

No. \_\_\_\_\_  
IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER 2005 TERM

DAVID O'DONALD,  
Petitioner

v.

TRACY JOHNS, WARDEN,  
Respondent

**MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS**

Petitioner, David O'Donald, pursuant to Title 18, United States Code, Section 3006A(d) (6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Petitioner in the United States Court of Appeals for the Third Circuit.

DATED: January 3, 2006

Respectfully submitted,

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TO THE UNITED STATES COURT OF APPEALS

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FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. Does 18 U.S.C. § 3624(b) make federal prisoners eligible for up to 54 days of good conduct time credit for each year of their "term of imprisonment" imposed by the sentencing court, or only for 54 days for each year of time they actually serve, or is the statute ambiguous?

2. If the statute is ambiguous, as nine Circuit Courts of Appeals have held, does the rule of lenity apply to construction of the statute requiring the Court to conclude that the statute unambiguously states that prisoners serve the shorter sentence and thus leaving no room for agency discretion in construing the statute for purposes of Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984)?

**TABLE OF CONTENTS**

Question Presented . . . . . i

Table of Authorities . . . . . iii

Opinions and Orders Entered in this  
Case by the Courts Below . . . . . vi

Statement of Jurisdiction . . . . . vii

Statutory Provisions Involved . . . . . viii

Statement of the Case . . . . . 1

Reasons for Granting the Writ . . . . . 5

Conclusion . . . . . 25

Contents of Appendix:

District Court's Memorandum Order denying  
Petitioner's petition for writ of habeas corpus . . . 1a

Opinion of the United States Court of Appeals for  
the Third Circuit dated March 22, 2005 . . . . . 2a

Decision of the United States Court of Appeals for  
the Third Circuit denying petition for rehearing with  
suggestion for rehearing *en banc* . . . . . 3a

Certificate of Service . . . . . 27

Certificate of Declaration of Mailing Rule 29.2 . . . . . 28

**TABLE OF AUTHORITIES**

**CASES:**

|                                                                                     |            |
|-------------------------------------------------------------------------------------|------------|
| Bailey v. United States                                                             |            |
| 516 U.S. 137 (1995)                                                                 | 7,8        |
| Bernitt v. Martinez                                                                 |            |
| ___ F.3d ___, 2005 WL 3534188 *1 (8 <sup>th</sup> Cir. 2005)                        | 6,25       |
| Bifulco v. United States                                                            |            |
| 447 U.S. 381 (1980)                                                                 | 18         |
| Brown v. Gardner                                                                    |            |
| 513 U.S. 115 (1994)                                                                 | 8          |
| Brown v. McFadden                                                                   |            |
| 416 F.3d 1271 (11 <sup>th</sup> Cir. 2005)                                          | 6          |
| Burge v. Butler                                                                     |            |
| 867 F.2d 247 (5 <sup>th</sup> Cir. 1989)                                            | 21         |
| Caron v. United States                                                              |            |
| 524 U.S. 308 (1998)                                                                 | 24         |
| Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.                            |            |
| ___ 467 U.S. 837 (1984)                                                             | passim     |
| Clark v. Martinez                                                                   |            |
| 125 S.Ct. 716 (2005)                                                                | 18         |
| Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.<br>and Constr. Trades Council |            |
| 485 U.S. 568 (1988)                                                                 | 19         |
| EEOC v. Arabian American Oil Co.                                                    |            |
| 499 U.S. 244 (1991)                                                                 | 19         |
| General Dynamics Land Systems, Inc. v. Cline                                        |            |
| 124 S.Ct. 1236 (2004)                                                               | 18         |
| Hunter v. Fasching                                                                  |            |
| 195 F.2d 1007 (10 <sup>th</sup> Cir. 1952)                                          | 12         |
| I.N.S. v. St. Cyr                                                                   |            |
| 533 U.S. 289 (2001)                                                                 | 17,22      |
| Ladner v. United States                                                             |            |
| 358 U.S. 169 (1958)                                                                 | 18         |
| Leocal v. Ashcroft                                                                  |            |
| 125 S.Ct. 377 (2004)                                                                | 18         |
| Mistretta v. United States                                                          |            |
| 488 U.S. 361 (1989)                                                                 | 21         |
| Morales v. Trans World Airlines, Inc.                                               |            |
| 504 U.S. 374 (1992)                                                                 | 21         |
| Moreland v. Fed. Bureau of Prisons                                                  |            |
| ___ F.3d ___, 2005 WL 3030414, *4 (5 <sup>th</sup> Cir. 2005)                       | 6          |
| National Cable v. Brand X Internet                                                  |            |
| 125 S.Ct. 2688 (2005)                                                               | 16-18      |
| O'Donald v. Johns                                                                   |            |
| 402 F.3d 172 (3 <sup>rd</sup> Cir. 2005)                                            | passim     |
| Pacheco-Camacho v. Hood                                                             |            |
| 272 F.3d 1266 (9 <sup>th</sup> Cir. 2001)                                           | 6,14,24,25 |

