

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ELLEN JEANETTE MORELAND,
Petitioner,

v.

FEDERAL BUREAU OF PRISONS;
HARLEY G. LAPPIN, Director, Federal Bureau of Prisons;
JOYCE FRANCIS, Warden, Federal Prison Camp-Bryan,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

- I. Whether, as the Fifth Circuit concluded in petitioner's case, 18 U.S.C. § 3624(b)'s provision regarding the calculation of good conduct credits is unambiguous or, instead, as nine other Courts of Appeals have held, § 3624(b) is ambiguous.

- II. Whether, assuming this Court agrees that 18 U.S.C. § 3624(b) is ambiguous, the rule of lenity requires the statute to be applied in a manner that awards a federal prisoner up to fifty-four days of good conduct credit for each year of the prison sentence imposed by the sentencing court; or, instead, whether deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), should be afforded to the Federal Bureau of Prisons' interpretation of § 3624(b), which only awards up to fifty-four days of credit for each year actually served by an inmate.

- III. Whether, despite the lack of a circuit split concerning the ultimate manner in which 18 U.S.C. § 3624(b) is applied, this Court nonetheless should grant certiorari to address the foregoing questions in view of the fact that the United States Sentencing Commission based the Guidelines' Sentencing Table upon the interpretation of § 3624(b) advocated by petitioner as opposed to the different interpretation followed nationwide by the Federal Bureau of Prisons.

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PRAYER

The petitioner, Ellen Jeanette Moreland, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on November 10, 2005.

OPINIONS BELOW

On November 10, 2005, the United States Court of Appeals for the Fifth Circuit entered its opinion reversing the judgment of the district court in this case and also rendering judgment for respondents. Moreland v. Federal Bureau of Prisons, ___ F.3d ___, 2005 WL 3030414 (5th Cir. Nov. 10, 2005). A copy of that opinion is attached as Appendix A.

A copy of the district court's final judgment is attached as Appendix B. A copy of the district court's order adopting and incorporating the United States magistrate judge's report and recommendation - which is reported at 363 F. Supp. 2d 882 (S.D. Tex. Apr. 1, 2005) - is attached as Appendix C.

JURISDICTION

On November 10, 2005, the United States Court of Appeals for the Fifth Circuit entered its opinion reversing the judgment of the district court and rendering judgment for respondents. No petition for rehearing was filed.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTE AND REGULATION INVOLVED

This case implicates 18 U.S.C. § 3624(a) & (b), which provide in pertinent part:

(a) Date of release. - A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

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

(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to a determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. . . . Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

18 U.S.C. § 3624(a) & (b).

This case also implicates 28 C.F.R. § 523.20 (version in effect prior to Dec. 5, 2005),¹ which provides in pertinent part that:

¹ Effective December 5, 2005, the regulation was amended in a manner that has no impact on the issues raised in this case. See 70 Fed. Reg. 72166.

Pursuant to 18 U.S.C. § 3624(b), as in effect for offenses committed on or after November 1, 1987[,] but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year. . . .

28 C.F.R. § 523.20.

STATEMENT OF THE CASE

A. Course of Proceedings

On September 22, 2004, the petitioner, Ellen Jeanette Moreland, filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in federal district court in Houston, Texas. 1 R. 6.² After the respondents filed their response and the parties thereafter filed additional briefing, United States Magistrate Judge Stephen Smith held a hearing on the petition on February 22, 2005. 2 R. 1 et seq. On March 8, 2005, Magistrate Judge Smith issued his memorandum and recommendation that the district court grant the petition. 1 R. 124. Respondents filed timely objections to the report. Id. at 162, 189. On March 30, 2005, Magistrate Judge Smith issued a revised memorandum and recommendation that habeas corpus relief be granted, id. at 142, which the district court adopted as its own opinion on April 1, 2005. Id. at 213. On the same date, the district court entered its final judgment granting habeas corpus relief. Id. at 214; see also Moreland v. Federal Bureau of Prisons, 363 F. Supp. 2d 882 (S.D. Tex. Apr. 1, 2005).

On April 15, 2005, respondents filed a timely notice of appeal. 1 R. 231. On November 10, 2005, the United States Court of Appeals for the Fifth Circuit issued its opinion reversing the judgment of the district court and rendering judgment for

² The record on appeal ("R.") is cited as follows: "[volume number] R. [page number(s)]."

respondents. See Appendix A. Petitioner has filed a motion to stay the issuance of the Fifth Circuit's mandate, which is still pending before the Fifth Circuit.

B. Statement of the Facts

On February 14, 1990, the petitioner, Ellen Jeanette Moreland, committed a federal drug trafficking offense in Wisconsin. She thereafter was arrested, tried, and convicted in federal court in the Eastern District of Wisconsin. On January 25, 1991, she was sentenced by a federal district court in Wisconsin to serve 210 months (or 17.5 years) in the custody of the Federal Bureau of Prisons. 1 R. 40.³ At the time that the court's judgment and sentence were entered, Ms. Moreland already had served 157 days in pretrial detention, which was credited toward her sentence. 1 R. 36. Without a reduction in her sentence for good behavior, her custodial sentence would expire on February 18, 2008. See Fifth Circuit Brief of Respondents-Appellants, at 6.

