

TABLE OF CONTENTS

	<u>Page</u>
IDENTITY OF AMICUS CURIAE	1
ARGUMENT.....	2
A. THE FISCAL AND HUMAN COSTS OF PERMITTING INCARCERATION BEYOND WHAT CONGRESS CLEARLY AUTHORIZED SUPPORTS REVERSAL.....	3
B. APPELLANT’S INTERPRETATION IS SUPPORTED BY THE COMMON UNDERSTANDING THAT INMATES SHOULD SERVE 85%–NOT 87.2%– OF THEIR SENTENCES.....	5
C. RULES OF STATUTORY CONSTRUCTION REQUIRE REJECTION OF THE BOP’S INTERPRETATION OF SECTION 3624(b).....	8
D. THE BOP’S INTERPRETATION OF THE GOOD TIME CREDIT STATUTE IS NOT ENTITLED TO ANY DEFERENCE.....	11
E. THE RULE OF LENITY SHOULD BE APPLIED IN THIS CASE.....	16
CONCLUSION	20
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972)	4
<i>Babbitt v. Sweet Home Chapter of Communities for a Great Or.</i> , 515 U.S. 687 (1995)	12, 19
<i>Bifulco v. United States</i> , 447 U.S. 381, 387 (1980)	16
<i>Chevron U.S.A. v. Natural Resources Defense Council</i> , 467 U.S. 837, 842-43 (1984)	11, passim
<i>Crandon v. United States</i> , 494 U.S. 152 (1990)	17, passim
<i>Dolfi v. Pontesso</i> , 156 F.3d 696, 700 (6 th Cir. 1998)	17, passim
<i>Glover v. United States</i> , 531 U.S. 198 (2001)	4
<i>Graves v. Bledsoe</i> , 334 F. Supp. 2d 906 (W.D. Va. 2004)	8
<i>Harco Holdings, Inc. v. United States</i> , 977 F.2d 1027, 1035 (7 th Cir. 1992)	15
<i>INS v. St. Cyr</i> , 533 U.S. 289, 320 & n.45 (2001)	16
<i>Liparota v. United States</i> , 471 U.S. 419, 427 (1985)	17
<i>Lopez v. Davis</i> , 531 U.S. 230 (2001)	12, 18
<i>Lynce v. Mathis</i> , 519 U.S. 433 (1997)	16
<i>McBoyle v. United States</i> , 283 U.S. 25, 27 (1931)	17

Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001).8, passim

Pasciuti v. Drew, 2004 WL 1247813 (N.D.N.Y. 2004). 9

Pelissero v. Bureau of Prisons, 170 F.3d 442, 447 (4th Cir. 1999). 13

Preiser v. Rodriguez, 411 U.S. 475 (1973). 16

Thorpe v. U.S. Parole Comm’n, 902 F.2d 291, 291-2 (5th Cir. 1990) 5

Trevino-Casares v. U.S. Parole Comm’n, 992 F.2d 1068, 1073. 15

United States v. Bass, 404 U.S. 336, 347-48 (1971). 17

United States v. Prevatte, 66 F.3d 840, 846 (7th Cir. 1995). 5

United States v. R.L.C., 503 U.S. 291, 305-06 (1992).16, passim

United States v. Tocco, 135 F.3d 116, 131-32 (2d Cir. 1998). 5

Weaver v. Graham, 450 U.S. 24 (1981). 16

White v. Scibana, 314 F. Supp. 2d 834, 840 (W.D. Wis. 2004). 5

White v. Scibana, 390 F.3d 997, 2004 WL 2749863
(7th Cir. Dec. 2, 2004). 5

Williams v. Dewalt, ___ F. Supp. 2d ___, 2004
WL 3022300 (Dec. 29, 2004). 2, passim

Statutes and Rules

18 U.S.C. Section 3006(A)	1
18 U.S.C. Section 3624(b)2, passim
28 C.F.R. § 523.20(a)(1)	15
Federal Rule of Appellate Procedure 29.	1