|                                           |           |
|-------------------------------------------|-----------|
| Perez-Olivo v. Chavez                     |           |
| 394 F.3d 45 (1 <sup>st</sup> Cir. 2005)   | 6,25      |
| Petty v. Stine                            |           |
| 424 F.3d 509 (6 <sup>th</sup> Cir. 2005)  | 6,25      |
| Russello v. United States                 |           |
| 464 U.S. 16 (1983)                        | 9         |
| Sash v. Zenk                              |           |
| 428 F.3d 132 (2 <sup>nd</sup> Cir. 2005)  | 6         |
| U.S. v. Ron Pair Enterprises, Inc.        |           |
| 489 U.S. 235 (1989)                       | 14        |
| United States v. Bass                     |           |
| 404 U.S. 336 (1971)                       | 20        |
| United States v. Maria                    |           |
| 186 F.3d 65 (2 <sup>nd</sup> Cir. 1999)   | 9         |
| United States v. R.L.C.                   |           |
| 503 U.S. 291 (1992)                       | 20        |
| United States v. Thompson/Center Arms Co. |           |
| 504 U.S. 505 (1992)                       | 18        |
| United States v. Vonn                     |           |
| 535 U.S. 55 (2002)                        | 23        |
| United States v. Wilson                   |           |
| 503 U.S. 329 (1992)                       | 13        |
| United States v. Wiltberger               |           |
| 18 U.S. (5 Wheat) 76 (1820)               | 19        |
| Wasko v. Vasquez                          |           |
| 820 F.2d 1090 (9 <sup>th</sup> Cir. 1987) | 21        |
| White v. Scibana                          |           |
| 390 F.3d 997 (7 <sup>th</sup> Cir. 2005)  | 6,9,14,25 |
| Yi v. Fed. Bureau of Prisons              |           |
| 412 F.3d 526 (4 <sup>th</sup> Cir. 2005)  | 6,14,25   |
| Zadvydas v. Davis                         |           |
| 533 U.S. 678 (2001)                       | 18        |

**STATUTES:**

|                                                          |        |
|----------------------------------------------------------|--------|
| Title 18 U.S.C. § 710,                                   |        |
| recodified in 1948 as 18 U.S.C. § 4161                   | 11     |
| Title 18 U.S.C. § 3624(b)                                | passim |
| Title 18 U.S.C. § 4161, as repealed by Section 235(a)(1) |        |
| of Pub. L. 98-473, effective November 1, 1987, set       |        |
| out in <u>Federal Criminal Code and Rules</u> , 1137-38  |        |
| (West, 2004 ed.)                                         | 11,12  |
| Title 28 U.S.C. § 1254(1)                                | vii    |
| Title 28 U.S.C. § 1651(a)                                | vii    |
| Title 28 U.S.C § 2241                                    | vii,3  |

**MISCELLANEOUS:**

Friendly, H., *Benchmarks* (1967) . . . . . 20

Scalia, Antonin, *Judicial Deference to  
Administrative Interpretations of Law*,  
1989 Duke L.J. 511 . . . . . 22,23

1 William Blackstone, *Commentaries* \*92 . . . . . 20

H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N.  
at 2518-19 . . . . . 12

Bureau of Prisons Program Statement 5880.28 . . . . . passim

Sentence Computation Manual CCCA (1999) p. 1-45 . . . . . 9

*Webster's Third New International Dictionary* (1986) . . . . . 11

[http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp) . . . . . 6

**OPINIONS AND ORDERS ENTERED IN  
THIS CASE BY THE COURTS BELOW**

On June 1, 2004, United States Magistrate Judge Keith A Pesto filed a Report and Recommendation recommending that Mr. O'Donald's Petition for Writ of Habeas Corpus be denied. On June 10, 2004, United States District Judge Kim R. Gibson adopted the Report and Recommendation and denied Mr. O'Donald's petition. A copy of the Report and Recommendation and the District Court's order adopting the Report and Recommendation are attached to this petition as Appendix 1a.

On March 22, 2005, the United States Court of Appeals for the Third Circuit issued a precedential opinion affirming the District Court's denial of Mr. O'Donald's petition. A copy of that opinion is attached to this petition at Appendix 2a.

**STATEMENT OF JURISDICTION**

A writ of certiorari is sought from a precedential opinion of the United States Court of Appeals for the Third Circuit dated March 22, 2005. The basis for federal jurisdiction in the district court was 28 U.S.C § 2241.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a) which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The time for filing a Petition for Writ of Certiorari began to run on October 4, 2005, when the United States Court of Appeals for the Third Circuit denied Mr. O'Donald's petition for rehearing with suggestion for rehearing *en banc*. The time for filing a Petition for Writ of Certiorari expires on January 3, 2006.

### STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of 18 U.S.C. § 3624, the statute that governs the awarding of good conduct time ("GCT") credit to federal inmates. In pertinent part, the version of § 3624 applicable to Mr. O'Donald states:

**(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) A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days, at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate.