Because she was a model inmate, however, Ms. Moreland earned "good conduct credit" ("GCC") pursuant to 18 U.S.C. § 3624(b), which provides that a federal inmate "may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment." 18 U.S.C. § 3624(b)(1). When the Federal Bureau of Prisons ("BOP") informed her that, according to its formula contained in 28 C.F.R. § 523.20 and BOP Program Statement 5880.28, she was entitled to only 810 days of GCC - rather than the 945 days that she requested - this § 2241 litigation ensued. See Moreland,

³ The sentencing court also imposed a separate, consecutive 60-month sentence for a firearm conviction; however, that sentence was later vacated. 1 R. 56.

363 F. Supp. 2d at 884-85. At the time she filed her habeas corpus petition, Ms. Moreland was incarcerated at the women's federal prison camp in Bryan, Texas.

The essence of the parties' dispute in the courts below concerned whether Ms. Moreland is entitled to fifty-four days of GCC per year of the 17.5-year sentence *imposed* by the sentencing court (*i.e.*, 945 days), or, instead, whether she is only entitled to fifty-four days per year for the period of time that she actually served in BOP custody (*i.e.*, 810 days). See id. The district court agreed with Ms. Moreland's interpretation of 18 U.S.C. § 3624(b) and, thus, ordered the BOP to "calculate her Good Conduct Time under 18 U.S.C. § 3624(b) so that, for each year of the sentence imposed, she serves 311 days of actual time and earns 54 days of credit that vests immediately." See Appendix B.

The BOP promptly complied with the district court's order (which has since been reversed by the Fifth Circuit, although that court's mandate has not yet issued). Based on the district court's good conduct time calculation, the BOP on July 18, 2005, released Ms. Moreland from its custody during the pendency of respondents' appeal to the Fifth Circuit; as a result, she currently is serving the first year of her term of supervised release. Assuming the Fifth Circuit's mandate issues as currently scheduled, on January 3, 2006,⁴ the BOP will take Ms. Moreland back into some type of

⁴ According to the Fifth Circuit's website, the mandate will issue on January 3, 2006, unless that court were to grant Ms. Moreland's pending motion to stay the issuance of the mandate.

custody for approximately four months - the difference between BOP's original good conduct credit calculation (approved by Fifth Circuit on appeal) and the district court's good conduct credit calculation. See Moreland v. Federal Bureau of Prisons, ___ F.3d ___, 2005 WL 3030414, at *2 (5th Cir. Nov. 10, 2005).

BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT

_____This case was brought as a federal habeas corpus action under
28 U.S.C. § 2241.

REASONS FOR GRANTING THE WRIT

- I. This Court should grant certiorari to resolve the split between the Fifth Circuit and nine other circuits concerning whether 18 U.S.C. § 3624(b)'s provision for calculating good conduct credits is ambiguous.

As explained below, the larger issue in this case is the meaning of the third use of the phrase "term of imprisonment" in 18 U.S.C. § 3624(b)(1) - in particular, does it mean the prison sentence **imposed** by the sentencing court or, instead, the amount of prison time **actually served** by a federal prisoner? Ms. Moreland (who prevailed in the district court) contends the former, while respondents (who prevailed in the Fifth Circuit) contend the latter. Subsidiary questions include whether § 3624(b) is ambiguous and, if so, whether the rule of lenity or judicial deference to the Federal Bureau of Prison's interpretation of the statute under the Chevron⁵ doctrine would be appropriate in view of such ambiguity. The answers to these questions affect tens of thousands of federal prisoners in this country, as discussed below.

A. The Parties' Competing Interpretations of the Statute

In the Comprehensive Crime Control Act of 1984, P.L. 98-473, Congress effected a substantial reduction in the time taken off a federal prison sentence for "good conduct," from nearly a third of the sentence to only fifteen percent of the sentence. This change was codified in 18 U.S.C. § 3624(a) & (b), which set out the extent

⁵ Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

and operation of the new good conduct credit ("GCC"). These sections read in pertinent part:

(a) Date of release. - A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's **term of imprisonment**, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

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

(1) Subject to paragraph (2), a prisoner who is serving a **term of imprisonment** of more than 1 year other than a **term of imprisonment** for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the **time served**, of up to 54 days at the end of each year of the prisoner's **term of imprisonment**, beginning at the end of the first year of the term, subject to a determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. . . . Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the **term of imprisonment** shall be prorated and credited within the last six weeks of the sentence.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.⁶

18 U.S.C. § 3624(a) & (b) (emphasis added).

The dispute in this case arises from the Bureau of Prisons' policy that under the statute the GCC must be calculated on the basis of time actually served, not on the basis of the "term of

⁶ The portion omitted in ellipses as well as the succeeding subsections (3) and (4) of § 3624 deal with a requirement that the prisoner make progress toward earning a high school diploma, a subject not germane here.

imprisonment" imposed by the sentencing court. Using the time actually served rather than the "term of imprisonment" imposed as the basis for the GCC computation has a significant consequence in terms of the amount of prison time an inmate with good behavior must serve. Because the "time served" is always less than the total sentence of imprisonment "imposed" when GCC is earned, a credit based on time-served is always less than a credit for the total term of imprisonment. In the case of Ms. Moreland, who earned the maximum amount of GCC available according to the BOP, respondents (and the Fifth Circuit) have stated that she is entitled to only 810 days of good conduct credit, while Ms. Moreland (and the district court) have taken the position that she is entitled to 945 days of credit. See Moreland v. Federal Bureau of Prisons, 363 F. Supp. 2d 882, 885-86 (S.D. Tex. Apr. 1, 2005), rev'd, ___ F.3d ___, 2005 WL 3030414 (5th Cir. Nov. 10, 2005).

