## Misinterpretation of the Federal

# Good Time Statute

## Costs Prisoners Seven Days Every Year

By Stephen R. Sady

Wouldn't it be incredible if the Bureau of Prisons (BOP) has been miscalculating good time credits by seven days a year for every year of incarceration since 1987?

Wouldn't it be outrageous if, despite Senator Joseph Biden's intent — as co-author of the federal good time statute — that federal prisoners receive a 15 percent reduction in their sentences for good behavior, the Bureau of Prisons never allows a reduction greater than 12.8 percent?

Wouldn't it be awesome if, by correcting the BOP's misinterpretation of the statute, current federal prisoners would avoid up to 25,000 years of over-incarceration, saving taxpayers over $500,000,000?

Incredibly, the BOP has mangled the plain language of the good time statute. The BOP rule affects about 95 percent of federal prisoners sentenced since 1987, those eligible for good time under 18 U.S.C. § 3624(b). Despite the express intent of Congress to apply good time credits to the "term of imprisonment" imposed by the sentencing judge, the BOP applies good time only to time actually served. This means that every eligible federal prisoner is imprisoned seven days more per year than Congress intended.

The BOP implemented its erroneous interpretation of the statute with no regard for legislative history and legislative intent. But a recent Ninth Circuit opinion found the good time statute "ambiguous," then deferred to the BOP's interpretation instead of applying the rule of lenity.

Today, you can help save prisoners millennia of time and taxpayers millions of dollars by joining efforts to litigate this issue in district courts around the country and to develop a conflict in the circuits. We need litigators in every district if the illegal and immoral over-incarceration is to be brought to an end.

But before you turn the page, and leave the litigation to another attorney, let me convince you the cause is just and worth the fight. The merits favor the prisoner in every way. The statute is plain, and all the rules of statutory construction endorse our interpretation. The problem is partly political: How to persuade judges that the rule of law should trump the administrative convenience — and perhaps embarrassment — of the jailers. The National Association of Criminal Defense Lawyers (NACDL), Families Against Mandatory Minimums (FAMM), and the National Association of Federal Defenders (NAFD) have provided *amicus* support, and the briefing necessary to litigate this issue is easily available from the NACDL Web site.[1]

### The statute states that good time credits are awarded against the term of imprisonment imposed by the court.

Let's start with the statute. Section 3624(b) expressly links calculation of good time to the "term of imprisonment":

> [A] prisoner who is serving a *term of imprisonment* of more than 1 year . . . 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*. . . . [C]redit 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]

In every judgment and commitment order entered in federal court, the trial judge sentences the defendant to be "imprisoned for a term of" whatever the guidelines demand in the particular case.[3] Given the words in the judgment, the plain meaning of "term of imprisonment" is the period of incarceration to which the judge sentences a prisoner.[4]

Congress made its intent clear by using 54 days — which is about 15 percent of 365 days. Listen to the words of Senator Joseph Biden:

> I was the co-author of that bill. In the Federal courts, if a judge says you are going to go to prison for 10 years, *you know you are going to go to prison for at least 85 percent of that time* — 8.5 years, which is what the law mandates. *You can get up to 1.5 years in good time credits, but that is all.* And we abolished parole. So you know you'll be in prison for at least 8.5 years.[5]

Contrary to Senator Biden's expectation, the BOP never gives more than 1.28 years on a ten-year sentence.[6] The BOP rule allows only 47 days credit for each year of the sentence imposed, requiring no less than 87.2 percent of the sentence to be actually served. Although the 85 percent rule has been universally recognized by federal lawyers and sentencing judges as the measure of good time, the rule is not honored.[7] No federal prisoner, no matter how virtuous, ever serves less than 87.2 percent of the sentence imposed.[8]

## The Bureau of Prisons only awards good time credit against actual time served, reducing the amount of credit to 47 days for each year of the sentence.