The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. 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.

## STATEMENT OF THE CASE

This case presents the question of how good conduct time credit should be calculated for well behaved federal inmates. Answering this question requires the interpretation of Title 18 U.S.C. § 3624(b), a federal statute that nine out of the ten United States Courts of Appeals that have addressed the issue have found to be ambiguous. The interpretation of this statute affects each of the 188,998 inmates currently housed by the Bureau of Prisons who are serving sentences longer than one year but less than life, so its impact is substantial. Mr. O'Donald submits that § 3624(b)'s language is plain and requires the Bureau of Prisons to give him a credit of 54 days, beyond his time served, for each year of his term of imprisonment. In addition to being required by the plain language of the statute, this reading of the statute results in a simple, straight forward method of calculating good conduct time that is consistent with the method used to award good conduct time to federal inmates for over three quarters of a century prior to § 3624(b)'s enactment.

If this Court finds § 3624(b) ambiguous, the case then presents the question of how that ambiguity should be resolved. Mr. O'Donald submits that the venerable rule of lenity must be applied to resolve the ambiguity in his favor as § 3624(b) affects the severity of his sentence. While this Court's case

law makes this result seem uncontroversial, the lower courts have subjugated the rule of lenity to the Bureau of Prisons' interpretation of § 3624(b) which, perhaps not surprisingly, resolves any ambiguity in the statute against Mr. O'Donald, extending his term of imprisonment by 84 days. The path to this remarkable result is set forth below.

Mr. O'Donald is serving a 144-month sentence of imprisonment for armed bank robbery. He has thus far been a model prisoner and has not lost any good conduct time (GCT) due to misbehavior. The Bureau of Prisons (BOP) has calculated that the maximum amount of GCT Mr. O'Donald can earn, if he continues to behave, is 564 days, placing his release date at May 4, 2007. This calculation is based upon the BOP's interpretation of § 3624(b) that inmates earn GCT based upon time served, not based upon the sentence of imprisonment imposed.

Mr. O'Donald challenged the BOP's GCT calculation, arguing that § 3624(b) requires that he receive credit towards the service of his "**sentence, beyond the time served,**" of 54 days at the end of each year of his "**term of imprisonment.**" Under this reading of the statute, Mr. O'Donald is entitled to receive 648 days (12 x 54) of GCT, if he continues to behave, which would place his release date at February 12, 2007. Mr. O'Donald contends that the statute affords him a "credit" of up to 54 days "at the end of each year" of his "term of imprisonment."

That is, once Mr. O'Donald has served a year, the Bureau must decide how much credit he gets and deduct the credit from the year, establishing the date on which the year of the "term of imprisonment" ended. A year after that date, the Bureau must deduct the next credit, and so on. Under the statute, Mr. O'Donald could receive 648 days credit on his twelve-year term, rather than the 564 days accorded by the BOP. Mr. O'Donald further argued that if § 3624(b) was ambiguous as to whether GCT applied to the term of imprisonment imposed or time served the rule of lenity required that the ambiguity be resolved in his favor.

After exhausting his administrative remedies, Mr. O'Donald filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Western District of Pennsylvania challenging the BOP's calculation of his GCT. The Magistrate Judge to whom the case was referred recommended denying the petition. The Magistrate Judge found that § 3624(b) unambiguously required GCT to be calculated based on time served and even if the statute were ambiguous the BOP's program statement interpreting the statute to require GCT to be applied to time served was entitled to deference. The District Court adopted the Magistrate Judge's Report and Recommendation and denied the petition. On appeal, at the government's request, the case was consolidated with

Weaver v. Johns, Case No. 04-3116, another pro se case.

The United States Court of Appeals for the Third Circuit issued a per curiam opinion rejecting Mr. O'Donald's argument. Contrary to the District Court, the Third Circuit found § 3624 ambiguous as to whether GCT should be calculated based on the "term of imprisonment" imposed or "time served." Having found § 3624(b) ambiguous, the Third Circuit held that it "must defer to the BOP's interpretation" of the statute pursuant to Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) because the BOP's interpretation was reasonable. The rule of lenity did not apply, the Third Circuit held, because deference to the BOP's interpretation of the statute removed any ambiguity from the statute.

### REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Court should grant certiorari to definitively interpret the federal good conduct time statute as that statute impacts the liberty of almost all federal inmates and has been found ambiguous by nine United States Courts of Appeals.

There are two reasons this case is worthy of this Court's review. First, the statute at issue impacts the length of virtually every federal inmate's sentence and has been found ambiguous by nine of the ten United States Courts of Appeals that have considered the issue. It is therefore appropriate for this Court to definitively interpret the statute. Second, if the Court finds the statute ambiguous, the Court must clarify that the rule of lenity requires that the ambiguity be resolved in Mr. O'Donald's favor, leaving the statute unambiguous, thereby leaving no room for a contrary interpretation by the Bureau of Prisons. The Third Circuit along with several other Circuit Courts of Appeals have eviscerated the rule of lenity by resolving any ambiguity in the statute by deferring to the Bureau of Prison's interpretation of the statute and then finding the rule of lenity inapplicable because, by virtue of deference to the Bureau of Prisons interpretation of the statute, the statute is no longer ambiguous. This reasoning is in direct conflict with this Court's precedent.

