No. _____

IN THE

Supreme Court of the United States

ROBERT DEMETRIUS BARNES,
Petitioner,

v.

B. MASTERS, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6073

ROBERT DEMETRIUS BARNES,

Petitioner - Appellant,

v.

B. MASTERS, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Bluefield. David A. Faber, Senior District Judge. (1:14-cv-11923)

Argued: March 20, 2018 Decided: May 10, 2018

Before DUNCAN, KEENAN, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Jennifer Safstrom, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Jennifer Maureen Mankins, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. **ON BRIEF:** Erica Hashimoto, Director, Anjali Parekh Prakash, Supervising Attorney, Appellate Litigation Program, Carleton Tarpley, Student Counsel, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Carol Casto, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert Demetrius Barnes ("Appellant") appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.[1] He asks us to order the Bureau of Prisons ("BOP") to recalculate the federal sentence he is presently serving to include the 19 months between his November 6, 2001 state court sentencing and his June 13, 2003 federal court sentencing. However, because a sentence logically cannot begin before the date on which it is imposed, Appellant's federal sentence cannot be made retroactively concurrent. Further, the sentencing court is prohibited from ordering the BOP to award credit toward a sentence for time served that has already been credited toward another sentence. Accordingly, we affirm.

I.

A.

Appellant was arrested on April 25, 2001, in Frederick County, Maryland, and held in state custody. He was ultimately convicted in Maryland state court of robbery and weapons offenses that occurred on March 1, 2001. He was sentenced in state court on November 6, 2001, to 14 years of imprisonment.

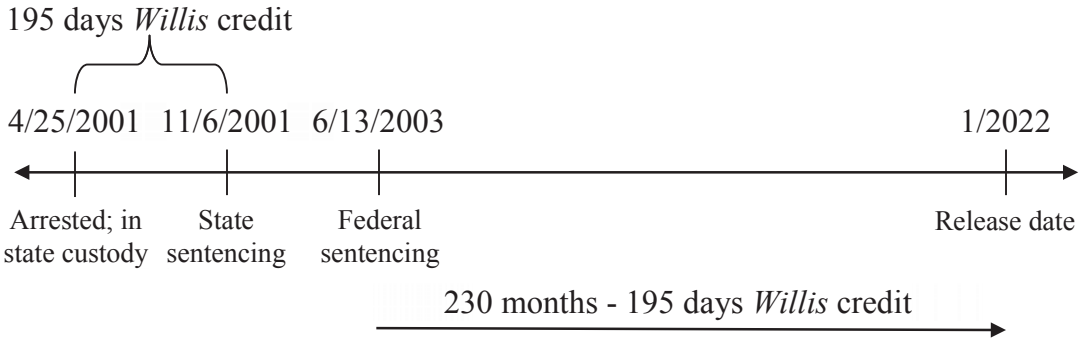
While Appellant was in state custody, federal authorities charged him with unrelated bank robbery and firearms offenses for conduct that occurred on March 21,

[1] "[T]he proper respondent to a [§ 2241] petition is 'the person who has custody over [the petitioner].'" *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (quoting 28 U.S.C. § 2242). At the time Appellant filed his petition, the warden of the facility in which he was detained was B. Masters ("Appellee").

2001. On April 17, 2003, Appellant pled guilty to these offenses. And on June 13, 2003, he was sentenced in federal court to 146 months of imprisonment for the bank robbery offense and 84 months of imprisonment for the firearms offense. The sentencing court ordered these two sentences to run consecutively, for a total sentence of 230 months of imprisonment, and further ordered that the federal sentence "run concurrent[ly] with the sentence now being served in the state system." J.A. 135.[2]

Appellant's state sentence concluded early on May 3, 2011, and he was released to BOP custody. In calculating Appellant's federal sentence, the BOP determined that his term of federal imprisonment began on June 13, 2003, the date of his federal sentencing. The BOP also awarded Appellant 195 days of prior custody credit pursuant to *Willis v. United States*, 438 F.2d 923, 925 (5th Cir. 1971) (holding that federal prisoner may receive sentence credit for time spent in presentence custody), for the time he spent in state custody between April 25, 2001, the date of his arrest, and November 6, 2001, the date of his state sentencing. Thus, according to the BOP's calculation, Appellant's federal sentence of 230 months of imprisonment would be fully served in January 2022.

[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.



B.

On March 10, 2014, Appellant, proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that the BOP "improperly calculat[ed]" his term of imprisonment by "denying him Federal credit for time served despite Sentencing Judge intending the Federal sentence to run concurrently with State sentence." J.A. 7. Specifically, Appellant asserted that the BOP failed to award him prior custody credit for the 19 months he spent in state custody between November 6, 2001, the date of his state sentencing, and June 13, 2003, the date of his federal sentencing.

The magistrate judge issued a report recommending that Appellant's petition be denied because 28 U.S.C. § 3585(b) prohibits the BOP from awarding "double credit" for time spent in prior custody that has been credited toward another sentence. Appellant timely filed objections to the magistrate judge's report, arguing that the sentencing court

had intended, pursuant to U.S.S.G. § 5G1.3,[3] to give him credit for the entirety of his state sentence. The district court adopted the magistrate judge's proposed findings and recommendation, reasoning that Appellant could not receive credit for the 19 month period because it had been credited toward his state sentence. The district court declined to consider the sentencing court's intent "because § 3585(b) governs the situation." J.A. 147. Therefore, the district court denied Appellant's petition. Appellant timely appeals.[4]

II.

A.

When sentencing a defendant "who is already subject to an undischarged term of imprisonment," the sentencing court may order that the sentence run concurrently to the undischarged term. 18 U.S.C. § 3584(a). In making this determination, the sentencing court considers the 18 U.S.C. § 3553(a) factors. *See id.* § 3584(b). In addition, the sentencing court is guided by U.S.S.G. § 5G1.3(c), which specifies when a defendant is subject to a permissive concurrent sentence. *See United States v. Mosley*, 200 F.3d 218, 222 (4th Cir. 1999) (per curiam). U.S.S.G. § 5G1.3(c) governs the imposition of concurrent sentences when the federal offense is unrelated to the offense for which the

[3] All references to the U.S.S.G. are to the 2002 edition in effect at the time of Appellant's federal sentencing.

[4] The district court's order denying Appellant's petition also denied him a certificate of appealability. But as Appellant points out, a certificate of appealability is not necessary in this case because Appellant filed his petition pursuant to § 2241. *See* 28 U.S.C. § 2253(c)(1) (providing that a certificate of appealability is required to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" or "the final order in a proceeding under [§] 2255").

defendant is serving an undischarged term of imprisonment.[5] It provides that the sentencing court may impose a sentence "to run concurrently" or "partially concurrently" to the undischarged term "to achieve a reasonable punishment for the . . . offense." U.S.S.G. § 5G1.3(c).

B.

Appellant argues that U.S.S.G. § 5G1.3(c) allows the sentencing court to impose a sentence that is fully retroactively concurrent with the undischarged term of imprisonment the offender is serving at the time of his federal sentencing. Essentially, Appellant argues that the sentencing court may order the federal sentence being imposed and the undischarged term of imprisonment to have the same start date. But U.S.S.G. § 5G1.3(c) does not authorize the sentencing court to impose a fully retroactively concurrent sentence.

1.

As an initial matter, Appellant asserts that we cannot consider Appellee's counterarguments, claiming that Appellee waived these issues by failing to raise them below. But Appellant's argument that U.S.S.G. § 5G1.3(c) allows the sentencing court to impose a fully retroactively concurrent sentence was far from clear until he filed his pro se objections to the magistrate judge's report. Moreover, the district court did not order Appellee to respond to these objections, and Appellee did not do so. Therefore, Appellee

[5] "Although § 5G1.3(c) is a policy statement, [we] enforce[] it like a guideline." *Mosley*, 200 F.3d at 222 n.5 (citing *United States v. Wiley-Dunaway*, 40 F.3d 67, 70–71 (4th Cir. 1994)).

raises these counterarguments now, at his first opportunity since they were fully presented.

2.

The earliest date on which a federal sentence may commence is the date on which the sentence is imposed. "[A] federal sentence cannot commence prior to the date it is pronounced, *even if made concurrent with a sentence already being served*." *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980) (emphasis supplied); *see Schleining v. Thomas*, 642 F.3d 1242, 1244 (9th Cir. 2011) ("[A] federal sentence cannot commence until a prisoner is sentenced in federal district court . . . ."); *Caloma v. Holder*, 445 F.3d 1282, 1285 (11th Cir. 2006) (quoting *Flores*, 616 F.2d at 841); *United States v. Gonzalez*, 192 F.3d 350, 355 (2d Cir. 1999) (holding that a sentencing court cannot "backdate" a sentence in order "to give [a defendant] credit for the time spent in custody"). Nothing in the language of U.S.S.G. § 5G1.3(c) authorizes the sentencing court to maneuver around this commonsense notion.

