

SEP 02 2019

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No. 19-6716

IN THE

SUPREME COURT OF THE UNITED STATES

ISRAEL CARL ISBELL — PETITIONER
(Your Name)

VS.

STEVE MERLAK, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Israel Carl Isbell Reg. No.: 15929-026
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ORIGINAL

QUESTIONS PRESENTED

1. Does one sovereign - specifically the federal government - lose or surrender its primary jurisdiction when they release an inmate who is serving their consecutive sentence into the physical custody of another sovereign, not on loan for prosecution but to serve the other sovereign's judgment against him?
2. Under the Sixth circuit precedent, "[t]he surrender to another state while the prisoner is serving a sentence is equivalent to a pardon.

In such a case the judgment of conviction is satisfied and there is no continuing jurisdiction." Isbell was serving a consecutive federal sentence when he was surrendered to Illinois for service of Illinois' sentence. In an unpublished opinion, the Sixth Circuit held that despite the surrender of Isbell, "the federal government did not relinquish ... jurisdiction [of him] when he was released into the custody of Illinois." Did the Sixth Circuit err in not following their own precedent?

3. Under the Sixth Circuit's precedent in Stroble, when a prisoner is loaned to a state under the IAD, and that state prosecutes the prisoner, then, through an administrative mistake, commences that prisoner's sentence and imprisons him in their state without returning him, then, after discovering the error, returns him, it was held that such an administrative mistake could not result in the loss of the receiving sovereign's primary jurisdiction because it did not have primary jurisdiction, he was merely on loan under the IAD. Isbell was not loaned under the IAD, and primary jurisdiction rested with the United States, who then surrendered him to Illinois for service of his state sentence. Did the lower courts err when they applied Stroble's reasoning to Isbell's case?
4. Under federal law, unless a federal court specifically orders a federal criminal sentence to run concurrently to another sentence, "Multiple terms of imprisonment imposed at different times are to be served consecutively." Isbell's federal judge did not order Isbell's sentence to run concurrent to his already-imposed state court sentence. Did the Bureau of Prisons err in holding that Isbell's federal sentence was concurrent, and abuse its discretion by granting a *numc pro tun* after first denying it?
5. Did the Sixth Circuit err in its holding that the United States did not relinquish primary jurisdiction over Isbell when it transferred him without writ to Illinois to serve his Illinois sentence, or is the Ninth Circuit correct in its intent analysis?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

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| <u>United States v. Cole</u> , 416 F.3d 894 (8th Cir. 2005). | . v, 4 |
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| <u>Wéékes v. Fleming</u> , 301 F.3d 1170 (10th Cir. 2002) | v, 8 |

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix K to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix J to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished. *The Report and Recommendation by the
Magistrate Judge was ADOPTED by the Court and appears
at Appendix I to this petition.*

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

Statement of Jurisdiction

This Court has Appellate jurisdiction under Article III Section 2 of the United States Constitution and statutorily under 28 U.S.C. §1254(1) because the Sixth Circuit Court of Appeal committed a substantive legal error that is of such importance to federal jurisprudence that it requires correction.

This Court should hear this case under Supreme Court Rule 10(a) because the Court of Appeals' decision is in conflict with another United States Court of Appeals on the same important matter; and under Rule 10(c) because the Court of Appeals' decision has decided an important question of federal law that has not been, but should be, settled by this Court.

The date on which the United States Court of Appeals for the Sixth Circuit decided my appeal was June 10, 2019. This petition for Writ of Certiorari was filed on September 2, 2019. Accordingly, this petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2

Amendment V (Due Process)

Statutes

28 U.S.C. §1254(1)

28 U.S.C. §2241

18 U.S.C. §3584(a)

18 U.S.C. §3585(a)

STATEMENT OF THE CASE

In 1922, this Court answered the question of whether one sovereign (specifically the Federal Government) could release their prisoner to another sovereign to face prosecution, without the sovereign losing their primary jurisdiction.¹

This case presents another important, specific question concerning the doctrine of primary jurisdiction: Does one sovereign (specifically the Federal Government) lose or surrender its primary jurisdiction when they release a prisoner who is serving their consecutive sentence, into the physical custody of another sovereign, not on loan for prosecution, but to serve the other sovereign's judgment against him?