Miscellaneous

141 Cong. Rec. S2348-01 (Feb. 9, 1996).	10
Brief of Amici Curiae In Support of Petition for a Writ of Certiorari at 10 available at http://www.nacdl.org/public.nsf/misc/goodtimecredit	6
Bureau of Prisons, <i>Annual Determination of Average Cost of Incarceration</i> , 69 Fed. Reg. 57364, 2004 WL 2112507 (Sept. 24, 2004).	4
Bureau of Prisons, <i>Weekly Population Report: January 6, 2005</i> , available at http://bop.gov/weekly.html	1
Federal Bureau of Prisons, <i>Quick Facts (Sept. 2004)</i> available at www.bop.gov/fact0598.html#Population	3
<i>Federal Sentencing Statistics</i> at Table 7.	3
H.R. Conf. Rep. 98-1159, reprinted in 1984 U.S.C.C.A.N. 3182, 3710. . . .	9, 13
PS 5100.07 at 5-8 available at http://www.bop.gov/progstat	7
PS 5880.28 at 1-40 to 61B available at http://www.bop.gov/progstat . . .	3, passim
Sauers Decl. at ¶ 7 & Att. D.	15

Stephen R. Sady, *Misinterpretation of the Federal Good Time Statute
Costs Prisoners Seven Days Every Year*, *The Champion* 12,
13 (Sept./Oct. 2002) 4

Telephone Interview with Vicky Russell, Federal Bureau of
Prisons Office of Research (Jan. 11, 2005). 3

United States Sentencing Commission, *Federal Sentencing Statistics
by State, District, and Circuit* at Table 5, available at
<http://ussc.gov/JUDPACK/2002/md02.pdf> 1

The Federal Public Defender for the District of Maryland, pursuant to Federal Rule of Appellate Procedure 29, submits this amicus-curiae brief in support of Appellant David Yi's request that this Honorable Court reverse the order of the District Court for the Eastern District of Maryland upholding the Bureau of Prisons' method of calculating good conduct time. In doing so, in addition to advancing the arguments herein, we adopt the arguments presented by Mr. Yi in his opening and reply briefs before this Court.

IDENTITY & INTEREST OF AMICUS CURIAE

The Federal Public Defender for the District of Maryland ("the Office") is one of more than fifty Federal Defender Organizations throughout the United States, authorized by the Criminal Justice Act, 18 U.S.C. section 3006A, to provide representation for those charged with federal criminal offenses who are unable to afford private legal counsel. The Office represents literally hundreds of clients whose interests are affected by this litigation.¹ The Office also represents four inmates—John

¹ The Office has been unable to locate statistics identifying the total number of current federal prisoners who were convicted in the District of Maryland. In 2002 alone (the last year for which statistics are available), however, 424 of the 518 defendant sentenced in the District of Maryland received terms of imprisonment. See United States Sentencing Commission, *Federal Sentencing Statistics by State, District, and Circuit* at Table 5, available at <http://ussc.gov/JUDPACK/2002/md02.pdf> (last visited Jan. 11, 2005) (hereinafter "*Federal Sentencing Statistics*"). Moreover, there are currently 1533 federal inmates incarcerated at Bureau of Prisons' facilities in the District of Maryland. See Bureau of Prisons, *Weekly Population Report: January 6, 2005*, available at

Johnson, Stefan McCray, Robert Moes, and Phillip Williams—who recently prevailed in their challenge to the Bureau of Prisons’ calculation of good conduct time before the Honorable Alexander Williams, Jr. *See Williams v. Dewalt*, ___ F. Supp. 2d ___, 2004 WL 3022300 (Dec. 29, 2004). Relief in that case was stayed pending this Court’s decision.

ARGUMENT

Congress plainly stated in 18 U.S.C. section 3624(b) that federal prisoners serving more than a one-year “term of imprisonment” are to receive credit “beyond the time served” of up to fifty-four days “at the end of each year of the prisoner’s term of imprisonment.” Despite this clear language, the Bureau of Prisons (“BOP”) awards only forty-seven days of good time credit, meaning that federal inmates serve more time in prison than Congress intended.