3.

Moreover, U.S.S.G. § 5G1.3(b)'s application notes clarify that a concurrent sentence "run[s] concurrently with the . . . months remaining" on the undischarged term of imprisonment. U.S.S.G. § 5G1.3 cmt. 2; *see Shelvy v. Whitfield*, 718 F.2d 441, 444 (D.C. Cir. 1983) ("[T]he second sentence runs together with *the remainder* of the one then being served." (emphasis in original)). Specifically, the application notes instruct the sentencing court to make an adjustment, pursuant to § 5G1.3(b), to the sentence ultimately imposed to account "for any period of imprisonment already served . . . if the

court determines that the period of imprisonment will not be credited to the federal sentence by the [BOP]." U.S.S.G. § 5G1.3 cmt. 2. If "concurrently" as used in § 5G1.3(b) meant "fully retroactively concurrently," then there would be no need for such an adjustment because a concurrent sentence would commence on the same date as the sentence the offender is already serving.

Thus, "concurrently" clearly does not mean "fully retroactively concurrently" in § 5G1.3(b), and there is no reason why the term "concurrently" should have a different meaning in § 5G1.3(c). *See Gregg v. Manno*, 667 F.2d 1116, 1117 (4th Cir. 1981) ("When the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place."). U.S.S.G. § 5G1.3(c) does not permit the imposition of a fully retroactively concurrent sentence. *See United States v. Fermin*, 252 F.3d 102, 109 (2d Cir. 2001) (noting that § 5G1.3(c) "provides considerable latitude to the sentencing court to fashion a consecutive, partially concurrent, or concurrent sentence *as to the remaining portion of the preexisting sentence*" (emphasis supplied)). Therefore, a concurrent sentence imposed pursuant to U.S.S.G. § 5G1.3(c) also runs concurrently with the remaining portion of the undischarged term of imprisonment.

C.

Further, Appellant's sentence could not be fully retroactively concurrent because he was sentenced to 84 months of imprisonment for a firearms offense that cannot "run concurrently with any other term of imprisonment imposed on the person," whether state or federal. 18 U.S.C. § 924(c)(1)(D)(ii); *United States v. Gonzales*, 520 U.S. 1, 11

(1997). Appellant was sentenced in state court to a term of 14 years of imprisonment. The federal sentencing court sentenced Appellant to 146 months of imprisonment for the bank robbery offense, which is fewer than 14 years of imprisonment. Therefore, if Appellant's federal sentence commenced on the same date as his state sentence, at least some portion of his 84 month sentence for the firearms offense would have impermissibly run concurrently to his 14 year state court sentence. *See* 18 U.S.C. § 924(c)(1)(D)(ii). And at the time of Appellant's federal sentencing, the sentencing court had no way of knowing that Appellant would be released early from his state sentence.

D.

Of particular note, U.S.S.G. § 5G1.3(c) does not permit the sentencing court to override the BOP's exclusive authority, pursuant to 18 U.S.C. § 3585(b), to calculate the amount of prior custody credit to which a federal offender is entitled. It merely grants discretion to the sentencing court to impose an appropriate sentence.

"After a district court sentences a federal offender, the [BOP] has the responsibility for administering the sentence." *United States v. Wilson*, 503 U.S. 329, 335 (1992). This responsibility includes the calculation of prior custody credit pursuant to 18 U.S.C. § 3585(b). *See id.* The BOP must give a defendant "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 long as that time "has not been credited against another sentence." 18 U.S.C. § 3585(b). Thus, the BOP cannot credit the 19 months

toward Appellant's sentence because that period has been credited toward another sentence. *See id.*

The sentencing court has no authority "to compute the amount of the credit" or "to award credit at sentencing." *Wilson*, 503 U.S. at 333–34; *see United States v. Dorsey*, 166 F.3d 558, 560 (3d Cir. 1999) ("In *Wilson*, the Supreme Court held that, despite the ambiguity as to who was to award credit for time served, only the BOP has the authority under [§] 3585(b) to award such credit."). Therefore, the sentencing court cannot order the BOP to award prior custody credit, which effectively means that the sentencing court cannot pronounce a sentence and order "credit for time served." If the sentencing court cannot order the BOP to award credit for time served, it stands to reason that we are likewise powerless to do so. As a result, the district court properly denied relief to Appellant.

III.

For the foregoing reasons, the district court's order is

AFFIRMED.

FILED: May 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6073, Robert Barnes v. B. Masters
1:14-cv-11923

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourt.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: May 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6073
(1:14-cv-11923)

ROBERT DEMETRIUS BARNES

Petitioner - Appellant

v.

B. MASTERS, Warden

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

ROBERT DEMETRIUS BARNES,

Petitioner,

v. CIVIL ACTION NO. 1:14-11923

BART MASTERS, Warden,
FCI McDowell,

Respondent.

MEMORANDUM OPINION AND ORDER

By Standing Order, this action was referred to United States Magistrate Judge Dwane L. Tinsley for submission of findings and recommendations regarding disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Tinsley submitted to the court his Proposed Findings and Recommendation ("PF&R") on October 12, 2016. In his PF&R, Magistrate Judge Tinsley recommended that the District Court deny Petitioner's 28 U.S.C. § 2241 petition, and that this action be removed from the docket of the court.

In accordance with the provisions of 28 U.S.C. § 636(b), the parties were allotted fourteen days, plus three mailing days, in which to file any objections to Magistrate Judge Tinsley's Findings and Recommendation. The failure of any party to file such objections constitutes a waiver of such party's

right to a de novo review by this court. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989).

Petitioner mailed his Objections to the PF&R on October 27, 2016. This was timely. Petitioner raises one objection: he argues that Magistrate Judge Tinsley's PF&R ignores that "the district court had authority under U.S.S.G. 5G1.3(c) to 'correct the disparity that resulted from the happenstance of the dates of the federal and state sentencing proceedings' by sentencing [Petitioner] to 230 months, less the approximately 25 months Petitioner spent in state custody, to reach an adjusted sentence of 205 months, which would then be served concurrently with the [remainder] of the state sentence." Doc. No. 12 (quoting Rios v. Wiley, 201 F.3d 257, 267 (3rd Cir. 2000)) (footnote adjusted).

Magistrate Judge Tinsley properly recognized that under Willis v. United States, 438 F.2d 923 (5th Cir. 1971), "Petitioner properly received 195 days of additional credit to his federal sentence for the time period between his arrest on April 25, 2001 and November 5, 2001, the day before his state sentence commenced." Doc. No. 11. Just as accurately Magistrate Judge Tinsley also noted that "under [18 U.S.C. § 3585(b)], Petitioner is not entitled to credit for the time period between November 6, 2001 and June 13, 2003, which was credited toward his state sentence and occurred prior to his

federal sentencing." Id. (emphasis added). Section 3585(b) allows the crediting for time period a prisoner has spent in detention but only if "that [time] has not been credited against another sentence." Importantly for this case, "prior custody credit cannot be granted if the prisoner has received credit toward another sentence." Doc. No. 11. Since § 3585(b) takes discretion out of the hands of the district court, that is the end of the inquiry. The court, consequently, need not determine what Judge Nickerson stated or intended. See Ramirez v. Mansukhani, 619 Fed. Appx. 237, 237 (4th Cir. 2015).

Petitioner also claims that Judge Nickerson of the District of Maryland intended for Petitioner to receive credit for the time he served between November 6, 2001 and June 13, 2003. See Doc. No. 11. Whether the Judge did so is beside the point because § 3585(b) governs the situation. Even a judicial assertion, which Petitioner understands Judge Nickerson to have made, cannot supersede the effect that an Act of Congress will have in a situation, for the simple reason that everything from the federal courts' ability to hear a dispute to the substantive law and the procedural rules that will govern that adjudicative function are decided not by judges but by statute and the Constitution (in that increasing order of importance). See Bowles v. Russell, 551 U.S. 205, 212—13 (2007) ("Within

constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.").

While this is not exactly a case about time limits going to the court's jurisdiction to adjudicate a case, the United States Supreme Court's lesson in Bowles still is pertinent. The narrower point is that even when a party acts "in reliance upon a District Court's order" that lies forbidden and outside the scope of what Congress, by statute, has allowed, a federal court is powerless to help the reliant party. Id. at 206—07. The broader point is that "[i]f rigorous" or, for that matter, relaxed "rules like the one applied today are thought to be inequitable," then it must be "Congress [which] authorize[s] courts to promulgate rules that excuse compliance with the statutory [requirements]." Id. at 214. Of their own volition, disguised as discretion, federal judges cannot arrogate to themselves that power which Congress is both constitutionally entitled to and has elected to keep for itself. To be sure, "[e]ven narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule." Id. That said, "[h]owever,

congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization." Id. at 214—15. In any event, "[p]ublic policy concerns, however grave, do not deputize th[e] court[s]"—state or federal—"to ignore the terms of a statute and act legislatively." Schroeder Invs., L.C. v. Edwards, 2013 UT 25, ¶ 25 (2013) (Lee, J.). This is because "[w]e are bound by the policy judgments of the legislature—even if we fundamentally disagree with them." Id. Consequently, Petitioner's objection is without merit.