Under Ms. Moreland's interpretation of the statute, the maximum available GCC for a prisoner is determined on the basis of the number of years in the "term of imprisonment" imposed at sentencing by a district court. To calculate the maximum available credit, the number of years in that term is multiplied times fifty-four days (in Ms. Moreland's case, $17.5 \times 54 = 945$).⁷ During the course of a prisoner's sentence, the credit granted is a deduction

⁷ This amount may, of course, be reduced at any time until the end of the prisoner's sentence by any amount that the prisoner has forfeited due to bad behavior. 18 U.S.C. § 3624(b)(2).

"at the end"⁸ of each year in the term, shortening each year by up to fifty-four days. The succeeding year then begins on the date determined by deducting the credit and runs for a year after that, subject again to another credit for each subsequent year. A partial credit is granted for the last portion of a year at the end of a sentence, assuming that the sentence imposed is not in complete years.

Ms. Moreland's formula is illustrated in the following year-by-year breakdown of a hypothetical ten-year prison sentence (which assumes 365-day years each of the ten years) in which a model prisoner earns full GCC:

Year One:

Day 1 through Day 311 [with 54 days of good conduct credit awarded on Day 366, retroactive to Day 311 (i.e., $365-54 = 311$), which becomes the last day of the first year of the term of imprisonment]

Year Two:

Day 312 through Day 622 [with 54 days of good conduct credit awarded on Day 677, retroactive to Day 622, which becomes the last day of the second year of the term of imprisonment]

Year Three:

Day 623 through Day 933 [with 54 days of good conduct credit awarded on Day 988, retroactive to Day 933, which becomes the last day of the third year of the term of imprisonment]

⁸ 18 U.S.C. § 3624(b)(1).

Year Four:

Day 934 through Day 1244 [with 54 days of good conduct credit awarded on Day 1299, retroactive to Day 1244, which becomes the last day of the fourth year of the term of imprisonment]

Year Five:

Day 1245 through Day 1555 [with 54 days of good conduct credit awarded on Day 1610, retroactive to Day 1555, which becomes the last day of the sixth year of the term of imprisonment]

Year Six:

Day 1556 through Day 1866 [with 54 days of good conduct credit awarded on Day 1921, retroactive to Day 1866, which becomes the last day of the sixth year of the term of imprisonment]

Year Seven:

Day 1867 through Day 2177 [with 54 days of good conduct credit awarded on Day 2232, retroactive to Day 2177, which becomes the last day of the seventh year of the term of imprisonment]

Year Eight:

Day 2178 through Day 2488 [with 54 days of good conduct credit awarded on Day 2543, retroactive to Day 2488, which becomes the last day of the eighth year of the term of imprisonment]

Year Nine:

Day 2489 through Day 2799 [with 54 days of good conduct credit awarded on Day 2854, retroactive to Day 2799, which becomes the last day of the ninth year of the term of imprisonment]

Year Ten:

Day 2800 through Day 3110 [with 54 days of good conduct credit awarded in a

prorated manner at the end of Day 3110, which would be the final day of incarceration assuming full good conduct credit were earned by the prisoner during the final year of the term of imprisonment].⁹

~

Conversely, the method of calculation that the BOP has adopted awards the fifty-four day credit not for each year of the term of imprisonment **imposed** on a prisoner, but instead only "for each year **served**" on the sentence. 28 C.F.R. § 523.20 (emphasis supplied). As Bureau of Prisons Program Statement 5880.28 (hereafter P.S. 5880.28)¹⁰ dealing with "Good Conduct Time" emphasizes: "It is essential to learn that [good conduct time credit] **is not** awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served." P.S. 5880.28 at 1-48 (emphasis in original).¹¹

The BOP's formula, boiled down to its simplest form, is as

⁹ The foregoing formula for calculation of GCC differs in one respect from the one adopted by the district court. The formula proposed here does not award GCC until a full 365 days of exemplary service of a prison sentence have passed, while the district court's formula awarded the GCC at the end of the 311th day of exemplary service of a prison sentence (i.e., 365 - 54 = 311). See Moreland, 363 F. Supp. 2d at 886-87. At oral argument in front of the Fifth Circuit, counsel for Ms. Moreland contended that either interpretation of 18 U.S.C. § 3624(b) was reasonable but embraced the one set forth above as more fully giving effect to each word of the statute. As discussed above, the Fifth Circuit rejected both interpretations and, instead, embraced the one followed by the BOP.

