No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES LEE REYNOLDS,

Petitioner,

v.

J. E. THOMAS,

Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

The petitioner, Charles Lee Reynolds, requests leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. § 3006A(d)(7). The petitioner was represented by counsel appointed under the Criminal Justice Act in the District of Oregon and on appeal in the Ninth Circuit Court of Appeals, and therefore no affidavit is required.

Respectfully submitted this 12th day of November, 2010.

Stephen R. Sady
Attorney for Petitioner

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On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Most federal crimes involve concurrent jurisdiction with state authority to prosecute and sentence. In *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922), this Court held that comity requires that state and federal jurisdictions must respect each others' decisions where dual prosecutions overlap. The federal Circuits are split on the question whether 18 U.S.C. § 3584(a) (2006), which addresses concurrent and consecutive sentences, authorizes a federal sentence to be imposed consecutively to or concurrently with a non-existent sentence. The federal courts, in those Circuits that do not permit sentencing relative to non-existent sentences, allow the Bureau of Prisons, an Executive Branch agency, to determine whether a sentence should run consecutively or concurrently, even where a subsequent state court judgment has ordered that the state sentence run concurrently with the previously imposed federal sentence. Judges in three Circuits have called upon Congress to address the manifest constitutional issues raised in those cases where the actual period of custody is determined not by the state courts or by the federal courts, but by the Bureau of Prisons. The question presented is:

> Whether, under 18 U.S.C. §§ 3584(a), 3585(b), and 3621(b), the Bureau of Prisons must administer the sentence of a federal prisoner, in order to be in compliance with federal sentencing statutes and the Constitution, in a manner that effectuates the subsequent judgment of the state judiciary that the state sentence run concurrently with the previously imposed federal term of imprisonment?

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On Petition For Writ Of Certiorari To
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For The Ninth Circuit

The petitioner, Charles Lee Reynolds, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 7, 2010, affirming the denial of habeas corpus relief.

1. Opinions Below

The district court denied habeas corpus relief on August 5, 2008, based on the adoption of findings and recommendations of the magistrate judge issued on June 25, 2008 (App. 1, 17). The Ninth Circuit affirmed the denial of habeas corpus relief on May 7, 2010,

in an opinion reported as *Reynolds v. Thomas*, 603 F.3d 1144 (9th Cir. 2010) (App. 19). The Ninth Circuit denied panel and en banc rehearing on August 17, 2010 (App. 51).

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2006).

3. Constitutional And Statutory Provisions

The statute authorizing sentencing judges to impose consecutive and concurrent sentences states in relevant part:

> **(a) Imposition of concurrent or consecutive terms.** – If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. § 3584(a) (2006). The statute authorizing the Bureau of Prisons to calculate credit against the term of imprisonment provides:

> **(a) Commencement of sentence.** – A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> **(b) Credit for prior custody.** – A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences –
>
> > **(1)** as a result of the offense for which the sentence was imposed; or

> **(2)** as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

18 U.S.C. § 3585 (2006). The Bureau of Prisons has authority to designate the place of imprisonment, including state facilities for the service of federal sentences, pursuant to the statute that states in part:

> **(b) Place of imprisonment.** – The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering –
>
> **(1)** the resources of the facility contemplated;
>
> **(2)** the nature and circumstances of the offense;
>
> **(3)** the history and characteristics of the prisoner;
>
> **(4)** any statement by the court that imposed the sentence –
>
> **(A)** concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
>
> **(B)** recommending a type of penal or correctional facility as appropriate; and
>
> **(5)** any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 U.S.C. § 3621(b) (2006). The full text of § 3585 and § 3621 are set out in the Appendix. App. 53, 54. The Appendix also includes the Guidelines on concurrent and consecutive sentences, U.S.S.G. §§ 5G1.3 and 5K2.23 (App. 57, 60), and the Bureau of Prison's rules pursuant to which the agency exercised power to create a de facto consecutive federal

sentence to a later-imposed state sentence ordered to run concurrently with the federal sentence (App. 61, 74).[1]

The interaction of these statutes and rules with subsequently imposed state sentences implicate several constitutional provisions. The Due Process Clause states, "No person shall be . . . deprived of life, liberty, and property, without due process of law." U.S. CONST. amend. V. The Full Faith and Credit Clause states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art IV, § 1. This provision of the Constitution applies to the federal government through a statute passed by the First Congress, which states:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (2006) (amended from the Act of May 26, 1790, 1 Stat. 122). The Constitution reserves to the States authority over areas not delegated to or prohibited by the federal government: "The powers not delegated to the United States by the Constitution, nor

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[1] Program Statement 5880.28 can be found in its entirety at http://www.bop.gov/policy/progstat/5880_028.pdf.

prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Supremacy Clause applies to crimes within the scope of federal laws and the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl.2.

4. Statement Of The Case

Grant of certiorari in this case will resolve one of the most intractable and pernicious problems of federal sentencing: Executive Branch creation of de facto consecutive sentences that neither state nor federal judges have ordered. The scenario frequently occurs: 1) a person is arrested by state authorities and is, therefore, in primary state custody; 2) through a writ of habeas corpus ad prosequendum or otherwise, the person is placed in temporary federal custody, is convicted, and receives a federal sentence; and 3) the person is returned to state custody, is convicted, and receives a sentence that is ordered to run concurrently with the federal sentence. Due to failure to construe federal sentencing statutes to avoid serious constitutional problems, the Ninth and other Circuits have approved federal administrative action that forces the federal prisoner to serve the federal sentence consecutively to the state sentence, contrary to the state court's judgment.

This case followed exactly the scenario that has frustrated courts and litigants for decades. Montana authorities arrested Mr. Reynolds and placed him in primary state custody.

By a writ of habeas corpus ad prosequendum, Mr. Reynolds was transferred to federal custody where he pleaded guilty and received a sentence to 71 months for identity theft and bank fraud. The federal judgment made no reference to concurrent or consecutive sentencing because no other sentence was in place.

After the federal sentencing, Mr. Reynolds was returned to Montana custody, entered guilty pleas, and received state judgments that explicitly stated that the state sentences were to be served concurrently with the federal sentence. But upon being transferred back to federal custody after 51 months spent serving his state sentences, the Bureau of Prisons (BOP) refused to designate the state prison for service of the federal sentence or credit the state time, creating a de facto consecutive federal sentence. In other words, the federal Executive Branch, after the federal judgment was entered, nullified the state judgment that the state sentences would be satisfied by the previously imposed federal custody.

The BOP presumes that silence in the federal judgment requires consecutive service under § 3584(a). To rebut that presumption, the BOP's rules call for an ad hoc post-sentence, non-binding inquiry to the federal judge regarding the appropriateness of concurrent or consecutive sentences when the federal judgment is silent. The first inquiry in Mr. Reynolds's case resulted in no comment, which the BOP interpreted as an intention to require service of 71 months consecutively to the 51 months already served on the state sentences based on the BOP's assessment of the seriousness of Mr. Reynolds's offense and of his history. When Mr. Reynolds wrote again to the judge several years later, the federal

judge indicated no objection to crediting the remaining time in custody, which still resulted in about 16 months of over-incarceration. Because this Court has held that over-incarceration implicates "equitable considerations of great weight," the Ninth Circuit reached the merits and, with one judge concurring, upheld the BOP's actions. *Reynolds*, 603 F.3d at 1148 (citing *United States v. Johnson*, 529 U.S. 53, 60 (2000)).

The federal courts are split regarding federal judges' authority, at the time of sentencing, to order a federal sentence to run concurrently with or consecutively to a non-existent sentence. Even where § 3584(a) is construed to limit sentencing power, federal courts have permitted the Executive Branch to create a de facto consecutive sentence, while recognizing the issues surrounding consecutive sentences executed in defiance of state judicial orders for concurrent sentences. Two Circuits and Judge Fletcher in the present case have called upon Congress to promulgate a legislative fix. However, the law in this area is susceptible to a simple judicial fix by this Court's grant of certiorari.

First, the Court should definitively resolve the Circuit split by holding that § 3584(a) only authorizes a federal judge to impose a sentence consecutively to or concurrently with an existing sentence. Second, based on mainstream principles of statutory construction, applied with due respect for the federal constitutional principles of finality, comity, separation of powers, and due process, the Court should foreclose post-sentence federal action that thwarts the later state judgment that its sentence should run concurrently. The judicial solution is simple:

- Under 18 U.S.C. § 3584(a), a federal sentencing judge does not have authority to order a sentence to run concurrently or consecutively with a sentence not imposed at the time of sentencing;

- Federal action after imposition of the federal judgment – judicial or executive – to thwart a subsequent state concurrent sentence would violate federal sentencing statutes and important federal constitutional rights;

- Therefore, the federal statutes must either be construed to bar the BOP from designating the place of incarceration under 18 U.S.C. § 3621(b) in a manner inconsistent with the subsequent state judgment, or, to achieve the same result, to recognize that a subsequent sentence ordered concurrently with a federal sentence must be respected under 18 U.S.C. § 3585(b), or the federal statutes violate the Constitution to the extent they thwart the subsequent state concurrent sentence.

The statutes and constitutional provisions underlying this simple solution effectuate this Court's recognition that proper respect for the dual sovereignties of States and the federal government require that subsequent judgments – whether state or federal – must be fully honored:

> We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adapted by them to avoid it . . . . The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same person and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

Ponzi v. Fessenden, 258 U.S. 254, 259 (1922). By allowing each sovereign to impose as much, or as little, punishment as that sovereign sees fit, the Court also protects the separation of powers by foreclosing an agency of the Executive Branch – the BOP – from adopting the judicial function of determining the length of the sentence a defendant serves.

5. Reasons For Granting The Writ

This case involves a question of exceptional importance that only this Court can resolve: the Circuits are split on the underlying statutory construction; and this Court's resolution of the split necessarily addresses constitutional principles of finality, comity, separation of powers, and due process that the lower courts have failed to sustain. This Court's intervention is necessary to bring rationality and fairness to a frequent problem in federal sentencing. In this case, the original state defense attorney, in writing to the BOP, quoted the agency's own web site describing state and federal concurrent and consecutive sentences as "probably the single most confusing and least understood sentencing issue in the Federal system." The federal district court in this case, bound by Ninth Circuit law, was "troubl[ed by] the fact that the same branch of government that prosecuted petitioner also determined that he should serve his federal sentence consecutively to his state sentences." The accretion of lower court case law, with constitutional issues inadequately considered, has obscured or ignored this Court's simple constitutional jurisprudence that, when applied to the sentencing statutes on a clean slate, provides a rational and easily understood rule for decisions: the federal judge can only impose a sentence consecutively to or concurrently with an existing sentence, and the federal BOP must provide full respect to the later decision of a state court judge that the state crime requires no, or only partial, punishment in addition to that previously imposed by the federal court.

A. To Formulate The National Rule For Concurrent And Consecutive Sentencing, This Court Must First Resolve The Mature Conflict Among The Circuits Regarding Federal Judicial Authority To Impose A Sentence Concurrently With Or Consecutively To A Non-Existent Sentence.

From the advent of the Sentencing Reform Act, the Circuits have been in disarray regarding a federal judge's power at sentencing to impose a sentence concurrently with or consecutively to a non-existent sentence. The Fifth, Eighth, Tenth, and Eleventh Circuits permit federal judges to impose a sentence consecutively to an unimposed state sentence; the Second, Fourth, Seventh, Sixth, and Ninth Circuits have held that § 3584(a) does not authorize the federal judge to impose a sentence consecutively to some sentence that may or may not be imposed in the future. As the Fifth Circuit recently concluded, the conflicting viewpoints have been exhausted and any reconsideration of the question "is best left to the discretion of our Supreme Court." *United States v. Setser*, 607 F.3d 128, 131 n.2 (5th Cir. 2010).

This Court should resolve the statutory construction question in favor of permitting federal judges to impose sentences only in relation to extant sentences. First, the text fully supports this reading. In the first sentence of § 3584(a), the statute explicitly refers to the power to impose a sentence in relation to another term of imprisonment where the sentences are imposed at the same time or "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." 18 U.S.C. § 3584(a). The second sentence, referring back to the first clause of the first sentence, creates a default rule of concurrent sentencing where the terms of imprisonment are imposed at the same time. *Id.*

The third sentence, referring back to the second clause of the first sentence, creates a rebuttable presumption of consecutive where the sentence is imposed upon a defendant serving an undischarged term of imprisonment. *Id.* The statute authorizes no judicial acts relative to potential future terms of imprisonment. *See Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*").

This construction is true to the text and avoids advisory opinions regarding sentences that may never be imposed and disrespect to state courts' independent judgments regarding state law questions. The plain language of the statute is also supported by the legislative history, which demonstrates that the drafters were concerned with the imposition of a federal sentence on a defendant already serving either a state sentence or another federal sentence. *United States v. Donoso*, 521 F.3d 144, 148-49 (2d Cir. 2008) (citing S. Rep. 98-225, at 126, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3309). If there were ambiguity in the statute, the doctrines of constitutional avoidance and the rule of lenity would require the construction favoring the defendant. *Skilling v. United States*, 130 S. Ct. 2896, 2930-32 (2010); *Clark v. Martinez*, 543 U.S. 371, 380-84 (2005).

Notwithstanding the comity and advisory opinion problems, four Circuits unequivocally read § 3584(a) to permit sentencing judges to impose sentence consecutively or concurrently to non-existent state sentences:

- *United States v. Setser*, 607 F.3d 128, 131-32 (5th Cir. 2010) ("[T]he district court had the authority to – and therefore did not abuse its discretion by – imposing a consecutive federal sentence to a yet imposed state sentence.").

- *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) ("[T]he authority to impose such a federal sentence to be served consecutively to a yet-to-be-imposed state sentence falls within the broad discretion granted to the court.").

- *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995) ("We find no language in section 3584(a) prohibiting a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed.").

- *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993) ("[T]he district court ha[s] the authority to impose a federal sentence consecutive to an *unrelated, unimposed state* sentence on *pending* charges.") (emphasis in original).

In contrast, five Circuits have held that § 3584(a), read in light of its context, its legislative history, and comity interests, only authorizes sentences consecutive to or concurrent with existing sentences:

- *United States v. Donoso*, 521 F.3d 144, 148 (2d Cir. 2008) ("The presumptions established by the last two sentences of § 3584(a) must be read in light of th[e] limiting language at the beginning of the section.").

- *United States v. Smith*, 472 F.3d 222, 225 (4th Cir. 2006) ("[T]he statute gives a court power to determine whether a sentence will 'run concurrently or consecutively' only when a defendant is (1) sentenced to 'multiple terms of imprisonment . . . at the same time,' or (2) 'already subject to an undischarged term of imprisonment.') (quoting 18 U.S.C. § 3584(a)).

- *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000) ("Neither § 3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his sentence must run consecutively to some sentence that may be imposed in the future.").

- *United States v. Quintero*, 157 F.3d 1038, 1039-40 (6th Cir.1998) ("We hold that 18 U.S.C. § 3584(a) does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence.").

- *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir.1991) ("[A] federal court may not direct a federal sentence to be served consecutive to a state sentence not yet imposed . . . .").

The Sentencing Commission should also be viewed on the side of the split holding that § 3584(a) does not apply to non-existent sentences. In U.S.S.G. § 5G1.3, the Commission addressed the application of concurrent and consecutive sentences in terms only of undischarged state or federal sentences, with instructions in the commentary on how to assure the sentence ran fully or partially concurrently with extant sentences or consecutively to such sentences. Similarly, by a 2004 amendment, the Commission recognized that departure may be appropriate for previously discharged state sentences under U.S.S.G. § 5K2.23. The Commission provides no guidance for, nor recognition of, the possibility of a sentence concurrent or consecutive to a future, yet-to-be-imposed sentence.

The first step to bringing rationality and fairness to this area of federal sentencing law is for this Court to resolve the conflict in the Circuits by holding that § 3584(a)'s words, context, legislative history, and constitutional implications compel the reading that Congress did not authorize federal courts to impose judgment regarding hypothetical future state sentences.

B. Based On § 3584(a)'s Limitation To Existing Sentences, The Bureau Of Prisons's Action That, After Imposition Of The Federal Sentence, Creates A De Facto Consecutive Sentence, Violates The Constitutional And Statutory Rights To Finality Of Judgments, Comity For State Judgments, Separation Of Powers, And Due Process.

This Court's task in bringing national uniformity and rationality to this area of federal sentencing law does not stop with resolving the conflicting interpretations of § 3584(a). The Circuits that recognize that sentencing judges cannot impose concurrent or consecutive

sentences on non-existent terms of imprisonment effectively permit the Executive Branch to exercise retrospectively that precise power, even where the resulting consecutive federal sentence clashes with an express state judgment. As a consequence, federal Executive Branch action – after imposition of the federal judgment – negates the later state judgment that the state sentence should run concurrently with the previous federal sentence. In the present case, one judge found that construing the third sentence in § 3584(a) to allow such Executive Branch power "is not an implausible construction," describing the post-sentencing procedure as follows:

> In a situation where a request for a nunc pro tunc designation is made, the subsequent state sentence has already been imposed. At least in a jurisdiction in which the federal judge has no authority to choose between a concurrent and consecutive sentence at the time of sentencing, the BOP sends a letter asking the judge whether he or she now wants the federal sentence to run concurrently or consecutively . . . This request by the BOP allows the federal sentencing judge in such jurisdictions, after the state sentence has been imposed, to say whether the federal sentence should be concurrent or consecutive . . . Once the BOP receives a response from the federal sentencing judge, it takes that response into account in deciding whether to grant the nunc pro tunc request.