**A. This Court must definitively interpret § 3624(b).**

There are currently 188,998 federal inmates in BOP custody. [http://www.bop.gov/locations/weekly\\_report.jsp](http://www.bop.gov/locations/weekly_report.jsp) (as visited January 2, 2006), and the length of almost all of those inmates' sentences is directly impacted by § 3624(b). Nine United States Courts of Appeals, including the Third Circuit in this case, have found that in enacting § 3624(b) Congress may have intended federal inmates to receive up to 54 days of GCT for each year of their "term of imprisonment" or Congress may have intended federal inmates to receive up to 54 days of GCT for each year actually served.<sup>1</sup> Assuming an inmate receives some GCT, she will always serve less time than the term of imprisonment imposed so awarding GCT based upon time served results in the inmate receiving less GCT time than awarding GCT based upon the term of imprisonment. The correct interpretation of the statute, therefore, determines the length of tens of thousands of inmates' sentences. This is reason enough for this Court to grant certiorari but what cements the need for certiorari is that the plain language of the statute requires GCT to be

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<sup>1</sup>Perez-Olivo v. Chavez, 394 F.3d 45, 51-52 (1<sup>st</sup> Cir. 2005); Sash v. Zenk, 428 F.3d 132, 136 (2<sup>nd</sup> Cir. 2005); O'Donald v. Johns, 402 F.3d 172, 174 (3<sup>rd</sup> Cir. 2005); Yi v. Fed. Bureau of Prisons, 412 F.3d 526, 533-34 (4<sup>th</sup> Cir. 2005); Petty v. Stine, 424 F.3d 509, 510 (6<sup>th</sup> Cir. 2005); White v. Scibana, 390 F.3d 997, 1002 (7<sup>th</sup> Cir. 2005); Bernitt v. Martinez, \_\_\_ F.3d \_\_\_, 2005 WL 3534188 \*1 (8<sup>th</sup> Cir. 2005); Pacheco-Camacho v. Hood, 272 F.3d 1266, 1270 (9<sup>th</sup> Cir. 2001); Brown v. McFadden, 416 F.3d 1271, 1273 (11<sup>th</sup> Cir. 2005); but see Moreland v. Fed. Bureau of Prisons, \_\_\_ F.3d \_\_\_, 2005 WL 3030414, \*4 (5<sup>th</sup> Cir. 2005) (holding § 3624(b) unambiguously requires GCT to be awarded based on time served).

calculated based upon the term of imprisonment.

The Third Circuit, and every other Court of Appeals that has found § 3624(b) to be ambiguous, found that Congress' third use of the phrase "term of imprisonment" in 18 U.S.C. § 3624(b) was, unlike the first two uses of the phrase, "ambiguous." But application of traditional canons of construction to the statute shows that the phrase "term of imprisonment" in subsection (b) is not ambiguous and must mean the sentence "imposed." In finding the phrase "term of imprisonment" ambiguous, the Third Circuit erred in failing to give it its "ordinary or natural" meaning, Bailey v. United States, 516 U.S. 137, 145 (1995), of the "sentence imposed;" it also failed to apply the "vigorous" presumption that when such a phrase is used more than once in the same sentence it means the same thing each time; it further failed to consider that, since Congress used both the phrases "time served" and "term of imprisonment" in the same sentence, there is a strong presumption that those phrases mean different things; and, finally, it entirely overlooked the provision of the statute requiring that the credit apply toward the "sentence, **beyond** the time served," not toward actual time served itself. When these traditional methods of interpretation are properly applied, and all provisions of the statute are considered, it is clear that the Third Circuit erred in holding that the phrase is ambiguous.

At issue in this case is the meaning of the phrase "term of imprisonment" when § 3264(b) says that a prisoner "serving a **term of imprisonment** of more than one year, other than a **term of imprisonment** for the duration of his life shall receive credit toward the service of the prisoner's sentence, beyond the time served, of fifty-four days, at the end of each year of his **term of imprisonment.**" In construing this provision, the Third Circuit erred initially in failing to give the phrase "term of imprisonment" its "ordinary or natural" meaning, Bailey v. United States, 516 U.S. 137, 145 (199 ), which is the "sentence imposed." While the phrase might mean "time served" if context dictated, here the context amply confirms that the ordinary meaning of the phrase was intended, and the phrase is not ambiguous. Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

The Third Circuit further erred in not interpreting the phrase consistently, as required by its context. Since the phrase is used three times within the same sentence, the context creates a "vigorous" presumption that it means the same thing each time. Brown v. Gardner, 513 U.S. at 118 ("presumption that a given term is used to mean the same thing throughout a statute ... is surely at its most vigorous when a term is repeated within a given sentence"). In the first two instances, the

statute provides that a prisoner is eligible to receive good conduct time credit only if his "term of imprisonment" is more than one year, and less than life, and it is impossible for "term of imprisonment" to mean time served in either case, as the Third Circuit and the BOP acknowledges. O'Donald, 402 F.3d at 174; BOP Program Statement 5880.28, Sentence Computation Manual CCCA (1999) p. 1-45; See also, White v. Scibana, 390 F.3d 997, 1001 (7<sup>th</sup> Cir. 2004). Thus, the meaning of "term of imprisonment" is not unclear in those instances, and the phrase indisputably means sentence imposed.