¹⁰ The full Program Statement can be found at www.bop.gov/progstat/5880_028.pdf.

¹¹ The regulation requires, in accordance with § 3624(b), that credit for the end of a sentence be prorated, but it bases the prorated credit on "the time **served** by the inmate" when it is "less than a full year." 28 C.F.R. § 523.20 (emphasis added).

follows. For each year of actual prison time served (*i.e.*, Day 1 through Day 365), the BOP on Day 366 will subtract fifty-four days from the inmate's projected release date. Once the inmate serving a multi-year sentence enters the final year in which the annually-adjusted projected release date falls, the BOP will prorate GCC for that final year based on the following formula: 0.148 day of GCC (*i.e.*, 54/365) for each day served during that final year or portion of a year. See Williams v. Dewalt, 351 F. Supp. 2d 412, 414 & n.3 (D. Md. 2004) (discussing BOP's formula). Using the hypothetical ten-year sentence set forth in the above illustration, a model prisoner would be awarded a total of 470 days of GCC (432 days for the first eight years of good behavior, *i.e.*, 54 x 8, plus the "prorated" amount of 38 days for the GCC earned during the final year, for a total of 470 days of GCC based on a total sentence of 3180 days served behind bars on a ten-year sentence). The bottom line is that the BOP's formula awards a model inmate sentenced to a prison term in excess of one year approximately forty-seven days of credit for each year of the term of imprisonment imposed (or an approximately 13% reduction), while the Ms. Moreland's formula awards a model inmate fifty-four days for each year of the term of imprisonment imposed (or an approximately 15% reduction).¹²

In the courts below, Ms. Moreland contended - with success in the district court - that the statute unambiguously supports her

¹² The 13% figure is derived by dividing 47 by 365 (12.87%), while the 15% figure is derived by dividing 54 by 365 (14.79%).

interpretation (as opposed to the Fifth Circuit's contrary holding that the statute unambiguously supports the BOP's interpretation). She maintains that position here, and will briefly explain why she is correct.¹³ When the full text of the statute is considered, and its words read with one another in context, rather than in isolation, it is clear that the district court's interpretation of § 3624(b)(1) is correct and that the BOP has erred as a matter of law in its implementation of the statute. See Moreland, 363 F. Supp. 2d 882.

The district court correctly observed that the phrase "term of imprisonment" - which is not defined by the statute - is used three times in the first sentence of § 3624(b)(1).¹⁴ Moreland, 363 F. Supp. 2d at 885-86. "On the first two occasions, the phrase undoubtedly means **sentence imposed**" as opposed to **time served**. Id. at 886. With respect to the third use of "term of imprisonment," the district court invoked the canon of statutory construction that "identical terms" used repeatedly within the same statutory provision mean the same thing, particularly when used in the same

¹³ Even assuming *arguendo* that she is not correct in this regard, at the very least her arguments bolster her alternative position that the statute is ambiguous.

¹⁴ That first sentence reads: "[A] prisoner who is serving a **term of imprisonment** of more than 1 year other than a **term of imprisonment** for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the **time served**, of up to 54 days at the end of each year of the prisoner's **term of imprisonment**, beginning at the end of the first year of the term, subject to a determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. § 3624(b)(1).

sentence of the act. Id.; see also Brown v. Gardner, 513 U.S. 115, 118 (1994). Although the district court recognized one instance in another part of § 3624 when Congress used the phrase "term of imprisonment" to mean "time served," id. at 886, that instance was outside of the critically important first sentence of § 3624(b)(1), which has obvious significance. See Brown, 513 U.S. at 118 (canon of statutory construction that identical terms in the same statute mean the same thing is "most vigorous" when the same term is repeated in a given sentence). The district court also correctly observed that, within the same sentence of § 3624(b)(1), Congress used the distinct phrase "time served" - "fully demonstrating its drafting ability to distinguish" between the phrases "term of imprisonment" (meaning sentence imposed) and "time served." Moreland, 363 F. Supp. 2d at 886.

Yet another part of the statute supports Ms. Moreland's interpretation. The statute plainly establishes a "**credit**" - that is, a deduction - of "up to 54 days at the end of each year of the . . . term of imprisonment," reducing the time that need be served in each such year. 18 U.S.C. § 3624(b) (emphasis added). The first clause of § 3624(b)(1) says that a sentencing credit applies "toward service of the prisoner's sentence, **beyond** the time served" (emphasis added). The plain meaning of this clause is that the sentence on the basis of which the credit is applied is not the "time served" alone - as the BOP mistakenly contends - but also the sentence "beyond the time served." This necessarily means the sentence imposed less the GCC of up to fifty-four days period year,

as calculated on an annual basis (as the statute clearly envisions).

Indeed, there is no other sensible construction of these words. Thus, the first clause of the statute directly refutes the respondents' statutory interpretation, for it makes the sentence toward which a credit applies the full "sentence, beyond the time served," not the "time served" alone. Congress obviously meant something by the words "sentence, **beyond** the time served," and it can only have meant that the credit did not apply to the "time served" alone.