Reynolds, 603 F.3d at 1158-59 (W. Fletcher, J., concurring) (citations omitted). The Ninth Circuit, as have other Circuits, expressly upheld this post-sentence Executive Branch procedure:

> In Reynolds's case, the federal sentencing judge responded to the BOP's letter by stating that he had no comment on whether the federal sentence should be concurrent or consecutive. In its denial of Reynolds's request, the BOP construed the judge's silence as an indication that the federal sentence should be served consecutively. The BOP's statement did not cite § 3584(a) but tracked both its language and its rule of construction. In

> implicitly relying on § 3584(a) in construing the judge's silence, the BOP construed the third sentence of § 3584(a) to include not only the judge's silence at the time of imposing sentence, but also his later silence when asked whether a nunc pro tunc designation was appropriate. That is, the BOP construed the phrase "unless the [federal] court orders that the terms are to run concurrently" to apply not only to silence at the time of sentencing but also to silence in response to a letter of inquiry from the BOP. This broad reading of the third sentence of § 3584(a) is not an implausible construction. I would therefore conclude that the BOP acted properly in construing the sentencing judge's answer to the BOP's letter, in which the judge refused to express a preference, as an indication that a consecutive sentence was appropriate.

Id. at 1159. However, Judge Fletcher explicitly noted that the federal sentencing judge's recommendation is not determinative; the BOP reserves for itself the ultimate decision whether to give effect to the state judgment of concurrency. *Id.* at 1158-59. The construction of the statute to confer on the Executive Branch retrospective power to overturn a subsequent state sentence violates a number of fundamental federal constitutional rights, both relating to the personal rights of the defendant and the comity interests of the States.

1. Federal Constitutional And Statutory Provisions Regarding Finality

This Court recently emphasized the importance of finality in narrowly construing the authority to modify a sentence under the retroactive crack amendment. *Dillon v. United States*, 130 S.Ct. 2683, 2690 (2010) ("[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment and may not be modified by a district court except in limited circumstances") (citing 18 U.S.C. § 3582(c)). Section 3582(c)(1)(B) limits modification of the sentence to what is "expressly permitted by statute." Given that the federal judge's oral pronouncement at a sentencing hearing constitutes the legal sentence,

federal constitutional and statutory protections on finality bar federal interference with subsequent state judgements. Fed. R. Crim. P. 35(c); *see United States v. Meza*, 620 F.3d 505, 507-09 (5th Cir 2010) (federal statutes generally bar sentence modification after adjournment of the sentencing hearing); *United States v. Bergmann*, 836 F.2d 1220, 1221-22 (9th Cir. 1988) (oral pronouncement of sentence governs over later written judgment because the "constitutional double jeopardy protections and the defendant's right to be present at the time of sentencing . . . require strict adherence"). The narrow statutory circumstances permitting modification of a federal sentence do not include a subsequent independent evaluation by the BOP as to concurrent or consecutive service of the sentences, even with consideration of what the federal judge would have wanted.

Adherence to the requirements of finality also protects against the loss of due process protections that are missing after judgment is entered. Even though the post-judgment BOP actions may mean years of additional imprisonment, the prisoner lacks basic protections such as the right to counsel at sentencing, *Mempa v. Rhay*, 389 U.S. 128, 137 (1967), the due process rights to notice and opportunity to be heard incorporated in Rule 32, and the safeguards against unreliable information, *United States v. Tucker*, 404 U.S. 443, 447 (1972). Most basically, the defendant has no right to be present when decisions are made that can greatly increase the actual time the defendant must serve in custody for his federal sentence. Fed. R. Crim. P. 43(a).

2. *Constitutional Protections Incorporated In Comity And Full Faith And Credit*

Our system of dual sovereignty entitles both state and federal governments to execution of their own laws with mutual respect for the decisions of the other. The interrelating doctrines of dual sovereignty, federalism, comity, and full faith and credit establish that a federal statute cannot constitutionally permit a federal agency to unilaterally supersede the subsequent state sentencing decision of a state judge.

The federal government does not have general authority under the Supremacy Clause to second guess state criminal judgments. Rather, the state and federal sovereigns must co-exist and interact with complete mutual respect. *Ponzi*, 258 U.S. at 259; *see Strand v. Schmittroth*, 251 F.2d 590, 605 (9th Cir. 1957) (because there is "no 'federal supremacy' in the corner of the field which is specifically under consideration, the powers of a particular state and the central government are those of dual sovereignty in the identical territory."). In effect, the system of establishing primary jurisdiction upon which detainers are filed operates in criminal law analogously to commercial liens – once the first jurisdiction acts, the second is free to act independently and fully based on the previous final disposition. *Ponzi*, 258 U.S. at 260 ("The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purposes.").

In the area of general law enforcement outside areas of exclusive federal jurisdiction, this Court in *United States v. Lopez* noted that "under our federal system, the States possess primary authority for defining and enforcing the criminal law." 514 U.S. 549, 561 n.3 (1995). This observation is consistent with the Tenth Amendment's reservation of powers to the States. *See* St. George Tucker, 1 BLACKSTONE COMMENTARIES, Appendix, at 186-87 (Birch & Small 1803) (the punishment for State "[c]rimes and misdemeanors," in all cases not exclusively within federal jurisdiction, "belongs to the state jurisprudence"); 2 THE FEDERALIST, No. 45 at 82 (J. & A. McLean 1788) (James Madison) ("The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order . . . of the State."). Each sovereign has the power to impose as much or as little punishment for the crime as the sovereign desires.

The federal government's ability to set punishment was not compromised or constrained where, as in the present case, the federal sentencing judge determined that 71 months incarceration was appropriate. The state sentence subsequently ordered to run concurrently does not impact the federal sentencing authority because the 71 months must be served. The State interest is simply that its conviction and sentence do not require more than the 71 months previously imposed by the federal court. The federal government must give effect to the State's concurrent sentence because the subsequent sentencing only asserted the State's own power, with no concomitant diminution of federal authority. *See*

Kelly v. Robinson, 479 U.S. 36, 47 (1986) ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States."); *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

Federal post-judgment action that trumps a subsequent state concurrent sentence raises serious questions under the Full Faith and Credit Clause. From the first days of the Republic, Congress extended the Full Faith and Credit Clause to the federal government by statute. *See* 28 U.S.C. § 1738; *Davis v. Davis*, 305 U.S. 32, 39-40 (1938). The full faith and credit obligation "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 (1982).

> The evils of introducing a general system of re-examination of the judicial proceedings of other states, whose connexions are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases. Motives of this sort, founded upon an enlarged confidence, and reciprocal duties, might well be presumed to have entered into the minds of the framers of the confederation, and the constitution. They intended to give, not only faith and credit to the public acts, records, and judicial proceedings of each of the states, such as belonged to those of all foreign nations and tribunals; but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the state, where they originated.

Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1304, at 187 (1833) (Boston, Hilliard, Gray & Co. 1833) (emphasis in original; footnotes omitted). By disregarding the properly imposed state judgment that the state offense required no more

incarceration than had previously been imposed, the BOP violated the integrity the state proceedings and deprived the resulting judgment of the "positive and absolute verity" required by the Full Faith and Credit Act.

The Ninth Circuit's rejection of the Full Faith and Credit Act in this context rests on an erroneous premise: "We hold that the Act does not apply to an attempt to enforce a state criminal sentence to limit a federal sentence for a federal crime." *Taylor v. Sawyer*, 284 F.3d 1143, 1153 (9th Cir. 2002) (cited in *Reynolds*, 603 F.3d at 1150-52). While it is true that the subsequent state sentence cannot "limit" the federal sentence, it is simply incorrect that respecting the subsequent judgment of concurrency limits the federal punishment. In the present case, the Montana state court merely exercised its sovereign authority to impose punishment for violations of its laws. The previous federal sentence of 71 months remained completely intact and completely served. But by disrespecting the subsequent sentence – failing to give it full faith and credit – Mr. Reynolds was initially required to serve over four years of additional prison time that neither the state nor the federal court had ordered. This Court should construe the Full Faith and Credit Act to foreclose federal Executive Branch, post-judgment action that effectively negates the subsequent state court judgment that the state sentence should run concurrently with the federal sentence.

3. Constitutionally Required Separation Of Powers

Whether a sentence runs consecutively or concurrently determines the quantum of punishment – a decision vested solely in the Judiciary. By exercising its policy statements,

the "BOP makes the foundational decision of *whether* the separate sentence should be concurrent." *Reynolds*, 603 F.3d at 1157 (W. Fletcher, J., concurring) (emphasis in original). This exceeds the BOP's power. The BOP's proper role is the administrative task of executing the judicially imposed sentence. *See United States v. Wilson*, 503 U.S. 329, 335 (1992) (the BOP "has the responsibility for administering the sentence."). Because sentencing decisions "properly [belong] to a member of the judicial branch," that determination cannot rest in the Executive Branch. *Reynolds*, 603 F.3d at 1160 (W. Fletcher, J., concurring).

The BOP's interpretation of the sentencing statutes violates the separation of powers doctrine because an Executive agency cannot, by deciding the concurrent or consecutive question, exercise the Judiciary's role of determining the length of punishment upon conviction. The BOP's program statements plainly state that the agency is not bound by the preference of the federal judge when making *nunc pro tunc* determinations. *Reynolds*, 603 F.3d at 1161 (W. Fletcher, J., concurring). The BOP's purported discretion to ignore the federal judge's preference accentuates the underlying impropriety of any federal post-judgment exacerbation of the original federal judgment.

4. Due Process Protections Against Arbitrary And Capricious Punishment

This Court has stated that the calculation of pretrial credit depending on the timing of sentencing would be "arbitrary": "We can imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in

prison, to depend on the timing of his sentencing." *Wilson*, 503 U.S. at 334. Yet that is precisely what happened in the present case. Due to the timing of state and federal prosecutions, the BOP initially determined that Mr. Reynolds should serve 51 months more than the sentences reflected in his federal and state judgments. Even more capriciously, the actual time served increased or decreased depending on when requests were made for federal post-judgment recommendations: the amount of actual custody depended on whether and how often requests were made. In the present case, Mr. Reynolds may have served months or years less if he had made his second request sooner; he might still be serving the full extra 51 months if he had failed to make such a request.

In reliance on *Wilson*, a district court invalidated a similar BOP rule that made the length of sentence depend on the timing of prosecution, stating: "Courts do not construe ambiguous statutory language to make the amount of time an individual spends in prison depend on luck." *Lopez v. Terrell*, 697 F. Supp. 2d 549, 571 (S.D.N.Y. 2010). The court found it "patently arbitrary" for bureaucratic and litigation factors, irrelevant to the purposes of sentencing, to extend the length of time a person spends in prison. *Id.* In a related context, the Ninth Circuit recognized that, where the time in actual custody depended on the vagaries of where the juvenile was arrested, such disparate treatment "might well trigger equal protection concerns." *Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006). By construing the relevant statutes to foreclose the BOP from dishonoring the subsequent state sentence, depending on the luck of prosecutorial timing or prisoner initiative, this Court

avoids serious due process and equal protection issues involving the central value of human freedom. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects.").

C. Certiorari Is Appropriate Because The Court Would Be Addressing An Exceptionally Important Question.

Certiorari should be granted because federal court of appeals judges have called for assistance in resolving the Circuit split as well as the separation of powers problems that only this Court can untangle after years of confusing rulings where basic constitutional issues were not adequately litigated or addressed. As reflected in the Fifth Circuit's recent decision to wait for this Court to resolve the split regarding § 3584(a)'s meaning, no further percolation is appropriate. *Setser*, 607 F.3d at 131 n.2. In the present case, the concurring judge joined two other Circuits in calling for Congress to fix the injustice of BOP practices that convert concurrent sentences into de facto consecutive sentences. *Reynolds*, 603 F.3d at 1160-61 (W. Fletcher, J., concurring) (citing *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 76 (2d Cir. 2005); *Fegans v. United States*, 506 F.3d 1101, 1104 (8th Cir. 2007)). This concern is not new: nearly 20 years ago, a Ninth Circuit judge decried the injustice of a BOP de facto consecutive sentence that resulted in a prisoner spending "approximately 8 years and seven months in prison, although neither the federal nor the state sentencing court anticipated that he would spend more than five years in prison." *Del Guzzi v. United States*, 980 F.2d 1269, 1271 (9th Cir. 1992) (Norris, J., concurring).

Despite these judicial calls for reform, nothing has changed. Prosecutors, defense counsel, and judges routinely have extreme difficulty achieving the sentencing result anticipated by all in the frequently arising situation where a defendant is subject to both state and federal prosecution. Federal and state prosecutions that go wrong involve the most serious constitutional principles. At a time when federal prisons are at 137% of capacity, the time involved in sentencing errors is great: the original BOP decision would have added over four years to Mr. Reynolds's imprisonment. The courts have expressed repeated concern regarding the obvious separation of powers issue when the same branch of government that prosecutes the federal prisoner determines concurrency instead of the sentencing judge from either sovereign. The case also involves federalism and comity concerns where the federal BOP countermands the state court's determination that the state sentence should run concurrently. And the case implicates core due process concerns if the Executive Branch is allowed unilaterally to upset the finality of the federal and state sentencing.

The Circuit decisions inadequately consider the full context of the federal sentencing statutes, the practical implications of the conflicting rules, and the doctrine of constitutional avoidance. As a result, judges have been forced to approve unjust results. That status quo need not be tolerated: this Court should apply the rules of construction – especially the doctrine of constitutional avoidance – to do simple justice in a manner all players in the system can easily understand.

D. By Reviewing The Relevant Sentencing Statutes And Constitutional Provisions Afresh, This Court Would Remove The Obstacles To Providing Due Respect For Subsequent State Judgments Of Concurrency.

By granting certiorari, this Court can properly construe the relevant statutes to avoid the serious constitutional questions raised by de facto consecutive sentences, imposed by the Executive Branch, that nullify subsequent legitimate state judgments that the state sentence should run concurrently with the previously imposed federal sentence. Such constructions would prevent the federal statutes from being unconstitutional as applied.

This Court should grant certiorari to construe the relevant federal sentencing statutes following the rule requiring avoidance of serious constitutional issues. *Skilling*, 130 S. Ct. at 2929-30; *Martinez*, 543 U.S. at 380-81. This principle of construction applies to each of three statutes: 1) § 3584(a) should be construed to bar post-judgment federal action that extends the period of actual incarceration by rendering a subsequent state concurrent sentence in fact consecutive; 2) § 3621(b) should be construed to bar exercise of designation authority that thwarts a subsequently imposed state concurrent sentence; and 3) § 3585(b) should be construed to permit sentence calculations that respect subsequent concurrent state sentences. To avoid the constitutional problems of Executive indefinite detention, this Court construed a six-month limit into an immigration detention statute with no time limit. *Zadvydas*, 533 U.S. at 689. With human liberty also at issue, the present statutes are easily susceptible to interpretations that avoid constitutional problems, especially in the context of the "overarching" statutory instruction to assure that a defendant receives a sentence no

greater than necessary to achieve the purposes of sentencing under 18 U.S.C. § 3553(a). *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (quoting *Kimbrough v. United States*, 552 U.S. 85, 111 (2007)); *see also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (the rule of lenity applies to the "severity of sentencing" under the Sentencing Reform Act).

The simplest answer to the interaction of state and federal sentences is to resolve the Circuit conflict by construing § 3584(a) to bar federal judgments regarding unimposed sentences. Implementing constitutional interests in comity and separation of powers, as well as the contextual meaning of the relevant statutory language, this Court should hold that neither the federal judge nor the BOP has the authority to direct that a federal sentence be served consecutively to a state sentence not yet imposed, either before or after entry of the federal judgment. Both § 3584(a)'s statutory language limiting the subsection to persons "already subject to an undischarged term of imprisonment," as well as fundamental constitutional principles, prohibit federal actors from interfering with the State's rights to apply and to enforce its own laws as it sees fit. The Ninth Circuit's recognition in this case that, under § 3584(a), "federal courts cannot order a sentence to run either concurrently or consecutively to a non-existent term," *Reynolds*, 603 F.3d at 1149, should have resolved this case. The statute that barred the sentencing judge from acting during the sentencing hearing also barred federal judicial and executive action, after entry of judgment, that retrospectively did the exact same thing.

In addition to § 3584(a), this Court should construe § 3621(b) and § 3585 to require the BOP to respect subsequently imposed state judgments of concurrency. As has been held since *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1991), the BOP has authority to make *nunc pro tunc* designations to state institutions under § 3621(b). This authority should be construed to require such designation where necessary to effectuate a legitimate subsequent state judgment that a sentence run concurrently with a previous federal sentence. The BOP's failure to do so violates the statute as construed to avoid serious constitutional problems.

The Court should also construe § 3585 to the same effect. The prohibition on credit for prior custody is limited to time "that has not been credited against another sentence." As Mr. Reynolds stated in reply to the BOP's reliance on this section:

> Neither does the government's discussion of § 3585(b) affect the analysis in this case. There are clearly recognized exceptions to any statutory prohibition on receiving double credit . . . . The BOP is not compelled to create a consecutive sentence that neither the federal nor the state judge ordered.

Given that each of Mr. Reynolds's state judgments expressly referenced the federal judgment in ordering concurrency, the Court should interpret the statute to avoid serious constitutional problems: legitimate and expressly interrelated judgments do not constitute "credit against another sentence" under § 3585(b). Therefore, the BOP has the power to credit the time judicially determined to constitute the same sentence – or not "another sentence" – by the state judgment of concurrency.