Once it is established that the words "term of imprisonment" mean "sentence imposed" the first two times they are used, the BOP must overcome the strong presumption that Congress meant them to mean the same thing the third time. The Third Circuit opinion gives no sufficient basis for overcoming that strong presumption.

Because Congress used the phrase "time served" in the same sentence in which it used "term of imprisonment," there is a further strong presumption that they mean different things and that "term of imprisonment" does not mean "time served." United States v. Maria, 186 F.3d 65, 71 (2<sup>nd</sup> Cir. 1999) (use of "different words" strongly suggests "different meanings were intended"); see Russello v. United States, 464 U.S. 16, 23 (1983) (declining to give different words the same meaning).

The Third Circuit gives no sound reason why Congress would first have used "term of imprisonment" to mean "sentence imposed," then have used the phrase "time served" to convey its ordinary meaning, and then, a few words away, have used the phrase "term of imprisonment" differently, to mean "time served," instead of simply using the words "time served" again. Had Congress meant "time served," it would certainly have said so, just as it had earlier in the same sentence. The Third Circuit's holding improperly assumes that Congress used words in an entirely arbitrary manner.

Finally, the Third Circuit opinion entirely overlooks language of subsection (b) explicitly stating that the credit is not based on "time served." The section specifically provides that the "credit" applies towards the "sentence, **beyond** the time served." The only interpretation that gives this phrase any independent meaning is to construe it to provide that the credit is not based on time served, but on the "sentence, beyond the time served." This language, which the Third Circuit entirely overlooked, explicitly confirms O'Donald's reading of the statute giving the words "term of imprisonment" their ordinary meaning and reading them consistently in subsection (b) to mean "sentence imposed."

A consistent reading of "term of imprisonment" in § 3624(b) results in a simple, straight-forward method of awarding GCT.

An inmate whose term of imprisonment is longer than one year but less than life can estimate the total GCT he can earn by multiplying his term of imprisonment, in years, by 54. The credit is a deduction, see Webster's Third New International Dictionary 532-33 (1986) (credit means "deduction from an amount otherwise due"), made yearly "at the end of each year of the ... term of imprisonment," that reduces the time served for the year from 365 to 311 days, ending the year 54 days earlier than it otherwise would have. The BOP's method of calculating GCT based on time served makes GCT difficult to calculate, requiring the use of lengthy calculations that the BOP admits are "arithmetically complicated" and require forty-five pages to explain. P.S. 5880.28 p. 1-44.

Keeping the meaning of term of imprisonment consistent throughout § 3624(b) also has the benefit of complying with the method used to award GCT for most of the Twentieth Century. The old version of the good time statute, 18 U.S.C. § 710, recodified in 1948 as 18 U.S.C. § 4161,<sup>2</sup> permitted a "deduction from the term of [the prisoner's] sentence" of a certain number of "days for each month" in the sentence. Id. With a brief exception discussed below, under that statute the settled method of calculating the credit was "by multiplying the number of

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<sup>2</sup>See 18 U.S.C. § 4161, as repealed by Section 235(a)(1) of Pub. L. 98-473, effective November 1, 1987, set out in Federal Criminal Code and Rules, 1137-38 (West, 2004 ed.).

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. This method of calculating GCT resulted in prisoners receiving GCT credit for time they did not actually serve but no one found this "unseemly." To the contrary, Congress expressly chose this method of calculating GCT over the time served method.

In Hunter v. Fasching, 195 F.2d 1007 (10<sup>th</sup> Cir. 1952) the Tenth Circuit held that a minor wording change made to § 4161 in 1948 required that GCT be awarded based on time actually served. The Attorney General responded by asking Congress to amend the statute to return to awarding GCT based upon the sentence imposed because the Tenth Circuit's holding "require[d] well-behaved prisoners to serve longer periods of confinement than they would under the method of computation which had been used through half a century." H.R. Rep. 86-935, reprinted in 1959 U.S.C.C.A.N. at 2518-19. Congress complied with the Attorney General's request, amending the statute to "return to the [previous] method of computing good conduct time," basing the credit on the "sentence as imposed by the court." Id. The statute then remained substantially unchanged until its repeal, effective November 1, 1987.