Having reviewed the Findings and Recommendation filed by Magistrate Judge Tinsley as well as Petitioner's Objections, the court adopts the findings and recommendations contained therein. Accordingly, the court hereby **DENIES** Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (Doc. No. 1), and **DIRECTS** the Clerk to remove this action from the active docket of the court.

Additionally, the court has considered whether to grant a certificate of appealability. See 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this court is debatable or wrong and

that any dispositive procedural ruling is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683–84 (4th Cir. 2001). The court concludes that the governing standard is not satisfied in this instance. Accordingly, the court **DENIES** a certificate of appealability.

The Clerk is directed to forward a copy of this Memorandum Opinion and Order to Petitioner and counsel of record.

IT IS SO ORDERED this 7th day of December, 2016.

ENTER:

David A. Faber
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BLUEFIELD

ROBERT DEMETRIUS BARNES,

Petitioner,

v. **Case No. 1:14-cv-11923**

BART MASTERS, Warden,
FCI McDowell,

Respondent.

PROPOSED FINDINGS AND RECOMMENDATION

On March 10, 2014, Petitioner, an inmate who was then housed at FCI McDowell, in Welch, West Virginia, acting *pro se*, filed an Application Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus by a Person in State or Federal Custody (hereinafter "Petitioner's section 2241 petition") (ECF No. 1). This matter is assigned to the Honorable David A. Faber, Senior United States District Judge, and it has been referred to the undersigned United States Magistrate Judge for submission of proposed findings and a recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

Petitioner is currently serving a 230-month term of imprisonment, imposed on June 13, 2003 by the United States District Court for the District of Maryland, for aiding and abetting bank robbery and the use of a weapon during a crime of violence. (ECF No. 6, Ex. 1, Decl. of J.R. Johnson, ¶ 9 and Attach. C, Judgment in a Criminal Case No. WMN-

[1] This information is taken from Respondent's Response to the undersigned's Order to Show Cause (ECF No. 6) and its attachments.

02-0105).[2] Petitioner has filed this petition for a writ of habeas corpus seeking prior custody credit for the time period between April 25, 2001 and June 12, 2003, when he was in state custody, but had not yet been sentenced by the federal court. An explanation of the procedural history of Petitioner's criminal cases will be helpful.

On April 25, 2001, Petitioner was arrested for robbery by authorities in Frederick County, Maryland and held in state custody. (ECF No. 6, Ex. 1, Decl. of J.R. Johnson, ¶ 6). On May 30, 2001, Petitioner was charged in Baltimore County, Maryland, for robbery with a deadly weapon, first degree assault, and handgun violations that occurred on March 1, 2001. (*Id.*) On November 6, 2001, Petitioner was sentenced in the Baltimore County Circuit Court to 14 years of imprisonment for the robbery and weapons charges that occurred on March 1, 2001. Petitioner received credit toward that sentence beginning on June 13, 2001. (*Id.*, ¶ 7 and Attach. A, Sentence Information from the State of Maryland).

Petitioner remained in state custody following his April 25, 2001 arrest, but was borrowed by federal authorities on various occasions, pursuant to writs of habeas corpus *ad prosequendum*. (*Id.*, ¶ 8 and Attach. B, U.S. Marshals Form 129). According to the docket sheet for Petitioner's federal case, which is available on PACER, Petitioner was initially charged by an Information filed on March 7, 2002. (Case No. 1:02-cr-00105-WMN-1 (D. Md.), ECF No. 1). He was subsequently indicted on August 15, 2002. (*Id.*, ECF No. 19). On April 17, 2003, Petitioner pled guilty to aiding and abetting bank robbery and use of a weapon, pursuant to a written plea agreement. (*Id.*, ECF No. 35).

[2] Petitioner was sentenced to 146 months on the bank robbery and aiding and abetting count, followed by a consecutive term of 84 months on the use of a weapon and aiding and abetting count. (*See* ECF No. 1 at 20, Ex. IX; ECF No. 6 at 2 and Ex. 1, ¶ 9).

On June 13, 2003, Petitioner was sentenced in the United States District Court for the District of Maryland to the 230-month term of imprisonment discussed above. (*Id.*, ¶ 9 and Attach. C, Judgment in a Criminal Case No. WMN-02-0105). Petitioner's federal sentence was ordered to run concurrently with his already imposed state sentence. Petitioner was then returned to state custody. (*Id.*, ¶ 10 and Attach. B). On May 27, 2009, the Federal Bureau of Prisons designated Petitioner's state facility for service of his federal sentence beginning on June 13, 2003. (ECF No. 1 at 22, EX. XI).

On May 3, 2011, Petitioner was released from state custody to the United States Marshals Service in order to be delivered to the Federal Bureau of Prisons to serve the remainder of his federal sentence. (*Id.*, ¶ 11 and Attach. D, Letter to U.S. Marshals Service). A sentence computation was completed, which commenced Petitioner's federal sentence on June 13, 2003, the date it was imposed. Petitioner also received credit toward his federal sentence from April 25, 2001, the date of his arrest, until November 5, 2001, the day before his Maryland state sentence commenced. Petitioner's current release date is September 16, 2019.

Petitioner's section 2241 petition contains the following four grounds for relief:

1. BOP's calculation of Petitioner's pre-sentence custody credits (April 25, 2001 thru June 13, 2003) fail[s] to account for the court's order that Petitioner's federal and state sentence run concurrent.

   The determination of the sentences both Federal & State be run concurrent was decided and stated by district court Judge William M. Nickerson [See Sentencing Transcripts page 13, line(s) 20-22] "Those two sentences, however, to run concurrently with the sentence now being served in the state system." [See Judgment in a Criminal Case page 2] & [See Nunc Pro Tunc Order in prison file]

2. BOP fails to correct the miscalculation of Petitioner's pre-sentence custody credits (April 25, 2001 thru June 13, 2003) as directed in prison file(s) including Sentencing Transcripts under Program Statement 5800.11

> Petitioner was sentenced under statute 5G1.3(c)[3] wherein the district court Judge William M. Nickerson determined the Federal & State sentence(s) run concurrent without objection by the U.S. Attorney General, where in the BOP [is] "bound" by the statement/directive set by Petitioner's sentencing judge.
>
> 3. BOP refuses to grant prior custody credit when Petitioner's Federal & State sentences run concurrent and Federal sentence full term release date is greater than the state sentence full term release date.
>
> Wherein the Petitioner's state sentence of a maximum fourteen (14) years is inferior to the present Federal sentence of a maximum nineteen (19) years & one (1) month. The application of -1502 total diminution of confinement credits according with provision of the Correctional Services Articles Title 3, Subtitle 7 and Title 11 (annotated Code of Maryland), did not benefit Petitioner due to Federal detainer [See Mandatory Supervision Release Certificate No. 0411015638 – State of Maryland.]
>
> 4. BOP is indifferent to approx. eighteen (18) months prior custody credits from November 6, 2001 thru June 13, 2003, when under *Willis* credit toward state sentence in Petitioner's case.
>
> The state case was a related case to the current Federal offense see PSI # 78 – Case # -1CR2280. Petitioner's state and federal sentences are ran [sic; run] concurrently; and the federal sentence full term release date is greater than the state sentence full term release date. BOP's present indifference forces the Petitioner to serve 95% of the nineteen (19) years & one (1) month sentence from the date of arrest.

(ECF NO. 1 at 6-8). As demonstrated by the attachments to his petition, Petitioner exhausted the Federal Bureau of Prisons' administrative remedies concerning his claims.

On October 17, 2014, the undersigned issued an Order to Show Cause (ECF No. 3) directing Respondent to file a response to Petitioner's section 2241 petition. On November 14, 2014, Respondent filed a Response to Order to Show Cause asserting that

[3] The undersigned believes that Petitioner is referring to section 5G1.3(c) of the United States Sentencing Guidelines which permits a district court to impose a sentence concurrent to another undischarged sentence "to achieve a reasonable punishment for the instant offense." UNITED STATES SENTENCING GUIDELINES § 5G.13(c).

Petitioner's sentence was correctly calculated and that he is not entitled to any further relief. (ECF No. 6).