E. The Present Case Presents An Ideal Vehicle For Resolving These Issues.

This case provides a perfect fact situation to resolve the state and federal sentencing issues impacting numerous defendants. This case is a prototype of the infinite variety of state and federal interactions: the initial arrest by state authorities and resulting state primary jurisdiction; the formal or informal transfer to federal court for proceedings resulting in the federal sentence; the return to state custody and eventual imposition of a state sentence ordered to run concurrently with the previous sentence; and the transfer back to federal custody after service of all or part of the state sentence. In federal custody, the BOP then either entirely or partially disregards the state judgment of concurrency.

The statutory questions are especially clear because the BOP articulated the initial refusal to provide any concurrency in almost the precise language of § 3584(a): "The federal judgment was silent regarding execution of your [sentence]. As such, multiple terms of imprisonment imposed at different times are deemed consecutive unless the court dictates otherwise." *Reynolds*, 603 F.3d at 1157. The BOP then essentially undertook an executive re-sentencing by evaluating Mr. Reynolds' conduct and criminal history to determine whether he should receive the concurrent time through *nunc pro tunc* designation to the state facility. Given the second post-judgment request for input from the federal judge, the present case is especially illustrative of the irrational vagaries of determining time in custody after both state and federal judgments have become final. The separation of powers issues, and all other issues argued here, were clearly raised and briefed before the lower courts.

6. Conclusion

This case involves issues central to this Court's reasons for grating certiorari: the federal Circuits have exhausted attempts to resolve an almost even split; basic constitutional principles previously elaborated by this Court are not being followed; resolution of the questions can only be accomplished by this Court; the underlying issues frequently recur within the federal criminal justice system; and fundamental comity and liberty interests are at stake. The Court should issue a writ of certiorari.

Dated this 12th day of November, 2010.

Stephen R. Sady
Attorney for Petitioner

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES LEE REYNOLDS,

Petitioner,

v.

J. E. THOMAS,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon on November 12, 2010, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Kelly A. Zusman
U.S. Attorney
1000 SW Third, Suite 600
Portland, OR 97204

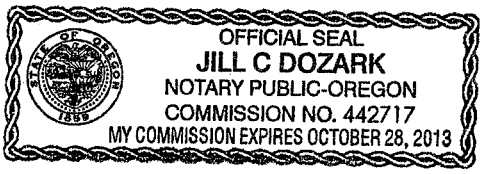
Neal K. Katyal
Acting Solicitor General
Room 5614
Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, DC 20530-0001

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 12th day of November, 2010, with first-class postage prepaid.

Dated this 12th day of November, 2010.

Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 12th day of November, 2010.



Notary Public of Oregon

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CHARLES LEE REYNOLDS,

Petitioner,

v.

J.E. THOMAS,

Respondent.

Civil No. 07-1244-ST

FINDINGS AND RECOMMENDATION

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///

STEWART, Magistrate Judge.

Petitioner brings this habeas corpus action pursuant to 28 U.S.C. § 2241 in which he challenges the computation of his federal sentence. Specifically, he alleges that the Bureau of Prisons ("BOP") wrongfully denied him credit toward his federal sentence for 50 months and 22 days he spent in Montana state custody. With that credit, he would be entitled to release in July 2008 rather than in February 2012. For the reasons set forth below, the Petition for Writ of Habeas Corpus (docket #1) should be denied.

BACKGROUND

According to the record in this case, a federal warrant was issued for petitioner's arrest at 2:45 p.m. on October 3, 2002. Petitioner's Reply Exhibit C. That same evening, petitioner was arrested by the Ennis (Montana) Police Department following his attempt to cash a forged cashier's check at a local bank earlier that day at approximately 4:30 p.m. and his subsequent attempt to elude the police. Petitioner's Reply Exhibit B, pp. 1-2. After being treated at a local hospital for injuries sustained during his attempt to elude the police, authorities from the Ennis Police Department booked petitioner into the Madison County Jail at 4:00 a.m. on October 4, 2002. Petitioner's Reply Exhibit A.

The Booking Sheet shows that the arrest had been made pursuant to a "warrant." *Id.* However, it was not until approximately five hours later that Officer Thomas W. Tighe of the Ennis Police

Department received the federal arrest warrant which had been issued the previous day. Petitioner's Reply Exhibit B, p. 3. Officer Tighe then served the federal warrant on petitioner at 10:05 a.m. on October 4, 2002. *Id.* Rather than referring to the federal warrant, the "warrant" on the Booking Sheet appears to refer to one of the other "outstanding felony warrants" for petitioner's arrest. *Id* at 1 and Exhibit F(PSR), ¶¶ 20, 87. In any event, the authorities clearly had probable cause to arrest and book petitioner for committing various state crimes on October 3, 2002.

On October 29, 2002, petitioner was charged by information in Madison County on various state charges. Petitioner's Exhibit E. However, on November 25, 2002, a representative of the U.S. Marshal's Service took custody of petitioner at the Lewis and Clark County Jail pursuant to a writ of *habeas corpus ad prosequendum* for his appearance on criminal charges in the United States District Court. Respondent's Exhibit 1, Att. 2. Petitioner ultimately pled guilty to Identity Theft and Bank Fraud in the U.S. District Court in Montana, and on May 22, 2003, the federal court sentenced him to 71 months in custody as to each count to be served concurrently. Respondent's Exhibit 1, p. 1.

Petitioner was returned to state custody following his federal sentencing and was convicted on state charges in the First Judicial Circuit Court of Montana, sitting in Lewis and Clark County. As a

result, on August 1, 2003, that court imposed the following terms of imprisonment:

> Group A -- sentences to run concurrently with each other and with the federal sentence:
>
> 1. DUI: 9.5 years;
>
> 2. Forgery: 10 years;
>
> 3. Fraudulently obtaining dangerous drugs: 5 years;
>
> Group B -- sentences to run consecutively with each other and consecutively to Group A:
>
> 4. Theft of identity: 10 years; and
>
> 4a. Theft of identity: 5 years (suspended);
>
> Group C -- sentences to run concurrently with Group B and consecutively to Group A:
>
> 5. Forgery: 15 years (5 years suspended).

Respondent's Exhibit 1, Att. 4, pp. 3-4 (emphasis added).

On December 24, 2003, petitioner was sentenced by the Fifth Judicial District Court sitting in Madison County after he pled guilty to criminal possession of drugs, criminal endangerment, and criminal mischief. Respondent's Exhibit 1, Att. 5. That court sentenced petitioner to five years imprisonment to be served concurrently to the sentences imposed in Lewis and Clark County and the U.S. District Court. *Id.*

In 2004, petitioner, with the assistance of counsel, asked the BOP to reconsider its computation of his sentence based on his assertion that he began his incarceration as a federal prisoner. Petitioner's Reply Exhibit G, pp. 1-5. He asked the BOP to

designate *nunc pro tunc* his state institution as the facility for service of his federal sentence. Such a designation, if allowed, would have reduced petitioner's scheduled term of incarceration by approximately four years.

On December 16, 2004, the BOP responded that the Judgment from petitioner's federal criminal case "reveals the concurrent language pertains to the two federal sentences which were imposed, and not for the state sentences he is currently serving. Bureau of Prisons staff discussed this interpretation with the Chambers of the [sentencing judge], who indicated no objections with our assessment." *Id* at 6.

Petitioner did not find this letter to be sufficiently responsive and, through counsel, sent another letter to the BOP on December 30, 2004, in which he agreed that "there is no specific mention of concurrency with state sentences[,]" but asked whether the BOP "would consider asking [the sentencing judge] again, whether under the circumstances here -- that the subsequent state judgment were specified to run concurrently with the federal sentence -- if [the sentencing judge] would recommend it also[.]" *Id* at 7-8. Regional counsel for the BOP responded that there was no reason for further discussion. *Id* at 9.

Petitioner remained in state custody until December 22, 2006, when he was transferred to federal custody. When the BOP computed

his sentence, it did not award him for credit for his time served in state custody.

On September 17, 2007, the BOP sent a letter to petitioner's federal sentencing judge, the Honorable Charles C. Lovell. The BOP advised Judge Lovell that petitioner had requested a reduction in his federal term in accordance with the United States Sentencing Guidelines ("USSG") § 5G1.3 so that he might receive credit for time he spent in state custody. Respondent's Exhibit 1, Att. 9. Judge Lovell responded that he made no reference to the state sentences during federal sentencing because the state sentences did not exist. Respondent's Exhibit 1, Att. 10. He concluded that he had no comment on the BOP's consideration of petitioner for retroactive designation of the state institution for service of the federal sentence. *Id.* Thereafter, the BOP assessed petitioner's *nunc pro tunc* request pursuant to 18 U.S.C. § 3621(b) and denied it. Respondent's Exhibit 1, Att. 11.

Petitioner filed this habeas corpus action in August 2007 alleging that the BOP wrongfully denied him credit for time served, and that such a denial is arbitrary, capricious, and not in accordance with the law.

FINDINGS

The Attorney General, through the BOP, is responsible for sentence computation decisions. *United States v. Wilson*, 503 U.S.

329, 331 (1992). Commencement of a federal prisoner's sentence, as well as credit for prior custody, are governed by 18 U.S.C. § 3585:

> (a) **Commencement of a sentence.**--A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> (b) **Credit for prior custody.**--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences-
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after commission of the offense for which the sentence was imposed;
>
> *that has not been credited against another sentence.*

18 U.S.C. § 3585 (bold in original, italics added).

Petitioner erroneously claims that he was initially taken into custody pursuant to the federal warrant. As discussed above, the law enforcement officers from Ennis, Montana, were unaware of the federal warrant when they arrested petitioner and booked him into a local jail. Accordingly, petitioner was not received into federal custody for service of his federal sentence until December 22, 2006. Thus, for purposes of 18 U.S.C. § 3585(a), petitioner's federal term of imprisonment did not begin until that date.

Petitioner also is ineligible for federal sentencing credit as "prior custody credits" pursuant to 18 U.S.C. § 3585(b) for the time he spent in state custody. The time he spent in Montana's jails and prisons between October 3, 2002, and his release to federal custody on December 22, 2006, was all credited towards his state sentence. Because 18 U.S.C. § 3585(b) explicitly provides that no prior custody credits will be awarded based on time credited toward the service of another sentence, petitioner is not entitled to such credit.

Petitioner argues that the denial of his request for *nunc pro tunc* designation of the state prison for service of his federal sentence was arbitrary and capricious, and not in accordance with the law. First, he contends that the BOP improperly imputed an intent to the sentencing court to effectively run the federal and state sentences consecutively. The only written document from Judge Lovell regarding the issue of concurrent versus consecutive sentencing states as follows:

> I am in receipt of your letter dated September 17, 2007, seeking my position on your contemplated retroactive designation of state institution for service of Defendant Reynolds' 71-month federal sentence.
>
> When I sentenced Defendant Reynolds on May 22, 2003, I was aware, of course, that he was then pending sentencing both in Lewis and Clark County (Montana First Judicial District) and also in Madison County (Montana Fifth Judicial District). I made no reference to the Defendant's state sentences because they did not yet exist.

> In response to your inquiry, I have no comment on your consideration of Defendant Reynolds for retroactive designation of the state institution for service of the federal sentence.

Respondent's Exhibit 1, Att. 9 at 2.

Petitioner faults the BOP for allowing the federal sentence to run consecutively despite the state courts' express intentions that the state sentences run concurrently with petitioner's federal sentences. However, the intentions of the state courts are not binding on the federal courts. *Jake v. Herschberger*, 173 F.3d 1059, 1065 (7th Cir. 1999) ("determination as to concurrence of sentence made by one sovereign does not bind the other"). Because petitioner's federal Judgment was silent as to being concurrent with any future state sentences and Judge Lovell expressed no preference when asked, the BOP was within its discretion to run the federal sentence consecutively.

Petitioner also alleges that the BOP failed to follow its own rules with respect to the *nunc pro tunc* designation request. Specifically, he asserts that the BOP erroneously applied 18 U.S.C. § 3621(b) to determine his eligibility for retroactive designation of his state prison as a place for service of his federal sentence. The BOP's assessment of petitioner's case was in accordance with Program Statement 5160.05, titled "Designation of State Institution for Service of Federal Sentence," which requires the BOP to analyze such requests under the factors identified in 18 U.S.C. § 3621(b).

The BOP rejected petitioner's *nunc pro tunc* designation request based on the comments of the sentencing court, his lengthy criminal history, and the career nature of his criminal activities. Respondent's Exhibit 1, Att. 11. Petitioner asserts that 18 U.S.C. § 3621(b) should only be applied prospectively to determine a suitable place of confinement. Otherwise, he contends that it becomes a de facto resentencing by the BOP. However, he is unable to identify any controlling authority for such a proposition or an alternate mechanism by which the BOP is tasked with meaningfully addressing designation requests in a retroactive fashion. Accordingly, the BOP's application of 18 U.S.C. § 3621(b) to petitioner's case pursuant to the governing Program Statement does not violate principles of due process of law.

Petitioner next asserts that the BOP acted arbitrarily and capriciously and abused its discretion when it failed to consider that his federal sentence would have been concurrent under USSG § 5G1.3(b) if the state sentences had been imposed prior to the federal sentence. In this case, the state sentences were not imposed first. Thus, the Sentencing Guidelines do not call for concurrent state and federal sentences. Accordingly, the BOP's decision cannot be deemed arbitrary, capricious, or an abuse of discretion in this respect.

Petitioner also challenges the BOP's decision because it did not comport with *Cozine v. Crabtree*, 15 F. Supp.2d (1997) (D. Or.

1998). In *Cozine*, this court determined that "the United States had primary jurisdiction over Cozine at the time sentence was imposed, with no other pending convictions or sentences to serve." *Id* at 1020. Here, by contrast, Montana had taken primary jurisdiction of and did not release petitioner to federal custody until December 22, 2006, the date on which the BOP started the clock running on his federal sentence. In addition, the BOP's decision in *Cozine* was predicated on 18 U.S.C. § 3584, not 18 U.S.C. § 3585. Accordingly, *Cozine* is inapposite.

Even if Montana had primary jurisdiction, petitioner argues that it relinquished its jurisdiction by failing to proceed for over six months, citing *Buggs v. Crabtree*, 32 F. Supp.2d 1215 (D. Or. 1998). In *Buggs*, the court determined that the State of Washington, despite having primary jurisdiction over petitioner Buggs by arresting him on a state warrant, relinquished jurisdiction "by not acting on either of the state charges against him until over six months had passed, and the federal court had tried and sentenced petitioner on the federal charges." *Id* at 1219. As a result, it credited the time spent in state custody towards the later federal sentence.

In this case, the U.S. Marshal's Service took temporary custody of petitioner less than 60 days after his arrest by local authorities and shortly after an information had already been filed in Lewis and Clark County. Federal authorities took temporary

custody of petitioner via a *habeas corpus ad prosequendum*, a mechanism for temporary custody frequently utilized by the federal courts which does not divest a particular state of primary jurisdiction. *See Taylor v. Reno*, 164 F.3d 440, 444 (9th Cir. 1998). Six months later on May 22, 2003, petitioner was sentenced in federal court. Shortly thereafter, he was returned to state custody where his criminal proceedings in Lewis and Clark County moved relatively quickly, resulting in petitioner's sentencing on July 24, 2003. Based on this record, there is no indication that Montana (the sovereign with priority of jurisdiction) relinquished jurisdiction to the United States.

Petitioner's case is most analogous to *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72 (2nd Cir. 2005). In that case, the prisoner was in state custody in New York awaiting trial when he was indicted in federal court in June 1992 and temporarily removed to federal custody via a writ of *habeas corpus ad prosequendum*. Abdul-Malik was convicted in federal court in July 1993. Because there were no pending state sentences to serve, the federal district court did not express whether the federal sentence was to be served concurrently or consecutively with any future state sentence.

Abdul-Malik was returned to state custody following his conviction in federal court and, in August 1994, convicted of state charges and sentenced to 17 years in prison. The state court

indicated that its sentence was to be run concurrently to the federal sentence.

Thereafter, Abdul-Malik requested that the BOP, *nunc pro tunc*, designate his state prison as a federal prison such that his state and federal sentences would run concurrently. The BOP denied this request, and the district court denied his subsequent application for relief from the BOP's decision.

The Second Circuit determined that the expressed intention of the state sentencing court to run the state sentence concurrently with the prior federal sentence "is not binding on federal authorities." *Id* at 75. It concluded that because the BOP "gave 'full and fair consideration' to Abdul-Malik's request for designation of his state prison *nunc pro tunc* as a place of federal incarceration[,]" the BOP's decision "'is plainly and unmistakably within the BOP's discretion and we cannot likely second guess a deliberate and informed determination by the agency charged with administering federal prison policy.'" *Id* at 76, quoting *Taylor v. Sawyer*, 284 F.3d 1143, 1149 (9th Cir. 2002).

Petitioner in this case was taken into primary custody by Montana authorities and sentenced first in federal court, then in state court. Montana never relinquished primary jurisdiction over him until the expiration of his state sentences. Petitioner requested *nunc pro tunc* designation and the BOP, after consultation with the federal sentencing judge and an assessment of the factors

contained in 18 U.S.C. § 3621(b), declined to allow him to serve his federal sentence in the Montana prison. Accordingly, the BOP gave full and fair consideration to petitioner's request and properly exercised its discretion in denying it.

