit had reached that conclusion by viewing the regulation "as an incorrect *interpretation* of the statute, rather than as an exercise of delegated discretion." *Ibid.* The court explained that the statute gives the agency "the power to make [a] determination" and it found "nothing to prevent the Commission from exercising th[at] discretion on an across-the-board basis." *Id.* at 11a-12a. The court of appeals further concluded that the rule of lenity was inapplicable because the statute lacked a "grievous ambiguity." *Id.* at 13a.

ARGUMENT

Petitioner contends (Pet. 15-19) that 28 C.F.R. 2.52(c)(2) is an invalid exercise of the Parole Commission's rulemaking authority and that, under 18 U.S.C. 4210(b)(2), he should have received an individualized determination of whether the time he previously spent

on parole should be credited against his sentence. That issue does not warrant this Court's review for several reasons. First, 28 C.F.R. 2.52(c)(2) applies to prisoners on regular parole. For prisoners serving a term of special parole, parole revocation results in automatic forfeiture of the time previously spent on parole under 18 U.S.C. 841(c). Second, even if petitioner had been on regular parole when his parole was revoked in March 2008, 18 U.S.C. 4210(b)(2) and its implementing regulations make clear that petitioner would forfeit the time he previously spent on parole. Third, any conflict in the courts of appeals on that question, which is not implicated in petitioner's case, is of diminishing importance because federal parole is not applicable to any offense committed after November 1, 1987. Further review by this Court is unwarranted.

1. The court of appeals resolved this case by holding that, even if petitioner had been improperly awarded a new term of special parole, it did not harm him because 28 C.F.R. 2.52(c)(2) is a valid exercise of the Parole Commission's rulemaking authority. Pet. App. 8a-9a. Despite the court's ruling, the validity of Section 2.52(c)(2) is not properly at issue in petitioner's case because that regulation applies to prisoners serving a term of regular parole. Petitioner, however, was serving a term of special parole when his parole was revoked in March 2008. Accordingly, the forfeiture of his previous time spent on parole is governed by 21 U.S.C. 841(c), and forfeiture is mandatory under that statute when parole is revoked. See *ibid.* (when special parole is revoked, "the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special pa-

role"); see also Pet. 7 ("Any violation of special parole causes the parolee to automatically forfeit his street time.").

The Parole Commission has interpreted Section 841(c) as permitting the Commission to place an offender back on a term of special parole after special parole is revoked. See 28 C.F.R. 2.57(c) ("Should a parolee violate conditions of release during the Special Parole Term he will be subject to revocation on the Special Parole Term * * * and subject to reparole or mandatory release under the Special Parole Term."). Eight courts of appeals, including the Sixth Circuit, have disagreed with the Parole Commission and concluded that a term of special parole ceases to exist once it is revoked. See *Strong* v. *United States Parole Comm'n*, 141 F.3d 429, 433 (2d Cir. 1998); *Fowler* v. *United States Parole Comm'n*, 94 F.3d 835, 838-839 (3d Cir. 1996); *United States* v. *Robinson*, 106 F.3d 610, 612 (4th Cir. 1997); *Artuso* v. *Hall*, 74 F.3d 68, 71 (5th Cir. 1996); *Dolfi* v. *Pontesso*, 156 F.3d 696, 698-699 (6th Cir. 1998); *Evans* v. *United States Parole Comm'n*, 78 F.3d 262, 264-265 (7th Cir. 1996); *Robles* v. *United States*, 146 F.3d 1098, 1100 (9th Cir. 1998); *Whitney* v. *Booker*, 147 F.3d 1280, 1281-1282 (10th Cir. 1998); but see *Billis* v. *United States*, 83 F.3d 209, 211 (8th Cir.) (per curiam) (concluding that Parole Commission's interpretation that it could reparole a prisoner to special parole "is most consistent with the language of [Section] 841(c)"), cert. denied, 519 U.S. 900 (1996); *United States Parole Comm'n* v. *Williams*, 54 F.3d 820, 823, 824 (D.C. Cir. 1995) (same).