That the "credit" is to be based on the full term of imprisonment imposed is confirmed by the subsequent phrase granting a "credit . . . of up to 54 days at the end of each year of the prisoner's term of imprisonment." To begin with, a "credit" in this sense has the ordinary meaning of a "deduction from an amount otherwise due." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 532-33 (1986); see also BLACK'S LAW DICTIONARY 374 (8th ed. 2004) (definition number 6, which defines "credit" as a "deduction from an amount due"); Eckerd Corp. v. Alterman Properties, Inc., 589 S.E.2d 660, 663-64 (Ga. App. 2003) ("In its most basic sense, a credit is 'a deduction from an amount otherwise due.'" (citation omitted)). The amount "otherwise due" to be served, to which the credit applies, is "each year" of the term of imprisonment; by definition this cannot be the time already served, time which is not "due" but is instead "served."

The reading of "credit" in this way is strongly reinforced by

the fact that, in context, the words "term of imprisonment," to which the credit applies, are consistently used in the first sentence of § 3624(b)(1) to mean the term imposed by the court, not the time served.¹⁵ The requirement that credit be "at the end of each year" does not conflict with this reading; it says nothing other than that the "deduction" allowed by the credit may be "up to 54 days at the end" of each year imposed, and thus be a reduction of up to fifty-four days in the time to be served in the year. The section's plain language accordingly grants the fifty-four day credit for each year of the term of imprisonment imposed.

The BOP's construction of the word "credit" violates the plain meaning of the word. It does not permit a "deduction" of fifty-four days for each year of the time "otherwise due" to be served, but only a deduction for each year that actually is served, a distorted use of the word "credit." This is not what Congress specified when it created a fifty-four day "credit" per year.

The Fifth Circuit, however, took a diametrically opposite position, concluding that 18 U.S.C. § 3624(b) - in particular, § 3624(b)(1)'s third use of the phrase "term of imprisonment" - unambiguously supported respondent's position. See Moreland, 2005 WL 3030414, at *4-*6. The court focused on § 3624(b)'s language that permits awards of up to fifty-four days of GCC "at **the end** of

¹⁵ The phrase "term of imprisonment" must be read in the context of the granting of a "credit," not in isolation. See, e.g., United States v. Morton, 467 U.S. 822, 828 (1984) (noting that particular words of a statute read in isolation were ambiguous, yet ambiguity disappeared when read together with other words of statute).

each year of the prisoner's term of imprisonment, beginning at **the end** of the first **year** of the term." Id. at *4 (quoting from § 3624(b); italics in original). "Given its context," the Fifth Circuit concluded, "this language has a temporal meaning and can only refer to the end of each year the prisoner serves. The word 'year' has a commonly understood meaning of 365 (or 366) days, not 311 days." Id. The court also implicitly rejected Ms. Moreland's argument based on the statute's use of the word "credit": "[The statute does not] indicate that good-conduct credit should be retroactively applied to reduce each 'year' the prisoner serves from 365 to 311 days." Id.

_____The Fifth Circuit recognized that its holding that § 3624(b) unambiguously supports the BOP's position is in conflict with all of the other circuits that have addressed the issue - nine in all, which have concluded that § 3624(b)(1)'s third use of the phrase "term of imprisonment" is ambiguous with respect to whether it means sentence imposed by a sentencing court or prison time actually served by an inmate. See Moreland, 2005 WL 3030414, at *6 & n.39; see also Perez-Olivo v. Chavez, 394 F.3d 45 (1st Cir. 2005); Sash v. Zenk, 428 F.3d 132 (2d Cir. 2005); O'Donald v. Johns, 402 F.3d 172 (3d Cir. 2005); Yi v. Federal Bureau of Prisons, 412 F.3d 526 (4th Cir. 2005); Petty v. Stine, 424 F.3d 509 (6th Cir. 2005);¹⁶ White v. Scibana, 390 F.3d 997 (7th Cir. 2004);

¹⁶ Although the Sixth Circuit in Petty cited with approval its earlier unpublished decision holding that the statute unambiguously supported the BOP's position, see Williams v. Lamanna, 20 Fed. Appx. 360 (6th Cir. 2001), it also cited with approval several

James v. Outlaw, 126 Fed. Appx. 758 (8th Cir. 2005); Mujahid v. Daniels, 413 F.3d 991 (9th Cir. 2005) (citing Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir. 2001)); Brown v. McFadden, 416 F.3d 1271 (11th Cir. 2005). One of the judges of the Fifth Circuit in petitioner's case, Judge Stewart, disagreed with the majority that § 3624(b) unambiguously supports the BOP's position; he agreed with the other circuits that the statute is ambiguous regarding how good conduct time should be calculated. Moreland, 2005 WL 3030414, at *7 (Stewart, J., concurring in the judgment).

Recognizing at least some validity in the same statutory interpretation arguments advanced by Ms. Moreland - particularly the fact that the first sentence of § 3624(b)(1) uses the same phrase "term of imprisonment" three times - these other nine circuits have concluded that § 3624(b) is ambiguous. See, e.g., Yi, 412 F.3d at 530-31. However, all nine circuits, after concluding that the statute is ambiguous, have proceeded to afford great deference to BOP's interpretation pursuant to Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). See, e.g., Mujahid, 413 F.3d at 997. (The Chevron issue will be discussed below.)