Petitioner argues that he should at least be credited with serving his sentence beginning on March 4, 2004, when he asserts that he was tendered by Montana to the U.S. Marshal's Service for service of his federal sentence. According to petitioner, the U.S. Marshal's Service rejected the tender based on a lack of available resources. There is no evidence in the record to support the contention that the U.S. Marshal's Service ever refused to take petitioner, and it appears that the U.S. Marshal's Service does not refuse inmate transfers due to limited resources. Declaration of Rebecca Hill, p. 1.

Petitioner also contends that the BOP misapplied 18 U.S.C. § 3584(a) to his case. That statute applies only where: (1) multiple terms of imprisonment are imposed at the same time; or (2) the inmate is subject to an undischarged term of imprisonment. Neither of these situations applies to petitioner. Furthermore, the record reveals that the BOP properly relied on 18 U.S.C. § 3585, not 18 U.S.C. § 3584, in assessing his term of federal custody. Declaration of Cheryl Pauley, p. 5.

Finally, petitioner asserts that the BOP exceeded its authority to administer federal sentences by converting concurrent

state sentences into consecutive sentences, thereby intruding on the State's exclusive authority to establish the quantum of punishment it deems appropriate under state law. As is apparent from the foregoing, the BOP did not exceed its authority, and its decision regarding petitioner's *nunc pro tunc* designation request did not alter the duration of the sentences imposed by Montana's state courts (although the decision did, of course, impact the cumulative term of imprisonment petitioner is obligated to serve).

What is troubling, though, is the fact that the same branch of government that prosecuted petitioner also determined that he should serve his federal sentence consecutively to his state sentences. "Federalism concerns are implicated because the federal BOP is given the effective authority to enforce (or not) a state court's determination that state sentence should run concurrently." *Abdul-Malik*, 403 F.3d at 76. While it may be preferable for such decisions to be made by the courts as opposed to the Attorney General (through the BOP), this is an issue for congressional consideration. *See id; see also Fegans v. U.S.*, 506 F3d 1101, 1104 (8th Cir. 2007).

Where, as here, the BOP gives full and fair consideration to an inmate's request for designation of his state prison *nunc pro tunc* as a place of federal incarceration, the resulting decision "is plainly and unmistakably within the BOP's discretion. . . ."

Id. Accordingly, the BOP's calculation of petitioner's sentence does not offend constitutional principles.

RECOMMENDATION

For the reasons identified above, the Petition for Writ of Habeas Corpus (docket #1) should be DENIED, and Judgment should be entered DISMISSING this case with prejudice.

SCHEDULING ORDER

Objections to these Findings and Recommendation, if any, are due July 14, 2008. If no objections are filed, then the Findings and Recommendation will be referred to a district judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district judge and go under advisement.

DATED this 25th day of June, 2008.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CHARLES LEE REYNOLDS,

Petitioner,

v.

J.E. THOMAS,

Respondent.

CV 07-1244-ST

ORDER

REDDEN, Judge:

On June 25, 2008, Magistrate Judge Stewart issued her Findings and Recommendation (doc. 22) that the court deny Charles Lee Reynolds' Petition (doc. 1) for Writ of Habeas Corpus, and enter judgment dismissing the case with prejudice.

The matter is now before this court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). The magistrate judge makes only recommendations to the district

court, and any party may file written objections to those recommendations. When a party timely objects to any portion of the magistrate's judge's Findings and Recommendation, the district court must conduct a *de novo* review of the portions of the Findings and Recommendation to which objections are made. 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). The district court is not required to review the factual and legal conclusions of the magistrate judge, to which the parties do not object. Thomas v. Arn, 474 U.S. 140, 149 (1985); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). The district court, however, retains responsibility for making the final determination and "may accept, reject, or modify, in whole or in part, the findings or recommendations" made by a magistrate judge. 28 U.S.C. § 636(b)(1).

Petitioner timely filed objections to Magistrate Judge Stewart's Findings and Recommendation. I have, therefore, given those portions of the Findings and Recommendation a *de novo* review. I agree with Magistrate Judge Stewart's analysis and conclusions. Accordingly, I ADOPT the Findings and Recommendation (doc. 22) without modification. The Petition for Writ of Habeas Corpus (doc. 1) is DENIED.

IT IS SO ORDERED.

DATED this 5th day of August, 2008.

/s/ James A. Redden
James A. Redden
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES LEE REYNOLDS, *Petitioner-Appellant,* v. J. E. THOMAS, warden, *Respondent-Appellee.*	No. 08-35810 D.C. No. 3:07-CV-01244-ST OPINION

Appeal from the United States District Court
for the District of Oregon
Janice M. Stewart, Magistrate Judge, Presiding

Argued and Submitted
May 5, 2009—Portland, Oregon

Filed May 7, 2010

Before: William A. Fletcher, Carlos T. Bea and
Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Ikuta;
Concurrence by Judge W. Fletcher

COUNSEL

Stephen R. Sady, Chief Deputy Federal Public Defender, for the appellant.

Suzanne A. Bratis, Assistant United States Attorney, for the appellee.

OPINION

IKUTA, Circuit Judge:

Charles Lee Reynolds appeals from the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241, contending that the Federal Bureau of Prisons ("BOP") erred by refusing to issue an order under 18 U.S.C. § 3621(b) that retroactively (*nunc pro tunc*) designated the Montana state prison where Reynolds served his state sentence as the place where he began serving his federal sentence. Such an order, in effect, would have deemed that Reynolds's federal sentence ran concurrently with his state sentence, and thus would have shortened Reynolds's term of federal imprisonment by the amount of time he served in state prison. We affirm the district court's denial of the petition.

I

On October 3, 2002, Reynolds attempted unsuccessfully to cash a forged cashier's check at a bank in Ennis, Montana. Notified by the bank, state police arrived, and Reynolds fled in his car. Following a high-speed chase, the police captured Reynolds and booked him in the Madison County, Montana, jail in the early hours of October 4. His booking sheet indicated that his arrest was "pursuant to a warrant." Five hours after booking, Reynolds's arresting officer received a copy of a federal warrant issued for Reynolds, which listed offenses relating to identity theft and interstate flight to avoid prosecution. On October 29, the county attorney for Madison County charged Reynolds by Information with forgery, identity theft, and violation of the terms of three suspended sentences. The county attorney for Lewis and Clark County, Montana, filed additional charges against Reynolds shortly thereafter.

Before Reynolds was tried or convicted in state court, the federal district court in Montana issued a writ of *habeas corpus ad prosequendum*, which released Reynolds to federal custody to answer federal criminal charges. On May 22, 2003, Reynolds pleaded guilty to identity theft, 18 U.S.C. § 1028(a)(7), and bank fraud, 18 U.S.C. § 1344. The district court judge, Judge Charles Lovell, sentenced Reynolds to 71 months' imprisonment for each count, with the sentences to be served concurrently. That same day, Reynolds was returned to state custody.

Reynolds pleaded guilty to charges in Lewis and Clark County on July 24, 2003. The state court sentenced Reynolds to a term of fifteen years in state prison, with five years suspended. The state judge ordered Reynolds's sentence for certain charges to run concurrently "with the federal sentence imposed on defendant." Four months later, the state court in Madison County sentenced Reynolds to an additional five years in state prison, and likewise specified that this sentence should "be served concurrently with Defendant's sentences in Lewis and Clark County, Montana, and U.S. District Court to the extent which they overlap." Reynolds served 51 months in state prison.

While in state prison, Reynolds petitioned the BOP to designate *nunc pro tunc* the Montana state prison as the "place in which he may serve his federal sentence" pursuant to 18 U.S.C. § 3621(b).[1] Reynolds sought a declaration that his fed-

[1]Section 3621(b) states, in pertinent part:

> (b) Place of Imprisonment.— The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

eral sentence began when he was first incarcerated in state prison. In support of his request, Reynolds noted that the Montana courts had ordered that Reynolds's state sentence was to run concurrently with his federal sentence. The BOP determined, however, that the federal court had not ordered that his sentences run concurrently, and confirmed this interpretation with Judge Lovell. The BOP denied Reynolds's request in December 2004.

On December 22, 2006, Reynolds was released from state prison and transferred to federal custody. He thereafter renewed his request for retroactive designation of the state prison as the place where he began serving his federal sentence. In response, the BOP again asked Judge Lovell to indicate "the Court's position on a retroactive designation" in Reynolds's case. In its letter, the BOP explained that if Reynolds's request were granted, he would have a projected release date of July 17, 2008; otherwise, his projected release date would be February 17, 2012. In a letter dated October 2007, Judge Lovell stated that he had "no comment on [the BOP's] consideration of Defendant Reynolds for retroactive designation of the state institution for the service of the federal sentence."

The BOP denied Reynolds's request in November 2007 based on the factors listed in 18 U.S.C. § 3621(b), specifically

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(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28.

the nature and circumstances of Reynolds's offense, Reynolds's history and characteristics, and Judge Lovell's response. Reynolds appealed this administrative determination. The BOP denied the appeal, stating that "[t]he federal judgment was silent regarding the execution of your service. As such, multiple terms of imprisonment imposed at different times are deemed consecutive unless the court dictates otherwise." Furthermore, the BOP explained, Reynolds did not merit *nunc pro tunc* designation of the state prison under the factors enumerated in 18 U.S.C. § 3621(b). Reynolds's actions (as noted by the federal sentencing court) posed a "significant danger to the community," Reynolds's flight from state authorities created a "substantial risk of death or serious bodily injury to others," and he had attempted to influence a witness. Furthermore, the BOP noted that in light of "the career nature of [his] criminal activities, lengthy criminal history to include violence, and the characteristics of the instant offense, the likelihood of [his] recidivism is highly probable."

Reynolds filed a petition for writ of habeas corpus under 28 U.S.C. § 2241. The district court denied the petition, and Reynolds timely appealed. In November 2009, while this appeal was pending, Reynolds renewed his request for a *nunc pro tunc* designation of the Montana state prison where he had been incarcerated as the place where he began service of his federal sentence. The BOP contacted Judge Lovell for a third time; this time, the judge responded that "since the objectives of sentencing have apparently been largely met in his case, I have no objections to your suggestion for a retroactive designation." On November 18, 2009, the BOP granted Reynolds's request. Based on this ruling, the BOP determined that Reynolds was entitled to immediate release. His five-year term of supervised release thus began on November 20, 2009.

II

Before addressing the merits of Reynolds's petition, we must address the government's argument that Reynolds's

challenge to the BOP's November 2007 decision is moot because it was superseded by the BOP's November 2009 decision.

[1] We conclude that Reynolds's petition is not moot. A challenge to a term of imprisonment is not mooted by a petitioner's release where the petitioner remains on supervised release and "[t]here is a possibility that [petitioner] could receive a reduction in his term of supervised release under 18 U.S.C. § 3593(e)(2)." *Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005); *accord Arrington v. Daniels*, 516 F.3d 1106, 1112 n.4 (9th Cir. 2008); *United States v. Verdin*, 243 F.3d 1174, 1179 (9th Cir. 2001). Reynolds is currently scheduled to remain on supervised release until 2014. In support of his petition challenging the BOP's November 2007 decision, Reynolds claims he is entitled to a recalculation of his release date to July 17, 2008, and asserts that he was overincarcerated for sixteen months: from July 17, 2008 to his actual release date of November 20, 2009. A court could consider this alleged period of over-incarceration under 18 U.S.C. § 3583(e) as a factor weighing in favor of reducing the term of supervised release. *See United States v. Johnson*, 529 U.S. 53, 60 (2000). Furthermore, because the BOP's November 2009 decision did not recalculate Reynolds's release date to July 17, 2008, it did not give Reynolds the relief he requested in his petition for habeas corpus. Accordingly, we reject the government's contention that Reynolds's appeal is moot.

III

We turn to the merits of Reynolds's claim that the BOP erred in November 2007 when it denied his request for *nunc pro tunc* designation of the Montana prison as the facility for service of his federal sentences. We review de novo the denial of a petition filed under 28 U.S.C. § 2241, *Bowen v. Hood*, 202 F.3d 1211, 1218 (9th Cir. 2000), reviewing underlying factual findings for clear error, *McNeedly v. Blanas*, 336 F.3d 822, 826 (9th Cir. 2003).

A

[2] We begin with a brief overview of the law applicable to federal courts and the BOP's determination of whether sentences should be served consecutively or concurrently. Under 18 U.S.C. § 3584, "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."[2] A court has the discretion, however, to order that multiple terms of imprisonment run concurrently when the court is imposing multiple terms on a defendant at the same time or is sentencing a defendant already subject to an undischarged term of imprisonment. *Id.* The discretion granted by this provision is limited in two respects. First, "concurrent sentences imposed by state judges are nothing more than recommendations to federal officials." *Taylor v. Sawyer*, 284 F.3d 1143, 1150 (9th Cir. 2002). Accordingly, "the court" referenced in § 3584(a) refers only to federal courts. Second, we have held that even federal courts "cannot order a sentence to run either concurrently or consecutively to a non-existent term." *Id.*; *see* 18 U.S.C.

[2]Section 3584 provides, in relevant part:

> (a) Imposition of concurrent or consecutive terms.— If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.
>
> (b) Factors to be considered in imposing concurrent or consecutive terms.— The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553 (a).

§ 3584(a). In other words, a federal court cannot order a sentence to be served concurrently with a sentence, including a state sentence, that has not yet been imposed. *Id.*

During the sentencing process, federal courts must also consider the United States Sentencing Guidelines. *See United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). Section 5G1.3 of the Guidelines provides that under certain circumstances, if a defendant is already subject to an undischarged term of imprisonment for "relevant conduct," the sentencing court should adjust a defendant's sentence for the crime of conviction to take into account the time already served and should order the sentence to run concurrently with the remaining undischarged term of imprisonment.[3] This Guideline also includes the Sentencing Commission's policy

[3]Section 5G1.3(b)-(c) provides:

> (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:
>
> (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
>
> (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.
>
> (c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

statement that where there is an undischarged term of imprisonment, the district court should exercise its discretion "to achieve a reasonable punishment" for the offense. § 5G1.3(c).

Once the district court has discharged its sentencing function, the defendant is committed to the custody of the BOP, which has the authority to calculate the defendant's sentences in accordance with the district court's orders, as well as to designate the facility for service of such sentences. By statute, a federal sentence "commences on the date the defendant is received in custody" at the "official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a). The BOP has the authority to "designate the place of the prisoner's imprisonment." 18 U.S.C. § 3621(b). In exercising this designation authority, the BOP is directed to consider a range of factors, including "the nature and circumstances of the offense," "the history and characteristics of the prisoner," "any statement by the court that imposed the sentence" including any recommendation as to the type of correction facility, and "any pertinent policy statement" of the Sentencing Commission. *Id.*

[3] On its face, § 3621(b) gives the BOP only the administrative responsibility to identify the facility in which a federal prisoner will serve out the sentence imposed by the district court. The BOP has interpreted this statute, however, as authorizing it to issue a *nunc pro tunc* order designating a state prison as the facility for service of a federal sentence "when it is consistent with the intent of the federal sentencing court or with the goals of the criminal justice system." BOP Program Statement 5160.05 (January 16, 2003). Program Statement 5160.05 explains, "[w]hen a federal judge orders or recommends a federal sentence run concurrently with a state sentence already imposed the Bureau implements such order or recommendation, ordinarily by designating the state facility as the place to serve the federal sentence." The BOP will also consider "an inmate's request for pre-sentence credit toward a federal sentence for time spent in service of a state sentence

as a request for a nunc pro tunc designation." The Program Statement requires the BOP to consider the inmate's request, and sets forth the procedure the BOP must follow in determining whether to designate a state prison for (in effect) concurrent service of a federal sentence. Such procedures require the BOP to ask the federal sentencing court if it has any objections to such designation.

We approved the BOP's approach under this Program Statement in *Taylor v. Sawyer*, 284 F.3d at 1148-49.[4] In that case, we considered and rejected the argument that the Program Statement's grant of authority to the BOP to issue a *nunc pro tunc* designation was inconsistent with § 3584 and thus invalid. *Id.* Instead, joining other circuits that had considered the issue, we concluded that "such a designation by the BOP is plainly and unmistakably within the BOP's discretion." *Id.* at 1149; *see McCarthy v. Doe*, 146 F.3d 118, 123 (2d Cir.1998) (holding that the BOP has the discretion to grant or deny a request for *nunc pro tunc* relief); *Barden v. Keohane*, 921 F.2d 476, 478 (3d Cir. 1990) (same); *see also Romandine v. United States*, 206 F.3d 731, 738 (7th Cir. 2000) (expressing agreement with "*McCarthy*'s bottom line" on this point). Finally, we rejected the defendant's arguments that such a conclusion was contrary to the doctrine of dual sovereignty, principles of comity and federalism, and the Full Faith and Credit Clause. *Taylor*, 284 F.3d at 1151-53.

B

Reynolds raises two arguments on appeal. First, notwithstanding our decision in *Taylor*, he asserts that the BOP had an obligation to comply with the state court's determination

[4]The BOP replaced Program Statement § 5160.04 (April 19, 2000) referenced in *Taylor*, 284 F.3d at 1143, with the current Program Statement § 5160.05 in January 2003 in order to comply with a federal "plain language" initiative. The two program statements are identical in all material respects.

that Reynolds's sentences should run concurrently with his federal sentence. Second, he asserts that the BOP's denial of his request for *nunc pro tunc* designation of the Montana prison was arbitrary and capricious, primarily because the BOP based its denial on the historical accident that Reynolds was sentenced by the federal court before the state court. We address these arguments in turn.

