

APPEAL NUMBER 04-2990

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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DAVID O'DONALD,  
APPELLANT/PETITIONER

V.

TRACY JOHNS, WARDEN,  
APPELLEE/RESPONDENT

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Brief *Amici Curiae* of Families Against Mandatory Minimums,  
National Association of Criminal Defense Lawyers, National  
Association of Federal Defenders, and Federal Public Defender  
and Community Defender Organizations in the  
Third Circuit in Support of the Petition for Rehearing

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MAUREEN KEARNEY ROWLEY, Esq.  
Chief Federal Defender, EDPA  
DAVID L. McCOLGIN, Esq.  
Supervising Appellate Attorney  
Defender Assoc. of Phila.  
Federal Court Division  
Suite 540 West, Curtis Center  
Independence Square West  
Philadelphia, PA 19106  
(215) 928-1100

RICHARD COUGHLIN, Esq.  
Federal Public Defender, DNJ  
972 Broad Street, 2nd Floor  
Newark, NJ 07102  
(973) 645-6347

PENNY MARSHALL, Esq.  
Federal Public Defender, DDE  
704 King Street, Suite 110  
Wilmington, DE 19801  
(302) 573-6010

THURSTON T. MCKELVIN, Esq.  
Federal Public Defender, DVI  
1115 Strand Street  
P.O. Box 3450 - Christiansted  
St. Croix, VI 00820  
(340) 773-3585

JAMES V. WADE, Esq.  
Federal Public Defender, MDPA  
100 Chestnut Street, Suite 306  
Harrisburg, PA 17101-2540  
(717) 782-2237

DAVID A. LEWIS, Esq.  
16 Court Street - 3rd Floor  
Brooklyn, NY 11241  
(212) 417-8700  
Attorney for Amicus NAFD

PETER GOLDBERGER, Esq.  
50 Rittenhouse Place  
Ardmore, PA 19003-2276  
(610) 649-8200  
Attorney for Amicus NACDL

MARY PRICE, Esq.  
General Counsel  
Families Against Mandatory  
Minimums Foundation  
1612 K Street, N.W., Suite 700  
Washington, DC 20006  
(202) 822-6700

ATTORNEYS FOR AMICI CURIAE

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### INTERESTS OF AMICI CURIAE

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization with 35,000 members and 30 chapters nationwide. FAMM does not oppose imprisonment, but urges that punishment be proportionate to the offense and the culpability of the offender. FAMM conducts research, promotes advocacy, assists prisoners with securing pro bono counsel, and educates the public regarding the excessive cost of mandatory sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the increasing reliance on lengthy periods of incarceration to the detriment of other responses to crime. FAMM is deeply interested in ensuring that prisoners spend no more time incarcerated than that authorized by law and that they be accorded correctly calculated credit for good conduct during incarceration.

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. NACDL has 10,000 members nationwide

-- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

The Federal Public Defender and Community Defender organizations for districts in the Third Circuit (the Community Defender Organization for the Eastern District of Pennsylvania, the Federal Court Division of the Defender Association of Philadelphia; the Federal Defender Office for the Middle District of Pennsylvania; the Federal Defender Office of New Jersey; the Federal Defender Office of Delaware; the Federal Defender Office for the Virgin Islands) represent indigent defendants in federal court in the Third Circuit pursuant to the Criminal Justice Act,

18 U.S.C. § 3006A. As the institutional defenders for indigent defendants, these organizations have a unique interest in all issues of federal criminal law and a unique perspective to offer the Court concerning the correct calculation of good conduct time for federal prisoners.

All Amici share an interest in this case because the panel's decision permits the imposition of imprisonment that has not clearly been authorized by Congress.

### **FACTS**

This case involves the interpretation of 18 U.S.C. § 3624(b), which provides that a prisoner such as Petitioner David O'Donald "may receive credit toward the service of [his] sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment." *Id.* (emphasis supplied). Petitioner O'Donald contends that this provision grants potential credit of up to 54 days for "each year ... of the term of imprisonment" imposed by the sentencing court, or 648 days on his 12-year term of imprisonment. The Bureau of Prisons would grant Mr. O'Donald 564 days' credit, 54 days for each year he will actually have served. The Bureau's view that credit is given for each year "served," not for the "term of imprisonment" imposed, inevitably produces a smaller credit.