The BOP fundamentally errs in its application of section 3624: it administratively substitutes “year served” for “year of the prisoner’s term of imprisonment.” Consequently, rather than simply subtracting fifty-four days for each year of the sentence imposed, the BOP resorts to a circular series of mathematical computations—described by the BOP as “arithmetically complicated”—to reach the

<http://bop.gov/weekly.html> (last visited Jan. 11, 2005).

bizarre conclusion that fifty-four days of good time credit, on a sentence of one year and a day, equals forty-seven days of good time credit. See PS 5880.28 at 1-40 to 61B available at <http://www.bop.gov/progstat> (last visited Jan. 11, 2005). The BOP thus deprives every inmate of seven days of good time credit per year of the sentence imposed.

A. THE FISCAL AND HUMAN COSTS OF PERMITTING INCARCERATION BEYOND WHAT CONGRESS CLEARLY AUTHORIZED SUPPORTS REVERSAL.

“This [seven-day] difference may be insignificant at first blush. The difference in the calculation to an inmate, however, is great. Using a ten year sentence as an example, the difference in time to be served by a model inmate under the BOP’s interpretation versus the plain reading of the statute amounts to an additional seventy days.” *Williams*, 2004 WL 3022300 at * 5 n.10.²

There are currently approximately 155,092 federal prisoners serving sentences greater than one year and less than life. See Federal Bureau of Prisons, *Quick Facts* (Sept. 2004) available at www.bop.gov/fact0598.html#Population (last visited Jan. 11, 2005). The mean sentence now being served is about 9.5 years. Telephone

² In 2002, the last year for which data are publicly available, the average sentence in Maryland was 73 months (approximately six years). The average sentence nationally was 54.7 months (a little less than five years). See *Federal Sentencing Statistics* at Table 7.

Interview with Vicky Russell, Federal Bureau of Prisons Office of Research (Jan. 11, 2005).³ At seven days per year, the time involved is over 28,000 years (155,092 x 7 x 9.5 / 365 = 28,256.5). At \$23,181 per year per inmate, *see* Bureau of Prisons, *Annual Determination of Average Cost of Incarceration*, 69 Fed. Reg. 57364, 2004 WL 2112507 (Sept. 24, 2004), the mere seven days on each year of a prisoner's sentence could amount to as much as \$620 million in prison expenditures that Congress never intended nor authorized.⁴ The human costs of this over-incarceration, of course, are unquantifiable. *See Glover v. United States* 531 U.S. 198 (2001) (holding that undeserved and unwarranted time spent in prison has constitutional implications); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (“the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or petty matter and may well result in quite serious repercussions . . .”).

³ According to Ms. Russell, the mean sentence being served by federal inmates in November 2004 was 113.7 months.

⁴ This cost was first calculated in an article by Chief Deputy Public Defender Stephen R. Sady, which appeared in the National Association of Criminal Defense Lawyer's magazine, *The Champion*. *See* Stephen R. Sady, *Misinterpretation of the Federal Good Time Statute Costs Prisoners Seven Days Every Year*, *The Champion* 12, 13 (Sept./Oct. 2002) (calculating cost of the BOP's approach to awarding good conduct time using then-current figures).

B. APPELLANT’S INTERPRETATION IS SUPPORTED BY THE COMMON UNDERSTANDING THAT INMATES SHOULD SERVE 85%–NOT 87.2%–OF THEIR SENTENCES.

“Although not controlling in construing a statute,” this Court should “find[] persuasive the fact that courts and practitioners have commonly understood that federal inmates are eligible for a reduction of up to 15% of their sentence, through the earning of good time credits.” *Williams*, 2004 WL 3022300 at * 6. Courts have expressed this common understanding, referring to the “eighty-five percent rule” in describing the amount of a federal sentence that an inmate must serve, or the “fifteen percent rule” in describing the amount of good time credit available on a federal sentence. *See, e.g., United States v. Tocco*, 135 F.3d 116, 131-32 (2d Cir. 1998) (assuming, in the course of calculating a sentence, that an inmate is entitled to “54 days of good time credit for each year of his prison sentence.”); *Thorpe v. U.S. Parole Comm’n*, 902 F.2d 291, 291-2 (5th Cir. 1990) (affirming Parole Commission’s calculation of internationally-transferred sentence based upon fifteen percent good time credit); *White v. Scibana*, 314 F. Supp. 2d 834, 840 (W.D. Wis. 2004) (“[T]he court of appeals has assumed that an inmate may be able to deduct up to 15% of his or her sentence by earning good conduct time . . .”), *citing White v. Scibana*, 314 F. Supp. 2d 834, 840 (W.D. Wis. 2004) & *United States v. Prevatte*, 66 F.3d 840, 846 (7th Cir. 1995) (Posner, J., concurring), *holding reversed in White v. Scibana*, 390