1

Reynolds begins with a two-part argument as to why the BOP erred in ignoring the state court's orders. Reynolds first points to § 3584(a), which states that multiple terms of imprisonment imposed at different times "run consecutively unless the court orders that the terms are to run concurrently." Because the state court here ordered the state and federal terms to run concurrently, Reynolds argues, the BOP was bound by this ruling. The BOP's decision to the contrary, Reynolds contends, was an improper assumption of judicial authority to determine the length of his sentences, rather than a proper exercise of discretion under § 3126(b). Thus, the BOP's actions contravened Congressional intent and the principles of federalism and separation of powers.

[4] Reynolds's arguments fail because they are contrary to *Taylor*, in which we upheld the BOP's authority to decline to make a *nunc pro tunc* designation of a state prison notwithstanding a state court's contrary order. 284 F.3d at 1149. In *Taylor*, a defendant in state pre-trial custody appeared before a federal court on a *writ ad prosequendum*, and was sentenced to a term of imprisonment on a federal offense. *Id.* at 1146. Returned to state custody, the defendant was sentenced to a term of state imprisonment to run concurrently with the federal sentence. *Id.* The federal sentencing court denied the defendant's request for an order giving him credit for time served in state prison, and also declined to recommend that the BOP issue a *nunc pro tunc* order designating the state prison as the place to serve his federal sentence. *Id.* Affirming

the denial of the defendant's petition for habeas corpus, we held that § 3584(a) did not impose any obligation on the BOP to implement a state's concurrency order. *Id.* at 1149-50. Further, we held that the BOP had discretion under § 3621(b) and its Program Statement to decline to issue such an order, explaining that "we cannot lightly second guess a deliberate and informed determination by the agency charged with administering federal prison policy." *Id.* at 1149.

Reynolds attempts to distinguish *Taylor* on the ground that the federal sentencing court in that case expressly stated its intent that the federal sentence run consecutively to the state sentence. Reynolds argues that under such circumstances, the state court's intent cannot bind a federal court, and the BOP was required to follow the federal court's order that its sentence run consecutively. Because the federal court in his case did not make such an order, Reynolds asserts that the state court's order bound the BOP.

[5] We disagree. Notwithstanding factual differences, *Taylor* forecloses Reynolds's argument. As in this case, the defendant in *Taylor* argued "that the BOP, in administering a federal sentence, should not be allowed to disregard a state court's alleged order of concurrency," and that the BOP's action was invalid because it was "preempting what he claims are rights of the state court." *Id.* at 1151. We rejected those arguments as having "no persuasive support in constitutional principle, consistent practice or established case law." *Id.* Given our ruling in *Taylor*, we must conclude that the BOP had discretion to reject Reynolds's request for a *nunc pro tunc* designation notwithstanding the state court's order, and such a determination was not inconsistent with § 3584(a).

In light of this conclusion, we need not reach Reynolds's argument that the BOP is powerless to designate a state prison *nunc pro tunc* on its own authority in light of contrary Congressional intent, separation of powers principles, and federalism concerns. Because the BOP did not order a *nunc pro tunc*

designation of the state prison in this case, and it is that failure that Reynolds here challenges, any question about the scope of the BOP's authority to do so is not properly before us. In any event, *Taylor* held that "such a designation by the BOP is plainly and unmistakably within the BOP's discretion." *Id.* at 1149.

2

Although it is not entirely clear, Reynolds's second argument appears to be that, but for the historical accident that Reynolds's federal sentence was imposed first, his state and federal sentences would have run concurrently by force of law. Under these circumstances, Reynolds argues, the BOP's denial of Reynolds's requested *nunc pro tunc* designation was arbitrary, capricious, an abuse of discretion, and contrary to law. Reynolds provides three reasons why his sentences should have been imposed in a different order, and should now be deemed to run concurrently.

First, Reynolds claims that his original arrest in October 2002 was under a federal warrant, and the district court erred in holding otherwise. Therefore, Reynolds argues, he was in primary federal jurisdiction at the time the federal district court issued its sentence and he should have served the federal sentence first. If this had occurred, Reynolds would then have received credit for the entire federal sentence because the state court ordered the state sentence to be served concurrently.

We need not reach the question whether it would be an abuse of discretion to deny a *nunc pro tunc* designation under these circumstances, because here the district court did not clearly err in determining that Reynolds was under the primary jurisdiction of the state at the time of his federal conviction. "Normally, the sovereign which first arrests an individual acquires priority of jurisdiction for purposes of trial, sentencing, and incarceration." *United States v. Warren*,

610 F.2d 680, 684-85 (9th Cir. 1980). Although both state and federal arrest warrants were outstanding for Reynolds, his arresting officers did not receive a copy of the federal arrest warrant until 9:00 a.m. on October 4, five hours after Reynolds was booked into Madison County jail. Additionally, the federal district court brought Reynolds before it pursuant to a writ of *habeas corpus ad prosequendum*, a further indication that the state had primary jurisdiction over him. *See, e.g.*, *Thomas v. Brewer*, 923 F.2d 1361, 1365 (9th Cir. 1991); *Gunton v. Squier*, 185 F.2d 470, 470-71 (9th Cir. 1950). Moreover, even were we to assume that a state's prosecutorial delay might result in an abdication of primary jurisdiction, *see Buggs v. Crabtree*, 32 F. Supp. 2d 1215, 1220 (D. Or. 1998), no such delay occurred here. Reynolds was taken into federal custody less than sixty days after his arrest and was sentenced by state court approximately two months after being returned to federal custody.

Reynolds's second argument is that the BOP acted arbitrarily and capriciously in failing to consider that the federal sentence would have run concurrently with the state sentence under § 5G1.3 if the state sentence had been imposed first. Reynolds explains that had the state sentence been pending when he appeared before the district court, § 5G1.3 would have led the federal sentencing court to impose a federal sentence that ran concurrently with the remaining undischarged term of state imprisonment. According to Reynolds, the BOP's failure to take into account this direction constituted an abuse of discretion and violated the Sentencing Commission's policy direction that, where there is an undischarged term of imprisonment, the district court should exercise its discretion "to achieve a reasonable punishment" for the offense. § 5G1.3(c).

This argument is unavailing, even assuming the state court's sentence was for "relevant conduct" and otherwise met the criteria in § 5G1.3. The record establishes that the BOP carefully and thoroughly reviewed the factors set forth

in its Program Statement before denying Reynolds's request. There is no evidence that Reynolds asked the BOP to consider § 5G1.3 in connection with his request for *nunc pro tunc* designation. Even if Reynolds had brought § 5G1.3 to the BOP's attention, that Guideline is inapplicable by its own terms, *see supra*; the BOP's failure to follow an inapplicable Guideline is not an abuse of discretion.

[6] Finally, Reynolds asserts that the BOP acted arbitrarily and capriciously because it incorrectly interpreted the federal court's silence as intent that Reynolds's state and federal sentences run consecutively. Had the BOP not made such an error, Reynolds argues, it would have issued a *nunc pro tunc* designation. However, we see no error on the BOP's part. Section 3584(a) explicitly states that multiple terms of state and federal imprisonment run consecutively absent a court order that the sentences run concurrently. 18 U.S.C. § 3584(a). Here there was no federal court order indicating that Reynolds's sentences should run concurrently. By denying Reynolds's request, the BOP did no more than enforce the plain terms of § 3584(a). Accordingly, the BOP acted within its broad discretion under § 3621(b) and the Program Statement to grant or deny a request for *nunc pro tunc* relief after full and fair consideration.

AFFIRMED.

W. FLETCHER, Circuit Judge, concurring:

I would also affirm the district court's denial of the writ of habeas corpus. The federal Bureau of Prisons ("BOP") acted properly in construing the sentencing judge's answer to the BOP's letter, in which the judge refused to express a preference, as an indication that a consecutive sentence was appropriate. I write separately to express my concern that the

BOP's *nunc pro tunc* practice raises serious separation of powers questions.

I. Calculation of Sentences

In order to understand why the BOP's practice raises separation of powers concerns, it is necessary to discuss at some length the manner in which sentences are determined and calculated. A federal judge determines the length of a term of imprisonment for a person convicted of a federal crime. *See* 18 U.S.C. §§ 3551, 3553. Included in that determination is a decision whether terms of imprisonment will be served concurrently or consecutively. When choosing between concurrent and consecutive terms, a federal judge must "consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in [18 U.S.C.] section 3553(a)." 18 U.S.C. § 3584(b). The factors set forth in § 3553(a) include "the nature and circumstances of the offense and the history and characteristics of the defendant"; "the need for the sentence . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment . . . ; to afford adequate deterrence . . . ; to protect the public from further crimes of the defendant"; and "the need to avoid unwarranted sentence disparities."

The federal Bureau of Prisons incarcerates persons convicted of federal crimes. *See* 18 U.S.C. § 3621. Among its other responsibilities, the BOP calculates the length of time a person spends in federal prison in fulfilling the sentence imposed by a federal judge. In *United States v. Wilson*, 503 U.S. 329 (1992), the Supreme Court held that the BOP is responsible for calculating the amount of credit, if any, a federal prisoner should receive based on time previously served under another sentence, including a sentence served in state prison. *See* 18 U.S.C. § 3585(b) ("A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . as a result of any other charge for

which the defendant was arrested after the commission of the offense for which the sentence was imposed[ ] that has not been credited against another sentence.").

A rule of construction for determining whether a federal sentence is concurrent or consecutive with another sentence is provided in 18 U.S.C. § 3584(a):

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively . . . . Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

The first sentence of § 3584(a) has two clauses that address distinct situations. The first clause refers to multiple terms of imprisonment imposed on a defendant at the same time; this clause applies when a judge sentences a defendant in the same criminal proceeding for multiple violations of federal law. The second sentence of § 3584(a) provides that in this situation, if the federal judge fails to specify either concurrent or consecutive sentences, the sentences are concurrent. The second clause of the first sentence refers to a term of imprisonment imposed when a defendant has already been sentenced in a separate state or federal proceeding, and when that earlier term has not yet been fully served. The third sentence of § 3584(a) governs this situation, providing that if the federal judge fails to specify either a concurrent or consecutive sentence, the federal sentence is consecutive. The third sentence may be read more broadly to govern, in addition, the situation in which the federal judge imposes a sentence and another

sentence is imposed afterwards. In these situations, if the federal judge fails to specify, the sentences are consecutive.

The federal courts of appeals have split on the question of whether a federal sentencing judge has the authority to dictate whether a sentence is to run concurrently or consecutively with respect to a yet-to-be imposed sentence. The Eighth, Tenth and Eleventh Circuits have held that the judge has this authority. *See United States v. Mayotte*, 249 F.3d 797, 798-99 (8th Cir. 2001) (per curiam); *United States v. Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995); *United States v. Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993). The Second, Fourth, Sixth and Seventh Circuits, as well as our own, have held that the judge does not have this authority. *See United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008); *United States v. Smith*, 472 F.3d 222, 225-26 (4th Cir. 2006); *Taylor v. Sawyer*, 284 F.3d 1143, 1148 (9th Cir. 2002) (citing *United States v. Neely*, 38 F.3d 458, 460-61 (9th Cir. 1994); *United States v. Clayton*, 927 F.2d 491, 492 (9th Cir. 1991)); *Romandine v. United States*, 206 F.3d 731, 737-38 (7th Cir. 2000); *United States v. Quintero*, 157 F.3d 1038, 1039-40 (6th Cir. 1998). The Fifth Circuit has held that the judge has this authority with regard to a yet-to-be imposed state sentence, but not a federal sentence. *See United States v. Quintana-Gomez*, 521 F.3d 495, 498 (5th Cir. 2008); *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006).

In circuits where the federal sentencing judge does not have the authority to dictate whether the federal sentence is to run concurrently or consecutively with a yet-to-be imposed sentence, the default is that the two sentences run consecutively. *See Romandine*, 206 F.3d at 737-38; *see also Taylor*, 284 F.3d at 1149. The same default result is achieved in circuits where the judge has the authority, if the judge fails to specify a concurrent or consecutive sentence. See 18 U.S.C. § 3584(a) (third sentence). The default result can frustrate the desire of

a federal sentencing judge. This is clearly so in circuits where the federal sentencing judge would impose a concurrent sentence with the yet-to-be imposed sentence but has no authority to do so. This can also be so in circuits where the federal sentencing judge has the authority to impose a concurrent sentence but at the time of sentencing has insufficient information about the circumstances of the other crime and the yet-to-be imposed sentence for that crime to decide whether a concurrent sentence is appropriate.

If the second sentencing judge is a federal judge, the desire of the initial sentencing judge to impose a concurrent sentence may sometimes be effectuated. In that circumstance, the second judge has the authority to impose a sentence that will run concurrently with the first. The second judge may or may not have the same view of the case, and of the appropriate sentence, as the first judge. But at least the second judge will be applying the same federal sentencing criteria as the first judge, and may reach the same answer the first judge would have reached.

When the second sentencing judge is a state judge, the desire of the initial sentencing judge to impose a concurrent sentence may also be effectuated; but that possibility is more remote than in the case where the second sentencing judge is federal. The problem arises when the state authorities have primary jurisdiction but the federal sentence is imposed first. The federal circuits are unanimous in holding that a state judge has no authority to require that a state sentence of imprisonment be served concurrently with a previously imposed federal sentence. *See Taylor*, 284 F.3d at 1151-52 ("[T]he BOP does not need to abide by a state's express desire to have its sentence run concurrent to a previously imposed federal sentence."); *see also Fegens v. United States*, 506 F.3d 1101, 1104 (8th Cir. 2007) ("It is well-settled that the state court's intent is not binding."); *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 73 (2d Cir. 2005). That is, there is nothing a state court judge can do to require federal authori-

ties to credit time served on a state sentence against a federal sentence. The state judge may take a previously imposed federal sentence into account by imposing a shorter state sentence than the judge otherwise would, thereby achieving a de facto concurrent sentence. But the state judge, for reasons of state law or policy, may be unable to do so even if that judge so desires.

So far as I am aware, there are no statistics showing how often a federal sentencing judge desires to impose a sentence that will run concurrently with a yet-to-be-imposed sentence but is unable to achieve that result. Similarly, I am not aware of statistics showing how often, in cases in which the first judge is federal and the second judge is state, both judges desire to impose concurrent sentences but neither judge is able to achieve that result. But even without reliable statistics, it is obvious that under the law, at least as so far described, there is a problem in effectuating the sentencing intention of a federal judge when he or she is the first judge to impose sentence.

In 1991, the Third Circuit devised an ingenious solution to the problem posed when the state has primary jurisdiction but the federal sentence is imposed before the state sentence. In *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1991), the court interpreted 18 U.S.C. § 3621(b) to permit the federal BOP to issue a *nunc pro tunc* order designating state prison as the place for service of a federal sentence, thereby achieving a concurrent state and federal sentence beginning on the date specified in the order.

Section 3621(b) provides:

> **Place of imprisonment.**—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the

Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

> (1) the resources of the facility contemplated;
>
> (2) the nature and circumstances of the offense;
>
> (3) the history and characteristics of the prisoner;
>
> (4) any statement by the court that imposed the sentence—
>
> > (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
> >
> > (B) recommending a type of penal or correctional facility as appropriate; and
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the

> Bureau determines has a treatable condition of substance addiction or abuse.

18 U.S.C. § 3621(b).

On its face, § 3621(b) appears to direct the BOP to determine only where a prisoner may be housed. The BOP may designate a non-federal facility, so long as that facility meets "minimum standards of health and habitability," and so long as the BOP has determined that the facility is "appropriate and suitable." Nowhere does § 3621(b) explicitly authorize the BOP, in designating a non-federal facility, to determine *nunc pro tunc* that time served in a state facility pursuant to a state sentence has been served concurrently with a federal sentence that was imposed earlier. However, the Third Circuit in *Barden* read § 3621(b) to provide that authorization.

In *Barden*, habeas petitioner Barden sought credit against his federal sentence for bank robbery, which he was then serving, for time already served in state prison for robbery, rape and kidnaping. The federal BOP refused, stating that it had no authority to grant such credit. The Third Circuit disagreed, writing:

> We agree with Barden that the federal government has the statutory authority [under 18 U.S.C. § 3621(b)] to make the *nunc pro tunc* designation Barden desires. . . . We do not pass upon Barden's contention that he is entitled to a favorable exercise of the broad discretion the Federal Bureau of Prisons (Bureau) has in acting on his request. Instead, we hold only that the federal authorities have an obligation, on the peculiar facts before us, to look at Barden's case and exercise the discretion the applicable statute grants the Bureau to decide whether the state prison in which he served his sentence should be designated as a place of federal confinement *nunc pro tunc*.

921 F.2d at 478. The BOP responded to *Barden* by instituting a *nunc pro tunc* sentencing procedure set forth in its Program Statements 5160.05 and 5880.28.

The Supreme Court has never endorsed the *nunc pro tunc* procedure authorized by the Third Circuit in *Barden*. A year after the Third Circuit's decision in *Barden*, the Court held in *United States v. Wilson*, 503 U.S. 329 (1992), that the BOP has the authority under 18 U.S.C. § 3585(b) to perform the mathematical computation involved in determining the time a federal prisoner should be credited based on time served on another sentence. However, the *nunc pro tunc* procedure authorized in *Barden* goes well beyond the calculation involved in *Wilson*. Under the *nunc pro tunc* procedure, the BOP does not merely perform the computation involved in determining *how much* a federal sentence should be reduced on account of time already served under a separate concurrent sentence. Rather, under the *nunc pro tunc* procedure, the BOP makes the foundational decision of *whether* the separate sentence should be concurrent.