The panel held that the portion of the statute emphasized above was "ambiguous" and that it was "unclear" whether Congress

intended to base the credit on the term of imprisonment imposed or on the time served alone. O'Donald v. Johns, 402 F.3d 172, 174 (3d Cir. 2005) (per curiam). It declined to resolve this ambiguity by applying the rule of lenity to produce the shorter sentence, and instead deferred to the Bureau's interpretation of the statute pursuant to Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). O'Donald, 402 F.3d at 174.

**REASONS REHEARING OR REHEARING EN BANC  
SHOULD BE GRANTED**

Amici support Petitioner David O'Donald's request for rehearing, or rehearing en banc, because the question presented is exceptionally important and because the panel misapprehended clear Supreme Court law. The question is of extraordinary importance because it involves the fundamental interest in freedom from unlawful imprisonment of thousands of prisoners in the custody of the Federal Bureau of Prisons in this Circuit. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2646 (2004) (freedom from "physical detention" is "most elemental of liberty interests"); [www.bop.gov/news/weekly\\_report.jsp](http://www.bop.gov/news/weekly_report.jsp) (over 18,000 prisoners held in Third Circuit). Since the panel has squarely concluded that it is "unclear" whether the statute authorizes the Bureau to incarcerate these thousands of prisoners for as long as the Bureau intends to, O'Donald, 402 F.3d at 174, this is a case of unusual gravity warranting en banc review.

The Court should also grant rehearing because the panel's opinion conflicts with the Supreme Court's holding in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 n. 9 (1984), that a court may not grant deference to an agency interpretation until it has applied the "traditional tools of statutory construction" and found them unavailing. Id. The rule of lenity is plainly such a traditional rule, see United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 n. 10 (1992), and the Supreme Court has consistently made clear that before granting Chevron deference, a court must apply such rules to interpret ambiguous statutes. See, e.g., INS v. St. Cyr, 533 U.S. 289, 320 n. 45 (2001) (where statute ambiguous, common-law presumption against retroactivity applied in preference to Chevron); see also Dolfi v. Pontesso, 156 F.3d 696, 699-700 (6<sup>th</sup> Cir. 1998) (rule of lenity, not Chevron deference, resolves ambiguity in penal statute). Since the rule of lenity is a "traditional" rule of construction like the presumption against retroactivity and other similar rules applied in preference to Chevron deference, the panel's failure to apply it was clear error.

Given the panel's holding that the statute was "ambiguous" and "unclear," it erred in adopting a construction of the statute imposing an increased penalty that is "based on no more than a guess as to what Congress intended." Ladner v. United States,

358 U.S. 169, 178 (1958). Accordingly, rehearing and rehearing en banc should be granted.

## **ARGUMENT**

### **POINT I**

**Rehearing, Either by the Panel or the Court En Banc, Should Be Granted to Permit This Court to Have the Benefit of Counseled Briefs in Deciding an Issue of Paramount Importance Directly Affecting the Amount of Time Most Federal Prisoners in This Circuit Must Actually Spend in Prison.**

Mr. O'Donald's appeal raises an issue that directly affects the vast majority of the 18,000 federal prisoners in this Circuit -- the calculation of good time credit for prisoners sentenced to more than one year in prison. Rarely does a single decision so directly affect so many. Yet the Court's precedential decision in this case was decided without benefit of counseled briefing for Mr. O'Donald. Mr. O'Donald proceeded pro se, filing an opening brief that included just nine pages of argument and a reply consisting of less than one page of argument. Neither of Mr. O'Donald's briefs addressed the critical issue in the case, the relationship between the rule of lenity and the Chevron doctrine in criminal cases. In contrast, the Bureau addressed the issue at length at pp. 43-49 of its brief, although it did not cite significant authorities favorable to Mr. O'Donald. See St. Cyr, 533 U.S. at 320 n. 45; Dolfi v. Pontesso, 156 F.3d at 699-700.

Amici believe that counseled briefing is essential in any criminal case that is to set precedent for the Circuit, for our adversary system works best, and is most likely to produce just results, when each party has the assistance of counsel to probe the weaknesses in the other's position. The Third Circuit Defender organizations stand ready to provide the necessary counsel in cases such as this.

Rehearing or rehearing en banc should now be granted so that the Court may have the benefit of thorough, counseled briefs before deciding an issue of such broad importance.