In reaching that conclusion, those courts relied on decisions interpreting the supervised release statute, 18 U.S.C. 3583(e)(3), which provides that a court may "revoke a term of supervised release, and require the de-

fendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision." Each court had interpreted the term "revoked" in the supervised release statute to mean "extinguished" or "cancel[led]," see, *e.g.*, *Evans*, 78 F.3d at 264; *Strong*, 141 F.3d at 431, and therefore concluded that Section 3583(e)(3) did not authorize the reimposition of supervised release on a supervisee whose previous term of supervised release had been revoked. See 141 F.3d at 432; *Fowler*, 94 F.3d at 838; *Robinson*, 106 F.3d at 612; *Artuso*, 74 F.3d at 71; *Dolfi*, 156 F.3d at 698; *Evans*, 78 F.3d at 265; *Robles*, 146 F.3d at 1100-1001; *Whitney*, 147 F.3d at 1282. Noting the similarity between the special parole statute and the supervised release statute, those courts interpreted the special parole statute in the same way. See, *e.g.*, *Artuso*, 74 F.3d at 71 ("The language of former section 841(c) is nearly identical to that of section 3583(e)(3). In particular, former section 841(c) and section 3583(e)(3) both used the term 'revoke' in identical contexts to mean cancel or rescind.") (internal citation omitted).

That reasoning has been vitiated by this Court's decision in *Johnson* v. *United States*, 529 U.S. 694 (2000). In *Johnson*, the Court held that Section 3583(e)(3) permits a district court to reimpose a term of supervised release after a previous term of supervised release has been revoked. The Court concluded that the word "revoke" in Section 3583(e)(3) does not mean "to cancel or rescind," but rather "to call or summon back." *Id.* at 706 (quoting *Webster's Third New International Dictionary* 1944 (1981). Accordingly, "a 'revoked' term of supervised release survives to be served in prison" and "any bal-

ance not served in prison may survive to be served out as supervised release." *Id.* at 707. The Court noted that the parole statute also used the term "revoke," and that "there seems never to have been a question that a new term of parole could follow a prison sentence imposed after revocation of an initial parole term." *Id.* at 711. The Court further noted that "[t]he same is true of special parole" and that, "[alt]hough the special parole statute did not explicitly authorize reimposition of special parole after revocation of the initial term and reimprisonment, the Parole Commission required it." *Id.* at 712 n.11. The Court acknowledged that some courts had recently rejected the Parole Commission's position but concluded that "this d[id] not affect the backdrop against which Congress legislated in 1984." *Ibid.*

Since *Johnson*, the only court of appeals to have reconsidered the special parole issue in a published opinion held that its interpretation of Section 841(c) "was abrogated by *Johnson* and that the Commission may reimpose special parole following revocation and incarceration." *Rich* v. *Maranville*, 369 F.3d 83, 90 (2d Cir.), cert. denied, 543 U.S. 913 (2004). Several district courts have likewise held that *Johnson* abrogated lower court decisions that relied on Section 3583 to hold that special parole could not be reimposed after it was revoked. See *Morris* v. *United States*, No. 5:04-HC-147-130, 2005 WL 6715424, at *2 (E.D.N.C. Feb. 1, 2005); *Rich* v. *Winn*, 345 F. Supp. 2d 46 (D. Mass. 2004); but see *Duff* v. *Apker*, No. 3:09-cv-672, 2010 WL 5653518, at *5-*9 & n.10 (M.D. Pa. Dec. 21, 2010) (recognizing that *Johnson* "implicitly undermines" circuit precedent but concluding that district court was bound by circuit precedent on special parole).