II. Reynolds's Arguments on Appeal

As the majority discusses, Reynolds makes two arguments on appeal. One of these arguments is that the BOP erred in denying Reynolds credit against his federal sentence for time served in state custody. The other is that in denying Reynolds credit, the BOP made a sentencing decision reserved to the judicial branch and thereby violated the separation of powers.

A. Denial of Credit Against Federal Sentence

In support of his argument that the BOP erred in denying him credit, Reynolds contends that federal authorities had primary jurisdiction, that U.S.S.G. § 5G1.3 required the *nunc pro tunc* designation, and that the BOP wrongly construed the federal judge's silence in response to the BOP's letter as an indication that the federal sentence should be served consecu-

tively. I agree with the majority that the district court did not clearly err in determining that the state had primary jurisdiction over Reynolds, and that U.S.S.G. § 5G1.3 is not applicable.

As to whether the BOP wrongly construed the federal court's silence, I agree with the majority that the BOP did not err in construing the sentencing court's silence as expressing an intent that the terms run consecutively. I write separately, however, to emphasize my concern with the statutory scheme and the consequences of the majority's holding.

In denying Reynolds's request for a *nunc pro tunc* designation, the BOP wrote, "The federal judgment was silent regarding the execution of your service. As such, multiple terms of imprisonment imposed at different times are deemed consecutive unless the court dictates otherwise." Reynolds argues that the BOP improperly construed the federal sentencing judge's silence. He writes in his brief, "There is simply no support for the BOP's conclusion that the sentencing court's silence denoted an intent for consecutive terms of imprisonment."

The BOP construes a federal judge's silence at the time of sentencing to indicate that the judge intends the federal sentence to be consecutive to a yet-to-be-imposed sentence. As I noted above, the third sentence of § 3584(a) provides a rule of construction for a sentence imposed by a federal judge. The third sentence provides, "Multiple terms of imprisonment imposed at different times run consecutively unless the [federal] court orders that the terms are to run concurrently." As discussed above, a broad but permissible reading of this third sentence is that it includes not only a situation in which the federal term of imprisonment is imposed after a previously imposed term of imprisonment that is still being served, but also a situation in which the other term of imprisonment is yet to be imposed. In Program Statement 5880.28, the BOP has so interpreted this sentence. Section 3(e) of Program Statement 5880.28 provides, "On occasion, a federal court will

order the federal sentence to run concurrently with or consecutively to a not yet imposed term of imprisonment. . . . If the federal sentence is silent, or ordered to run consecutively to the non-existent term of imprisonment, then the federal sentence shall not be placed into operation until the U.S. Marshals' Service or the Bureau of Prisons gains exclusive custody of the prisoner."

In jurisdictions where the federal sentencing judge has the authority to choose between a federal sentence that will run concurrently with or consecutive to a yet-to-be-imposed sentence, the operation of § 3584(a) and Program Statement 5880.28 is quite straightforward. The BOP can look to the sentencing proceeding in federal court, apply the rule of construction provided by the third sentence of § 3584(a) and the Program Statement, and determine the intent of the federal sentencing judge. Those jurisdictions include the Fifth, Eighth, Tenth and Eleventh Circuits. *See Mayotte*, 249 F.3d at 798-99; *Williams*, 46 F.3d at 58-59; *Ballard*, 6 F.3d at 1510; *Brown*, 920 F.2d at 1217.

But in jurisdictions where the federal sentencing judge does not have the authority to choose between a concurrent and consecutive sentence with respect to a yet-to-be-imposed sentence, the rule of construction cannot be sensibly applied to what the judge says, or does not say, at the time of sentencing. Those jurisdictions include the Second, Fourth, Sixth, Seventh and Ninth Circuits. *See Donoso*, 521 F.3d at 149; *Smith*, 472 F.3d at 225-26; *Taylor*, 284 F.3d at 1148 (citing *Neely*, 38 F.3d at 460-61; *Clayton*, 927 F.2d at 492); *Romandine*, 206 F.3d at 737-38; *Quintero*, 157 F.3d at 1039-40. In those jurisdictions, it makes little sense to rely on the silence of the federal sentencing judge at the time of sentencing to determine that judge's intent in choosing whether the federal sentence is to be concurrent or consecutive, because the judge in those jurisdictions has no authority to make that choice at the time of sentencing. Thus, there is no reason for the judge to say anything. Even if the judge would like to impose a concurrent

sentence, a statement to that effect would have no legal consequence.

In a situation where a request for a *nunc pro tunc* designation is made, the subsequent state sentence has already been imposed. At least in a jurisdiction in which the federal judge has no authority to choose between a concurrent and consecutive sentence at the time of sentencing, the BOP sends a letter asking the judge whether he or she now wants the federal sentence to run concurrently or consecutively. *See* Program Statement 5160.05 § 9(b)(4)(c) ("In making the determination [whether to grant a request for *nunc pro tunc* designation] the [Regional Inmate Systems Administrator of the BOP] will send a letter to the sentencing court . . . inquiring whether the court has any objections [to the designation]."). This request by the BOP allows the federal sentencing judge in such jurisdictions, after the state sentence has been imposed, to say whether the federal sentence should be concurrent or consecutive. (The record before us is not clear on the point, but it is possible that the BOP asks the federal sentencing judge this question in all jurisdictions, even those jurisdictions in which the judge has the authority, at the time of sentencing, to choose whether the sentence would be concurrent or consecutive. *But see id.* § 9(b)(4)(e) ("No letter need be written if it is determined that a concurrent designation is not appropriate.").) Once the BOP receives a response from the federal sentencing judge, it takes that response into account in deciding whether to grant the *nunc pro tunc* request. *See id.* § 9(a) ("Concurrent service of federal and non-federal sentences in a non-federal institution occurs when the [BOP] designates a non-federal institution for service of the federal sentence."); 9(b) ("Normally, designating a non-federal institution for the inmate is done when it is consistent with the federal sentencing court's intent.").

In Reynolds's case, the federal sentencing judge responded to the BOP's letter by stating that he had no comment on whether the federal sentence should be concurrent or consecu-

tive. In its denial of Reynolds's request, the BOP construed the judge's silence as an indication that the federal sentence should be served consecutively. The BOP's statement did not cite § 3584(a) but tracked both its language and its rule of construction. In implicitly relying on § 3584(a) in construing the judge's silence, the BOP construed the third sentence of § 3584(a) to include not only the judge's silence at the time of imposing sentence, but also his later silence when asked whether a *nunc pro tunc* designation was appropriate. That is, the BOP construed the phrase "unless the [federal] court orders that the terms are to run concurrently" to apply not only to silence at the time of sentencing but also to silence in response to a letter of inquiry from the BOP. This broad reading of the third sentence of § 3584(a) is not an implausible construction. I would therefore conclude that the BOP acted properly in construing the sentencing judge's answer to the BOP's letter, in which the judge refused to express a preference, as an indication that a consecutive sentence was appropriate.

B. Separation of Powers

Reynolds argues that in denying him credit towards his federal sentence for time served on his state sentence, the BOP violated the separation of powers. Reynolds first contends that the BOP could not disregard the express view of the state court judges that his state sentences should be served concurrently with his federal sentence. I agree with the majority that this argument—in reality a federalism rather than separation of powers argument—is foreclosed by our decision in *Taylor*. We considered the full range of federalism arguments in *Taylor* when we held that the federal government is not obliged to give effect to the sentencing intentions of state court judges. *See* 284 F.3d at 1151-53.

Reynolds also contends that in denying a *nunc pro tunc* designation, the BOP arrogated unto itself a sentencing decision that properly belongs to the federal judiciary. The major-

ity declines to address this argument. It holds that any separation of powers arguments about the BOP's *nunc pro tunc* authority are not properly before the court because the BOP (initially) declined to grant a *nunc pro tunc* designation in this case, and that the arguments are foreclosed by *Taylor* in any event. The petitioner in *Taylor*, however, did not argue that the BOP's practice of granting and denying *nunc pro tunc* designations violated separation of powers, and our decision in his case did not purport to decide that issue. I therefore regard the separation of powers issue as presenting an open question in this circuit.

I agree with the majority that, on the record before us, the separation of powers question is not squarely presented in this case. However, because the majority's opinion and our decision in *Taylor* may be erroneously read as foreclosing a separation of powers argument, I write separately to discuss the argument, and to join other circuits in requesting that Congress address the issue through legislation.

Two of our sister circuits have addressed the separation of powers argument and have voiced doubts about the constitutionality of the BOP's practice. In *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72, 76 (2d Cir. 2005), the Second Circuit wrote:

> A separation of powers issue arises when the same branch of government that prosecutes federal prisoners determines concurrency in lieu of the judge. Federalism concerns are implicated because the federal BOP is given the effective authority to enforce (or not) a state court's determination that a state sentence should run concurrently. Given the divergent readings of the statutory scheme in the various circuits, the open questions as to how to treat prisoners sentenced first in the federal and then in the state court, and the phenomenon (in some circuits) that neither the state nor the federal court can run these

> concurrently, we respectfully invite congressional consideration of these statutes.

See also Fegans v. United States, 506 F.3d 1101, 1104 (8th Cir. 2007) ("[W]e agree with the Second Circuit that Congress should examine the issue because it implicates important federalism and separation of powers concerns . . . ." (citing *Abdul-Malik*, 403 F.3d at 76)).

The separation of powers argument is stated in summary form in the first sentence of the passage just quoted from the Second Circuit's decision in *Abdul-Malik*. In a slightly more expanded form, the argument is as follows: The task of the executive branch of the federal government is to prosecute those accused of federal crimes and incarcerate those who are convicted and sentenced to prison terms. The task of the judicial branch is to preside over criminal proceedings and impose sentence upon those who are convicted. A decision whether a federal sentence should run concurrently or consecutively is a sentencing decision that should be made by a member of the judicial branch. A decision whether to grant a *nunc pro tunc* designation has the effect of determining whether a federal sentence is served concurrently or consecutively. Therefore, a decision whether to grant a *nunc pro tunc* request is a sentencing decision that properly belongs to a member of the judicial branch. The BOP is part of the executive branch, so a decision whether to grant a *nunc pro tunc* request does not properly belong to the BOP.

There is a great deal not to like about the *nunc pro tunc* procedure followed by the BOP. It is a jerry-built, *ad hoc* system imposed upon the BOP by the Third Circuit in *Barden*, based on a questionable reading of 18 U.S.C. § 3621(b). One may easily understand what prompted the Third Circuit's decision in *Barden*: Without *Barden* or something like it, some federal prisoners would serve consecutive federal and state sentences despite the fact that both the federal and state sentencing judges desired to impose concurrent sentences. But

under *Barden*, an important sentencing decision may be made by the executive rather than the judicial branch.

On the facts of the case before us, I would hold that there has been no separation of powers violation. In this case, the BOP asked the federal sentencing judge whether he wanted Reynolds's sentence to be concurrent with or consecutive to the state sentences. When the federal judge declined to state a preference, the BOP used a permissible rule of construction, based on § 3584(a), to conclude that the federal judge's silence meant that Reynolds's sentence should be consecutive. (Later, following another *nunc pro tunc* request by Reynolds, the BOP again solicited the federal judge's view. The judge expressed that he had "no objection," and the BOP granted the request.) In this circumstance, I would conclude that the BOP's earlier denial of Reynolds's request for a *nunc pro tunc* designation was based on a permissible interpretation of what the federal sentencing judge intended, and that its denial thus did not violate separation of powers.

However, I note that, in responding to *nunc pro tunc* requests, the BOP may not always abide by the intentions of federal sentencing judges. For example, BOP Program Statement 5160.05 § 9(b) provides, "*Normally*, designating a non-federal institution for the inmate is done when it is consistent with the federal sentencing court's intent." (Emphasis added.) The word "normally" indicates that the BOP will usually, *but not always*, abide by the preference of the federal sentencing judge. Further, in its letter to Reynolds's federal sentencing judge, the BOP wrote, "It is the preference of the Bureau that the Federal Sentencing Court be given an opportunity to state its position with respect to a retroactive designation, which, *while not binding*, can be helpful in our determination to grant or deny the request." (Emphasis added.) The BOP's use of the phrase "while not binding," indicates that the BOP does not believe that it is required to abide by the preference of the sentencing judge. Finally, it is possible that at least in some circumstances the BOP does not solicit the view of the federal

sentencing judge at all. *See* Program Statement 5160.05 § 9(b)(4)(e) ("No letter need be written [to the sentencing judge] if it is determined that a concurrent designation is not appropriate."). However, we do not have before us a case in which the BOP has not solicited the view of the sentencing judge or, having done so, has disregarded that view.

III. Request to Congress

In view of the questionable interpretation of § 3621(b) on which *Barden* was based, the ambiguity of 18 U.S.C. § 3584(a), and the serious constitutional questions posed by the BOP's *nunc pro tunc* practice implemented pursuant to *Barden*, I would join the Second and Eighth Circuits in respectfully requesting Congress to give its careful attention to the issues raised by the imposition of overlapping federal and state sentences.

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES LEE REYNOLDS, Petitioner - Appellant, v. J. E. THOMAS, warden, Respondent - Appellee.	No. 08-35810 D.C. No. 3:07-CV-01244-ST District of Oregon, Portland ORDER

Before: W. FLETCHER, BEA and IKUTA, Circuit Judges.

Appellant's Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

Subsec. (e)(4). Pub. L. 103–322, §110505(2)(A), substituted "defendant" for "person".

Subsecs. (g) to (i). Pub. L. 103–322, §110505(3), added subsecs. (g) to (i) and struck out former subsec. (g) which read as follows:

"(g) POSSESSION OF CONTROLLED SUBSTANCES.—If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release."

1990—Subsec. (d)(2). Pub. L. 101–647, §3589(1), inserted a comma after "3553(a)(2)(B)".

Subsec. (e)(2) to (5). Pub. L. 101–647, §3589(2)(A)–(C), struck out "or" at end of par. (2), substituted "; or" for period at end of par. (3), and redesignated par. (5) as (4).

1988—Subsec. (d). Pub. L. 100–690, §7303(b)(1), inserted "and that the defendant not possess illegal controlled substances" before period at end of first sentence.

Pub. L. 100–690, §7305(b)(1), substituted "(b)(20)" for "(b)(19)" in concluding provisions.

Subsec. (d)(1). Pub. L. 100–690, §7108(a)(1), inserted "(a)(2)(C)," after "(a)(2)(B),".

Subsec. (d)(2). Pub. L. 100–690, §7108(a)(2), which directed that "(a)(2)(C)," be inserted after "(a)(2)(B),", was executed by inserting "(a)(2)(C)," after "(a)(2)(B)" as the probable intent of Congress, because no comma appeared after "(a)(2)(B)".

Subsec. (e). Pub. L. 100–690, §7108(b)(1), inserted "(a)(2)(C)," after "(a)(2)(B)," in introductory provisions.

Subsec. (e)(2). Pub. L. 100–690, §7108(b)(2), inserted "or" after "supervision;".

Subsec. (e)(3). Pub. L. 100–690, §7305(b)(2)(A), which directed amendment of par. (3) by striking "or" at the end could not be executed because of the intervening amendment by Pub. L. 100–690, §7108(b)(3), (4). See below.

Pub. L. 100–690, §7108(b)(3), (4), redesignated par. (4) as (3) and struck out former par. (3) which read as follows: "treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title; or".

Subsec. (e)(4). Pub. L. 100–690, §7305(b)(2)(B), which directed amendment of par. (4) by striking the period at the end and inserting "; or" could not be executed because subsec. (e) did not contain a par. (4) after the intervening amendment by Pub. L. 100–690, §7108(b)(4). See below.

Pub. L. 100–690, §7108(b)(4), redesignated par. (4) as (3).

Subsec. (e)(5). Pub. L. 100–690, §7305(b)(2)(C), added par. (5).

Subsec. (g). Pub. L. 100–690, §7303(b)(2), added subsec. (g).

1987—Subsec. (b)(1). Pub. L. 100–182, §8(1), substituted "five years" for "three years".

Subsec. (b)(2). Pub. L. 100–182, §8(2), substituted "three years" for "two years".

Subsec. (b)(3). Pub. L. 100–182, §8(3), inserted "(other than a petty offense)" after "misdemeanor".

Subsec. (c). Pub. L. 100–182, §9, inserted "(a)(2)(C),".

Subsec. (e)(1). Pub. L. 100–182, §12(1), inserted "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation,".

Subsec. (e)(2). Pub. L. 100–182, §12(2), struck out "after a hearing," before "extend a term" and inserted "the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and" after "pursuant to".

Subsec. (e)(4). Pub. L. 100–182, §25, inserted ", except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony, or more than 2 years in prison if the offense was a Class C or D felony" before "Commission" at end.

1986—Subsec. (a). Pub. L. 99–570, §1006(a)(1), inserted ", except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute".

Subsec. (b). Pub. L. 99–570, §1006(a)(2), substituted "Except as otherwise provided, the" for "The".

Subsec. (e). Pub. L. 99–570, §1006(a)(3)(A), and Pub. L. 99–646, §14(a)(1), amended section catchline identically, substituting "conditions or revocation" for "term or conditions".

Subsec. (e)(1). Pub. L. 99–646, §14(a)(2), struck out "previously ordered" before "and discharge".

Subsec. (e)(4). Pub. L. 99–570, §224(a)(3)(B)–(D), added par. (4).