#### **POINT II**

**At the First Step of Chevron Analysis, Before Deferring to an Agency's Interpretation, a Court Is Required to Apply the "Traditional Tools of Statutory Construction" Including Traditional Canons of Construction Such As the Rule of Lenity.**

Since the panel found § 3624(b) ambiguous, it erred when it failed apply the rule of lenity to resolve the ambiguity in Petitioner's favor, Ladner v. United States, 358 U.S. at 178 (Court will not construe a statute to "increase the penalty" on an individual, when it is ambiguous), and instead deferred to the Bureau's interpretation of the statute under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837. The Supreme Court made it clear in Chevron itself that a court must employ the "traditional tools of statutory construction" before it resorts to Chevron deference to construe an ambiguity,

Chevron, 467 U.S. at 842 n.9, and the rule of lenity is one of those “traditional tools.” United States v. Thompson/Center Arms Co., 504 U.S. at 518 n. 10 (“rule of lenity ... is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language”); see also Crandon v. United States, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring) (applying Chevron in lieu of lenity would “turn the normal construction of criminal statutes upside-down”). The Supreme Court has consistently applied similar canons of construction before granting Chevron deference, see, e.g., INS v. St. Cyr, 533 U.S. at 320 n. 45, and the rule of lenity must be applied at the first step of Chevron analysis to resolve statutory ambiguity in the scope of punishment Congress has authorized. Dolfi v. Pontesso, 156 F.3d at 700. Thus, the panel’s decision violates the dictates of Chevron itself and improperly permits the imprisonment of a citizen when that imprisonment is based on at most a “guess” as to what Congress intended. Ladner, 358 U.S. at 178.

To understand the application of the rules of lenity and Chevron deference, it is crucial to understand the nature of those rules. The rule of lenity is a traditional rule of judicial construction that, unlike the Chevron rule, applies specifically to prevent unauthorized punishment. As early as 1820, Chief Justice Marshall viewed the rule as ancient, and

stated that it was based on the "tenderness of the law for the rights of individuals," on the "principle that the power of punishment is vested in the legislative, not in the judicial department," and on the principle that "it is the legislature, not the Court, which is to define the crime, and ordain its punishment." United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95 (1820). The rule thus has two aspects, one requiring a clear definition of criminal offenses<sup>1</sup> and the second, applicable in this case, requiring that courts construe ambiguous penal statutes to yield "the shorter sentence." United States v. R.L.C., 503 U.S. 291, 305 (1992). 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., quoting United States v. Bass, 404 U.S. 336, 348 (1971), quoting H. Friendly, Benchmarks 209 (1967). Its purpose is to assure "that society, through its representatives, has genuinely

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<sup>1</sup> The first prong of the rule is a counterpart to the requirement that citizens receive "fair warning" of what conduct may be criminal. United States v. Lanier, 520 U.S. 259, 266 (1997). This aspect of the rule is not involved here, since the only question in this case is whether Congress has authorized the punishment the Bureau intends to inflict, not whether there has been fair warning of what conduct constitutes a crime. Thus, cases such as Pacheco-Camecho v. Hood, 272 F.3d 1266, 1271-72 (9<sup>th</sup> Cir. 2001), cert. denied, 535 U.S. 1105 (2002) have erred in suggesting that the rule of lenity does not apply here because the Bureau's regulation provides the requisite "fair warning." Even if the regulation is clear, it does not suffice to prove that Congress has authorized the punishment. To the extent the panel relied on this aspect of Pacheco-Camacho, see O'Donald, 402 F.3d at 174, it erred.

called for the punishment to be meted out." R.L.C., 503 U.S. at 309 (Scalia, J., concurring). Since punishment is 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. This aspect of the rule thus derives both from due process concerns protecting the "rights of individuals" and from the need to assure the separation of powers.<sup>2</sup>

The rule of Chevron deference, on the other hand, has neither the historical nor the constitutional foundation that the rule of lenity has. It arose merely two decades ago and has most persuasively been explained as adopting a "fictional presumed intent" of Congress that "ambiguities ... will be resolved ... not by the courts but by a particular agency, whose policy biases will ordinarily be known."<sup>3</sup> Antonin Scalia, Judicial Deference

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<sup>2</sup> See Burge v. Butler, 867 F.2d 247, 250 (5<sup>th</sup> Cir. 1989) (due process violation where "penalty ... not authorized by any applicable statute"); Wasko v. Vasquez, 820 F.2d 1090, 1091 n.2 (9<sup>th</sup> Cir. 1987) (punishment beyond "extent authorized by state statute" violated due process); cf. Mistretta v. United States, 488 U.S. 361, 391 n. 17 (1989) (placing sentencing power in Executive would raise constitutional question by "unit[ing] the power to prosecute and the power to sentence within one Branch").