F.3d 997, 2004 WL 2749863 (7th Cir. Dec. 2, 2004).

Defense lawyers generally understood that the BOP in fact provided the fifty-four days credit on each year of the sentence imposed:

Amici and their members are on the front lines of the criminal justice system. The lawyers of the NACDL [National Association of Criminal Defense Lawyers] and the NAFD [National Association of Federal Defenders] advise clients on a daily basis about their sentences, and specifically how much time they will actually have to serve **The members of amici all have always understood the federal good time statute to be unambiguous, with the 54 days being based on each year of the sentence imposed and requiring that prisoners serve exactly 85% of their sentences.**

Brief of Amici Curiae In Support of Petition for a Writ of Certiorari at 10 *available at* <http://www.nacdl.org/public.nsf/misc/goodtimecredit> (last visited Jan. 10, 2005) (emphasis added). The brief quoted other sources sharing the same view, including the U.S. Attorney for the Northern District of Alabama, Mike Whisonant (“Under the new law, you serve approximately 85 percent of your sentence. . . . You're eligible for 15 percent of your time off on good time. And that's only after the first year.”), Republican Alaska State Senator Dave Donley (“Federal statutes require inmates to serve at least 85% of the sentence imposed. The Federal government has asked all states to adopt its 85% sentencing standard.”), and the District of Columbia Advisory Commission on Sentencing (which based its recommendations on the premise that

“good time credit [would] be calculated pursuant to section 3624 of title 18 of the United States Code (no more than 15%).”). *See id.*

Indeed, even the BOP, in its Security Designation and Custody Classification Manual, invokes the eighty-five percent rule in describing an inmate’s expected length of incarceration:

MONTHS TO RELEASE. This item shall reflect the estimated number of months the inmate is expected to be incarcerated Based on the inmate’s sentence(s) enter the total of number of months remaining less 15% (for sentences over 12 months), and credit for any jail time served.

PS 5100.07 at 5-8 *available at* <http://www.bop.gov/progstat> (last visited Jan. 11, 2005). The BOP then gives an example: “ An adult convicted of Breaking and Entering under the [Sentencing Reform Act] provision is sentenced to eight years. The expected length of incarceration is (96 x 85% = 81.6).” *Id.*⁵ The program statement goes on to say “[o]ffenders whose offense was on or after November 1, 1987, will be expected to serve approximately 85% of the sentence length, rounded to the nearest whole number.” *Id.* at 6-8. The BOP’s own use of the eighty-five percent formula in its agency guidance casts doubt on the assertion that the statute must be read to limit the award of good time, or, alternatively, is ambiguous.

⁵ If the BOP were consistently following its own guidance, the expected length of the sentence actually would be $96 \times 87.2\% = 83.7$.

C. RULES OF STATUTORY CONSTRUCTION REQUIRE REJECTION OF THE BOP'S INTERPRETATION OF SECTION 3624(b).

There are three bases for finding that section 3624 plainly requires the result that Mr. Yi and the clients represented by amicus curiae seek—award of fifty-four days of good time credit for each year of the sentence imposed. Each of these is rooted in an established canon of statutory interpretation. Broadly stated, the arguments are that: (1) the plain meaning of section 3624(b) supports the award of fifty-four days for every year of the sentence imposed; (2) the context of the provision supports the award of fifty-four days for every year of the sentence imposed; and (3) the legislative history of the provision supports the award of fifty-four days for every year of the sentence imposed. *See Williams*, ___ F. Supp. 2d ___, 2004 WL 3022300 (Dec. 29, 2004). Mr. Yi elaborates on each of these bases in his briefs. Those arguments will not be repeated here.