ANALYSIS

The statutory basis for the commencement of a federal sentence is found in 18 U.S.C. § 3585(a), which provides that "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." (Emphasis added). Respondent's Response to the Order to Show Cause asserts that Petitioner's federal sentence commenced on June 13, 2003, the day such sentence was imposed and that "[a]ny contention that Petitioner's federal sentence commenced earlier is without merit." (ECF No. 6 at 3). The Response further states:

> Fundamental in this statutory language is the term "received in custody," which determines the commencement of a federal sentence term. Under such circumstances, the concept of primary jurisdiction applies. Primary jurisdiction was explained in *United States v. Smith*:
>
> > In the context of successive criminal prosecutions by different sovereignties this "chief rule which preserves our two systems of courts from actual conflict of jurisdiction" means that **the sovereignty which first arrests the individual acquires the right to prior and exclusive jurisdiction over him**, . . . and this plenary jurisdiction is not exhausted until there has been complete compliance with the terms of, and service of any sentence imposed by, the judgment of conviction entered against the individual by the courts of that first sovereignty . . . .
>
> *United States v. Smith*, 812 F. Supp. 368, 371 (E.D.N.Y. 1993) (quoting *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978)). Primary jurisdiction remains vested in a sovereign until that sovereign relinquishes its primary jurisdiction through dismissal of charges, bail release, parole release, or satisfaction of sentence. *See Chambers v. Holland*, 920 F. Supp. 618, 622 (M.D. Pa. 1996) (citing *United States v. Warren*, 610 F.2d 680, 684-85 (9th Cir. 1980) ("Primary jurisdiction remains vested in the state which first

> arrested the defendant until that jurisdiction relinquishes its priority by, e.g., bail release, dismissal of the state charges, parole release, or expiration of sentence.”))

(*Id.* at 4). Respondent asserts that the State of Maryland gained primary jurisdiction over Petitioner when they arrested him on April 25, 2001, and did not relinquish that primary jurisdiction until Petitioner completed his state term of imprisonment on May 3, 2011. (*Id.* at 4-5).

Section 3585(b) of Title 18 prohibits a defendant from receiving double credit for detention time. Thus, prior custody credit cannot be granted if the prisoner has received credit toward another sentence. *See United States v. Wilson*, 503 U.S. 329, 337 (1992); *United States v. Brown*, 977 F.2d 574 (4th Cir. 1992) (defendant may receive credit against his federal sentence for time spent in official detention prior to the date his sentence commences unless it has been credited against another sentence); *United States v. Goulden*, 54 F.3d 774 (4th Cir. 1995) (credit is only available for time spent in custody which has not been credited against another sentence). (ECF No. 6 at 6). Therefore, normally a prisoner could not receive credit toward his federal sentence for the time credited to his state sentence.

Under certain circumstances, however, the Attorney General or the Bureau of Prisons, may designate that a federal sentence commences while the prisoner is in state custody. *See United States v. Evans*, 159 F.3d 908, 911-912 (4th Cir. 1998) (a prisoner in state custody may have his federal sentence commence to run “if and when the Attorney General or the Bureau of Prisons (BOP) agree to designate the state facility for service of that federal sentence.”) This process is known as a “*nunc pro tunc* designation.” Petitioner received such a designation on May 27, 2009, when the BOP designated Petitioner’s state facility for service of his federal sentence beginning on June 13, 2003.

(*See* ECF No. 1 at 22, Ex. XI). Consequently, as noted by Respondent, Petitioner's federal sentence commenced on the earliest possible date, June 13, 2003 (the date it was imposed).

Furthermore, the holding in *Willis v. United States*, 438 F.2d 923 (5th Cir. 1971) provides another limited exception to the prior custody credit rule. When state and federal sentences are run concurrently, but crediting only the state sentence does not provide any benefit to the prisoner, the prisoner can receive double custody credit. In the instant case, Petitioner properly received 195 days of additional credit to his federal sentence for the time period between his arrest on April 25, 2001 and November 5, 2001, the day before his state sentence commenced. On the other hand, under section 3585(b), Petitioner is not entitled to credit for the time period between November 6, 2001 and June 13, 2003, which was credited toward his state sentence and occurred prior to his federal sentencing.

Accordingly, the undersigned proposes that the presiding District Judge **FIND** that Petitioner has received the proper prior custody credit and that his sentences have been properly executed. Therefore, it is respectfully **RECOMMENDED** that the presiding District Judge **DENY** Petitioner's section 2241 petition and dismiss this civil action from the docket of the court.

The parties are hereby notified that this "Proposed Findings and Recommendation" is hereby filed, and a copy will be submitted to the Honorable David A. Faber, Senior United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(e) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (making of objections), and then three days (service/mailing), from the date of filing this "Proposed Findings and

Recommendation" within which to file with the Clerk of this Court, specific written objections, identifying the portions of the "Proposed Findings and Recommendation" to which objection is made, and the basis of such objection. Extension of this time period may be granted by the presiding District Judge for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. *Snyder v. Ridenour*, 889 F.2d 1363 (4th Cir. 1989); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984). Copies of such objections shall be provided to opposing parties and Judge Faber.

The Clerk is directed to file this "Proposed Findings and Recommendation" and to mail a copy of the same to Petitioner, who is now in custody at FCI Pollock in Pollock, Louisiana, and to transmit a copy to counsel of record.

October 12, 2016

Dwane L. Tinsley
United States Magistrate Judge

FILED: July 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6073
(1:14-cv-11923)

ROBERT DEMETRIUS BARNES

Petitioner - Appellant

v.

B. MASTERS, Warden

Respondent - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Duncan, Judge Keenan, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

18 U.S.C. § 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 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 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.)

18 U.S.C. § 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.)

UNITED STATES SENTENCING COMMISSION
GUIDELINES MANUAL

This document contains the text of the *Guidelines Manual* incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; and November 1, 2002.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 287 and 288); November 1, 1994 (see Appendix C, amendment 507); November 1, 1998 (see Appendix C, amendment 579); November 1, 2000 (see Appendix C, amendment 598); November 1, 2002 (see Appendix C, amendment 642).

§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 the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, 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. *Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), 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 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 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. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).

3. *Concurrent or consecutive sentence - subsection (c) cases. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under this subsection, the court may impose a sentence concurrently, partially concurrently, or consecutively. To achieve a reasonable punishment and avoid unwarranted disparity, the court should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of:*

   (a) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

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

   (c) 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

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

4. *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 (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. 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.*

5. *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.*

6. *Revocations. If 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, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).*

7. *Downward Departure Provision.—In the case of a discharged term of imprisonment, a*

downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

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).

AO 242 (12/11) Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241

UNITED STATES DISTRICT COURT

for the

ROBERT DEMETRIUS BARNES
Petitioner

v.

B. Masters, Warden
Respondent
(name of warden or authorized person having custody of petitioner)

Case No. 1:14-11923
(Supplied by Clerk of Court)

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Personal Information

1. (a) Your full name: Robert Demetrius Barnes
   (b) Other names you have used:
2. Place of confinement:
   (a) Name of institution: Federal Correctional Institution McDowell
   (b) Address: P.O. Box 1009
   Welch, WV 24801
   (c) Your identification number: 34922-037
3. Are you currently being held on orders by:
   ☒ Federal authorities ☐ State authorities ☐ Other - explain:
4. Are you currently:
   ☐ A pretrial detainee (waiting for trial on criminal charges)
   ☒ Serving a sentence (incarceration, parole, probation, etc.) after having been convicted of a crime
   If you are currently serving a sentence, provide:
   (a) Name and location of court that sentenced you: U.S. District Court of Maryland Northern Division, 101 West Lombard St., Baltimore, Maryland 21201
   (b) Docket number of criminal case: WMN-02-105
   (c) Date of sentencing: Friday, June 13, 2003
   ☐ Being held on an immigration charge
   ☐ Other *(explain)*:

Decision or Action You Are Challenging

5. What are you challenging in this petition:

☒ How your sentence is being carried out, calculated, or credited by prison or parole authorities (for example, revocation or calculation of good time credits)

☐ Pretrial detention

☐ Immigration detention

☐ Detainer

☐ The validity of your conviction or sentence as imposed (for example, sentence beyond the statutory maximum or improperly calculated under the sentencing guidelines)

☐ Disciplinary proceedings

☐ Other *(explain)*: _____

6. Provide more information about the decision or action you are challenging:

(a) Name and location of the agency or court: B. Masters, Warden, 101 Federal Way, Welch, West Virginia 24801

(b) Docket number, case number, or opinion number: 742793-F1

(c) Decision or action you are challenging *(for disciplinary proceedings, specify the penalties imposed)*:

The BOP is improperly calculating the term of Petitioners imprisonment, improperly denying him Federal credit for time served despite Sentencing Judge intending the Federal sentence to run concurrently with State sentence.