Contrary to congressional intent and the plain meaning of "term of imprisonment," the BOP explicitly rejects crediting good time against the sentence imposed. Instead, and without authority, the BOP, both in its regulations and its program statement, substituted for "term of imprisonment" the phrase "for each year served."[9] By only giving credit against actual time served, the calculation must be based on a complex formula (that no one really understands) that reduces the good time by seven days a year.[10] For example, in the pristine case of a sentence to a year and a day, the BOP maximum award of good time is 47 days. The BOP's short form of the eight-step formula is as follows:

54 / 365 = .148
366 x .148 = 54.168 (366 + 54 = 420)
366 - 54 = 312 x .148 = 46.176 (312 + 46 = 358)
366 - 46 = 320 x .148 = 47.36 (320 + 47 = 367)
366 - 47 = 319 x .148 = 47.212 (319 + 47 - 366)

In contrast, the statute calls for 54 days at the end of each year of the term of imprisonment (311 + 54 = 365).[11]

While seven days might not seem like much (except to the defense bar, the prisoner serving the time, and his or her family), the BOP formula multiplies the misery for every year of the prisoner's sentence. The good time statute applies to every prisoner who receives a sentence to more than a year and less than life imprisonment. There are currently approximately 137,435 federal prisoners serving guideline sentences greater than one year and less than life.[12] The mean sentence being served now is about 9.5 years.[13] At seven days per year, the time involved is over 25,000 years (137,435 x 7 x 9.5 / 365 = 25,039). At $22,174. per year for non-capital incarceration expenditures,[14] the meager seven days on each year of a prisoner's sentence could amount to over $554 million in taxpayer money that Congress did not intend or authorize to expend on incarceration for current prisoners, and over $58 million more for each new year. The human costs of this over-incarceration defy quantification.

## 'Term of imprisonment' has a plain meaning intended by Congress, and is not ambiguous, under the rules of statutory construction.

The bad news is that in the only previous litigation on this issue, the Ninth Circuit upheld the BOP's calculation.[15] The good news is that to do so, the opinion had to at least find "term of imprisonment" to be ambiguous.[16] In doing so, the Ninth Circuit ignored and violated four of the Supreme Court's basic rules of statutory construction. Under any rigorous review of the statute using the basic rules of interpretation, "term of imprisonment" is not in the slightest ambiguous. The plain and only meaning is the sentence to incarceration imposed by the sentencing judge in the judgment and commitment order.

*1. 'Term of imprisonment' always means the 'sentence imposed,' not 'time served.'*

The Supreme Court requires that statutory terms be construed "in their context and with a view to their place in the overall statutory scheme."[17] "Term of imprisonment" is one of the most often used phrases in the federal criminal lexicon. And the phrase does not mean "time served," nor is it ambiguous.

Substantive criminal statutes routinely state the maximum "imprisonment" a charge carries. The federal sentencing statutes consistently use "term of imprisonment" to refer to the judge's sentence to imprisonment. Congress used "term of imprisonment" dozens of times in the Comprehensive Crime Control Act of 1984, of which the good time statute is part, and always used it to mean the judge's sentence, not actual time in custody.[18] Even under the earlier parole statutes, "term of imprisonment" meant the entire sentence — time in custody plus time on supervision.[19] The statutes authorizing the U.S. Sentencing Commission, and the federal sentencing guidelines themselves, refer to "term of imprisonment" as the sentence imposed by the judge.[20]

Whether viewed standing alone or in the context of federal sentencing law, "term of imprisonment" is unambiguous. As Congress knew, those words have a well-understood, unambiguous meaning. "Term of imprisonment" is unambiguous in its myriad uses, and is not ambiguous in this one statute.

*2. Congress specifically amended the good time statutes to use the sentence imposed, not the actual time served, as the basis.*

The history of the good time statute demonstrates that Congress consciously amended the statute to calculate good time against the judge's sentence. When Congress amends a statute, Congress intends its amendment to have real and substantial effect.[21] This basic rule of construction, approved by the Supreme Court, demonstrates the statute is not ambiguous.