With the exception of the District Court for the District of Maryland, the courts addressing this question have failed to meaningfully address the arguments about the meaning of the statute made by Mr. Yi and other inmates. *See, e.g., Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001) (addressing in limited fashion only plain meaning and legislative history); *Graves v. Bledsoe*, 334 F. Supp. 2d 906 (W.D.

Va. 2004) (considering only some aspects of plain meaning argument); *Pasciuti v. Drew*, 2004 WL 1247813 (N.D.N.Y. 2004) (unpublished) (citing *Pacheco-Camacho*). The same is true of the lower court's decision in this case, which gives only a "cursory nod" to the canons of statutory interpretation, *Williams*, 2004 WL 3022300 at * 2, and that through the lens of the Bureau of Prisons' view about the meaning of section 3624(b). In particular, no court has responded to the inmates' citation of Amendment 130, perhaps the clearest statement of Congressional intent in enacting section 3624(b). *See* H.R. Conf. Rep. 98-1159, reprinted in 1984 U.S.C.C.A.N. 3182, 3710 ("Amendment No. 130, Deletes 'thirty-six' as proposed by the House, and inserts in lieu thereof 'fifty-four' as proposed by the Senate which increases 'good time' that accrues from 10 percent to 15 percent.").

It would be a surprise to the authors of section 3624(b) to find that the BOP had translated the statute's prescription of fifty-four days of good conduct time into a complex formula requiring inmates to serve 87.2 percent. The authors did not believe there was any ambiguity about how good conduct time should be computed. The formula suggested by the statute is simple: 54 days multiplied by the term of imprisonment yields the amount of credit due an inmate who demonstrates good

conduct while in prison.⁶ This is precisely what Senator Joseph Biden, a co-author of the bill, envisioned: “In the federal courts, if a judge says you are going to go to prison for 10 years, you know that you are going to go to prison for at least 85% 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 (Feb. 9, 1996).⁷ This Court should require the BOP to implement Congress’ intent by reversing the lower court’s decision in Mr. Yi’s case.

⁶ By way of example, to apply section 3624(b) to a ten-year sentence, one would use the following calculations:

Statutory Formula:	54 days x 10 years = 540 days GCT
Total Term of Imprisonment (in days):	10 years x 365 days = 3650 days
Term of Imprisonment Less GCT:	3650 - 540 = 3110
Awarded at the end of each year:	311 + 54 = 365 days
Total Time To Be Served (Including GCT):	311 x 10 = 3110.

⁷ In the case of a sentence including a partial year, *e.g.*, 126 months (10 years and six months, the statute permits the BOP to “pro-rate” the additional six months. One would use the following calculations: (54 x additional days) ÷ 365 = pro-rated good time credit. In this example: (54 x 180 days) ÷ 365 = 26.6 = 27 days good time credit.

D. THE BOP’S INTERPRETATION OF THE GOOD TIME CREDIT STATUTE IS NOT ENTITLED TO DEFERENCE.

With the exception of the District Court for the District of Maryland, most courts have fallen back on “*Chevron* deference” in ruling in these cases. That approach is erroneous because when “the intent of Congress is clear,” as it is in this case, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Even if the statute were ambiguous, before exercising *Chevron* deference the Court must find that the agency possesses the expertise required to interpret the statute, that Congress has delegated authority to the agency to exercise its expertise, and that the agency’s interpretation is reasonable. *See id.* at 843-44. None of those things is true here.