<sup>3</sup> The function of the Chevron rule in the usual administrative law context is thus to be a "a background rule of law against which Congress legislates," indicating who will resolve statutory ambiguities. Scalia, 1989 Duke L.J. at 517. The rule of lenity fulfills this same function in the area of criminal law with even more precision than Chevron does. Lenity tells Congress not only what body will resolve ambiguities in penal statutes, but how that body will do so -- by declining to impose any punishment that Congress has not clearly authorized.

to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (1989) (hereafter "Scalia"). In Chevron itself, however, the Supreme Court made clear that the judiciary remained the "final authority on issues of statutory construction," and at the first step of Chevron analysis, it is the judiciary's duty to interpret the statute using "traditional tools of statutory construction." Chevron, 467 U.S. at 482 n. 9. Here, the panel erred in failing to carry out the full judicial interpretation of the statute required by Chevron. Dolfi v. Pontesso, 156 F.3d at 700 (rule of lenity, rather than Chevron deference, applies because interpretation of criminal statutes is province of federal courts).

Under Chevron, the panel was required not only to apply the ordinary rules of textual analysis before deferring to the Bureau's interpretation, but also to apply judicial rules of construction like the rule of lenity, designed to eliminate ambiguity in particular cases. In INS v. St. Cyr, 533 U.S. at 316, 320 n. 45, for example, the Supreme Court held that although a statute's language was ambiguous concerning its retroactive effect, Chevron deference did not apply since the ambiguity was eliminated by the presumption against retroactivity, a rule that was "deeply rooted in our jurisprudence." The Court held that Chevron itself required application of the presumption, since that presumption was one of the "traditional rules of statutory construction." Id. at 320 n. 45.

Similarly, the Supreme Court and the Courts of Appeals have applied other such "deeply rooted" rules of construction, including the rule of lenity, in preference to the rule of Chevron deference. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 574-75 (1988) (although agency's interpretation would "normally be entitled to deference," Court applied established rule avoiding constructions that would "raise serious constitutional problems" instead); EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 258 (1991) (Court applies "longstanding" presumption against extraterritorial effect, rather than deferring to the views of the EEOC);<sup>4</sup> Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-62 (10<sup>th</sup> Cir. 1997) ("canon of construction favoring Native Americans controls over" Chevron rule). And the Sixth Circuit has, of course, explicitly held that the rule of lenity supplants Chevron deference in construing ambiguous penalty provisions of the law. Dolfi v. Pontesso, 156 F.3d at 700.

All these rules of construction take priority over the rule of Chevron deference because they further important policies and because they are long-settled rules designed to construe specific

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<sup>4</sup> In applying the presumption against extraterritoriality, the Court accorded the E.E.O.C.'s position some deference, but less than deference under Chevron. 499 U.S. at 256-57. Justice Scalia, concurring, thought Chevron deference warranted, but nonetheless found that deference overcome by the presumption. Id. at 259-60.

types of statutes and thus constitute specific rules that govern over the more general rule of Chevron. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) (“a commonplace of statutory construction [is] that the specific governs the general”). Chevron, after all, is an enormously broad principle assuming an implicit congressional delegation of power to agencies to construe ambiguities in the statutes they administer. But long-established rules like the rule of lenity were devised by courts to further important constitutional and common-law interests in specific circumstances, and the broad rule of Chevron cannot displace all these rules within their proper spheres. Indeed, whenever such rules have conflicted with a claim of Chevron deference, the Supreme Court has consistently followed them and declined to give deference, as Chevron itself requires. See, St. Cyr, 533 U.S. at 316, 320 n. 45; DeBartolo, 485 U.S. at 575; Arabian American Oil, 499 U.S. at 248, 256-58.

The panel gave no reason for failing to apply the rule of lenity, beyond citing two cases in support of its ruling. 402 F.3d at 174. The first, Caron v. United States, 524 U.S. 308, 316 (1998), is inapposite, since it simply held that the rule of lenity does not apply when a statute does not present a serious ambiguity. But here, the panel explicitly found the statute “ambiguous,” since it was “unclear whether the phrase ‘term of imprisonment’ ... refers to the sentence imposed or time served.”