In petitioner's case, the court of appeals declined to address the continued vitality of its prior decision in *Dolfi*, which held that a term of special parole cannot be reimposed after it is revoked. 156 F.3d at 698-701. The court explained that "[r]egardless of *Dolfi*'s continuing vitality, [petitioner] suffered no harm from the reimposition of special parole." Pet. App. 8a. But *Johnson*'s abrogation of *Dolfi*—and the resulting conclusion that petitioner's previous time spent on parole was automatically forfeited by statute because he was serving a term of special parole when his parole was revoked in March 2008, see 21 U.S.C. 841(c)—is an alternative ground for affirmance of the court of appeals' judgment. See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). That alternative ground for affirmance makes this case a poor vehicle for addressing the question presented.

2. In any event, even if petitioner had been serving a term of regular parole when his parole was revoked in March 2008, 18 U.S.C. 4210(b)(2) and its implementing regulations make clear that petitioner would forfeit his street time because he was convicted of a new offense while on parole.

a. Under the regular parole regime, "the jurisdiction of the [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." 18 U.S.C. 4210(b). An exception applies, however, to prisoners who are convicted of a new offense while on parole. In those circumstances, "the Commission shall

determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexp[i]red 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).

That statute was enacted against a legislative background in which any violation of any parole term resulted in the forfeiture of time previously spent on parole. See 18 U.S.C. 4205 (1970) ("[T]he time the prisoner was on parole shall not diminish the time he was sentenced to serve."). Against that background, the Parole Commission issued an interpretive regulation stating that "[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, * * * forfeiture of time from the date of such release to the date of execution of the warrant is an automatic statutory penalty." 28 C.F.R. 2.52(c)(2).

That interpretation is correct. Unlike special parole, a prisoner is eligible for regular parole after serving a designated portion of his sentence. See 18 U.S.C. 4206. The "unexp[i]red term being served at the time of parole" is thus the time remaining on a prisoner's sentence when he is released from prison. 18 U.S.C. 4210(b)(2). Under Section 4210(b)(2), the prisoner must serve that unexpired term if he is convicted of a new crime while on parole; the only question for the Parole Commission to "determine" is how much, if any, of the offender's unexpired prison term will run concurrently with the sentence imposed for the new offense, and how much, if any, shall run consecutively to the new sentence.[2]

---

[2] Section 2.52(c)(2) does not address whether the parolee's unexpired prison term will run concurrently with or consecutively to the sentence for the new offense. That question is addressed in a differ-

The statute's legislative history confirms that the Commission's interpretation is correct. The House Conference Report describes Section 4210(b) as follows:

> This subsection * * * provides that an individual whose parole has been revoked upon conviction of any new criminal offense * * * *shall receive no credit for service of his sentence* from the day he is released on parole until he either returns to Federal custody following completion of any sentence of incarceration or upon the Commission determining that the sentence run concurrently with any new sentence that may have been imposed.

H.R. Rep. No. 838, 94th Cong., 2d Sess. 32 (1976) (emphasis added).

Furthermore, with the exception of the Ninth Circuit, federal courts have uniformly viewed the Commission's regulation as a correct interpretation of Section 4210(b)(2). See *Harris* v. *Day*, 649 F.2d 755, 759 (10th Cir. 1981) ("Appellant argues that this regulation contravenes the plain language of § 4120. * * * * We must disagree."); *Munguia* v. *United States Parole Comm'n*, 871 F.2d 517, 518 (5th Cir.) ("We conclude that * * * the forfeiture of street time was nondiscretionary and, indeed, was mandated by statute."), cert. denied, 493 U.S. 856 (1989); *Gordon* v. *United States Parole Comm'n*, 841 F. Supp. 176, 179 (E.D. Va. 1994) ("In light

---

ent regulation, 28 C.F.R. 2.47(e)(2), which petitioner does not challenge. That regulation provides that, in most cases, an offender's unexpired prison term should run consecutively to the sentence for the new offense. See 28 C.F.R. 2.47(e)(2); 46 Fed. Reg. at 35,635-35,637. The prisoner then receives credit for the time served for the new offense against any additional prison term that is imposed by the Parole Commission before the prisoner may be considered for reparole. 28 C.F.R. 2.47(e)(1).