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–119 effective 1 year after Nov. 26, 1997, see section 115(c)(1) of Pub. L. 105–119, set out as a note under section 14071 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by section 7303(b) of Pub. L. 100–690 applicable with respect to persons whose probation, supervised release, or parole begins after Dec. 31, 1988, see section 7303(d) of Pub. L. 100–690, set out as a note under section 3563 of this title.

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100–182 applicable with respect to offenses committed after Dec. 7, 1987, see section 26 of Pub. L. 100–182, set out as a note under section 3006A of this title.

EFFECTIVE DATE OF 1986 AMENDMENTS

Section 14(b) of Pub. L. 99–646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3583 of title 18, United States Code [Nov. 1, 1987]."

Section 1006(a)(4) of Pub. L. 99–570 provided that: "The amendments made by this subsection [amending this section] shall take effect on the date of the taking effect of section 3583 of title 18, United States Code [Nov. 1, 1987]."

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

§ 3584. Multiple sentences of imprisonment

(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment

ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2000.)

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

§ 3585. Calculation of a term of imprisonment

(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001.)

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

§ 3586. Implementation of a sentence of imprisonment

The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001.)

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

CHAPTER 228—DEATH SENTENCE

Sec.
3591. Sentence of death.
3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified.
3593. Special hearing to determine whether a sentence of death is justified.
3594. Imposition of a sentence of death.
3595. Review of a sentence of death.
3596. Implementation of a sentence of death.
3597. Use of State facilities.
3598. Special provisions for Indian country.
3599. Counsel for financially unable defendants.

PRIOR PROVISIONS

A prior chapter 228 (§§ 3591 to 3599) relating to imposition, payment, and collection of fines was added by Pub. L. 98–473, title II, § 238(a), Oct. 12, 1984, 98 Stat. 2034, effective pursuant to section 235(a)(1) of Pub. L. 98–473 the first day of the first calendar month beginning twenty-four months after Oct. 12, 1984. Pub. L. 98–596, § 12(a)(1), Oct. 30, 1984, 98 Stat. 3139, repealed chapter 228 applicable pursuant to section 12(b) of Pub. L. 98–596 on and after the date of enactment of Pub. L. 98–473 (Oct. 12, 1984). Section 238(i) of Pub. L. 98–473 which repealed section 238 of Pub. L. 98–473 on the same date established by section 235(a)(1) of Pub. L. 98–473 was repealed by section 12(a)(9) of Pub. L. 98–596.

AMENDMENTS

2006—Pub. L. 109–177, title II, § 222(b), Mar. 9, 2006, 120 Stat. 232, which directed amendment of the "table of sections of the bill" by adding item 3599 after item 3598, was executed by adding item 3599 to the table of sections for this chapter to reflect the probable intent of Congress.

§ 3591. Sentence of death

(a) A defendant who has been found guilty of—

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

(b) A defendant who has been found guilty of—

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing

solely on the basis of inability to make payments because the defendant is indigent.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2006; amended Pub. L. 104–132, title II, § 207(c)(5), Apr. 24, 1996, 110 Stat. 1240.)

PRIOR PROVISIONS

For a prior section 3614, applicable to offenses committed prior to Nov. 1, 1987, see note set out preceding section 3601 of this title.

AMENDMENTS

1996—Pub. L. 104–232, § 207(c)(5)(A), inserted "or restitution" after "fine" in section catchline.

Subsec. (a). Pub. L. 104–232, § 207(c)(5)(B), inserted "or restitution" after "fine".

Subsec. (c). Pub. L. 104–232, § 207(c)(5)(C), added subsec. (c).

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–132 to be effective, to extent constitutionally permissible, for sentencing proceedings in cases in which defendant is convicted on or after Apr. 24, 1996, see section 211 of Pub. L. 104–132, set out as a note under section 2248 of this title.

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

§ 3615. Criminal default

Whoever, having been sentenced to pay a fine, willfully fails to pay the fine, shall be fined not more than twice the amount of the unpaid balance of the fine or $10,000, whichever is greater, imprisoned not more than one year, or both.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2006.)

PRIOR PROVISIONS

For prior sections 3615 to 3620, applicable to offenses committed prior to Nov. 1, 1987, see note set out preceding section 3601 of this title.

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

SUBCHAPTER C—IMPRISONMENT

SUBCHAPTER C—IMPRISONMENT[1]

Sec.
3621. Imprisonment of a convicted person.
3622. Temporary release of a prisoner.
3623. Transfer of a prisoner to State authority.
3624. Release of a prisoner.
3625. Inapplicability of the Administrative Procedure Act.
3626. Appropriate remedies with respect to prison conditions.

AMENDMENTS

1996—Pub. L. 104–134, title I, § 101[(a)] [title VIII, § 802(c)], Apr. 26, 1996, 110 Stat. 1321, 1321–70; renumbered title I, Pub. L. 104–140, § 1(a), May 2, 1996, 110 Stat. 1327, which directed that table of sections at beginning of subchapter C of this chapter be amended generally to read "3626. Appropriate remedies with respect to prison conditions.", was executed by making amendment in item 3626 to reflect the probable intent of Congress. Prior to amendment, item 3626 read as follows: "3626. Appropriate remedies with respect to prison crowding."

1994—Pub. L. 103–322, title II, § 20409(c), title XXXIII, § 330010(3), Sept. 13, 1994, 108 Stat. 1828, 2143, transferred analysis of this subchapter to follow heading for this subchapter and added item 3626.

[1] So in original. Probably should not appear.

§ 3621. Imprisonment of a convicted person

(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

(c) DELIVERY OF ORDER OF COMMITMENT.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

(d) DELIVERY OF PRISONER FOR COURT APPEARANCES.—The United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

(e) SUBSTANCE ABUSE TREATMENT.—

(1) PHASE-IN.—In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare)—

(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—

(A) GENERALLY.—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) PERIOD OF CUSTODY.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

(3) REPORT.—The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain—

(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible; and

(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to carry out this subsection such sums as may be necessary for each of fiscal years 2007 through 2011.

(5) DEFINITIONS.—As used in this subsection—

(A) the term "residential substance abuse treatment" means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set apart from the general prison population—

(i) directed at the substance abuse problems of the prisoner;

(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems; and

(iii) which may include the use of pharmacoptherapies[1], if appropriate, that may extend beyond the treatment period;

(B) the term "eligible prisoner" means a prisoner who is—

(i) determined by the Bureau of Prisons to have a substance abuse problem; and

(ii) willing to participate in a residential substance abuse treatment program; and

(C) the term "aftercare" means placement, case management and monitoring of the participant in a community-based substance abuse treatment program when the participant leaves the custody of the Bureau of Prisons.

(6) COORDINATION OF FEDERAL ASSISTANCE.—The Bureau of Prisons shall consult with the Department of Health and Human Services concerning substance abuse treatment and related services and the incorporation of applicable components of existing comprehensive approaches including relapse prevention and aftercare services.

(f) SEX OFFENDER MANAGEMENT.—

(1) IN GENERAL.—The Bureau of Prisons shall make available appropriate treatment to sex offenders who are in need of and suitable for treatment, as follows:

(A) SEX OFFENDER MANAGEMENT PROGRAMS.—The Bureau of Prisons shall establish non-residential sex offender management programs to provide appropriate treatment, monitoring, and supervision of sex offenders and to provide aftercare during prerelease custody.

(B) RESIDENTIAL SEX OFFENDER TREATMENT PROGRAMS.—The Bureau of Prisons shall establish residential sex offender treatment programs to provide treatment to sex offenders who volunteer for such programs and are deemed by the Bureau of Prisons to be in need of and suitable for residential treatment.

(2) REGIONS.—At least 1 sex offender management program under paragraph (1)(A), and at least one residential sex offender treatment program under paragraph (1)(B), shall be established in each region within the Bureau of Prisons.

(3) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Bureau of Prisons for each fiscal year such

[1] So in original. Probably should be "pharmacotherapies".

sums as may be necessary to carry out this subsection.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2007; amended Pub. L. 101–647, title XXIX, § 2903, Nov. 29, 1990, 104 Stat. 4913; Pub. L. 103–322, title II, § 20401, title III, § 32001, Sept. 13, 1994, 108 Stat. 1824, 1896; Pub. L. 109–162, title XI, § 1146, Jan. 5, 2006, 119 Stat. 3112; Pub. L. 109–248, title VI, § 622, July 27, 2006, 120 Stat. 634.)

PRIOR PROVISIONS

For a prior section 3621, applicable to offenses committed prior to Nov. 1, 1987, see note set out preceding section 3601 of this title.

AMENDMENTS

2006—Subsec. (e)(4). Pub. L. 109–162, § 1146(1), added par. (4) and struck out heading and text of former par. (4). Text read as follows: "There are authorized to be appropriated to carry out this subsection—

"(A) $13,500,000 for fiscal year 1996;

"(B) $18,900,000 for fiscal year 1997;

"(C) $25,200,000 for fiscal year 1998;

"(D) $27,000,000 for fiscal year 1999; and

"(E) $27,900,000 for fiscal year 2000."

Subsec. (e)(5)(A)(iii). Pub. L. 109–162, § 1146(2), added cl. (iii).

Subsec. (f). Pub. L. 109–248 added subsec. (f).

1994—Subsec. (b). Pub. L. 103–322, § 32001(1), struck out ", to the extent practicable," after "The Bureau shall" in concluding provisions.

Pub. L. 103–322, § 20401, inserted "In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status." after subsec. (b)(5).

Subsec. (e). Pub. L. 103–322, § 32001(2), added subsec. (e).

1990—Subsec. (b). Pub. L. 101–647 inserted at end "The Bureau shall, to the extent practicable, make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse."

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

§ 3622. Temporary release of a prisoner

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

(Added Pub. L. 98–473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2007.)

PRIOR PROVISIONS

For a prior section 3622, applicable to offenses committed prior to Nov. 1, 1987, see note set out preceding section 3601 of this title.

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

EX. ORD. NO. 11755. PRISON LABOR

Ex. Ord. No. 11755, Dec. 29, 1973, 39 F.R. 779, as amended by Ex. Ord. No. 12608, Sept. 9, 1987, 52 F.R. 34617; Ex. Ord. No. 12943, Dec. 13, 1994, 59 F.R. 64553, provided:

The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society. Meaningful employment serves to develop those skills. It is also true, however, that care must be exercised to avoid either the exploitation of convict labor or any unfair competition between convict labor and free labor in the production of goods and services.

Under sections 3621 and 3622 of title 18, United States Code, the Bureau of Prisons is empowered to authorize Federal prisoners to work at paid employment in the community during their terms of imprisonment under conditions that protect against both the exploitation of convict labor and unfair competition with free labor.

Several states and other jurisdictions have similar laws or regulations under which individuals confined for violations of the laws of those places may be authorized to work at paid employment in the community.

Executive Order No. 325A, which was originally issued by President Theodore Roosevelt in 1905, prohibits the employment, in the performance of Federal contracts, of any person who is serving a sentence of imprisonment at hard labor imposed by a court of a State, territory, or municipality.

I have now determined that Executive Order No. 325A should be replaced with a new Executive Order which would permit the employment of non-Federal prison inmates in the performance of Federal contracts under terms and conditions that are comparable to those now applicable to inmates of Federal prisons.

NOW, THEREFORE, pursuant to the authority vested in me as President of the United States, it is hereby ordered as follows:

SECTION 1. (a) All contracts involving the use of appropriated funds which shall hereafter be entered into by any department or agency of the executive branch for performance in any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the

2010 FEDERAL SENTENCING GUIDELINES MANUAL

CHAPTER FIVE - DETERMINING THE SENTENCE

PART G - IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.

2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (<u>e.g.</u>, the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (<u>e.g.</u>, §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction for acceptance of responsibility;

final offense level of level 15; Criminal History Category I). The court determines that a sentence of 15 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

(A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));

(ii) the type (<u>e.g.</u>, determinate, indeterminate/parolable) and length of the prior undischarged sentence;

(iii) the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.

(C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

Background. In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553 (a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465); November 1, 1993 (see Appendix C, amendment 494); November 1, 1995 (see Appendix C, amendment 535); November 1, 2002 (see Appendix C, amendment 645); November 1, 2003 (see Appendix C, amendment 660); November 1, 2010 (see Appendix C, amendment 747).

(EFFECTIVE November 1, 2010)

United States Sentencing Commission

2010 FEDERAL SENTENCING GUIDELINES MANUAL

CHAPTER FIVE - DETERMINING THE SENTENCE

PART K - DEPARTURES

2. OTHER GROUNDS FOR DEPARTURE

§5K2.23. Discharged Terms of Imprisonment (Policy Statement)

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Historical Note: Effective November 1, 2003 (see Appendix C, amendment 660). Amended effective November 1, 2004 (see Appendix C, amendment 674).

(EFFECTIVE November 1, 2010)

United States Sentencing Commission

U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI: CPD
NUMBER: 5160.05
DATE: 1/16/2003
SUBJECT: Designation of State Institution for Service of Federal Sentence

1. **PURPOSE AND SCOPE.** To provide instructions for the designation of a state institution for concurrent service of a federal sentence.

2. **SUMMARY OF CHANGES.** This policy has been rewritten to comply with the "Plain Language" initiative.

3. **PROGRAM OBJECTIVES.** The expected results of this program are:

a. State institutions will be designated for concurrent service of a federal sentence when it is consistent with the intent of the federal sentencing court or with the goals of the criminal justice system.

b. Accurate records and accountability will be maintained by the Regional Inmate Systems Administrator (RISA) for inmates serving federal sentences in state institutions.

4. **DIRECTIVES AFFECTED**

a. **Directive Rescinded**

PS 5160.04 Designation of State Institution for Service of Federal Sentence (4/19/00)

b. **Directives Referenced**

PS 5100.07 Security Designation and Custody Classification Manual (9/3/99)

PS 5800.07	Inmate Systems Management Manual (12/24/91)
PS 5880.28	Sentence Computation Manual-CCCA (2/21/92)
PS 5880.30	Sentence Computation Manual ("Old Law" Pre-CCCA-1984) (7/16/93)
PS 5880.32	District of Columbia Sentence Computation Manual (1/23/01)
PS 7300.09	Community Corrections Manual (7/22/98)

5. **STANDARDS REFERENCED**

a. American Correctional Association 3rd Edition Standards for Adult Correctional Institutions: 3-4093 and 3-4094

b. American Correctional Association 3rd Edition Standards for Adult Local Detention Facilities: 3-ALDF-1E-02 and 3-ALDF-1E-03

c. American Correctional Association 2nd Edition Standards for Administration of Correctional Agencies: 2-CO-1E-04 and 2-CO-1E-05

6. **MCC/MDC/FDC APPLICATION.** This Program Statement applies to pre-trial and holdover inmates as indicated in subsequent sections.

7. **STATUTORY AUTHORITY.** Authority for designating a state institution as the place to serve a federal term of imprisonment is found in 18 U.S.C. § 3621(b), which states:

> **"The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable . . . ".**

a. For inmates who committed the underlying offense before November 1, 1987, a similar provision is found in 18 U.S.C. § 4082(b) (repealed).

b. Federal judges have the authority to order a federal term of imprisonment to run consecutively to or concurrently with any other sentence. When there is a previously imposed sentence (federal or non-federal) in existence at the time of federal sentencing, and the federal judge does not state whether multiple

terms of imprisonment are to run consecutively to or concurrently with one another, the sentences run consecutively (see 18 U.S.C. § 3584). (This applies only to federal offenses committed on or after November 1, 1987.)

c. When a federal judge orders or recommends a federal sentence run concurrently with a state sentence already imposed, the Bureau implements such order or recommendation, ordinarily by designating the state facility as the place to serve the federal sentence. United States v. Hardesty, 958 F.2d 910 (9th Cir. 1992).

d. For federal offenses that occurred prior to November 1, 1987, and there is a previously imposed sentence in existence at the time of federal sentencing and the federal judge is silent as to whether multiple terms run concurrently or consecutively, the RISA will have to research the record and make a determination regarding concurrency.

e. No concurrent designation will be considered when statutory language mandates consecutive service or the U.S. Sentencing Guidelines require consecutive service.

f. Authority for commencement of a sentence once a facility is designated is found in 18 U.S.C. § 3585(a) and § 3568 (repealed).

18 U.S.C. § 3585(a), states,

"A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served."

18 U.S.C. § 3568, states in part,

"The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence."

g. Just as the federal government has no authority to prescribe when a state sentence will commence, the state has no authority to order commencement of a federal sentence (see 18 U.S.C. § 3585(a) & § 3568 (repealed)).

8. **AUTHORITY FOR DESIGNATIONS.** The Bureau's authority to designate a state institution for concurrent service of a federal sentence is delegated to Regional Directors.

- A designation for concurrent service of sentence will be made only when it is consistent with the intent of the federal sentencing court or the goals of the criminal justice system.

a. Exceptions to the general rules regarding concurrent designation may be based on the merits of a particular case.

Information reviewed will include:

- inmate discipline history,
- institutional adjustment,
- recommendations of the Wardens at the state and federal institutions,
- the recommendation of the prosecuting Assistant U.S. Attorney,
- intent of the federal sentencing court, if available, and
- any other pertinent information regarding the inmate.

b. In the event of an "exception," the above information will be sent to the appropriate RISA who will coordinate a response.

The Regional Director is the final authority to determine exceptions.