(d) Date of the decision or action: _____

Your Earlier Challenges of the Decision or Action

7. **First appeal**

Did you appeal the decision, file a grievance, or seek an administrative remedy?

☒ Yes ☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: Warden Karen F. Hogsten of FCI McDowell

(2) Date of filing: July 15, 2013

(3) Docket number, case number, or opinion number: 742793-F1

(4) Result: Denied

(5) Date of result: July 25, 2013

(6) Issues raised: BOP has miscalculated jail credit

(b) If you answered "No," explain why you did not appeal:

8. **Second appeal**

After the first appeal, did you file a second appeal to a higher authority, agency, or court?

☒ Yes ☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: Regional Director C. Eichenlaub, Mid-Atlantic Region

(2) Date of filing: August 5, 2013

(3) Docket number, case number, or opinion number: 742793-R1

(4) Result: Denied

(5) Date of result: August 21, 2013

(6) Issues raised: Sentence not calculated correctly

(b) If you answered "No," explain why you did not file a second appeal:

9. **Third appeal**

After the second appeal, did you file a third appeal to a higher authority, agency, or court?

☒ Yes ☐ No

(a) If "Yes," provide:

(1) Name of the authority, agency, or court: General Councel

(2) Date of filing: October 1, 2013

(3) Docket number, case number, or opinion number: 742793-A1

(4) Result: Denied

(5) Date of result: November 6, 2013

(6) Issues raised: Sentence not calculated correctly

(b) If you answered "No," explain why you did not file a third appeal:

10. **Motion under 28 U.S.C. § 2255**

In this petition, are you challenging the validity of your conviction or sentence as imposed?

☐ Yes ☒ No

If "Yes," answer the following:

(a) Have you already filed a motion under 28 U.S.C. § 2255 that challenged this conviction or sentence?

☐ Yes ☐ No

If "Yes," provide:

(1) Name of court:

(2) Case number:

(3) Date of filing:

(4) Result:

(5) Date of result:

(6) Issues raised:

(b) Have you ever filed a motion in a United States Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), seeking permission to file a second or successive Section 2255 motion to challenge this conviction or sentence?

☐ Yes ☐ No

If "Yes," provide:

(1) Name of court:

(2) Case number:

(3) Date of filing:

(4) Result:

(5) Date of result:

(6) Issues raised:

(c) Explain why the remedy under 28 U.S.C. § 2255 is inadequate or ineffective to challenge your conviction or sentence:

11. **Appeals of immigration proceedings**

Does this case concern immigration proceedings?

☐ Yes ☒ No

If "Yes," provide:

(a) Date you were taken into immigration custody:

(b) Date of the removal or reinstatement order:

(c) Did you file an appeal with the Board of Immigration Appeals?

☐ Yes ☐ No

If "Yes," provide:

(1) Date of filing:

(2) Case number:

(3) Result:

(4) Date of result:

(5) Issues raised:

(d) Did you appeal the decision to the United States Court of Appeals?

☐ Yes ☐ No

If "Yes," provide:

(1) Name of court:

(2) Date of filing:

(3) Case number:

(4) Result:

(5) Date of result:

(6) Issues raised:

12. **Other appeals**

Other than the appeals you listed above, have you filed any other petition, application, or motion about the issues raised in this petition?

☐ Yes ☒ No

If "Yes," provide:

(a) Kind of petition, motion, or application:

(b) Name of the authority, agency, or court:

(c) Date of filing:

(d) Docket number, case number, or opinion number:

(e) Result:

(f) Date of result:

(g) Issues raised:

Grounds for Your Challenge in This Petition

13. State every ground (reason) that supports your claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: BOP's calculation of Petitioners pre-sentence custody credits (April 25, 2001 thru June 13, 2003) fail to account for the court's order that Petitioner's federal and state sentences run concurrent.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

The determination of the sentences both Federal & State be run concurrent was decided and stated by district court Judge William M. Nickerson [See Sentencing Transcripts page 13, line(s) 20-22] "Those two sentences, however, to run concurrently with the sentence now being served in the state system." [See Judgement in a Criminal Case page 2] & [See Nunc Pro Tunc Order in prison file]

(b) Did you present Ground One in all appeals that were available to you?

☒ Yes ☐ No

GROUND TWO: BOP fails to correct the miscalculation of Petitioners pre-sentence custody credits (April 25, 2001 thru June 13, 2003) as directed in prison file(s) including Sentencing Transcripts under Program Statement 5800.11.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

Petitoner was sentenced under statute 5G1.3(c) wherein the district court Judge William M. Nickerson determined the Federal & State sentence(s) run concurrrent without objection by the U.S. Attorney General, wherein the BOP 'bound' by the statement / directive set by Petitioners sentencing judge.

(b) Did you present Ground Two in all appeals that were available to you?

☒ Yes ☐ No

GROUND THREE: BOP refuses to grant prior custody credit when Petitioners Federal & state sentences run concurrent and Federal sentence full term re-release date is greater than the state sentence full term release date.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

Wherein the Petitioner's state sentence of a maximum fourteen (14) years is inferior to the present Federal Sentence of a maximum nineteen (19) years & one (1) month. The application of -1502 total diminution of confinement credits to the state term of confinement according with provision of the Correctional Services Articles Title 3, Subtitle 7 and Title 11 (annotated Code of Maryland), did not benefit Petititoner due to Federal detainer [See Manadatory Supervision Release Certificate No. 0411015638 -State of Maryland

(b) Did you present Ground Three in all appeals that were available to you?

☒ Yes ☐ No

GROUND FOUR: BOP is indifferent to approx. eighteen (18) months prior custody credits from November 6, 2001 thru June 12, 2003, when under Willis the BOP can grant prior custody credit, "even if it results in a double-credit toward state sentence" in Petitioners case.

(a) Supporting facts *(Be brief. Do not cite cases or law.)*:

The state case was a related case to current Federal offense see PSI # 78-Case # 01CR2280. Petitioner's state and federal sentences are ran cuncurrently; and the federal sentence full term release date is greater than the state sentence full term release date. BOP's present indifference forces the Petitioner to serve 95% of the nineteen (19) years & one (1) month sentence from the date of arrest.

(b) Did you present Ground Four in all appeals that were available to you?

☒ Yes ☐ No

14. If there are any grounds that you did not present in all appeals that were available to you, explain why you did not:

Request for Relief

15. State exactly what you want the court to do: I humbly pray this Court finds these grown just and reasonable. That the Courts instruct the BOP to calculate this sentence consistent with the Sentencing Judge's announced intention. Furthermore applying the custody credits form November 6, 2001 thru June 12, 2003.

Declaration Under Penalty Of Perjury

If you are incarcerated, on what date did you place this petition in the prison mail system:

2-19-14

I declare under penalty of perjury that I am the petitioner, I have read this petition or had it read to me, and the information in this petition is true and correct. I understand that a false statement of a material fact may serve as the basis for prosecution for perjury.

Date: 2-19-14

Robert Barnes

Signature of Petitioner

Mr. Robert Barnes pro-se

Signature of Attorney or other authorized person, if any

APPENDIX

I. BP-8

II. BP-8 (Response)

III. BP-9

IV. BP-9 (Response)

V. BP-10 (Response)

VI. BP-11

VII. BP-11 (Response)

VIII. Sentencing Transcripts, page 13, Line 17 - 22

IX. Judgement & Committment Order page 2 of 7

X. Maryland Division of Correction Release Certificate

XI. NUNC PRO TUNC ORDER

EXHIBIT I.

MCD-1330.16
Administrative
Remedy Program
July30, 2010
Page 4
Attachment A

REQUEST FOR ADMINISTRATIVE REMEDY
INFORMAL RESOLUTION FORM
FCI/FPC MCDOWELL
Welch, WEST VIRGINIA

The Bureau of Prisons Program Statement on Administrative Remedy Procedures for Inmates states that before an inmate seeks formal review of a complaint, he must try to resolve the complaint informally by presenting it to a staff member. The staff member must also try to resolve the complaint "informally" before the inmate will be given an Administrative Remedy Form..

INMATE'S NAME: Robert D. Barnes NO. 34922-037 UNIT B-4

1. Specific Complaint: Upon speaking with Mrs. Broton concerning my jail credits she informed me that the B.O.P. can not apply jail credits that back date the time of the commencement of sentence when a state sentence is imposed first. This said inmate believes this policy is being mis-interpreted.
2. Relief Requested: To formally proceed with the B.P. process.