In view of the foregoing circuit split, this Court should grant certiorari. For the reasons advanced by Ms. Moreland here and in the courts below, this Court should conclude that § 3624(b) unambiguously supports her position. Alternatively, at the very

decisions of other circuits that have held that the statute is ambiguous. See Petty, 424 F.3d at 510 (citing cases).

least, this Court should conclude that the statute is ambiguous. If this Court so concludes, then this Court should next address whether the rule of lenity or the Chevron doctrine applies to that ambiguity. That question is addressed immediately below.

II. Assuming that this Court believes that 18 U.S.C. § 3624(b) is ambiguous, this Court should grant certiorari and address whether Chevron deference or the rule of lenity applies.

Because the Fifth Circuit concluded that § 3624(b) unambiguously supports the BOP's position, the Fifth Circuit did not address whether any deference was due to the BOP's administrative regulation interpreting the statute, 28 C.F.R. § 523.20. See Moreland, 2005 WL 3030414, at *1.¹⁷ Judge Stewart, who concurred only in the Fifth Circuit's judgment because he believed that § 3624(b) is ambiguous, agreed with the nine other circuits that have addressed the issue and contended that deference was due to the BOP's interpretation of the statute under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). See Moreland, 2005 WL 3030414, at *7-*8 (Stewart, J., concurring in the judgment) (citing cases). Judge Stewart, in accordance with some of the other circuits, also rejected the argument that, instead of Chevron deference, the rule of lenity should be applied to the ambiguous statute. See id. at *7 n.1 (Stewart, J., concurring in judgment) (citing Sash v. Zenk, 428 F.3d 132 (2d Cir. 2005)); see also Mujahid, 413 F.3d at 998-99; Yi, 412 F.3d at 535; O'Donald, 402 F.3d at 174; Perez-Olivo, 394 F.3d at 53-54. These other courts have concluded either that Chevron deference "trumps" the rule of

¹⁷ In dicta, in Sample v. Morrison, 406 F.3d 310 (5th Cir. 2005), another panel of the Fifth Circuit stated that, if 18 U.S.C. § 3624(b) is ambiguous, the court would apply Chevron deference to the BOP's interpretation of the statute. See id. at 313.

lenity, see, e.g., Yi, 412 F.3d at 535 (citing Babbitt v. Sweet Home Sweet Home Chapter of Communities, 515 U.S. 687, 704 n.18 (1995)), or that the rule of lenity is not implicated because § 3624(a) is not a "penal" statute subject to the rule of lenity. See, e.g., Sash, 428 F.3d at 134-35.¹⁸ As explained below,

¹⁸ Before reaching the Chevron issue, most of the other circuits have concluded that the legislative history of 18 U.S.C. § 3624(b) did not clarify the ambiguity in the statute. See, e.g., Yi, 412 F.3d at 533-34; Perez-Olivo, 394 F.3d at 49-51. No circuit has stated that the legislative history **supports** the BOP's position.

As the district court correctly observed, see Moreland, 363 F. Supp. 2d at 887-888, the legislative history of § 3624 fully supports Ms. Moreland's interpretation of the statute. Notably, the method of good conduct credit computation required under Ms. Moreland's interpretation, basing good conduct credit on the sentence imposed rather than the time the prisoner has served, was the method approved by Congress from 1902 to 1987. The old version of the good conduct credit statute, 18 U.S.C. § 710, recodified in 1948 as 18 U.S.C. § 4161, permitted a "deduction from the term of [the prisoner's] sentence" of a certain number of "days for each month" in the sentence. Id. Under that statute, and until 1987, the settled method of calculating the credit was "by multiplying the number of months of a sentence as imposed by the court by the appropriate number of days [per month] as prescribed in the statute." H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19.

The legislative history of § 3624 shows no intent to change the prior mode of calculating the sentence credit, based on the "sentence as imposed by the court." H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19. Congress enacted § 3624 in response to three quite different complaints about the GTC that existed before 1987. First, the credit could be awarded, rescinded, and then restored, which made the length of sentences to be served unpredictable. S. Rep. 98-225 at 46, 48-49, 56-59, 146-47, reprinted in 1984 U.S.C.C.A.N. 3182, 3229, 3231-32, 3239-41, 3329-30. Second, the existing statute was too complex, providing different rates of credit for different sentences, and Congress sought simplicity and uniformity in the GTC. Id. at 146-47, reprinted in 1984 U.S.C.C.A.N. at 3329-3330. Finally, Congress sought to reduce the size of the credit to fifty-four days, enough to provide an incentive for good behavior, yet not so much "that it will carry forward the uncertainties as to release dates that occur

application of Chevron deference - rather than the rule of lenity - fundamentally conflicts with numerous decisions of this Court.