9. **CONCURRENT SERVICE OF FEDERAL AND STATE SENTENCES**

a. Concurrent service of federal and non-federal sentences in a non-federal institution occurs when the Bureau designates a non-federal institution for service of the federal sentence. Ordinarily, the reason for selecting the non-federal institution is that primary custody resided with the non-federal jurisdiction and the federal sentencing court intended its sentence be served concurrently with the non-federal sentence.

b. When an inmate is sentenced in both federal and state jurisdictions, care must be taken to ensure that he or she is suitable for federal designation. Normally, designating a non-federal institution for the inmate is done when it is consistent with the federal sentencing court's intent. Ordinarily, this intent is made known in one of the following ways:

(1) **Court Order.** The sentencing court orders, on the Judgment & Commitment Order or the Judgment in a Criminal Case (J&C), that the federal sentence be served concurrently with a state sentence. The court may make clear its intent by using language similar to:

- "Said sentence to run concurrently with the state sentence the defendant is presently serving."
- "Sentence to run concurrently with sentence imposed under Docket 168-88, San Diego County Court, on May 14, 1988."
- "Sentence is hereby ordered to run concurrently with any other sentence presently being served."
- "Sentence to begin immediately."

(2) **Court Recommendation of Non-Federal Confinement.** The sentencing court recommends a non-federal institution as the place of confinement on the J&C. Most J&Cs have a preprinted area for recommendations with language similar to: **"the court makes the following recommendations to the Bureau of Prisons..."**

If the inmate was in primary non-federal custody, (i.e., produced on writ), and the court uses the preprinted phrase and adds the name of a state institution, this will be accepted as a court recommendation for concurrent service. This wording could also appear in the body of the J&C.

(3) **Concurrent Service of Sentence After Imposition.** The court may, from time to time, order concurrent service of the federal sentence at some time after its imposition. This may occur when primary jurisdiction resided with the state and the court believed mistakenly that the inmate was in federal custody for service of the federal sentence on the date of imposition.

(4) **Inmate Request.** Occasionally, an inmate may request a nunc pro tunc (i.e., occurring now as though it had occurred in the past) designation. As a result of the decision in Barden v. Keohane, 921 F.2d 476 (3rd Cir. 1990), the Bureau considers an inmate's request for pre-sentence credit toward a federal sentence for time spent in service of a state sentence as a request for a nunc pro tunc designation.

(a) In Barden, the court held that the Bureau must consider an inmate's request for concurrent service of the state and federal sentences.

- However, there is no obligation under Barden for the Bureau to grant the request by designating a state institution retroactively as the place to serve the federal sentence.

(b) This type of request will be considered regardless of whether the inmate is physically located in either a federal or state institution. Information will be gathered, if available, to include:

- a copy of the federal and state J&Cs,
- the state sentence data record to include jail credit, and
- any other pertinent information relating to the federal and state sentences.

(c) In making the determination, if a designation for concurrent service may be appropriate (e.g., the federal sentence is imposed first and there is no order or recommendation regarding the service of the sentence in relationship to the yet to be imposed state term), the RISA will send a letter to the sentencing court (either the Chambers of the Judge, U.S. Attorney's Office, and/or U.S. Probation Office, as appropriate) inquiring whether the court has any objections. Regardless of where the original inquiry is directed, the U.S. Attorney's Office and U.S. Probation Office will receive a courtesy copy.

(d) If, after 60 days, a response is not received from the sentencing court, the RISA will address the issue with the Regional Counsel and a decision will be made regarding concurrency.

(e) No letter need be written if it is determined that a concurrent designation is not appropriate. If the court has indicated previously that its language on judgments is sufficient for designation of a state institution for service of the federal sentence, then no further letters need be written.

When the original sentencing judge is no longer available and the assigned judge offers no opinion, the RISA will make a determination based on the particular merits of the case. (Refer to Section 8.a. for more information.) The RISA will notify the inmate of the decision in writing and place a copy of this notification in the J&C file.

(f) The Bureau will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service of sentence (e.g., the federal sentencing court ordered the sentence to run consecutively to any other

sentence, or custody in operation, during any time in which the inmate requests concurrent designation).

(5) **State Request.** Occasionally, a Regional Office receives a request from a state jurisdiction indicating that the state and federal sentences are to be served concurrently, whether by state court order or department of corrections referral.

(a) The RISA will gather and review all information pertaining to the federal and state sentences. After reviewing this information carefully, if necessary, the RISA will correspond with the federal sentencing court to ascertain whether it has any objections to the federal and state sentences running concurrently. A courtesy copy of this correspondence will be forwarded to the appropriate U.S. Attorney. (The same procedures apply as outlined in subsections 4.c. and d., Inmate Request.)

(b) If the court has no objections, the state institution may be designated as the place to serve the federal sentence concurrently with the state sentence, according to the procedures detailed in this Program Statement.

Note: The Bureau will not, under ordinary circumstances, such as overcrowding in a state institution, accept transfer of the inmate into federal custody for concurrent service.

10. **RESPONSIBILITIES.** The following procedures are to be used when a state institution is designated for the concurrent service of federal and state sentences. (See the **Security Designation and Custody Classification Manual** for procedures when a federal inmate transfers from a federal to a non-federal institution for concurrent service of a federal and state sentence.)

a. **Notification to Regional Director.** The Regional Director, of the region where the state institution is located, will be notified of the federal court's order that the federal sentence run concurrently with the state sentence. This notification will be received from the Community Corrections Manager (CCM). The CCM forwards the Regional Office a copy of:

- the inmate's J&C Order,
- the federal register number,
- the U.S. Marshals Tracking Form (USM-129),
- the Pre-Sentence Investigation Report (PSI), and
- any other available pertinent information.

b. **Designation.** The RISA, through the Regional Director, may make a nunc pro tunc designation to the non-federal institution using a letter to the U.S. Marshals Service (USMS)(Attachment A).

(1) As part of the designation process, a date is specified nunc pro tunc (i.e., occurring now as though it had occurred in the past) as the effective date the sentence will begin.

(2) Specifying a nunc pro tunc designation ensures that time lost in administrative processing is not passed on to the inmate. It is this designation that allows the federal sentence to commence.

(3) As the recommendation for concurrent service, in most cases, is received after the imposition of sentence, the nunc pro tunc designation will normally be effective from the original date of sentencing, unless otherwise indicated in the subsequent order.

(4) Since the inmate is primarily in state custody, all decisions regarding confinement and classification are at the sole discretion of the state authorities. A copy of the letter will be forwarded to the USMS in the district where the state institution is located as notification to lodge a detainer.

(5) The letter, along with sentence computation data sheet, will be mailed to the appropriate state department of corrections; an informational copy will be sent to the USMS in the sentencing district; and a copy to the U.S. Parole Commission (USPC), if appropriate. A copy of the letter will be placed in the J&C file, maintained by the appropriate RISA. The sentence computation data sheet will also be mailed to the inmate.

(6) Should the court order concurrent service of the federal sentence after the inmate is received in federal custody, the RISA will determine whether a nunc pro tunc order is appropriate.

(7) By action of a nunc pro tunc order, the Federal sentence may commence on the date of its imposition or on a subsequent date that will not cause the inmate to be a late release by virtue of the nunc pro tunc order.

(8) Should a nunc pro tunc designation be granted, a thorough review of jail credit (Willis/Kayfez) must be conducted as outlined in the sentence computation manuals.

(9) If the nunc pro tunc designation results in a date that

would make the inmate "past due" for release, such designation will be retroactive to a point in time that the sentence, when calculated in the same manner as any other sentence, results in a release date that affords the institution time to conduct normal release processing.

(10) If the D.C. Superior Court recommends designation of a state institution for service of a D.C. sentence, the RISA in the appropriate region will gather and review all information pertaining to the D.C. sentence. If it is determined that a nunc pro tunc designation is warranted, a copy of the designation letter along with other relevant information will be forwarded to the D.C. Records Center (DCRC) for computation of the D.C. sentence. The DCRC will maintain an administrative file, compute the sentence, and will be responsible for all computation updates.

Should an update be required to the D.C. state concurrency sentence computation, the RISA will provide all appropriate documentation to the DCRC. Once the DCRC updates the sentence computation, they will notify the RISA via GroupWise.

c. **Files**. The RISA is to maintain a file on all state concurrency cases. Each file will contain the following:

- the J&C Order,
- the USM-129,
- a copy of the letter to the USMS (Attachment A),
- the PSI, and
- a signed/certified copy of the Sentence Data Computation Sheet.

(1) When the inmate satisfies the federal sentence, copies of release certificates, as well as the notifications to state authorities, the USMS, U.S. Probation Office, and the USPC, will be placed in the file. Concurrency files will be retained until the sentence expires and then they will be sent to the appropriate Federal Records Center in accordance with the Inmate Systems Management Manual.

(2) If the inmate is eligible for parole, the RISA will send the following to the USPC:

- the letter to the USMS (Attachment A),
- the J&C Order,
- the USM-129,
- the PSI,
- a copy of the Sentence Data Computation Sheet, and
- any other available pertinent information.

(3) If a copy of the inmate's PSI is not provided in the designation packet, the RISA will request a copy from the U.S. Probation Office.

d. **Sentence Computation.** The RISA is responsible for:

- computing the inmate's sentence (with the exception of D.C. Code sentences),
- posting awards of Extra Good Time (EGT),
- notifying the USMS and the state department of corrections of the inmate's release date, and
- completing all necessary SENTRY transactions.

(1) The RISA has the final approval for state recommendations for EGT. EGT awards for inmates in state institutions must be consistent with the requirements for those in federal institutions (see the sentence computation manual).

(2) The maximum amount of Statutory Good Time (SGT) or Good Conduct Time (GCT) an inmate is entitled to receive will be awarded unless documentation provided by state authorities recommends a forfeiture of SGT or disallowance of GCT based on the inmate's behavior.

After reviewing the documentation provided by the state, the RISA will determine, in consultation with the Regional Discipline Hearing Administrator or Regional Counsel, whether some or all of the SGT or GCT should be forfeited/disallowed.

e. **Release**

(1) Should an inmate be released from the non-federal jurisdiction before the statutory release or parole date of the federal term of imprisonment, the USMS will assume custody. The USMS may request designation from the respective CCM 30 days prior to assuming custody of the inmate. The USMS must provide documentation verifying the completion of the state sentence. The RISA is then to forward all inmate files (Central, Medical, and J&C) to the designated federal institution.

(2) If the federal term expires prior to the inmate's release from the non-federal jurisdiction, the RISA is to notify the state department of corrections, the USMS, and the USPC (if necessary). The RISA will complete the appropriate release paperwork as it pertains to the confinement portion of the federal sentence. Upon receiving the release notification, the USMS will withdraw the detainer.

f. **Monitoring.** The RISA will establish a system to monitor release dates of concurrent sentences so that timely notification will be made to state authorities, the USMS, and the USPC (if necessary). This may be accomplished by using:

- a SENTRY release roster,
- a log, or
- any other method that enables the RISA to monitor release dates.

(1) The USPC will prepare certificates for inmates scheduled for release on parole. The RISA will ensure that any parole certificates received on a state concurrency case are accurate and any discrepancies are reported to the USPC. Normally, the RISA prepares the mandatory release and special parole term certificates.

For the completion of any other release paperwork, refer to the Inmate Systems Management Manual. For information on fines and restitution, refer to the appropriate program statements.

(2) A term of supervised release that follows a federal sentence will not commence until the inmate is released from all periods of confinement. When an inmate has a term of supervised release and the federal sentence expires prior to the state term, the RISA will ask the state authorities to notify the U.S. Probation Office 30 days prior to release from state custody. The RISA will forward a courtesy copy of the request to the U.S. Probation Office.

g. **Primary Jurisdiction.** When it has been determined an inmate was committed improperly to federal custody and primary jurisdiction resides with a state sovereign (i.e., the inmate was under jurisdiction of the federal sentencing court on the basis of a writ of habeas corpus ad prosequendum), institution staff, through the RISA, will make every effort to return the inmate to state custody.

A return to the state means that the federal sentence should be considered as **not** having commenced since transfer to the Bureau was in error and the prisoner should have been returned to the state after federal sentencing as a required condition of the federal writ (see Crawford v. Jackson, 589 F.2d 693 (D.C. Cir. 1978)). The federal J&C will be lodged as a detainer, through the USMS, with the state authorities. If the federal court recommends concurrent service of the federal and state sentences, the case should be referred to the appropriate RISA.

/s/
Kathleen Hawk Sawyer
Director

Sample Letter to U.S. Marshal

Date :
Inmate's Name :
Register Number :
Docket Number :
Offense :
Sentence :
Judicial District :
Sentence Begins :
Release Date :
Designated Facility :

U.S. Marshals Service
District of Maryland
605 U.S. Courthouse
101 West Lombard Street
Baltimore, MD 21201

Maryland Dept. of Corrections
6776 Reisterstown Road
Suite 310
Baltimore, MD 21215-2341

Attn: Criminal Desk

The United States District Court that sentenced the above individual recommended that the federal sentence run concurrently with the state sentence. To make this possible, I have designated the above facility for service of the federal sentence.

Please lodge and maintain a detainer with the local authorities for the duration of the federal sentence. The date indicated above is the projected release date.

Please request that state authorities notify you 60 days in advance of any release from state custody, or in the event the inmate escapes, dies, or is transferred.

Upon notice of release from state custody, please request federal designation through the Community Corrections Manager in your district.

I understand that no charge will be made to the federal government during the time the inmate is in service of the state sentence.

Sincerely,

Regional Director

STATE CORRECTIONAL AUTHORITY: This is for notification purposes only and does not limit your discretion in any decision affecting this offender's classification, work, and quarters assignments or other treatment and programs.

e. Multiple Sentences of Imprisonment. The statute that governs the manner in which multiple sentences of imprisonment may be imposed is 18 U.S.C. § 3584.

* (1) Subsection (a) of Section 3584 states,

> **(a) Imposition of concurrent or consecutive terms.--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.**

The Bureau of Prisons interprets the phrase, **"an undischarged term of imprisonment,"** as applying to any lawfully imposed federal or state, local or foreign (non-federal) sentence or revocation of a conditional release term (probation, supervised release, parole, etc.). *

The legislative history for this subsection states that,

> **. . . if the court is silent as to whether terms of imprisonment <u>imposed at the same time</u>** (emphasis added) **are concurrent or consecutive, the terms run concurrently unless a statute requires that they be consecutive. If, on the other hand, multiple terms of imprisonment are <u>imposed at different times</u>** (emphasis added) **without the judge specifying whether they are to run**

concurrently or consecutively, they will run consecutively unless the statute specifies otherwise.

This subsection allows the court flexibility in sentencing when multiple terms of imprisonment are imposed and codifies the rules to follow if the court remains silent.

*

Sentences that are imposed as the result of a single trial on the counts within a single indictment are considered to have been imposed at the same time, regardless of whether they are imposed at different times on the same date or on a later date.

Sentences that are imposed on the same date, or on different dates, based on convictions arising out of different trials, are considered to have been imposed at different times even if the trials arose out of the same indictment.

The court's sentencing flexibility, in addition to applying to federal undischarged terms of imprisonment, also extends to those prisoners who have non-federal undischarged terms of imprisonment.

The court may, for a prisoner who is serving a non-federal undischarged term of imprisonment while "on loan" to the federal government under the jurisdiction of a federal writ of habeas corpus ad prosequendum, impose the federal sentence to run concurrently with, or consecutively to, the other undischarged term of imprisonment. Upon receipt of the judgment

and commitment from the U. S. Marshals' Service that orders the federal sentence to be served concurrently with the non-federal sentence, the RISA shall, in accordance with 18 U.S.C. § 3621(b), designate the non-federal facility as the place to serve the federal sentence and complete the other procedures required by the Program Statement on Designation of State Institution for Service of Federal Sentence, for executing this type of concurrent sentence.

On occasion, a federal court will order the federal sentence to run concurrently with or consecutively to a not yet imposed term of imprisonment. Case law supports a court's discretion to enter such an order and the federal sentence shall be enforced in the manner prescribed by the court. If the just imposed federal sentence is ordered to run concurrently with a non-existent term of imprisonment, then the RISA shall designate the non-federal place as the place to serve the federal sentence as of the date that the federal sentence was imposed. If the federal sentence is silent, or ordered to run consecutively to the non-existent term of imprisonment, then the federal sentence shall not be placed into operation until the U.S. Marshals' Service or the Bureau of Prisons gains exclusive custody of the prisoner.

Regardless of whether the court orders the federal sentence to be served consecutively to, or concurrently with, the non-federal non-existent or undischarged term of

imprisonment, the prisoner shall be returned to the non-federal jurisdiction until the prisoner is released (completes the undischarged term of imprisonment) from the non-federal term.

Federal courts sometime order a **portion** of the federal sentence to run concurrently with or consecutively to another federal sentence or a non-federal sentence. The Bureau of Prisons will attempt to accommodate a court's intent as fully as possible. Since the possible number of ways of imposing a **portion** of a sentence concurrently with or consecutively to another sentence are numerous, staff should refer such sentences to the RISA for assistance. *

(2) Subsection (c) of Section 3584 provides the rules for the treatment (calculation) of multiple sentences and states,

> **Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.**

* This statement means that SRA sentences, including a term of imprisonment that results from a revocation of supervised release or probation, shall be aggregated to form a single sentence for computation purposes. Those sentences that were imposed, however, on or after November 1, 1987 (the effective date of the SRA) but prior to the Supreme Court decision in Mistretta January 18, 1989 (during which some courts held that some or all of the SRA was unconstitutional, shall not be aggregated with valid SRA sentences. A sentence that is, or was, imposed for an offense that occurred prior to