---

3. Date/Time Complaint received from inmate: 7/1/13
4. Date/Time Informally discussed with inmate: 7/15/13 1178
5. Staff Response:

6. Date Administrative Remedy provided: 6.27.13

7. Informal Resolution **was / was not** accomplished.

[signature] 34922-037
INMATE'S SIGNATURE/REGISTER NO. — 7-1-13 DATE

[signature]
STAFF MEMBER'S NAME & TITLE — 7.1.13 DATE

[signature]
UNIT MANAGER'S SIGNATURE — 7-16-13 DATE

DISTRIBUTION: If the complaint is informally resolved before being receipted, the Correctional Counselors shall maintain the informal resolution form for future reference. If the complaint is not informally resolved, forward the original resolution form, attached to the Administrative Remedy Form, to the Administrative Remedy Clerk.

EXHIBIT II.

Charles Yates - Re: BP8 Barnes 34922-037

From: Jennifer Broton
To: Charles Yates
Date: 7/15/2013 7:09 AM
Subject: Re: BP8 Barnes 34922-037

Your federal sentence was imposed on 06-13-2003 and commenced on that same date. You did receive jail credit for the period from 04-25-2001 thru 06-11-2001 and 06-12-2001 thru 11-05-2001, a total of 195 days. The period of 06-12-2001 thru 11-05-2001 is Willis Credit and was applied in accordance with Program Statement 5880.28, Sentence Computation Manual (CCA of 1984).

Jennifer A. Broton
Supervisory Correctional Systems Specialist
FCI McDowell
P.O. Box 1029
Welch, WV 24801
(304)436-7300 x7372

>>> Charles Yates 7/1/2013 10:34 AM >>>
Please respond to attached.

Yates

Charlie Yates, Correctional Counselor B-Unit
FCI McDowell, WV
PO Box 1029
101 Federal Drive
Welch, WV 24801
304-436-7300 Ext. 7535

7/15/2013

EXHIBIT III

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Barnes, Robert, D. (LAST NAME, FIRST, MIDDLE INITIAL) 34922-037 (REG. NO.) B-4 (UNIT) F.C.I. McDowell (INSTITUTION)

Part A- INMATE REQUEST upon speaking with Mrs. Broton concerning my jail credits she informed me that the B.O.P. can not apply jail credits that back date the time of the commencement of sentence when a state sentence is imposed first. This said inmate believes this policy is being mis-interpreted. At this time I'm requesting that your office look further into this matter.

7-15-13
DATE

Robert Barnes #34922-037
SIGNATURE OF REQUESTER

Part B- RESPONSE

Administrative Remedy Coordinator
Received
JUL 17 2013

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 742793-F1

CASE NUMBER:

Part C- RECEIPT

Return to: (LAST NAME, FIRST, MIDDLE INITIAL) (REG. NO.) (UNIT) (INSTITUTION)

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN

PRINTED ON RECYCLED PAPER

BP-229(13)
APRIL 1982

REQUEST FOR ADMINISTRATIVE REMEDY 742793-F1

Your request for Administrative Remedy, received July 17, 2013, has been reviewed. You allege Bureau of Prisons policy, concerning jail credit, when a state sentence is imposed first, has been misinterpreted and request further investigation.

A review of your case has determined you were sentenced June 13, 2003, in the United States District Court, District of Maryland. William M. Nickerson, Senior United States District Judge, sentenced you to a total term of 146 months imprisonment as to Count 2; and 84 months as to Count 3, to run consecutive to the term imposed under Count 2. These sentences were ordered to run concurrent with the sentence being served in the state system. Therefore, your federal sentence began on the date it was imposed. On June 12, 2001, you were arrested in Baltimore County, Maryland for charges related to your federal offense. You were sentenced in Baltimore County Circuit Court and began serving the imposed sentence on November 6, 2001. Jail credit has been applied to your federal sentence for the time period from June 12, 2001 thru November 5, 2001.

Your sentence has been calculated in accordance with Program Statement 5880.28, Sentence Computation Manual (CCA of 1984) which states, "In no case can a federal sentence of imprisonment commence earlier than the date on which it is imposed". It further states, qualified non-federal presentence time or jail credit is defined as "time spent in nonfederal presentence custody from the date of the federal offense, that does not overlap any other authorized prior custody time credits, to the date the first sentence begins to run, federal or non-federal". Based on this, the time period from November 6, 2001 thru June 12, 2003, cannot be applied to your federal sentence as jail credit since the state sentence had already commenced.

Based on the above information, your request is denied. If you are not satisfied with this response, you may appeal to the Regional Director, Bureau of Prisons, Mid-Atlantic Region, 302 Sentinel Drive - Suite 200, Annapolis Junction, Maryland 20701, within 20 calendar days of the date of this response.

Karen F. Hogsten, Warden

Date 7/25/13

EXHIBIT V.

REGIONAL ADMINISTRATIVE REMEDY APPEAL
Part B - Response

Date Filed: August 5, 2013 Remedy ID No.: 742793-R1

You are appealing the Warden's response to your Administrative Remedy. You claim that your sentence is not calculated correctly. You request jail credit be applied to your sentence from November 6, 2001, through June 12, 2003.

Title 18, U.S.C. § 3585(a) establishes the rule for commencement of a sentence. In no case can a federal sentence commence earlier than the date on which it is imposed. Prior custody time credit is controlled by Title 18, U.S.C. § 3585(b) and states that credit shall be given for time spent in official detention prior to the date the sentence commences, provided it has not been credited against another sentence.

Program Statement 5880.28, Sentence Computation Manual (CCCA of 1984), provides instructions for calculating federal sentences. Page 1 - 22, of this program statement refers to Willis time credit. This credit is applied when a federal and state sentence is running concurrent and the Raw EFT (effective full term) date of the non-federal term is equal to or less than the Raw EFT date of the federal sentence. Credit is given for time spent in non-federal presentence custody that begins on or after the date of the federal offense up to the date that the first sentence begins to run, federal or non-federal.

Investigation of your complaint reveals that your federal sentence began on June 13, 2003, the date it was imposed. You were awarded jail credit from April 25, 2001, through June 11, 2001, as this was time spent in official detention and not awarded toward any other sentence. You were also awarded Willis credit from June 12, 2001, through November 5, 2001. This credit stopped on November 5, 2001, as your state sentence began on November 6, 2001.

Your appeal is denied. If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534. Your appeal must be received in the General Counsel's Office within 30 days from the date of this response.

AUG 21 2013
Date

C. Eichenlaub
Regional Director
Mid-Atlantic Region

EXHIBIT VI.

...partment of Justice
...ral Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Barnes, Robert, D. (LAST NAME, FIRST, MIDDLE INITIAL) 34922-037 (REG. NO.) [S.H.U]A-168 (UNIT) F.C.I. McDowell (INSTITUTION)

Part A - REASON FOR APPEAL This said inmate is appealing the regional directors decision concerning the non applied jail credits to my current sentence. The Regional Director is only applying Title 18, U.S.C. 3585(a). When reviewing my sentencing transcript you will find that this said inmates was sentenced under 18, U.S.C. 3585(b) by applying the sentencing statue of 5G1.3(c) which states: Credit shall be given for time spent in official detention prior to the date the sentence commences, provided it has not been credited against another sentence. The time period from 11-6-2001 thru 6-12-2003 should be applied because the 6-12-2001 Baltimore County offense is a related case of my current offense in which points were given [see P.S.I. #78 - case #01CR2280]. To not apply these credits will force this said inmate to serve 95 % of his sentence. At this time I'm requesting that your office look futher into this matter thus finding merit and applying the appropiate credits.

10-1-13 (DATE) [See Attachment] Robt Barnes #34922-037 (SIGNATURE OF REQUESTER)

Part B - RESPONSE

RECEIVED
OCT 17 2013
Administrative Remedy Office
Federal Bureau of Prisons

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 712793

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

UPN LVN

PRINTED ON RECYCLED PAPER

BP-231(13)
JUNE 2002

EXHIBIT VII.

Administrative Remedy No. 742793-A1
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal wherein you request additional credit toward your federal sentence for time spent in service of your state sentence from November 6, 2001, through June 12, 2003.

You provide no new information in this matter beyond that which you supplied at the Institution and Regional Office levels. A review of your record reveals at the time your federal sentence was imposed, you were under the primary jurisdiction of the State of Maryland, and in federal custody pursuant to a writ.

On June 13, 2003, you were sentenced in the United States District Court, District of Maryland, to a 230-month total term of imprisonment for Bank Robbery, Aiding and Abetting, and Use of a Weapon. At the time of sentencing, the Court ordered your federal sentence to run concurrent to the state sentence you had been serving.

Pursuant to Program Statement 5880.28, Sentence Computation Manual (CCCA of 1984), and the provisions of Title 18 U.S.C. § 3585(a), the earliest possible date a sentence can commence is the date on which it was imposed. As such, your federal sentence has been computed to commence on June 13, 2003, the date of imposition, in order to affect concurrent service of sentence as ordered by the Court.