Chevron involved an amendment to the Clean Air Act, which permitted the Environmental Protection Agency (“EPA”) to require states in violation of air quality standards to establish permit programs to control stationary sources of pollution. The EPA promulgated a regulation defining “stationary sources,” which was challenged by nonprofit organizations. *See id.* at 840. In upholding the regulation, the Supreme Court held that when an agency is entrusted to administer a statutory scheme, and when Congress has left a gap for the agency to fill, courts should accord deference

to any reasonable interpretation by the agency. *See id.* at 843-44. Deference is accorded because “understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulation.” *Id.* at 844. In *Chevron*, the Court held that Congress intended that the EPA create regulations regarding the state permit programs that balanced policy interests in promoting economic growth and protecting the environment; thus, the EPA’s interpretation involved special expertise and deserved deference. *See id.* at 863. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) (“The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress.”)

Chevron deference may be accorded to the BOP’s regulations under circumstances requiring special expertise. For example, in *Lopez v. Davis*, 531 U.S. 230 (2001), the Court accorded deference to the BOP in its administration of the Residential Drug Treatment Program offered by federal prisons. The Court held that Congress had granted the BOP the discretion to decide which inmates qualified for early release after completion of the Program. *See id.* at 240. Thus, the BOP could decide to make categorical exclusions, including preventing any inmate whose offense involved a firearm from receiving early release. *See id.* at 244 (“The Bureau

reasonably concluded that an inmate’s prior involvement with firearms, in connection with the commission of a felony, suggests his readiness to resort to life-endangering violence and therefore appropriately determines the early release decision.”). Implicit in the Court’s decision is a recognition of the BOP’s special expertise in administering penal programs. *Cf. Pelissero v. Bureau of Prisons*, 170 F.3d 442, 447 (4th Cir. 1999) (“Congress entrusted the decision whether to grant inmates early release . . . solely to the discretion and expertise of the BOP, with a cautious eye toward the public safety and welfare.”) (internal quotation marks and citation omitted).

This case is different because Congress never delegated to the BOP the power to decide the maximum amount of available good time credit.⁸ In fact, in section 3624(b), as discussed above, Congress *dictated* rather than delegated the formula for determining available good time credit: “54 days at the end of each year of the term of imprisonment.” 18 U.S.C. section 3624(b); *see* H.R. Conf. Rep. 98-1159, reprinted in 1984 U.S.C.C.A.N. 3182, 3710 (“Amendment No. 130, Deletes ‘thirty-six’ as proposed by the House, and inserts in lieu thereof ‘fifty-four’ as proposed by the Senate which increases ‘good time’ that accrues from 10 percent to 15 percent.”). In

⁸ In contrast, Congress granted the BOP discretion only in its area of expertise—determining eligibility for good time credit, *i.e.*, whether the inmate had “displayed exemplary compliance with institutional disciplinary regulations.” *Id.*

setting out this formula, Congress suggested that determining the maximum available amount of good time credit was beyond the BOP's expertise. *Cf. Pacheco-Camacho*, 272 F.3d at 1270 (“[I]t is the administrative responsibility of the Attorney General, the Department of Justice, and the Bureau of Prisons to compute sentences and apply credit where it is due.”) (internal quotation marks and citations omitted). Congress simply asked the BOP to complete the math (*i.e.*, 10 years x 54 days = 540). Because the BOP was not authorized to interpret the maximum available amount of good time credit, its interpretation is not accorded any deference under *Chevron*.

Moreover, the BOP's interpretation of the statute is unreasonable. As discussed above, the simplest, clearest, and most honest reading of section 3624(b) affords inmates fifty-four days of good time credit per year of their sentences, awarded “at the end of each year” of the term ($311 + 54 = 365$). This is the only way to effect Congress' intent as expressed in section 3624(b) that inmates serving a sentence of one year and a day receive good time credit. If good time credit were earned only after service of 365 days, it would be impossible for an inmate serving a sentence of 366 days to receive more than one day of credit. The BOP's method for awarding good time credit in a-year-and-a-day sentences recognizes this. Credit is earned after only 319 days. *See* PS 5880.28 at 1-44-50.⁹

⁹ Even here, the BOP awards only 47 days credit ($319 + 47 = 365$).