This Court repeatedly has held that a grievously ambiguous federal statute affecting the length of a criminal defendant's prison sentence is subject to the rule of lenity, which requires such an ambiguity to be construed in favor of the defendant. See United States v. R.L.C., 503 U.S. 291, 305 (1992); Ladner v. United States, 358 U.S. 169, 178 (1958); see also Bifulco v. United States, 447 U.S. 381, 387 (1980). Furthermore, this Court has made it clear that the "traditional tools of statutory construction" are to be employed **before** a court resorts to Chevron deference to construe an ambiguous statute, see General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under Chevron, deference to its statutory interpretation is called for only when the devices for judicial construction have been tried and found to yield no clear sense of congressional intent."); accord INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001). Of critical importance here, this Court has held that the rule of lenity is one of those "traditional tools." See United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 n.10 (1992) (holding that the "rule of lenity . . . is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language").

under current law." Id. Thus, Congress said nothing to indicate any desire to change the long-standing method of calculating the credit based on the "sentence as imposed by the court," H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19.

Because of the importance of the policies that underlie the rule of lenity, it, like these other substantive canons of construction, must be applied before deference is accorded the agency's construction of a penal statute. Otherwise, the law would, for the first time, permit imprisoning a citizen when that imprisonment is "based on no more than a guess as to what Congress intended." Ladner, 358 U.S. at 178. This is especially true in Ms. Moreland's case, since the BOP's published regulation in the Code of Federal Regulations and its Program Statement - setting forth its interpretation of § 3624(b) - were promulgated **after** the date of Ms. Moreland's offense; on that date, the BOP's policy had been set forth only in an unpublished counsel's memorandum. See Moreland, 363 F. Supp. 2d at 891, 893 ("Agency counsel opinions contained in internal memos hardly constitute the sort of 'fair warning' contemplated by the rule of lenity.").

The rule of lenity, unlike the Chevron rule, arose in the context in which this case arises, namely, the interpretation of penal laws providing for imprisonment. The rule of lenity has two aspects, one requiring a clear definition of criminal offenses and the second, which is applicable in this case, requiring courts to adopt the construction of an ambiguous penalty statute "yielding the shorter sentence." R.L.C., 503 U.S. at 305. This second aspect of the rule is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Id. (citations and internal quotation marks omitted). The rule's purpose in this context is "assuring that 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). Since the punishment must be based on the "moral condemnation of the community" expressed in legislation, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not be imposed." Id.

That the rule of lenity must precede the application of Chevron deference is clear from this Court's treatment of similar substantive canons of construction. When this Court has in the past been faced with a conflict between established substantive canons and the Chevron doctrine, it has consistently applied the canons. In St. Cyr, for example, the Court found a statute repealing relief from deportation to be ambiguous with respect to whether it could be applied retroactively. 533 U.S. at 320. Despite this ambiguity, this Court specifically rejected the INS's argument that its own construction of the statute was entitled to deference under Chevron. Instead, this Court applied the common-law presumption against retroactive application of statutes, id. at 320 n. 45, a principle it had held was "deeply rooted in our jurisprudence." Id. at 316, 320 n. 45. Similarly, this Court has applied other such "deeply rooted" rules of construction in preference to Chevron. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988) (although agency's interpretation would "normally be entitled to deference," Court applied rule avoiding constructions that would "raise serious constitutional problems;" rule had "so

long been applied" as to be "beyond debate"); EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 256-58 (1991) (Court applied "longstanding" presumption against extra-territorial effect, rather than deferring to the views of the EEOC).

These rules of construction take priority over the rule of Chevron deference, both because of the importance of the policies they further and because they are the rules designed over the years to apply to specific legal situations, and thus constitute specific rules that must govern over the general rule of Chevron. See, e.g., Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). Chevron, after all, is an enormously broad principle that assumes in countless instances an implicit Congressional delegation of power to agencies to construe every ambiguity or silence in the statutes which they administer. But established rules such as the rule of lenity were devised by courts to deal with specific recurring legal problems, and there is no reason the broad rule of Chevron, whatever its merits in general, should displace these specific rules when they are being applied within their proper spheres. Id.; see St. Cyr, 533 U.S. at 320 n. 45.

Finally, applying Chevron deference to a Justice Department agency's interpretation of a statute affecting criminal punishment would run afoul of the principle of separation of powers. See Crandon v. United States, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring) (applying Chevron in lieu of lenity with respect to a

law enforcement agency's regulation seeking to implement a penal statute would "turn the normal construction of criminal statutes upside-down"); see also Evans v. United States Parole Com'n, 78 F.3d 262, 265 (7th Cir. 1996) ("[W]e have substantial doubt that the Judicial Branch owes any deference to the Executive Branch when the question concerns the maximum term of imprisonment; certainly judges do not defer to the Attorney General's interpretation of Title 18.").