Title 18 U.S.C. § 3585(b) prohibits the application of prior custody credit if the credit was awarded toward the service of another sentence. The exception to § 3585(b) is the awarding of Willis or Kayfez credit. Since your federal and state sentences were ordered to run concurrently, your case was reviewed for any additional credit pursuant to Willis and/or Kayfez. Qualified state presentence credit is defined as time spent in non-federal presentence custody that begins on or after the date of the federal offense (March 21, 2001) up to the date the first sentence, federal or non-federal, begins to run. In your case, the first sentence (state) began to run on November 6, 2001.

The federal raw Expiration Full Term (EFT) is determined by adding the Term in Effect (230 months) to the Date Computation Begins (June 13, 2003) which equals August 12, 2022. The non-federal raw EFT is determined by adding the Term in Effect (14 years) to the

cont. EXHIBIT VII.

Administrative Remedy No. 742793-A1
Part B - Response
Page 2

Date Computation Begins (November 6, 2001) which equals November 5, 2015. Since your federal raw EFT is greater than your non-federal raw EFT, you are entitled to Willis credits from June 12, 2001, through November 5, 2001, for a total of 147 days.

Furthermore, you received jail credit from April 25, 2001, through June 11, 2001, toward the service of your federal sentence for time spent in custody after your arrest in Frederick County, Maryland, and your release on your own recognizance on June 11, 2001.

We find your sentence has been computed as directed by federal statute, the intent of the Court, and Bureau of Prisons Program Statement 5880.28. Accordingly, your appeal is denied.

November 6, 2013
Date

Harrell Watts, Administrator
National Inmate Appeals

PAGE 2 OF 2

Robert Barnes, not the so-called thug that was running the streets with a drug addiction, that was just doing crazy things.

I'm asking you as humbly as I can, and as I know how, to please show a little mercy. I'm trying my best to be a different person.

I just want to thank my family that did show up for their support. I see that I do have someone who cares about me. That's all, Your Honor.

THE COURT: Certainly an unusual situation, to find a young man who has had the family support that you have had wind up in a situation such as this. I'm sure that the punishment that the family suffers as a result of all this is extremely hard.

Mr. Clarke's suggestion or recommendation that a sentence at the mid-range for the reasons that he articulated is entirely appropriate.

With respect to Count Two, I'm going to impose a sentence of 146 months; with respect to Count Three, 7 years, or 84 months, commitment to the Bureau of Prisons, running consecutive to the 146 months in Count Two. Those two sentences, however, to run concurrently with the sentence now being served in the state system.

A term of supervised release of five years is imposed as to Count Two and as to Count Three running concurrently with Count Two. The conditions being, in addition to the standard

DEFENDANT: ROBERT DEMETRIUS BARNES (1) **CASE NUMBER: WMN-02-0105**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 146 months as to Count 2; and 84 months as to Count 3, to run consecutive to the term imposed under Count 2. Sentences imposed under Counts 2 and 3 to run concurrent with the sentence now being served in the state system.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.
☐ as notified by the United States Marshal.

☐ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☐ before 2 p.m. on _____.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on 01-19-12 to USP Big Sandy at Ashland KY, with a certified copy of this judgment.

D. Berkebile, Warden
~~UNITED STATES MARSHAL~~

By: D. Clark, CSO
~~DEPUTY U.S. MARSHAL~~

EXHIBIT X

State of Maryland
DIVISION OF CORRECTION

MANDATORY SUPERVISION RELEASE CERTIFICATE

No. 0411015638

I. CERTIFICATION OF DIMINUTION OF CONFINEMENT CREDITS

I certify that BARNES, ROBERT DEMETRIUS, DOC No. 305234, who is confined at Maryland Correctional Training Center, is entitled to be released in accordance with Correctional Services Article Title 7, §§7-501 and 7-502, Annotated Code of Maryland on 05/03/2011. Determination of said release date is through the application of 1502 total diminution of confinement credits to the term of confinement in accordance with the provisions of the Correctional Services Article Title 3, Subtitle 7 and Title 11, Annotated Code of Maryland. This release pertains to the following court case tracking numbers:
011001311786
I further certify that the maximum expiration date of this inmate's term of confinement is 06/13/2015

Grove, D. Suzanne
Original Signature on file — 04/26/2011
Commitment Records Specialist Manager/Supervisor — Date

II. REPORTING INSTRUCTIONS (Complete A or B and enter information in A on OBSCIS I, Screen 10)

A. RELEASE TO THE COMMUNITY

Where this inmate states that he/she will reside:

He/she is hereby directed to report, in person, no later than 10:00 a.m. on __ to the Division of Parole and Probation office located at:

Telephone no. _____

with _____
Name of person with whom residing

_____
Telephone number

B. RELEASE TO A DETAINER

Whereas this inmate is being released to a detainer lodged on 06/13/0003 by USMS, Baltimore, MD 21201 , he/she is hereby directed to immediately contact the Division of Parole and Probation at 443-263-3696 for further reporting instructions if he/she is released from the detainer prior to the maximum expiration date of the term of confinement for which this mandatory supervision release is granted.

III. ACKNOWLEDGEMENT OF THE CONDITIONS OF MANDATORY SUPERVISION RELEASE

I have read, or have had read to me, this certificate, including the reverse side which lists standard conditions of mandatory supervision as well as any special conditions as established by a Commissioner of the Maryland Parole Commission. I understand my obligation to observe and abide by all conditions and that I will be deemed as if released on parole. I will remain under the supervision of the Division of Parole and Probation, subject to all the same laws, rules and regulations and conditions that apply to parolees, until my term of confinement expires.

I hereby waive extradition to the State of Maryland and expressly agree that I will not contest any effort to return me to the State of Maryland in consequence of my violating any of the terms and conditions of this mandatory supervision release. I fully understand that my violation of any of these terms and conditions may result in the revocation of my mandatory supervision release by the Maryland Parole Commission and the taking of all diminution of confinement credits I earned as of the date of my release under mandatory supervision.

☐ Pay **RESTITUTION** as ordered by __ Court(s),Case Numbers(s). __, as directed by your supervising agency in accordance with the payment plan developed by the Division of Parole and Probation.

Signature of Mandatory Supervision Releasee — 4-28-11 Date

Witness — CCMS II Title

ORIGINAL-Commitment File **COPIES**: Inmate, Maryland Parole Commission, Division of Parole and Probation, Base File

EXHIBIT XI

U.S. Department of Justice

Federal Bureau of Prisons

Designation & Sentence Computation Center

Grand Prairie, Texas 75051

Date	:	May 27, 2009
Inmate's Name	:	Barnes, Robert
Register Number	:	34922-037
Offense	:	Bank Robbery, Aiding and Abetting & Use of Of a Weapon
Sentence	:	230 months
Judicial District	:	Maryland
Sentence Begins	:	June 13, 2003
Release Date	:	August 12, 2019
Designated Facility	:	Maryland Department of Corrections

U.S. Marshals Service

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 Bureau of Prisons Designation & Sentence Computation Center, Grand Prairie, TX.

I understand no charge will be made to the Federal Government during the time the inmate is serving the State sentence.

Sincerely,

Delbert Sauers, Chief
Designation and Sentence Computation Center

Mr. Robert Barnes #34922-037
FCI McDowell
P.O.Box 1009
Welch, WV 24801

United States District Courts
Clerk of The Court
601 Federal Street, Rm#2303
Bluefield, WV 24701, U.S.

RE: PETITION UNDER § 2241

Dear Clerk,

Enclosed, you will find the Section 2241 motion completed to the best of the petitioners knowledge and understanding, with Appendix of attached EXHIBIT(s) I thru XI., with money order for filing fee.

Thank you for your time and service in this matter.

Petitioner, pro-se

Robert Barnes

Mr. Robert Barnes -
Reg#: 34922-037

ROBERT D. BARNES, 34922-037
FCI MCDOWELL
FEDERAL CORRECTIONAL INSTITUTION
P.O.BOX 1009
WELCH, WV 24801
CERTIFIED MAIL
7013 0600 0000
PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS, FOLD AT DOTTED LINE
MAIL
34922-037
Us Dis Crt Clerk Office
601 Federal ST
Rm.2303
Bluefield, WV 24701
United States

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL

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Commissioner, Ex-officio

EDWARD F. REILLY, JR.
Commissioner, Ex-officio

This document contains the text of the Guidelines Manual incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; and November 1, 1995.

produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

Commentary

This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the adjusted combined offense level. To the extent possible, the total punishment is to be imposed on each count. Sentences on all counts run concurrently, except as required to achieve the total sentence, or as required by law.