Illinois first arrested Isbell, establishing their primary jurisdiction over him. Illinois later released Isbell on bail, thereby relinquishing its primary jurisdiction over him.² Sometime later, Illinois re-arrested Isbell on other charges. Charges which the United States would later pursue. Illinois loaned Isbell to the United States for prosecution via a writ of Habeas Corpus ad Prosequendum and dismissed the second set of charges against him.³ Sometime later, Illinois reinstated Isbell's bond for the first offense,⁴ and once again affirmed its relinquishment of its priority of jurisdiction.² Illinois ultimately sentenced Isbell to serve a ten-year term of imprisonment on May 17, 2010, and ordered him to surrender for service of their sentence on June 26, 2010.⁵

Before Isbell could "surrender" for service of his state sentence however, he was sentenced by the United States to a 180-month term of imprisonment in the custody of the B.O.P. on June 25, 2010.⁶ The sentence handed down by U.S. District Judge Michael Mihm was "silent" in regards to

1. *Ponzi v. Fessenden*, 258 U.S. 254 (1922).
2. *United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005).
3. Appendix A - Dismissal of State Charge (11/5/09).
4. Appendix B - Illinois Bond Reinstatement (2/8/10).
5. Appendix C - Illinois State Judgment and Proceeding transcript (5/17/10).
6. Appendix D - 1:09-CR-10122 (C.D. of Illinois) Judgment and Commitment order.

Statement of the Case (cont.)

whether his sentence would be concurrent or consecutive to the State Court sentence,⁷ triggering the statutory presumption of a consecutive sentence.⁸ Because Isbell had been received in primary federal custody on June 25, 2010 at the Tazewell County Justice Center - a state and federal holding facility - to await transportation to the official detention facility at which Isbell's federal sentence was to be served, he satisfied the statutory requirements for the commencement of his federal sentence as well.⁹ While serving his consecutive federal sentence, Isbell was released to the Illinois Department of Corrections to serve the Illinois sentence on July 22, 2010.¹⁰ There was no writ or anything indicating that Isbell was being loaned to Illinois. Isbell requested nunc pro tunc designation from the Bureau of Prisons ("BOP") and was denied on January 19, 2011.¹¹ Seven months later, the BOP reversed their position and claimed (contrary to the record) that Isbell's federal sentence was concurrent,¹² they then had Isbell transferred back into federal custody on August 3, 2011. Isbell filed his administrative remedies with the BOP claiming that he was "pardoned" under the holding of the Sixth Circuit in Thompson v. Bannan, 298 F.2d 611, 615 (6th Cir. 1962) which held that "[t]he surrender to another state while the prisoner is serving a sentence is equivalent to a pardon.

In such a case the judgment of conviction is satisfied and there is no continuing jurisdiction."¹³ Isbell exhausted his remedies and filed a §2241 making the same claims.

6. Appendix D - 1:09-CR-10122 (C.D. of Illinois) Judgment & Commitment Order.
7. Appendix E - Excerpt of federal sentencing transcript. Doc. No. 50 of case no.: 1:09-CR-10122, pgs. 43-50, 81, see also Appendix I, Page 3 for the full text quote.
8. 18 U.S.C. §3584(a) reads that: "Multiple terms of imprisonment imposed at different times are to be served consecutively, unless the court orders the term to run concurrently."
9. 18 U.S.C. §3585(a) states that: "[a] sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to... the official detention facility at which the sentence is to be served."
10. Appendix F - USMS Order releasing Isbell to Illinois, and release booking sheet.
11. Appendix G - BOP Nunc Pro Tunc denial letter.
12. Appendix H - BOP Grant of Nunc Pro Tunc.
13. See related §2241: 4:16-CV-1883 (N.D. of Ohio, 2016) Doc. 1

Statement of the Case (cont.)

These claims were denied by Judge James G. Carr who held that, contrary to Isbell's position, it was not Thompson v. Barman, *Supra*, that controlled his case, but rather he held, the controlling case was Stroble v. Egeler, 547 F.2d 339, 340 (6th Cir. 1977).¹⁴ Judge Carr also found that Isbell received a concurrent federal sentence.¹⁵

Isbell appealed, and the Sixth Circuit affirmed on May 1, 2018.¹⁶

Isbell timely filed a petition for panel rehearing which was denied on July 6, 2018. Isbell then petitioned this Court for Certiori review which was denied on December 10, 2018. Meanwhile, Isbell fought his second §2241 through both the District and Appellate Courts.¹⁷ The Sixth Circuit affirmed the denial of Isbell's second §2241 petition on June 10, 2019. This petition follows.

14. See Doc. 14 in 4:16-CV-1883, filed 9/18/17

15. *id.*

16. See Isbell v. Merlak, 2018 WL 3954190 (6th Cir. 2018)

17. See Appendix I - Magistrate Judge Greenberg's Report and Recommendation, which the District Court ADOPTED as the opinion of the Court on August 30, 2018, in case no. 4:18-CV-1306, Appendix J-The Opinion of District Judge James G. Carr in case no. 4:18-CV-1306, and Appendix K - The Panel Opinion of the Sixth Circuit, appeal no. 18-3887 (appeal of case no. 4:18-CV-1306).