Between 1902 and 1948, federal good time statutes allowed a well-behaved prisoner to serve less time by receiving credit for good time against "the term of his sentence."[22] The time was deducted not from the time actually spent in prison, but from the term of the sentence in increments dependent upon the length of the term.

| TERM OF IMPRISONMENT | BOP MAXIMUM GOOD-TIME CREDIT FOR TERM IMPRISONMENT | | | BOP MAXIMUM GOOD-TIME CREDIT FOR EACH YEAR OF TERM OF IMPRISONMENT | ACTUAL TIME IN CUSTODY |
|---|---|---|---|---|---|
| 1 year and a day (or 366 days) | 47 days | ÷ 1 | = | 47 days | 319 |
| 2 years (or 730 days) | 94 days | ÷ 2 | = | 47 days | 636 |
| 3 years (or 1065 days) | 141 days | ÷ 3 | = | 47 days | 954 |
| 4 years (or 1460 days) | 188 days | ÷ 4 | = | 47 days | 1272 |
| 5 years (or 1825 days) | 235 days | ÷ 5 | = | 47 days | 1590 |
| 6 years (or 2190 days) | 282 days | ÷ 6 | = | 47 days | 1900 |
| 7 years (or 2555 days) | 329 days | ÷ 7 | = | 47 days | 2226 |
| 8 years (or 2920 days) | 372 days | ÷ 8 | = | 47.125 days | 2543 |
| 9 years (or 3285 days) | 424 days | ÷ 9 | = | 47.111 days | 2861 |
| 10 years (or 3650 days) | 471 days | ÷ 10 | = | 47.1 days | 3179 |

| TERM OF IMPRISONMENT | - | MAXIMUM STATUTORY 54 DAYS GOOD TIME CREDIT FOR EACH YEAR OF TERM OF IMPRISONMENT | | ACTUAL TIME IN CUSTODY |
|---|---|---|---|---|
| 1 year and a day (or 366 days) | - | 54 days (54 x 1) | = | 312 days |
| 2 years (or 730 days) | - | 108 days (54 x 2) | = | 622 days |
| 3 years (or 1065 days) | - | 162 days (54 x 3) | = | 903 days |
| 4 years (or 1460 days) | - | 216 days (54 x 3) | = | 1244 days |
| 5 years (or 1825 days) | - | 270 days (54 x 5) | = | 1555 days |
| 6 years (or 2190 days) | - | 324 days (54 x 6) | = | 1866 days |
| 7 years (or 2555 days) | - | 378 days (54 x 7) | = | 2177 days |
| 8 years (or 2920 days) | - | 432 days (54 x 8) | = | 2488 days |
| 9 years (or 3285 days) | - | 486 days (54 x 9) | = | 2799 days |
| 10 years (or 3650 days) | - | 540 days (54 x 10) | = | 3110 days |

*Different interpretations yield significant changes in good time credits and time served.*

In 1948, Congress adopted new statutory language: "to be credited as earned and computed monthly." Congress did so not to diminish the number of days a prisoner could earn but to address when the credit accrued. This language "was interpreted as requiring good time to be computed on the basis of actual time served rather than on the basis of the term of the sentence as imposed by the court."[23]

The precise problem that is occurring now developed first in 1948: "The effect of this interpretation is to require 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."[24] To solve this problem, Congress, in 1959, deleted the time served language and returned to the methodology of crediting against the sentence, not time served.[25]

In the current good time statute, Congress continued the pre-1948 and post-1959 formulation, eschewing language such as "credited as earned and computed monthly" and substituting "term of imprisonment." Thus, Congress specifically considered the loss of good time resulting from calculating against time actually served and rejected that method.

*3. The same words should mean the same thing in the samestatute.*

The Supreme Court has instructed that identical words — such as "term" and "term of imprisonment" — appearing in different parts of the same act have the same meaning.[26] In a bizarre and unwarranted departure from the rule of intra-statutory of consistency, the BOP treats "term of imprisonment" as the sentence imposed in one part of Section 3624(b) and as time actually served in the rest of Section 3624(b).