Nothing in the language of § 3624(b) or its legislative history indicates that Congress intended to change from its

chosen method of awarding GCT based upon the sentence imposed to a new method, which it had previously rejected, of awarding GCT based upon time served. Congress cannot be assumed to have changed such a long-standing policy without signaling its intentions clearly. United States v. Wilson, 503 U.S. 329, 336 (1992) (“It is not lightly to be assumed that congress intended to depart from a long established policy.”).

The primary ground the Third Circuit offered for finding the phrase “term of imprisonment” ambiguous was that basing the GCT on the sentence imposed would lead to the “unseemly” result of prisoners receiving GCT for time they did not actually serve. O’Donald, 402 F.3d at 174. Since, “[a]s an inmate earns GCT each year, his overall time to serve is reduced,” the Third Circuit believed he would receive “GCT for time he was not actually incarcerated.” Id. This “unseemly result,” the panel concluded, would “frustrate the process and militates against finding that the phrase ‘term of imprisonment’ unambiguously refers to the sentence imposed.” O’Donald, 402 F.3d at 174. This reasoning is without basis in the text of the statute and fails to comprehend the actual method of sentence computation that the statute requires.

First, the Third Circuit pointed to no language in the statute disapproving basing the credit on time not actually served, since the statute explicitly bases it on the “sentence,

beyond the time served." If the language of a statute is plain, a court must enforce the statute as written unless doing so creates results demonstrably at odds with Congress' intent. U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989). Moreover, as explained above, for the better part of a century prior to enactment of § 3624(b), Congress explicitly approved a policy of basing credit on the sentence "as imposed by the court," a policy that inevitably grants credit for time not served and explicitly rejected a policy of basing credit on time served. Nothing in the statute or its history suggests that Congress believed such a long-standing policy was "unseemly." Accordingly, enforcing § 3624(b) as written, that "term of imprisonment" means sentence imposed, is not demonstrably at odds with the intent of its drafters.

Second, reading "term of imprisonment" to mean sentence imposed does **not** in fact result in any unseemly windfall to prisoners or defeat the purposes of the statute, as the Third Circuit and several other courts seem to have feared. O'Donald, 402 F.3d at 174; Yi, 412 F.3d at 531-32; White, 390 F.3d at 1001-02; Pacheco-Camacho, 272 F.3d at 1268-69. Under Mr. O'Donald's reading of the statute a prisoner must earn every day of GCT, which is deducted from the year of the term of imprisonment after a year has been served. After a year has been served, the BOP reviews the prisoner's conduct and makes

a bookkeeping entry showing that the prisoner satisfied the full year on, for example, the 311<sup>th</sup> day served (if a 54 day deduction is warranted) and that a new year began on the 312<sup>th</sup> day. At the end of the new year, the BOP again makes such an entry showing the effect of another credit, and so on. There is no "windfall," and the Bureau may review a year of conduct at the end of each year except the last.<sup>3</sup>

At bottom, the flaw in the Third Circuit's "unseemly" argument is that it simply assumes what the BOP seeks to prove: that Congress intended good conduct time to be based on the time served and not on the term of imprisonment. If Congress intended that prisoners receive 54 days credit for each year of their term of imprisonment there is nothing "unseemly."

Depriving a citizen of his liberty is the government's most extreme use of its power short of execution. As such, inmates being deprived of their liberty, and their family and friends, deserve to know that the length of their prison sentences conforms to the law. Accordingly, this Court should grant certiorari to determine definitively whether § 3624(b) requires GCT to be awarded based upon the term of imprisonment imposed or time served.

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<sup>3</sup> In the last year of the term, to avoid a prisoner serving excess time, the time must be "credited during the last six weeks of the sentence," not after a year has been served. 18 U.S.C. § 3624(b).

**B. This Court should clearly enunciate the principle that the rule of lenity requires any ambiguity found in a statute that affects the severity of an inmates sentence must be resolved in favor of the inmate.**

If § 3624(b) is ambiguous, it is vital that the ambiguity be resolved in favor of federal inmates pursuant to the rule of lenity rather than against federal inmates based on deference to the BOP's interpretation of the statute. The rule of lenity exists, in part, to assure that no man languishes in prison unless the lawmaker has clearly said he should. The Third Circuit's opinion turns the rule of lenity on its head by concluding that the ambiguity in § 3624(b) must be resolved against Mr. O'Donald, thereby lengthening his sentence, because the court was required to accept the BOP's interpretation of § 3624(b). This logic allows the jailer to determine the length of the sentence when Congress has failed to make the length of the sentence clear and must be rejected.

The Court addressed this issue last term, albeit in a different context. In National Cable v. Brand X Internet, 125 S.Ct. 2688, 2700-02 (2005), the Court had to determine if the Ninth Circuit's judicial interpretation of 47 U.S.C. § 153(46) took precedent over a contrary interpretation of the statute by the Federal Communications Commission, the agency responsible for administering the statute. The Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the

prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” Id. at 2700. This Court gave as an example of such a situation a court invoking a rule of construction, “**(such as the rule of lenity)**” requiring it to conclude that the statute was unambiguous to reach its judgment. Id. at 2701-02 (emphasis added). In such a situation, the rule of lenity removes any ambiguity in the statute and leaves no room for agency discretion.