of the plain language of the statute and its legislative history, the regulation, which provides for forfeiture of time spent on parole when the parolee is convicted of a new crime punishable by imprisonment, is a reasonable interpretation of 18 U.S.C. § 4210(b)."); cf. *Del Genio* v. *United States Bureau of Prisons*, 644 F.2d 585, 588 (7th Cir. 1980) (concluding that prior version of Section 2.52(c)(2) was a reasonable [interpretation] consistent with the intent of Congress"), cert. denied, 449 U.S. 1084 (1981).

b. Even if 18 U.S.C. 4210(b)(1) could be interpreted to mean that the Parole Commission has discretion to determine whether a prisoner should receive credit against his sentence for time previously spent on parole when parole is revoked for commission of a new crime, the Parole Commission could properly make that determination by rule. Petitioner contends (Pet. 15-18) that the Commission cannot exercise its discretion "by a rulemaking applicable to all cases." This Court has held otherwise.

In *Lopez* v. *Davis*, 531 U.S. 230 (2001), for example, the Court considered a statute that gave the Bureau of Prisons (BOP) discretion to reduce the sentence of a nonviolent offender who had successfully completed a drug treatment program, see 18 U.S.C. 3621(e)(2)(B), and a regulation issued by the BOP stating that any inmate whose offense of imprisonment involved a firearm would be categorically ineligible for such a reduced sentence, see 28 C.F.R. 550.58(a)(1)(vi)(B) (2000). The Court rejected the petitioner's argument that the BOP "must not make categorical exclusions, but may rely only on case-by-case assessments." 531 U.S. at 243. The Court explained that "[e]ven if a statutory scheme requires individualized determinations, * * * the

decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *Id.* at 243-244 (quoting *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991)). The Court noted that "[t]he approach pressed by [the petitioner]—case-by-case decisionmaking in thousands of cases each year—could invite favoritism, disunity, and inconsistency," and it concluded that the Bureau was "not required continually to revisit issues that may be established fairly and efficiently in a single rulemaking proceeding." *Id.* at 244 (internal quotation marks and citations omitted). If 28 C.F.R. 2.52(c)(2) is interpreted as a grant of discretion to the Parole Commission to determine whether to award credit for time spent on parole, it was similarly proper for the Commission to determine by rule that parolees who commit a new crime while on parole would receive no credit toward their sentences for previous time spent on parole.

Petitioner contends (Pet. 18) that the rule of lenity would trump any interpretive discretion the Commission might have. That is incorrect. See *Reno* v. *Koray*, 515 U.S. 50, 61 (1995) (applying deference to BOP program statement); *id.* at 64-65 (rejecting application of the rule of lenity).

c. Petitioner contends (Pet. 15-18) that the Commission's interpretation of 18 U.S.C. 4210(b)(2) is inconsistent with the statutory language requiring the Commission to determine whether the parole-violator term should run concurrently with or consecutively to the prison term of the new offense "in accordance with the provisions of section 4214(b) or (c)." 18 U.S.C. 4210(b)(2). Those statutory provisions provide for a dispositional record review of a parole-violator warrant

(18 U.S.C. 4214(b)(1)) or a parole revocation hearing (18 U.S.C. 4214(c)). Petitioner identifies nothing in those provisions that would prohibit the Commission's interpretation of Section 4210(b)(2).

Petitioner further contends (Pet. 18) that the Commission's interpretation of Section 4210(b)(2) "cannot be squared" with the statute's requirement that "'in no case shall' [service of the prisoner's parole violator term] 'together with such time as the parolee has previously served in connection with' the original offense [for which he was paroled], 'be longer than the maximum term for which he was sentenced in connection with such offense.'" That provision simply acknowledges that the total length of a parolee's incarceration for a federal sentence may not exceed the sentence originally imposed. The clause offers no assistance on the question of statutory interpretation that petitioner has raised.

