

is based upon time served, and generally results in more time in prison than the method of calculation proposed by Petitioner. Magistrate Judge Smyser carefully considered the language of the statute at issue, the pertinent case law, and the parties' respective contentions. He found the BOP interpretation of the statute in question to be entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). He further found the BOP interpretation of the good conduct time statute to allow for credit only for time actually served to be reasonable. In doing so, he joined a long and almost unbroken line of precedent that has sustained the BOP method of computing good conduct time credit. See, e.g., Perez-Olivio v. Chavez, 394 F.3d 45, 49-52 (1st Cir. 2005); White v. Scibana, 390 F.3d 997, 1001-1003 (7th Cir. 2004); Pacheco-Camacho v. Hood, 272 F.3d 1266, 1271 (9th Cir. 2001); Yeiser v. Bureau of Prisons, No. 04-CIV-5770, 2005 WL 282865 (S.D. N.Y. Feb. 7, 2005); Whitfield v. Hollingsworth, No. CIV 04-2730, 2004 WL 3049763 (D. Minn. Dec. 30, 2004).¹ Magistrate Judge Smyser further observed that Judges Rambo and Caputo of this Court have also sustained the BOP method of calculating good conduct time, citing Hamilton v. Holt, No. 1:CV-04-2264 (M.D. Pa. Dec. 21, 2004) (Rambo, J.), and Baldwin v. Angelinie, No.

¹ In Williams v. DeWalt, No. 04-2732, 2004 WL 3022300 (D. Md. Dec. 29, 2004), the court found that the statute in question required calculation of good conduct time credit on the basis of the term of imprisonment imposed, as opposed to the actual time served. For the reasons expressed by Magistrate Judge Smyser, I find this conclusion, which is contrary to the overwhelming majority of cases, to be unpersuasive.

3:CV-03-1144 (M.D. Pa. April 2, 2004). I find Magistrate Judge Smyser's analysis, which is completely consistent with the overwhelming majority of the cases to have addressed the issue, to be compelling. ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Report and Recommendation of Magistrate Judge Smyser, a copy of which is attached hereto, is ADOPTED.

2. The petition for a writ of habeas corpus is DENIED.

3. The Clerk of Court is directed to mark this matter CLOSED.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | |
|-------------------------------|----------------------------|
| GLENN GERMANY, | : CIVIL NO. 3:04-CV-2560 |
| | : |
| Petitioner | :(Chief Judge Vanaskie) |
| | : |
| v. | :(Magistrate Judge Smyser) |
| | : |
| JOSEPH SMITH, <i>Warden</i> , | : |
| | : |
| Respondent | : |

REPORT AND RECOMMENDATION

On November 26, 2004, the petitioner, a federal prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The petitioner claims that the Bureau of Prisons has miscalculated the amount of good time credits he is entitled to pursuant to 18 U.S.C. § 3624(b). For the reasons stated below it is recommended that the petition be denied.

I. Background and Procedural History.

The petitioner was convicted in the United States District Court for the Western District of Missouri of possession with intent to distribute cocaine, possession with intent to distribute marijuana and escape. *Doc. 7- Baumgartel Decl.* at ¶ 4. On April

19, 1993, he was sentenced to 188 months imprisonment. *Id.* As of December 21, 2004, the Bureau of Prisons (BOP) calculated that the petitioner had earned a total of 648 days of good conduct time (GCT). *Id.* at ¶ 5. The BOP calculates that the petitioner is projected to earn another 89 days of GCT during the remainder of his sentence and that he is projected to be released from custody on June 13, 2006. *Id.* at ¶¶ 4 & 5.

The petitioner filed the petition in this case on November 26, 2004. After the petitioner paid the filing fee, by an Order dated December 13, 2004 the respondent was ordered to show cause on or before January 3, 2005, why the petitioner should not be granted habeas corpus relief. The Order of December 13, 2004 also provided that the petitioner may file a reply to the response within 10 days of the filing of the response.

On January 3, 2005, the respondent filed a response to the petition for a writ of habeas corpus. The petitioner has not filed a reply.