"Term of imprisonment" appears in the very first phrase of the statute. There it unambiguously means the sentence imposed by the court. It makes prisoners sentenced to a "term of imprisonment of more than one year" eligible to receive good time credit. Both the BOP and the Ninth Circuit recognize this.[27] Yet where the exact same words — "term" and "term of imprisonment" — are used later in the statute, the Ninth Circuit finds the words ambiguous and defers to the BOP's different interpretation of the same words to mean "time actually served."

"Term of imprisonment" and "term," in their second,third, and fourth appearances in the statute, mean the exact same thing as in their first unambiguous usage. The principle of intra-statutory consistency renders "term of imprisonment" unambiguous throughout the subsection. Because the words refer to the sentence imposed in the opening phrase of the subsection — and logically can have no other meaning — the words must have the same meaning throughout the statute.

Interestingly, the Ninth Circuit never addressed this obvious inconsistency. The court did recognize that "term of imprisonment" referred unambiguously to the judge's sentence in a different subsection of Section 3624, but refused to resolve the inconsistency. The Ninth Circuit noted that the use of "term of imprisonment" in Section 3624(a) — referring to the date of release — unequivocally refers to "term of imprisonment" as the judge's sentence.[28] But the Ninth Circuit let this incongruity stand.[29]

When Congress means time served, Congress says "time served," not "term of imprisonment." In Section 3624(b), the phrase "time served" is only used to specify that the 54 days is credited "beyond the time served." Prisoners should receive 54 days credit against terms of imprisonment of over one year, based on 311 days in custody, plus 54 days "beyond the time served," to equal each year (365 days) of the sentence imposed by the judge. The BOP's mathematical formula results in only 47 days for every year of a term of imprisonment. Instead of using "term served,"

Congress deliberately used the "term of imprisonment." The Supreme Court refrains from concluding that differing language — here "time served" and "term of imprisonment" — "has the same meaning in [two subsections]. . . . We would not presume to ascribe this difference to a simple mistake in draftsmanship."[30]

*4. Congress' intent to simplify good time calculations is thwarted by the BOP's interpretation.*

The Supreme Court looks to the purpose of the statute to aid in interpretation.[31] The legislative history demonstrates that the Comprehensive Crime Control Act of 1984 purposefully sought simplification and predictability in the calculation of sentences. Congress specifically referred to the need for change from "the complexity of current law" and the need for good time credit at an "easily determined rate."[32] The formula of 311 + 54 = 365 is simple, predictable, and comprehensible, both by the public in general, and by the prisoner, judges, and lawyers whom it most affects. Congress clearly intended Subsection (b) to "be considerably less complicated than under current law in many respects."[33]

The use of "time served" rather than the "term of imprisonment" requires complicated and virtually incomprehensible calculations. The BOP's method — covering dozens of explanatory pages and an eight-step process that the BOP itself terms "arithmetically complicated"[34] — is the type of complexity Congress sought to avoid. The BOP does not even claim that the eight-step formula meets the statutory language — the BOP formula only "best conforms" to the statute.[35]

The only reason for resorting to this mathematical complexity is an attempt to give effect to the erroneous designation of time served as the baseline. The underlying calculations for individual prisoners are not easily accessible to prisoners or the public. The BOP's methodology thwarts Congress' intent to simplify good time calculations.

The BOP defends its interpretation with the last sentence of Section 3624(b): "Credit for the last year or portion of the year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence." This sentence relates primarily to the time at which good time will be credited to an inmate and recognizes that sentences are not imposed solely in full year increments. Applying the credit to an imposed sentence does not thwart this process and, more importantly, the proration process does not intrinsically require that good time credits be calculated against time served. Most importantly, Congress once again employed "term of imprisonment" as the basis for computation, not time served. Contrary to the Ninth Circuit's view, the 54 days is Congress' determination of the maximum credit against a "term of imprisonment," not a "bonus" or "windfall in the last year."[36]