Finally, petitioner contends (Pet. 18-19) that the statute's requirement that the Parole Commission make a "determin[ation]" is "at least ambiguous on the question of whether an actual judgment or choice must be made in each case" and that the rule of lenity therefore prohibits the Commission from making such a determination by rule. That is incorrect. The rule of lenity applies only "if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508-2509 (2010) (internal quotation marks and citations omitted). Because no such "grievous ambiguity or uncertainty" exists here (see pp. 13-15, *supra*), the rule of lenity is inapplicable.

3. Petitioner correctly points out (Pet. 12-13) that the Ninth Circuit has held that Section 4210(b)(2) does not

require automatic forfeiture of a prisoner's previous time spent on parole when parole is revoked after a parolee commits a new offense. See *Rizzo* v. *Armstrong*, 921 F.2d 855 (1990). That circuit split has been in existence for more than 20 years, and it does not warrant this Court's review.[3]

In *Rizzo*, the Ninth Circuit concluded that 28 C.F.R. 2.52(c)(2) "impermissibly change[d] the scope of [18 U.S.C. 4210(b)(2)] by making street time forfeiture mandatory." 921 F.2d at 861. In the Ninth Circuit's view, the statute's directive that the Commission must determine whether "all or any part" of the remaining prison term "shall run concurrently or consecutively with the sentence imposed for the new offense" means that the Commission "has a choice not only whether the unexpired term will run concurrently or consecutively, but also how much—if any—of the term will run concurrently or consecutively." *Id.* at 860. As explained above

---

[3] Petitioner further contends (Pet. 10-11) that there is a circuit split on "the validity of 28 C.F.R. [] 2.52(c)(2) with respect to prison street time." But Section 2.52(c)(2) does not address "prison street time" at all. Rather, as previously explained, see p. 4 & n.1, *supra*, 28 C.F.R. 2.47(e)(2) sets forth the Parole Commission's determination that a parole-violator term should run consecutively to the prison sentence for a new offense. See 28 C.F.R. 2.47(e)(2); 46 Fed. Reg. at 35,635-35,637. That regulation was enacted several months after the Tenth Circuit's decision in *Harris* v. *Day*, 649 F.2d 755 (1981). The Tenth Circuit's observation that 28 C.F.R. 2.52(c)(2) says nothing about whether "unexpired term time remaining on the [parolee's] sentence is to run concurrently or consecutively with the sentence imposed for the second offense," and its statement in dicta that "[t]he regulation cannot contradict the statute and thereby deprive a parolee of his statutory right to an individual determination of the matter," 649 F.2d at 760, thus cannot be considered a ruling on the validity of the Parole Commission's later-enacted regulation.

(see p. 15, *supra*), every other court to have considered that question has come to the opposite conclusion.

That circuit conflict has been in existence for more than 20 years. The Parole Commission has issued a policy statement which provides that, in light of *Rizzo*, it will exercise discretion on whether to order forfeiture of all or any part of a prisoner's time spent on parole when conducting revocation hearings in the Ninth Circuit. 28 C.F.R. 2.52, App. Under that policy statement, the Parole Commission only even "consider[s] granting credit" for time spent on parole in cases where the parole violator was originally classified in the "very good" risk category; the new conviction is "not * * * for a felony offense"; and all parole violation behavior is both non-violent and not repetitive of the original offense behavior. *Ibid.* Those very strict guidelines before the Parole Commission will even consider granting credit for previous time spent on parole considerably narrow any practical implication of the circuit split.

In any event, any conflict in the courts of appeals on the question of whether 28 C.F.R. 2.52(c)(2) is a correct interpretation of 18 U.S.C. 4210(b)(2) does not warrant this Court's review. As petitioner recognized in his brief to the court of appeals (Pet. C.A. Br. 2), federal parole is "a subject of dwindling importance, as the federal prisoners subject to its mandate grow steadily older and less numerous." Parole in the federal system applies only to offenses committed before November 1, 1987, which was more than 25 years ago, and the legal significance of the issue is thus of steadily diminishing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

FEBRUARY 2013