For an inmate sentenced to more than one year and a day, such as Mr. Yi or any of the clients represented by amicus curiae, the BOP refuses to award good time credit until a full 365 days has been served. *See* PS 5880.28 at 1-48 (“[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.”); 28 C.F.R. § 523.20(a)(1) (“54 days of credit for each year served”); Sauers Decl. at ¶ 7 & Att. D (noting that petitioner has received good time credit on each “anniversary date,” which marks a year spent in custody). The BOP is steadfast in this interpretation even though, as noted in petitioner’s opening memorandum and above, the BOP interprets “term of imprisonment” as “sentence imposed” in other parts of section 3624, suggests in its program statements that it is applying the eighty-five percent rule, and awards good time credit earlier in a-year-and-a-day cases.

“[D]eference only applies to ‘reasoned and consistent’ agency positions.” *Harco Holdings, Inc. v. United States*, 977 F.2d 1027, 1035 (7th Cir. 1992). Because the BOP is patently inconsistent in its interpretation and application of section 3624(b), deference is inappropriate. *Cf. Trevino-Casares v. U.S. Parole Comm’n*, 992 F.2d 1068, 1073 (“Assuming, for purposes of argument, that enough ambiguity exists to bring us to the second question articulated in *Chevron* We have concluded that the Commission’s construction is both internally inconsistent and

impermissibly at odds with the evident intent of the statutory scheme. Accordingly, we consider it proper, indeed our duty, to follow our own independent interpretation of the statutes that govern the controversy before us.”).

E. THE RULE OF LENITY SHOULD BE APPLIED IN THIS CASE.

Even assuming that section 3624 is ambiguous, the rule of lenity—not the *Chevron* rule—is the appropriate tool for construing the statute because section 3624 is penal in nature. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).¹⁰ The rule of lenity applies if there is doubt about a penal law’s meaning, even after resort to the language and structure, legislative history, and motivating policies of the statute. *See United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992); *Bifulco*, 447 U.S. at 387.¹¹ The rule “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.” *Bifulco* 447 U.S. at 387. Under

¹⁰ The credit for good time law is a penal statute located in the criminal sentences section of Title 18. The Supreme Court previously has found that good time statutes are penal in nature in the contexts of *ex post facto* and habeas corpus litigation. *See Lynce v. Mathis*, 519 U.S. 433 (1997); *Weaver v. Graham*, 450 U.S. 24 (1981); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Under this precedent, the federal good time law is a penal statute to which the rule of lenity applies.

¹¹ In fact, because the rule of lenity is a “traditional rule[] of statutory construction,” courts should apply it before granting *Chevron* deference. *See Chevron*, 467 U.S. at 482 n.9. *Cf. INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001) (rejecting agency’s argument that it was entitled to *Chevron* deference and instead applying the common law presumption against retroactivity).

the rule of lenity, of course, courts “[may] not interpret a federal criminal statute so as to increase the penalty that it places on an individual” *Id.*

“[T]he venerable rule of lenity is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.” *R.L.C.*, 503 U.S. at 305 (internal quotation marks and citation omitted). It is founded on two principles: first, that a criminal statute should be construed in such a way that its language gives “fair warning” to the “common mind,” *McBoyle v. United States*, 283 U.S. 25, 27 (1931); and second, that legislatures, not agencies or courts, should define criminal liability, *see Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-48 (1971). “[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing,” *R.L.C.*, 503 U.S. at 305, and statutes that have penal effect, *see Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998).

As discussed in Mr. Yi’s opening brief, the Supreme Court’s decision in *Crandon v. United States*, 494 U.S. 152 (1990) shows that the rule of lenity is the appropriate tool for this case because the executive branch’s interpretation of an ambiguous penal statute is not controlling. The Sixth Circuit’s decision in *Dolfi v. United States*, 156 F.3d 696, 700 (6th Cir. 1998), which applied the rule in declining to defer to the Parole Commission’s interpretation of a revocation statute, strengthens

Mr. Yi's position. As it has in the litigation in other jurisdictions, the BOP has neglected to address Mr. Yi's citation to *Crandon* and *Dolfi*, even though *Dolfi* is probably the most analogous reported case to this one outside the good time credit context.