II. Discussion.

The petitioner claims that the BOP has miscalculated his

GCT. The plaintiff contends that the BOP's miscalculation is a result of its misinterpretation of 18 U.S.C. § 3624(b).

18 U.S.C. 3624 governs the release of a prisoner. 18 U.S.C. § 3624(a) provides that a prisoner shall be released by the BOP "on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward service of the prisoner's sentence as provided in subsection (b)." 18 U.S.C. § 3624(b) deals with GCT and provides in pertinent part:

(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determined that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding, credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

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

The petitioner contends that he is entitled to 54 days of GCT for each full year of his sentence as imposed by the court and that he should receive a prorated credit for the last portion of the last year of his sentence. The BOP, on the other hand, awards GCT based on the amount of time actually served. See 28 C.F.R. § 523.20 ("Pursuant to 18 U.S.C. § 3624(b), as in effect for offenses committed on or after November 1, 1987 but before April 26, 1996, an inmate earns 54 days credit toward service of sentence (good conduct time credit) for each year served."). The BOP's method of calculating GCT is set forth in its Sentencing Computation Manual as Program Statement 5880.28. The BOP converts the 54 days of credit a year earned by the model prisoner to 0.148th of a day of credit for every actual day served during good behavior ($54/365 = 0.148$).

When examining an agency's construction of a statute that it administers, the court must first inquire "whether Congress has directly spoken on the precise question at issue." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to

the unambiguously expressed intent of Congress." *Id.* 842-843. "If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.* at 843 (footnote omitted). "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

We conclude that the phrase "term of imprisonment" as used in Section 3624(b) to describe how GCT credit is awarded is ambiguous.

The petitioner contends that "term of imprisonment" is a legal term of art which means the sentence imposed. The petitioner is correct that in many instances "term of imprisonment" has been used as a synonym for "sentence." See *White v. Scibana*, 314 F.Supp.2d 834, (W.D.Wis. 2004)(setting forth numerous instances in which "term of imprisonment" is used in the criminal code as a synonym for "sentence"), *reversed*, 390 F.3d 997 (7th Cir. 2004).

Even in parts of § 3624 it is clear that Congress used the phrase "term of imprisonment" to mean the sentence imposed. For

example, § 3624(a) provides that a prisoner shall be released "on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward service of the prisoner's sentence as provided in subsection (b)." This sentence makes sense only if "term of imprisonment" means the sentence imposed. *White v. Scibana*, 390 F.3d 997, 1001 (7th Cir. 2004) ("The phrase "term of imprisonment" as used in subsection (a) must refer to the expiration of the *sentence imposed*, since it is axiomatic that a prisoner is released when he has served out his sentence."). Similarly, the first sentence of § 3624(b)(1) provides that "a prisoner who is serving a term of imprisonment of more than 1 year other than a term of imprisonment for the duration of the prisoner's life" may receive GCT. This portion of the statute makes sense only if "term of imprisonment" is used to mean sentence. *Id.* ("In this part of the statute "term of imprisonment" must also refer to the sentence because the Bureau has to determine whether a prisoner is eligible for the credit on the first day he arrives in prison. . . . If "term of imprisonment" here means time served, then an inmate who initially would be eligible for the credit because his sentence was, say, 366 days, would become ineligible once the credit was taken into account.").

It is a general rule of statutory construction that identical words used in different parts of the same statute are

presumed to have the same meaning. *White, supra*, 390 F.3d at 1002. However, "[t]he rule is only a presumption, of course, and 'the presumption is not rigid and readily yields whenever there is such variation in the connection in which words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'" *White, supra*, 390 F.3d at 1002 (quoting *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004)).