The language of Congress is easily applied by prorating the good time over the term of imprisonment (*e.g.*, 54 days on one year; 27 days for six months; 9 days for two months). The proration is subject to a simple mathematical formula:[37]

$$\frac{\text{days left}}{365} = \frac{x}{54} \quad \text{or} \quad x = \frac{54 \times \text{days left}}{365}$$

Congress specifically directed that the proration be based on the "term of imprisonment" imposed by the court, not the time served by the inmate. The BOP's "eight-step method by which the proration occurs" has no basis in Section 3624(b): the statute makes no reference to proration against time served, but rather specifically discusses proration in the context of "term of imprisonment." The proration is simple: after previous good time is credited, the last year or part of a year of the term of imprisonment is subject to credit of a proportion of 54 days up to the full amount, depending on the amount of the term remaining and the conduct of the prisoner.

**Even were the statute ambiguous, Supreme Court authority requires application of the rule of lenity, not deference to an executive agency.**

Even assuming that "term of imprisonment" is ambiguous, the Supreme Court, especially Justice Scalia, provides clear authority rejecting the Ninth Circuit's approach. The rule of lenity must be used in construing an ambiguous penal statute.[38] Deference to the BOP's administrative construction of an ambiguous penal statute "would turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with the doctrine of severity."[39] The Ninth Circuit erred in relying on administrative law principles that apply to statutory silence, rather than criminal law jurisprudence that controls when penal statutes are ambiguous.

*1. Section 3624(b) is a penal statute to which the rule of lenity must be applied.*

The rule of lenity applies where, even after resort to the language and structure, legislative history, and motivating policies of the statute, reasonable doubt persists about a penal statute's intended scope.[40] In *Bifulco v. United States*, the Supreme Court addressed statutory ambiguity in the punishment provisions of a federal drug statute.[41] The defendant asserted that the drug conspiracy statute did not provide for a special parole term. The Court held that the rule of lenity "must" inform construction of ambiguous criminal statutes, and the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."[42]

The statute providing credit for good conduct is a penal statute located in the criminal sentences section of Title 18. The Supreme Court has found that good time statutes are penal in several contexts.[43] Under well-established precedent, the federal good time law is a penal statute to which the rule of lenity applies.

*2.* Chevron *deference does not apply under Justice Scalia's reasoning in* Crandon.

In upholding the BOP's interpretation, the Ninth Circuit applied principles from civil administrative law regarding statutory silence or ambiguity under *Chevron USA v. Natural Resources Defense Council*.[44] Because *Chevron* does not apply to ambiguous criminal statutes, any statutory ambiguity must be resolved in favor of the prisoners under the rule of lenity. The Supreme Court addressed the conflict between administrative construction of criminal statutes and the rule of lenity in *Crandon v. United States*.[45]

In *Crandon*, several private executives who accepted government positions received payments from their private employer to compensate them for financial loss from their transfers to public employment. The Court had to decide whether a criminal code prohibition on supplemental compensation to government employees barred the payments. The Court interpreted the penal statute, relying in part on the rule of lenity, to ultimately conclude that the statute did not prohibit the payments.[46]

In a concurring opinion, Justice Scalia, joined by Justices O'Connor and Kennedy, addressed the weight to be

accorded the Executive Branch's interpretation of the penal statute. The concurring justices drew a clear line between the Executive Branch's duty to implement its interpretation of the statute and the Judicial Branch's function to interpret criminal statutes.[47] The concurrence concluded that the executive's construction of a penal statute "is not even deserving of persuasive effect" because it "would turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with the doctrine of severity."[48]

The Sixth Circuit has applied the *Crandon* concurrence to hold that the rule of lenity, rather than administrative deference, applies to statutory ambiguity regarding punishment.[49] In declining to defer to the Parole Commission's interpretation of a statute, the Sixth Circuit stated that the agency's invocation of *Chevron* "overlook[s] a crucial distinction between criminal and civil statutes."[50] In criminal statutes, *Chevron* does not apply because the Judicial Branch, not the Executive Branch, is entrusted with interpretation of the criminal code:

> Judicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases. . . . The rule of lenity requires a stricter construction of "ambiguity in a criminal statute," not deference. . . . When the Department of Justice made a similar argument in *Crandon v. United States*, 494 U.S. 152, 177-78, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990), Justice Scalia pointed out in a concurring opinion that *Chevron* does not require the judiciary to defer to executive interpretations of the criminal code.[51]

The Ninth Circuit is now in conflict with the Sixth Circuit's implementation of the *Crandon* concurrence.