This section applies to multiple counts of conviction (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

Counts for which a statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. § 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the particular offense of conviction. That sentence then runs consecutively to the sentences imposed on the other counts. See Commentary to §§2K2.4 and 3D1.1 regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 287 and 288); November 1, 1994 (see Appendix C, amendment 507).

§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 the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, 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. *Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), 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 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 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. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).*

3. *Concurrent or consecutive sentence - subsection (c) cases. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under this subsection, the court may impose a sentence concurrently, partially concurrently, or consecutively. To achieve a reasonable punishment and avoid unwarranted disparity, the court should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of:*

   (a) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

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

   (c) 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

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

4. *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 (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. 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.*

5. *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.*

6. *Revocations. If 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, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).*

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).

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL

This document contains the text of the *Guidelines Manual* incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; and November 5, 2003.

count of violating 18 U.S.C. § 2113(a) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 400 months is appropriate (applicable guideline range of 360-life). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 40 months on the 18 U.S.C. § 2113(a) count. The sentence on each count is imposed to run consecutively to the other counts.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 287 and 288); November 1, 1994 (see Appendix C, amendment 507); November 1, 1998 (see Appendix C, amendment 579); November 1, 2000 (see Appendix C, amendment 598); November 1, 2002 (see Appendix C, amendment 642).

§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) (e.g., 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 Judgement in a Criminal Case Order (i) the applicable subsection (e.g., §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 13; Criminal History Category I). The court determines that a sentence of 13 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 (e.g., 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).

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL

Appendix C (Volume II)

This document contains amendments to the *Guidelines Manual* effective November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; and November 5, 2003. For amendments effective November 1, 1997, and earlier, *see* Appendix C, Volume I.

of violence (as defined in 18 U.S.C. § 16) or drug trafficking crime (as defined in 18 U.S.C. § 924(c)) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor. The Act included a sense of Congress that any such enhancement should be at least two levels.

In response to the directive, the amendment creates a new Chapter Three adjustment at §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence). The new adjustment provides for the greater of a two level adjustment if the defendant was convicted of a crime of violence or a drug trafficking crime and the offense involved the use of body armor, or a four level adjustment if the defendant used body armor in preparation for, during the commission of, or in an attempt to avoid apprehension for, the offense.

An application note defines "drug trafficking crime" (as defined in 18 U.S.C. § 924(e)(2)). This definition includes any felony punishable under the Controlled Substances Act. The application note also defines "crime of violence" (as defined in 18 U.S.C. § 16). This definition includes offenses that involve the use or attempted use of physical force against property as well as persons. Both of these definitions are somewhat broader than the definitions of "crime of violence" and "drug trafficking offense" used in a number of other guidelines. The definition of "body armor" is the same as the statutory definition provided in 18 U.S.C. § 921(a)(35).

An application note makes clear that in order for §3B1.5 to apply, the body armor must be used, i.e., actively employed either in a manner to protect the person from gunfire or as a means of bartering. Mere possession is insufficient to trigger the adjustment.

Another application note explains that in order for the heightened, four level adjustment to apply, the defendant must have used the body armor or aided, abetted, counseled, commanded, induced, procured, or willfully caused someone else to use the body armor.

Effective Date: The effective date of this amendment is November 1, 2003.

660. Amendment: Section 5G1.3 is amended by striking subsection (b) as follows:

> "(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.",

and inserting the following:

> "(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.".

Section 5G1.3(c) is amended by inserting "involving an undischarged term of imprisonment" after "case".

The Commentary to §5G1.3 captioned "Application Notes" is amended by striking Notes 2 through 7 as follows:

"2. Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), 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 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 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. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).

3. Concurrent or consecutive sentence - subsection (c) cases. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under this subsection, the court may impose a sentence concurrently, partially concurrently, or consecutively. To achieve a reasonable punishment and avoid unwarranted disparity, the court should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of:

(a) the type (e.g., determinate, indeterminate/parolable) and length of

the prior undischarged sentence;

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

(c) 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

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

4. 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 (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. 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.

5. 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.

6. Revocations. If 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, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).

7. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.",

and inserting the following:

"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) (e.g., 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 Judgement in a Criminal Case Order (i) the applicable subsection (e.g., §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 13; Criminal History Category I). The court determines that a sentence of 13 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 (e.g., 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).".

Chapter Five, Part K, is amended by adding at the end the following new policy statement:

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

A sentence below the applicable guideline range 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.".

Reason for Amendment: This amendment addresses a number of issues in §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

First, this amendment clarifies the rule for application of subsection (b) (mandating a concurrent term of imprisonment) with respect to a prior term of imprisonment by stating that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. By clarifying the application of subsection (b), this amendment addresses conflicting litigation regarding the meaning of "fully taken into account." Compare, e.g., United States v. Garcia-Hernandez, 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is "fully taken into account" if and only if the guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding), with United States v. Fuentes, 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been "fully taken into account" when the prior offense is part of the same course of conduct, common scheme, or plan).

Second, this amendment addresses how this guideline applies in cases in which an instant offense is committed while the defendant is on federal or state probation, parole, or supervised release, and has had such probation, parole, or supervised release revoked. Under this amendment, the sentence for the instant offense may be imposed concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment; however, the Commission recommends a consecutive sentence in this situation. This amendment also resolves a circuit conflict concerning whether the imposition of such sentence is required to be consecutive. The amendment follows holdings of the Second, Third, and Tenth Circuits stating that imposition of sentence for the instant offense is not required to be consecutive to the sentence imposed upon revocation of probation, parole, or supervised release. See United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999); United States v. Swan, 275 F.3d 272, 279-83 (3d Cir. 2002); United States v. Tisdale, 248 F.3d 964, 977-79 (10th Cir. 2001).

Third, this amendment provides a new downward departure provision in §5K2.23 (Discharged Terms of Imprisonment) regarding the effect of discharged terms of imprisonment. This provision replaces the departure provision previously set forth in Application Note 7 of §5G1.3. By placing the departure provision in Chapter Five, Part K, this amendment brings structural clarity to §5G1.3 because the guideline applies to undischarged, rather than discharged, terms of imprisonment. For ease of application, the new commentary in §5G1.3 provides a reference to §5K2.23.

Finally, this amendment addresses a circuit conflict regarding whether the sentencing court may grant "credit" or adjust the instant sentence for time served on a prior undischarged term covered under subsection (c). Compare Ruggiano v. Reish, 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), with United States v. Fermin, 252 F.3d 102

(2d Cir. 2001) (court may not grant such credit). The amendment makes clear that the court may not adjust or give "credit" for time served on an undischarged term of imprisonment covered under subsection (c). However, the amendment adds commentary to §5G1.3 to provide that courts may consider a downward departure in an extraordinary case, in order to achieve a reasonable punishment for the instant offense.

Effective Date: The effective date of this amendment is November 1, 2003.

661. Amendment: Section 1B1.1 is amended by inserting before subsection (a) the following new paragraph:

> "Except as specifically directed, the provisions of this manual are to be applied in the following order:".

The Commentary to §1B1.1 captioned "Application Notes" is amended by striking Note 4 as follows:

> "4. The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.
>
> Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together).",

and inserting the following:

> "4. (A) Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.
>
> (B) Cumulative Application of Multiple Adjustments from Multiple Guidelines.—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL 2016

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This document contains the text of the *Guidelines Manual* incorporating amendments effective November 1, 2016, and earlier.

(ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.

(iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 113(a)(3) (10 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 287 and 288); November 1, 1994 (amendment 507); November 1, 1998 (amendment 579); November 1, 2000 (amendment 598); November 1, 2002 (amendment 642); November 1, 2004 (amendment 674); November 1, 2005 (amendments 677 and 680); November 1, 2010 (amendment 747); November 1, 2012 (amendments 767 and 770).

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State 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), 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) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result 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), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (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 is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (d).

(B) **Inapplicability of Subsection (b).—**Subsection (b) does not apply in cases in which the prior offense was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (*e.g.*, the prior offense is a prior conviction 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 (*e.g.*, §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 90 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 25 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 115 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 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).**—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense 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), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

4. **Application of Subsection (d).—**

(A) **In General.**—Under subsection (d), 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 (*e.g.*, 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 (d), 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 (d) 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 (d) 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 (d) 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 (d), 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(d), rather than as a credit for time served.

5. **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: Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." *See Setser v. United States*, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, 132 S. Ct. at 1468. Exercise of that discretion, 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 (amendment 289); November 1, 1991 (amendment 385); November 1, 1992 (amendment 465); November 1, 1993 (amendment 494); November 1, 1995 (amendment 535); November 1, 2002 (amendment 645); November 1, 2003 (amendment 660); November 1, 2010 (amendment 747); November 1, 2013 (amendment 776).; November 1, 2014 (amendments 782, 787, and 789); November 1, 2016 (amendment 802).