Those circuits that have relied on Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 704 n.18 (1995), for the proposition that the rule of lenity does not foreclose deference to the BOP's reasonable interpretation of an ambiguous penal statute, have erred. In Babbitt, this Court refused to apply the rule of lenity - and, instead, applied Chevron deference - to administrative regulations promulgated by the Secretary of the Interior that implemented the Endangered Species Act (a statute containing civil and criminal enforcement provisions). Id. at 704 & n. 18. However, Babbitt did not address a **Justice Department** agency's regulation seeking to implement a penal statute, which, as discussed above, is due absolutely no Chevron deference. See Crandon, 494 U.S. at 177-78 (Scalia, J., concurring); see also Leocal v. Ashcroft, 125 S. Ct. 377, 384 n.8 (2004) (stating that, if the disputed provision of 18 U.S.C. § 16 were ambiguous, the rule of lenity would apply and the Justice Department's

interpretation would not be followed).¹⁹ Furthermore, in Babbitt, there was no statutory ambiguity at issue; the only question involved the facial validity of administrative regulations well within the scope of statutory delegation. The case involved only notice, not the rule of lenity's separation-of-powers concern that only the Legislative Branch should write the laws on punishment. Babbitt, 515 U.S. at 704 n.18.

In sum, if § 3624(b) is ambiguous, the rule of lenity must apply rather than Chevron deference. To do otherwise would, for the first time, permit the imprisonment of citizens without the "assur[ance] that society, through its representatives, has genuinely called for the [full] punishment to be meted out." R.L.C., 503 U.S. at 309 (Scalia, J., concurring). There is no justification for declining to apply the rule of lenity here.²⁰

¹⁹ Notably, the Justice Department in Leocal conceded that no deference was due to its interpretation of federal penal law. See Brief for Respondent, Leocal v. Ashcroft, No. 03-583, 2004 WL 1617398, at *33 (11th Cir. July 14, 2004) (citing Justice Scalia's concurring opinion in Crandon with approval).

²⁰ It is worth noting that this Court has considered the application of the rule of lenity in two cases involving the BOP's interpretations of statutes it administers, without any suggestion that the rule of lenity was inapplicable to such interpretations. See Reno v. Koray, 515 U.S. 50, 56-60 (1995); Lopez v. Davis, 531 U.S. 230, 244 n. 7 (2001). In both cases, the Court rejected the prisoner's reliance on the rule solely because there was no ambiguity in the statute. Koray, 515 U.S. at 65 (lenity reserved for cases in which Court could make "no more than a guess about what Congress intended"); Lopez v. Davis, 531 U.S. at 244 n. 7 ("rule of lenity is not invoked by a grammatical possibility"). In neither case did the Court suggest that the rule had no application, and the Court clearly **assumed** the rule would have applied even given the nature of the statute, had there been any ambiguity.

III. Despite the lack of a circuit split concerning the ultimate manner in which 18 U.S.C. § 3624(b) is applied, this Court nonetheless should grant certiorari to address the foregoing two questions in view of the fact that the United States Sentencing Commission based the Guidelines' Sentencing Table upon the interpretation of § 3624(a) advocated by petitioner as opposed to the different interpretation followed nationwide by the Federal Bureau of Prisons.

In a letter submitted to the Fifth Circuit after oral argument but before the court issued its decision, Ms. Moreland called the court's attention to the United States Sentencing Commission's SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 23 (June 18, 1987). The Report establishes that the Guidelines' Sentencing Table was calibrated on the assumption that well-behaved prisoners would receive 15% good conduct credit on the sentence imposed. See also USSG Ch.1, Pt. A, § 3, para. 3 (as amended in 1989) ("The abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior.").

The Report sets out the methodology for creation of the Sentencing Table. The Commission collected a large sample of sentences for a broad array of crimes and determined the actual time served as a baseline. Then, the Commission "adjusted for good time" by figuring out the longer sentence for which the actual time served would be 85%:

Prison time was increased by dividing by 0.85 good time when the term [of imprisonment] exceeded twelve months. This adjustment corrected for the good time (resulting in early release) that would be earned [under 18 U.S.C. §

3624]. . . . This adjustment made sentences in the Levels Table comparable with those in the Guidelines (which refer to sentences prior to the awarding of good time).

SUPPLEMENTAL REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS
23 (June 18, 1987).

The Commission's interpretation of § 3624(b)'s formula for good conduct credit - fifty-four days per year of the sentence imposed (or approximately 15% of each year) - is precisely the one advanced by Ms. Moreland but rejected by the BOP and the Fifth Circuit. As discussed above, under BOP's formula, approximately 13% of each year of the sentence imposed is reduced for a prisoner's exemplary conduct. Deferring to the BOP's interpretation thus would mean that every federal prisoner since 1987 who was sentenced under the Sentencing Reform Act of 1984 to a term of imprisonment in excess of one year received a guideline sentence premised on a 2% error.

The fact that the Sentencing Commission based its Sentencing Table on the fifty-four day (15%) formula rather than the forty-seven day (13%) formula underscores the national importance of the issues raised in Ms. Moreland's case. Furthermore, resolution of this case in Ms. Moreland's favor would save the federal taxpayers many millions of dollars per year - in that each federal prisoner serving a prison sentence in excess of one year who earns good conduct credit would be eligible for release from prison seven days earlier for each year of his or her term of imprisonment.

For these reasons, this Court should grant certiorari and

address the questions raised in this petition, notwithstanding the lack of a circuit split concerning the ultimate manner in which 18 U.S.C. § 3624(b) is applied by the Courts of Appeals.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment of the Fifth Circuit.

Date:
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