Although in § 3624(a) and in the first part of § 3624(b)(1) Congress plainly used the term "term of imprisonment" to mean "sentence," in another subsection of § 3624 Congress plainly used the term "term of imprisonment" to refer to time served. Subsection (d) of § 3624 provides that "[u]pon the release of a prisoner on the expiration of the prisoner's term of imprisonment" the BOP shall furnish the prisoner with suitable clothing, an allotment of money and transportation. This sentence makes sense only if "term of imprisonment" means time served. *Perez-Olivo v. Chavez*, _____ F.3d _____, 2005 WL 31913 at *3 (1st Cir. 2005) ("Plainly Congress intended the prisoner to be furnished with these items upon release after completion of his 'time served.'"); *Loeffler v. Bureau of Prisons*, No. 04 Civ. 4627(GWG), 2004 WL 2417805 at *3 (S.D.N.Y. Oct. 29, 2004) ("[I]t would make no sense to provide these amenities at a time when the prisoner's

original imposed sentence had expired - a date that would obviously occur after the prisoner had been released based on the good time credits."). The phrase "term of imprisonment" is used inconsistently throughout § 3624. *Perez-Olivo, supra*, 2005 WL 31913 at *3.

Interpreting the phrase "term of imprisonment" as meaning sentence imposed when that phrase is used in Section 3624(b) to describe how GCT credit is awarded is arguably "inconsistent with the retrospective year-end evaluation and award system the statute contemplates." *White, supra*, 390 F.3d at 1002. Accordingly, we conclude that the statute is ambiguous as to whether the 54 days of credit for good conduct awarded for each year of the prisoner's "term of imprisonment" is based on the sentence imposed or the time actually served in prison. *Id.* at 1002-1003.²

The BOP must calculate how much GCT to award to a prisoner and in the process it must necessarily interpret the phrase "term

² The petitioner cites statements made by Senator Biden to the effect that a federal prisoner serves at least 85% of his sentence. These statements were made many years after the enactment of § 3624 and were not made in the context of interpreting § 3624. *Loeffler, supra*, 2004 WL 2417805 at *5 n1. Therefore, they are not probative of legislative intent. *Perez-Olivo, supra*, 2005 WL 31913 at *7 n.3. Moreover, Senator Biden's references to 85% could logically be viewed as a shorthand reference to the fact the 54 days of GCT permitted per year is 15% of a year of time served "rather than as a *sub silentio* interpretation of the meaning of 'term of imprisonment.'" *Loeffler, supra*, 2004 WL 2417805 at *5 n1.

of imprisonment." *Perez-Olivo, supra*, 2005 WL 31913 at *6. The question is whether it is reasonable for the BOP to interpret the phrase "term of imprisonment" as used in the phrase "of up to 54 days at the end of each year of the prisoner's term of imprisonment" in the first sentence of 3624(b)(1) and as used in the last sentence of Section 3634(b)(1) to mean "time served" rather than "sentence imposed." We conclude that the BOP's interpretation is reasonable.

Interpreting the phrase "term of imprisonment" to mean the sentence imposed could lead to cases where a prisoner is awarded GCT for a year when the prisoner actually served no time in prison during that year. For example, "a ten year or 120 month sentence would result in 540 days of eligible GCT." *Hamilton v. Holt*, Civil No. 1:CV-04-2264, slip op. at 4 (M.D.Pa. Dec. 21, 2004)(Rambo, J.). "Essentially, an inmate would be eligible for 54 days per year sentenced, irrespective of time actually served." *Id.* "Therefore, an inmate could receive GCT for the tenth year, even though the inmate did not actually serve any portion of the tenth year." *Id.*³

³Similarly, if the phrase "term of imprisonment" is interpreted, as the petitioner suggests it should be, to mean the sentence imposed, then in the petitioner's case he could receive GCT for last two and a third years of his sentence even though he did not actually serve those years. The petitioner was sentenced to 188 months imprisonment. 188 months is 15.6666 years or, rounding off, 5716 days. Under petitioner's interpretation of "term of imprisonment" he would be entitled, assuming good behavior, to 846 days of GCT (calculated: 15 years x 54 days of credit per year = 810 credit days; .6666 of a year = 241 days; 54 days of credit per year/365

This conflicts with the directive in 3624(b)(1) that the award of GCT be made at the end of each year of the term of imprisonment and that the award be based on the prisoner's behavior during that year.