The Court has consistently applied traditional canons of statutory construction to remove ambiguity from statutes rather than defer to agency interpretations of those statutes. In I.N.S. v. St. Cyr, 533 U.S. 289 (2001), for example, the Court found a statute repealing relief from deportation to be ambiguous with respect to whether it could be applied retroactively. Id. at 320. The Court rejected the I.N.S.’s argument that its own construction of the statute was entitled to deference under Chevron explaining:

We only defer, however, to agency interpretations of statutes that, applying the normal tools of statutory construction are ambiguous. Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for Chevron purposes, no ambiguity in such a statute for an agency to resolve.

Id. at 320 n. 45 (internal quotations and citations omitted).

National Cable and St. Cyr put into practice this Court’s

finding that “[e]ven for an agency able to claim all the authority possible under Chevron, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.” General Dynamics Land Systems, Inc. v. Cline, 124 S.Ct. 1236, 1248 (2004). Included in “the devices of judicial construction” are “traditional tools of statutory construction.” Chevron, 467 U.S. at 842. The rule of lenity is a traditional tool of statutory construction “whose purpose is to help give authoritative meaning to statutory language.” United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 n.10 (1992); Ladner v. United States, 358 U.S. 169, 178 (1958) (Court will not construe a statute to “increase the penalty” on an individual, when it is ambiguous); see Bifulco v. United States, 447 U.S. 381, 387 (1980) (rule of lenity applies to “penalties”). Thus, National Cable’s invocation of the rule of lenity as an example of a rule of statutory construction that removes all ambiguity from a statute leaving no ambiguity for an agency to resolve. See also Leocal v. Ashcroft, 125 S.Ct. 377, 384 n.8 (2004) (invoking rule of lenity to reject I.N.S.’s interpretation of 18 U.S.C. § 16’s definition of crime of violence); Zadvydas v. Davis, 533 U.S. 678 (2001), and Clark v. Martinez, 125 S.Ct. 716 (2005) (invoking rule of constitutional avoidance to reject agency interpretation of statute); 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 applies "longstanding" presumption against extra-territorial effect, rather than deferring to the views of the EEOC)<sup>4</sup>.

It is simply beyond dispute that courts must employ the traditional tools of statutory construction, such as the rule of lenity, to resolve ambiguity in a statute **before** giving deference to an agency interpretation of the statute. This not only makes sense as a matter of statutory interpretation, it also helps protect against potential due process and separation of powers issues.

In United States v. Wiltberger, 18 U.S. (5 Wheat) 76 (1820), Chief Justice Marshall noted that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." Id. at 95. The rule was, he went

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<sup>4</sup>In applying the presumption against extraterritoriality, the Court found a lower level of deference applicable to the E.E.O.C.'s position than would have been granted under Chevron. 499 U.S. at 256-57. Justice Scalia, concurring, thought Chevron deference warranted, but would, nonetheless, have found that deference overcome by the presumption against extraterritoriality. Id. at 259-60.

on, "founded on the tenderness of the law for the rights of individuals; and on the principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define the crime, and ordain its punishment." *Id.* (emphasis supplied); see 1 William Blackstone, *Commentaries* \*92 ("A man cannot suffer more punishment than the law assigns, but he may suffer less.").

The rule thus 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." *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."" *United States v. R.L.C.*, 503 U.S. 291, 305 (1992), quoting *United States v. Bass*, 404 U.S. 336, 348 (1971), quoting H. Friendly, *Benchmarks* 209 (1967). 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.*

The imprisonment of a person, when it is not clear that Congress itself intended that result, implicates due process as well as separation of powers interests, and the rule of lenity acts as both a protection of the "rights of individuals" against unauthorized punishments and a means of assuring the constitutional distribution of power. See Burge v. Butler, 867 F.2d 247, 250 (5<sup>th</sup> Cir. 1989) (punishment not authorized by legislature violated due process); 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 power to make sentencing guidelines in Executive would raise constitutional question by "unit[ing] the power to prosecute and the power to sentence within one Branch").

The rules of statutory 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. 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.

Moreover, consideration of the rationale for the Chevron doctrine shows that specific substantive canons of construction such as the rule of lenity should displace Chevron when they conflict, for they perform the very function that Chevron performs in ways superior to Chevron and they protect substantive values Chevron does not address. The Chevron doctrine is justifiable in general on the basis of Congressional intent, recognizing that the intent is in most cases a "fictional presumed intent," that the rule "operates principally as a background rule of law against which Congress legislates," and that its function is to inform Congress that the "ambiguities [Congress] creates ... will be resolved ... not by the courts but by a particular agency, whose policy biases will ordinarily be known." Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (hereafter "Scalia").