402 F.3d at 174. Thus the rule of lenity applies in this case.

The panel also relied on the Ninth Circuit's decision in Pacheco-Camecho v. Hood, 272 F.3d at 1271-72, which in turn relied on Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687 (1995). Babbitt, however, does not preclude application of the rule of lenity here. Babbitt held that the rule of lenity did not apply to a "facial" challenge like that before the Court,<sup>5</sup> but that the rule did apply to questions arising from a "specific factual dispute," even in civil cases. Id. at 704 n. 18. This case presents the kind of "specific factual dispute" -- whether Mr. O'Donald is entitled to 564 or 648 days' good time credit -- to which the rule of lenity does apply. In cases precisely like this one, the Supreme Court has regularly assumed that the rule of lenity could apply, without suggesting that they were "facial challenges" to which it would be inapplicable. See, e.g., Lopez v. Davis, 531 U.S. 230, 244 n. 7 (2001); Reno v. Koray, 515 U.S. 50, 64-65 (1995).<sup>6</sup>

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<sup>5</sup> In Babbitt itself, the case did not involve a "specific factual dispute" because it was a challenge to every possible application of a broad regulation before any enforcement proceeding had been brought. 515 U.S. at 699-700. The Court noted that there were "strong arguments" against the validity of the regulation in some, but not all, of its potential applications. Id. But the possible ambiguity of the governing statute with respect to some of these applications could not invalidate the regulation as a "facial" matter, since it was valid in large part.

<sup>6</sup> Babbitt is distinguishable for yet another reason. In Babbitt, the question involved was whether there was "fair

In this case the panel specifically held that it was "unclear" whether the increased punishment inflicted by the Bureau of Prisons was in fact authorized by the statute. The panel was required to resolve this ambiguity using a "traditional tool ... of statutory construction," the rule of lenity. Chevron, 467 U.S. at 842 n. 9; St. Cyr, 533 U.S. at 316, 320 n. 45; see Dolfi v. Pontesso, 156 F.3d at 700. Its failure to do so requires rehearing.

### CONCLUSION

The Court should order rehearing or rehearing en banc.

Respectfully submitted,

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DAVID L. McCOLGIN, Esq.  
Assistant Federal Defender  
Supervising Appellate Attorney  
Defender Assoc. of Phila.  
Federal Court Division

Of Counsel:  
RICHARD COUGHLIN, DNJ  
PENNY MARSHALL, DDE  
THURSTON T. MCKELVIN, DVI  
JAMES V. WADE, MDPA  
DAVID A. LEWIS, NAFD  
PETER GOLDBERGER, NACDL  
MARY PRICE, FAMMF

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MAUREEN KEARNEY ROWLEY, Esq.  
Chief Federal Defender, EDPA

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warning" of a criminal violation, not whether Congress had actually authorized particular punishment. Since Congress had explicitly delegated power to the agency to define prohibited conduct and its regulation was clear, the Court held that the regulation did give "fair warning" of what conduct was prohibited. Babbitt, 515 U.S. at 704 n. 18. Here, however, the rule of lenity must apply, since the scope of the congressional authorization itself is not clear, and the Court can only guess whether Congress actually intended the punishment the Bureau's regulation inflicts. See, n. 1. supra.

**CERTIFICATE OF BAR MEMBERSHIP**

It is hereby certified that David L. McColgin is a member of the bar of the Court of Appeals for the Third Circuit.

\_\_\_\_\_  
DAVID L. MCCOLGIN

DATE: May 25, 2005

**CERTIFICATION**

I, David L. McColgin, Assistant Federal Defender, Supervising Appellate Attorney, Defender Association of Philadelphia, Federal Court Division, hereby certify that the electronic version of the attached brief sent by e-mail to the Court was automatically scanned by Symantec AntiVirus Corporate Edition, version 8.00, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

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DAVID L. McCOLGIN

DATE: May 25, 2005

**CERTIFICATE OF SERVICE**

I, David L. McColgin, Assistant Federal Defender,  
Supervising Appellate Attorney, Defender Association of  
Philadelphia, Federal Court Division, hereby certify that I have  
filed this same day, both in electronic and paper form, the Brief  
for Amici Curiae and served two (2) copies, via first class U.S.  
mail, upon the following:

Kelly R. Labby, Esq.  
Assistant United States Attorney  
17 South Park Row, Room A330  
Erie, PA 16501-1158

Thomas Patton, Esq.  
Assistant Federal Defender  
1111 Renaissance Centre  
1001 State Street  
Erie, PA 16501

\_\_\_\_\_  
DAVID L. McCOLGIN

DATE: May 25, 2005