While Congress delegates certain tasks to the BOP, it by no means delegates the determination of the maximum amount of good time on a term of imprisonment. The agency does not purport to lower the maximum good time; the regulation and program statement only claim to implement the good time statute. The federal courts, not agencies, clarify ambiguous criminal statutes, and executive interpretation under *Chevron* "is not even deserving of any persuasive effect."[52] Interpretation of Section 3624(b) does not require any executive expertise to which the courts should defer.[53]

The Ninth Circuit's error lies in its confusion of statutory ambiguity and statutory silence. Statutory ambiguity requires application of the rule of lenity. On the other hand, statutory silence permits the agency to fill the void as it sees fit within reason.[54] Although arguably unclear, the statute is not silent about the allocation of good time credits. The BOP argues that the statute is ambiguous and then purports to be doing no more than construing the statute. In that case, *Chevron* deference must give way to the rule of lenity.[55]

Any ambiguity in the criminal statute establishing the maximum good time credits should be resolved based on the rule of lenity, not the executive branch's tendency toward severity in the treatment of its prosecutorial targets. The rule of lenity requires that the ambiguity be resolved in favor of the defendant, which in this case means by interpreting the credit to apply to the imposed sentence.

## Litigation under 28 U.S.C. § 2241 is simple and rewarding.

In the words of Frederick Douglass, "Power concedes nothing without a demand; it never did and it never will. Find out what people will submit to, and you have found the exact amount of injustice which will be imposed upon them." We need lawyers to take up this issue in every district court. Incarceration beyond legislative authorization is immoral as well as illegal. From biblical times,[56] through English common law,[57] through the founding of the Republic,[58] to this very day,[59] any doubt about the measure of punishment has been resolved in favor of mercy. The cruel injustice of overincarceration can only be overcome by individual lawyers coming forward and taking action.

This litigation presents a simple application of the rule of law. Yet it has tremendous consequences for individual prisoners, the separation of powers, and the public fisc. Prisoners need trained advocates at their side. Model pleadings and briefs are available from the NACDL Web site.[60] By taking up this issue of statutory misconstruction, lawyers can bring justice to an extraordinary number of federal prisoners. Delay in reaching the question results in irreparable harm to the prisoners who are completing their sentences every day. The defense bar should take extraordinary action both to save the expense and human toll of overincarceration and to implement Congress' sentencing statute as written.

## Notes

1. See http://www.nacdl.org/goodtimecredit.

2. 18 U.S.C. § 3624(b) (emphasis added)

3. Administrative Office Form 245 (July 1990) (Judgment in a Criminal Case).

4. Barnhart v. Sigmon Coal Co., 122 S.Ct. 941, 950 (2002) (In all statutory construction cases, the "first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'") (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)); United States v. LaBonte, 520 US 751, 757 (1997) ("[W]e assume that in drafting this legislation, Congress said what it meant.").

5. 141 CONG. REC. S2349 (Feb. 9, 1996) (emphasis added); *see also* 140 CONG. REC. S13,350 (1994) ("So my Republican friends in a compromise we reached on the Senate floor back in November . . . said no State can get any prison money unless they keep their people in jail for 85 percent of the time just like we do at the Federal level in a law written by yours truly and several others.") (statement of Sen. Biden).

6. For example, the maximum good time on one year is 47 days, five years is 235 days, ten years is 471 days and twenty years is 941 days. The math works out to be a little over 12.8%. Chart available at Exhibits to Memorandum at http://www.nacdl.org/goodtimecredit.