On the other hand, "[u]nder the BOP's interpretation, an inmate serving a ten-year sentence would receive approximately 470 days of GCT." *Graves v. Bledsoe*, 334 F.Supp.2d 906, 908 (W.D.Va. Aug. 19, 2004). "During the first eight years the inmate would receive 54 days at the end of each year in which he met the requirements of earning GCT, resulting in a maximum of 432 days." *Id.* at n.1. "Because the inmate would only be incarcerated for a portion of the ninth year, he would only receive a prorated credit of about 38 days, $(54/365 \text{ times } 260 = 38)$ for a total of 470 days of GCT, and be released 260 days into his ninth year." *Id.*

days in a year = .148 credits per day; $241 \text{ days} \times .148 = 35.668$ (rounded up to 36) credit days; $810 + 36 = 846$ credit days of GCT). To arrive at the number of days of his sentence that the petitioner would actually serve in prison under his interpretation, subtract the number of days of GCT from the total number of days in the petitioner's sentence. Thus, under his interpretation, the petitioner would actually serve 4870 days in prison (calculated: $5716 \text{ days in sentence} - 846 \text{ days of GCT} = 4870 \text{ days actually served in prison}$). 4870 days is 13.34 years. Under the petitioner's interpretation, he would only serve 13.34 years of his sentence but he would receive credit for the entire 15.6666 years of his sentence. Thus, the petitioner would receive credit for the last (approximately) two-thirds of the fourteenth year of his sentence, for the fifteenth year of his sentence and for last .6666 of a year of his sentence, even though he did not actually serve any portion of that time in prison. Under the petitioner's interpretation he would receive .1737 days of credit for each day he actually served (calculated: $846 \text{ days of GCT} / 4870 \text{ days actually served} = .1737$).

We conclude that the BOP's interpretation is reasonable. The BOP's interpretation is consistent with the directive in § 3924(b)(1) that GCT be awarded at the end of each year or the prisoner's term of imprisonment and that credit for the last year or part of year be prorated. Further, § 3924(b)(1) makes a prisoner's receipt of GCT subject to a determination by the BOP that "during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." "This evidences Congress' clear intent that the BOP evaluate a prisoner's conduct during his time in prison, making it reasonable for the BOP to require that time actually be served in order for the conduct during that time to be evaluated." *Perez-Olivo, supra*, 2005 WL 31913 at *6.

Our conclusion that the BOP's interpretation is reasonable is consistent with the majority of courts that have considered the issue. See e.g. *Perez-Olivo, supra*, 2005 WL 31913; *White, supra*, 390 F.3d at 1003; *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001); *Graves, supra*, 334 F.Supp.2d at 908; *Hamilton v. Holt*, Civil No. 1:CV-04-2264, slip op. at 6 (M.D.Pa. Dec. 21, 2004)(Rambo, J.); *Baldwin v. Angelinie*, 3:CV-03-1144 (M.D.Pa. Apr. 2, 2004)(Caputo, J. adopting Report and Recommendation of M.J.

Mannion)⁴. *But see Williams v. Dewalt*, ___ F.Supp.2d ___, 2004 WL 3022300 (D.Md. Dec. 29, 2004) (holding that § 3624(b) is not ambiguous and that GCT is to be awarded on the sentence imposed rather than on the time actually served by the inmate).

III. Recommendation.

Based on the foregoing, it is recommended that the petition for a writ of habeas corpus be denied and that the case file be closed.

/s/ J. Andrew Smyser

J. Andrew Smyser
Magistrate Judge

⁴ The respondent also cites *Hill v. Nash*, 3:CV-02-1022, slip op. (M.D. Pa. Jan. 30, 2003), as a case in which the United States District Court for the Middle District has already rejected a challenge similar to the one presented by the petitioner in this case. In *Hill*, in the course of addressing Hill's challenge to the calculation of his sentence expiration date, Chief Judge Vanaskie states: "Hill does not contest the calculation of GCT credits. Instead, he advances the meritless and unsubstantiated assertion that, as a federal inmate, he is only required to serve 85% of his sentence." *Id.* at 6. Chief Judge Vanaskie then went on to address Hill's contention regarding the date when his sentence commenced. *Id.* It is not clear to the undersigned that Chief Judge Vanaskie addressed the precise question at issue in this case in *Hill*.

Dated: January 28, 2005.