Given the basis for Chevron, then, there are three reasons

its doctrine should not displace specific existing canons of statutory construction. First, the mere “fictional presumed intent” of Congress involved in Chevron can hardly be said to have gone so far as to extinguish the effectiveness of rules the courts have followed for decades or centuries. There is nothing in Chevron or any of its progeny to suggest that it allows the courts to presume an even broader intent to repeal the rule of lenity, or other such rules, in circumstances to which Chevron applies. Indeed, Chevron says just the opposite. 467 U.S. at 842 n. 9 (preserving “traditional tools of statutory construction”). Any repeal of the effect of existing substantive rules through a Congressional delegation would require a clear statement of intent, and could not simply be “presumed.” See United States v. Vonn, 535 U.S. 55, 65 (2002) (partial repeals by implication not favored).

Second, when the broad Chevron rule, based on this “fictional ... intent,” conflicts with a specific canon of construction like the rule of lenity, the specific rule performs the function of the general Chevron rule, by informing Congress who will resolve the “ambiguities it creates” in that context. Scalia, supra, at 517. Indeed, the specific rule performs this function better than Chevron does, for it also tells Congress what the result will be if Congress leaves any ambiguity, which Chevron cannot do.

Third, and finally, the specific rule fosters time-honored common-law or constitutional interests, such as the protection of personal liberty, which are beyond Chevron's scope. Thus, it is not surprising that, when these rules have come in conflict, the Supreme Court has abandoned Chevron in favor of rules that are well-established, specifically suited to the circumstances, and that further important interests.

The Third Circuit cited two cases in support of its finding that the rule of lenity did not apply because the ambiguity in the statute had been resolved by other means, Caron v. United States, 524 U.S. 308, 316 (1998), and Pacheco-Camacho, 272 F.3d at 1271-72. Neither case supports the Third Circuit's holding. Caron rejected the application of the rule of lenity because the Court found the statute at issue unambiguous. This hardly supports the Third Circuit's ruling as it specifically found that § 3642(b) **is** ambiguous. Pacheco-Camacho found the rule of lenity did not apply to § 3624(b), even though the Ninth Circuit found the statute to be ambiguous, because the BOP's policy statements and published regulations interpreting § 3624(b) gave fair warning that GCT would be calculated based upon time served. While that may or may not be true, that does not address the rule of lenity's concern that no man languish in prison unless the lawmaker has clearly said he should. In this case, the Third Circuit explicitly found that it was not clear

that Congress intended Mr. O'Donald to spend the additional 84 days in prison the BOP says he must.

Subjugating the rule of lenity to Chevron deference eviscerates the rule of lenity's protection against inmates languishing in prison unless the lawmaker has clearly said he should. Under the Third Circuit's methodology, also adopted by several other Courts of Appeals<sup>5</sup>, if the lawmaker has not clearly set the punishment the agency that executes the punishment gets to decide the extent of the punishment. That conflicts with this Court's precedent and must be rejected. The rule of lenity must apply and any ambiguity in § 3624(b) must be resolved in Mr. O'Donald's favor.

#### **CONCLUSION**

For all of the foregoing reasons, it is respectfully requested that the within petition for writ of certiorari be

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<sup>5</sup>Perez-Olivo, 394 F.3d at 53 (rule of lenity does not foreclose deference to an administrative agency's reasonable interpretation of a statute); Yi, 412 F.3d at 535 ("Rather than apply a presumption of lenity to resolve the ambiguity, Chevron requires that we *defer* to the agency's reasonable construction of the statute.") (emphasis in original); Petty, 424 F.3d at 510 ("The BOP's interpretation of the statute is reasonable."); White, 390 F.3d at 1002-03 (§ 3624(b) ambiguous and court therefore must defer to BOP's interpretation of statute); Bernitt, 2005 WL 3534188, \*1 ("Because section 3624(b) is ambiguous, we must defer to the BOP's interpretation if it is reasonable."); Pacheco-Camacho, 272 F.3d at 1271 ("To the extent that there is any ambiguity in section 3624(b), the BOP has resolved it through a reasonable interpretation, and the rule of lenity does not apply."); Brown, 416 F.3d at 1273 (rule of lenity inapplicable because of the BOP's reasonable interpretation of § 3624(b)).

granted, and that this Court accept Mr. O'Donald's case for review.

Respectfully submitted,

LISA B. FREELAND  
Federal Public Defender

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Thomas W. Patton  
Assistant Federal Public Defender  
Counsel for Petitioner,  
David O'Donald

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was mailed this 3<sup>rd</sup> day of January, 2006, to the following:

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No. \_\_\_\_\_  
IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER 2005 TERM

DAVID O'DONALD, Petitioner

v.

TRACY JOHNS, WARDEN,  
Respondent

**DECLARATION PURSUANT TO RULE 29.2**  
**OF THE RULES OF THE SUPREME COURT**

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari on behalf of David O'Donald was mailed to the Clerk's Office of the United States Supreme Court in Washington, D.C., postage and fees paid (USC-426), First Class Mail.

DATE: January 3, 2006

\_\_\_\_\_  
Thomas W. Patton  
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