7. *See* other pleadings in support (Brief of Amici in *Pacheco-Camacho*.)

8. Congress also showed its intent to require 85% by the number itself: 54 is 15% of 365. In an earlier version of the good time statute, Congress used 36 days, "approximately 10%." Sen. Rep. 28-225, *reprinted in* 1984 U.S.C.C.A.N. at 3329-30. The final version simply added 5% to the maximum term. *See* other pleadings in support (Brief of Amici in *Pacheco-Camacho*.)

9. 28 C.F.R. § 523.20(a); Program Statement 5880.28 at 1-48 ("It is essential to learn that [good time credit] *is not* awarded on the basis of the length of the sentence imposed, but rather on the number of days actually served") (emphasis in original).

10. Program Statement 5880.28 at 1-40 to 61B (July 19, 1999).

11. In fact, Congress enacted a technical amendment to Section 3624(b) "to clarify that *the good time credit* can be earned for the first year of the term of imprisonment." Criminal Law And Procedure Technical Amendments Act, H.R. Rep. 99-797 at 21, *reprinted in* 1986 U.S.C.C.A.N. at 6144 (emphasis added).

12. FEDERAL BUREAU OF PRISONS: QUICK FACTS (Jan. 2002); *available at* www.bop.gov/fact0598.html.

13. Telephone interview with Jerry Gayes, Federal Bureau of Prisons, Office of Research (Apr. 15, 2002).

14. Telephone interview with Sue Allison, Federal Bureau of Prisons, Office of Research (Apr. 15,2002).

15. Pacheco-Camacho v. Hood, 272 F.3d 1266 (9th Cir.), *cert. denied*, 122 S.Ct. 2313 (2002).

16. *Pacheco-Camacho,* 272 F.3d at 1270 ("Finding the meaning of 'term of imprisonment' as used in Section 3624(b), to be ambiguous….").

17. Tyler v. Cain, 533 U.S. 656, 662 (2001) (quoting Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989)); *see also* Jones v. United States, 527 U.S. 373, 389 (1999) (statutory language must be read in context); Bailey v. United States, 516 U.S. 137, 145 (1995) (same).

18. See Exhibits to Memorandum at http://www.nacdl.org/goodtimecredit

19. Raines v. U.S. Parole Commission, 829 F.2d 840, 844 (9th Cir. 1987) ("Term of imprisonment includes time on parole").

20. 28 U.S.C. § 994 (referring throughout to the incarceration ordered in a criminal case as involving a "term of imprisonment"); U.S.S.G. § 5C1.1 (Imposition Of A Term Of Imprisonment).

21. Stone v. INS, 514 U.S. 386, 397 (1995).

22. 18 U.S.C. § 701(1944).

23. H.R. Report 86-935 (Aug. 18,1959), *reprinted in* 1959 U.S.C.C.A.N. at 2519.

24. *Id.*

25. *Id.*

26. Sullivan v. Stroop, 496 U.S. 478,484 (1990).

27. If the BOP instead interpreted "term of imprisonment of more than 1 year" to mean "time served of more than one year," consistent with its later interpretation,then only those prisoners who actually spend at least one year and one day in prison are eligible to receive good time credit. This is not the case. Program Statement 5880.28 at 1-45 ("the very shortest sentence that can be awarded [good time credit] is a sentence of at least 1 year and 1 day."). Mr. Pacheco-Camacho, who was sentenced to a year and a day, was eligible for and received good time credit, just not the full statutory allocation. *Pacheco-Camacho*, 272 F.3d at 1267.

28. *Pacheco-Camacho*, 272 F.3d at 1271.

29. The Ninth Circuit misplaced reliance on United States v. Johonson, 529 U.S. 53 (2000). In *Johnson,* the Court construed the supervised release statute to unambiguously dictate the commencement of supervision upon release from custody. The Supreme Court found no need to resort to other subsections of the statute because 1) the statute was unambiguous; 2) the same terminology was not used in the different subsections; and 3) there was no express reference between the relevant statutory subsections. In this case, the same language is used in both subsections 3624(a) and 3624(b), and Section 3624(a) sets the release date as the "term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in section (b)." Thus, *Johnson* is irrelevant to the intra-statute inconsistency in Section 3624(b).