Instead, the government relies on *Pacheco-Camacho*'s misguided discussion of *Chevron* deference and the rule of lenity. As explained above, *Pacheco-Camacho* and its progeny confuse *Chevron* deference in situations in which the statute delegates authority to an agency to fill gaps left by Congress with the judicial function of defining an ambiguous statutory term in a penal statute. We do not contest the BOP's authority to gap-fill in areas in which Congress itself has deferred to the agency's expertise, for example, in determining whether inmates are eligible for programs, *cf. Lopez v. Davis*, 531 U.S. 230, 241 (2001) (holding that the BOP had discretion, under the governing statute, to promulgate regulation regarding early release of inmates completing drug treatment program), or have complied with institutional disciplinary regulations, as in 18 U.S.C. section 3624(b) (granting the BOP authority to determine whether inmates show "exemplary compliance with institutional disciplinary regulations"). Here, there is no gap to fill. As previously noted, in section 3624(b), Congress gave the BOP the formula for allotting good time credit.

For this reason, *Pacheco-Camacho's* reliance on the footnote rejecting application of the rule of lenity in *Babbitt v. Sweet Home Chapter of Communities for Great Or.*, 515 U.S. 687 (1995), is misplaced. *Chevron* deference was appropriate in *Sweet Home* because Congress clearly had delegated to the administrative agency the authority to exercise its expertise. *See id.* at 700 (“Given Congress’ clear expression of the ESA’s broad purpose to protect endangered and threatened wildlife, the Secretary’s definition of “harm” is reasonable.”), 708 (“Fashioning appropriate standards for issuing permits under § 10 for takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion.”). Despite this delegation, the plaintiffs had argued that, rather than *Chevron* deference, the rule of lenity should apply. The Court rejected this argument, noting that “[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement.” *Id.* at 704 n.18. This comment simply confirms that the rule of lenity does not automatically displace other means of statutory construction merely because a penal statute is at issue. It does not foreclose application of the rule of lenity in situations in which *Chevron* deference is not appropriate, and the Court is left with no other tool of statutory construction for resolving ambiguity. This case presents one of those situations.

The Court’s refusal to apply the rule of lenity in *Pacheco-Camacho* also neglects to consider the second purpose of the rule—“assuring that the society, through its representatives, has genuinely called for the punishment to be meted out.” *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring). Given that Congress announced its intended formula for computing good time credit, and that judges, lawyers, and defendants have always understood good time credit to accrue at a rate of fifty-four days per year, if the Court finds any statutory ambiguity in section 3624(b), this case should be resolved in accordance with the line of cases applying the rule of lenity to ambiguous penal statutes, including *Crandon*, and *Dolfi*.

CONCLUSION

This case provides the Court an opportunity to fulfill section 3624(b)’s promise to federal prisoners that they will serve eighty-five percent of their sentences. By the terms of the statute, and contingent on their conduct in prison, Mr. Yi and other federal inmates should receive good time credit in the amount of fifty-four days for each year of their sentences (plus a prorated period for any remaining months). The Office of the Federal Public Defender for the District of Maryland therefore joins Mr. Yi in requesting that this Court reverse the judgment of the District Court for the Eastern District of Virginia.

REQUEST FOR ORAL ARGUMENT

Amicus Curiae respectfully requests, pursuant to Federal Rule of Appellate Procedure 34, that this Honorable Court grant oral argument on this appeal, and permit participation by Amicus Curiae. Oral argument and participation by Amicus Curiae is warranted in this case due to the significance of the Court's decision to a large class of individuals, including four now represented by Amicus Curiae.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this _____ day of January, 2005, a copy of the foregoing Motion to Permit Filing of Brief of Amicus Curiae and Request to Participate in Oral Argument was mailed, first-class postage prepaid to: Counsel for Appellant, Christopher H. Howard, Esquire and M. Owen Gabrielson, Esquire, Holland & Knight, LLP, 520 Pike Street, Suite 2600, Seattle, WA 98101, and Counsel for Appellee, Tara Louise Casey, Esquire, Assistant United States Attorney, 600 E. Main Street, Suite 1800, Richmond, VA 23219.

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