30. *Barnhart*, 122 S.Ct. at 952 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

31. United States v. LaBonte, 520 U.S. 751, 757 (1997).

32. Senate Report No. 98-225, *reprinted in* 1984 U.S.C.C.A.N. at 3329-30.

33. 1984 U.S.C.C.A.N. at 3329.

34. Program Statement 5880.28 at 1-44.

35. Program Statement 5880.28 at 1-44-44A.

36. *Pacheco-Camacho*, 272 F.3d at 1269.

37. In counting parts of a day, "The fraction is always dropped." Program Statement 5880.28 at 1-45. See http://www.nacdl.org/goodtimecredit

38. Bifulco v. United States, 447 U.S. 381, 387 (1980).

39. Crandon v. United States, 494 U.S. 152, 177-78 (1990) (Scalia,J., concurring).

40. United States v. R.L.C., 503 U.S. 291, 305-06 (1992); *Bifulco*, 447 U.S. at 387.

41. 447 U.S. at 382-83.

42. 447 U.S. at 387.

43. *See* Lynce v. Mathis, 519 U.S. 433 (1997) (ex post facto); Weaver v. Graham,450 U.S. 24 (1981) (same); Preiser v. Rodriguez, 411 U.S. 475 (1973) (habeas corpus).

44. 467 U.S. 837 (1984).

45. Crandon v. United States, 494 U.S. 152 (1990).

46. *Id*. at 168.

47. 494 U.S. at 177 ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

48. *Crandon*, 494 U.S. at 178.

49. Dolfi v. Pontesso, 156 F.3d 696, 700 (6th Cir. 1998).

50. *Id*. at 700.

51. *Id*. at 700 (citations omitted).

52. *Crandon*, 494 U.S. at 177 (Scalia, J., concurring). See http://www.nacdl.org/goodtimecredit

53. *Dolfi*, 156 F.3d at 700 ("Unlike environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts.").

54. *See, e.g.*, Lopez v. Davis, 531 U.S. 230, 242 (2001).

55. In avoiding application of the rule of lenity to this penal statute, the Ninth Circuit relied on a footnote in Babbitt v. Sweet Home, 515 U.S. 687 (1995). *Pacheco-Camacho*, 272 F.3d at 1271. The reliance is misplaced. The critical distinction is that the sentence in *Sweet Home* applies to "facial challenges to administrative regulations," not "statutory ambiguity" as claimed in the Ninth Circuit's opinion.

56. *Compare* 2 Corinthians 11:24 *with* Deuteronomy 25:1-3 (to ensure against exceeding legal punishment, even the persecutors of St. Paul limited punishment to thirty-nine lashes in conformance with the tradition of stopping one short of Jewish law's maximum of forty lashes).

57. 1 WILLIAM BLACKSTONE, COMMENTARIES 92 ("A man cannot suffer more punishment than the law assigns, but he may suffer less.").

58. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

59. Glover v. United States, 531 U.S. 198, 204 (2001) (any over-incarceration is sufficient to meet the prejudice requirement for a Sixth Amendment violation based on ineffective assistance of counsel).

60. See http://www.nacdl.org/goodtimecredit.

## About the Author

A graduate of Antioch College (1973) and Lewis and Clark Law School (1977), Stephen R. Sady was a staff attorney with Evergreen Legal Services Farm Worker Division in Sunnyside, Washington from 1977 to 1981, then joined the Oregon Federal Defender Office. In 1990, he spent four months in Colombia teaching with a Fulbright grant. Now the Chief Deputy of the Federal Public Defender for the District of Oregon and an adjunct professor at Lewis and Clark Law School, he frequently lectures and writes on various areas of criminal defense.

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