REASONS FOR GRANTING THE PETITION

ISSUE I

Under Sixth Circuit precedent, "[t]he surrender to another state while the prisoner is serving a sentence is equivalent to a pardon.

In such a case the judgment of conviction is satisfied and there is no continuing jurisdiction.¹⁸ Isbell was serving a consecutive federal sentence when he was surrendered to Illinois for service of Illinois sentence. In an unpublished opinion, the Sixth Circuit held that despite the surrender of Isbell, "the federal government did not relinquish ... jurisdiction [of him] when he was released to the custody of Illinois." Did the Sixth circuit err in not following its own precedent?

Argument.

The Sixth Circuit has reasoned that it has not erred because of their precedent in Stroble v. Egeler, 547 F.2d 339, 340 (6th Cir. 1977), but Isbell argues his case is distinguished from Stroble and presents the following statement:

Under the Sixth Circuit's precedent in Stroble, when a prisoner is loaned to a state under the IAD, and that state prosecutes the prisoner, then, through administrative mistake, commences that prisoner's sentence and imprisons him in their state without returning him, then, after discovering the error, returns him, it was held that such an administrative mistake could not result in the loss of the receiving sovereign's primary jurisdiction because it did not have primary jurisdiction, he was merely on "loan" under the IAD. Isbell was not loaned under the IAD, and primary jurisdiction rested with the United States, who then surrendered him to Illinois for service of his state sentence. Did the lower courts err when they applied Stroble's reasoning to Isbell's case? (Stroble's reasoning appears in Appendix L and is cited as Stroble v. Egeler, 408 F.Supp. 630, 635 (E.D. Mich. 1976)).

ISSUE II

Under federal law, unless a federal court specifically orders a federal criminal sentence to run concurrently to another sentence, "Multiple terms of imprisonment imposed at different times are to be served consecutively." Isbell's federal judge did not order Isbell's sentence to run concurrent to his already-imposed state court sentence. Did the Bureau of Prisons err in holding that Isbell's federal sentence was concurrent, and abuse its discretion by granting a *nunc pro tunc* after first denying it?

18. Thompson v. Barman, 298 F.2d 611, 615 (6th Cir. 1962).

This issue was raised but never addressed in the lower courts. Further, Isbell develops no argument as the appendices speak for themselves, and have not been disputed in any court.

ISSUE III

Circuit Split

The Ninth Circuit splits with the Seventh, Tenth, and even the Sixth Circuits over the important question of primary jurisdiction and what actions (or lack thereof) constitute a sovereign's intent to relinquish it. In the Ninth Circuit's Johnson v. Gill¹⁹, Johnson was twice "mistakenly transferred" from state custody to federal custody and back again. The Court held that whether or not the state relinquished their primary jurisdiction "turns on whether th[at] sovereign ... intended to surrender its priority upon transfer, or merely transferred temporary control of the defendant[.]"²⁰

There is a presumption of intent not to relinquish primary jurisdiction upon transfer in the Ninth Circuit.

But, in the Seventh circuit, the Pope²¹ Court held that "[i]n the absence of evidence that the transferring sovereign intended to maintain [primary jurisdiction], we presume the sovereign intended to relinquish it."²² The Seventh Circuit followed a district court in Massachusetts²³ which held that "Florida permitted the United States to take custody of [the prisoner] without the use of a writ, which would have maintained its primary jurisdiction. It thus voluntarily, if mistakenly, allowed the United States to take primary jurisdiction over [the prisoner]."²⁴ This case followed the Tenth Circuit's holding.²⁵ Even the Bureau of Prisons itself defines exclusive custody, i.e. primary jurisdiction, as custody obtained without the use of a restrictive writ.²⁶

19. 883 F.3d 756 (9th Cir. 2018).

20. *id.* at 765.

21. Pope v. Perdue, 889 F.3d 410 (7th Cir. 2018).

22. *id.* at 415-16.

23. Stephens v. Sabol, 539 F.Supp.2d 489 (D. Mass. 2008).

24. *id.* at 495.

25. Weekes v. Fleming, 301 F.3d 1175, 1180-81 (10th Cir. 2002).

26. Federal Bureau of Prisons Computation Manual at 1-12, Program Statement 5880.28 (July 19, 1999).

Finally, in spite of the Sixth Circuit's own holding which found that (citing this Court's holding in Ponzi, *supra*) "[t]he ... authorities could waive their pri[mary] jurisdiction and are presumed to have done so, in the absence of an affirmative showing to the contrary[,]"²⁷ they still found (in an unpublished opinion) against Isbell in this case.

They found that when Isbell was transferred, a detainer was filed by federal authorities. This Court held that "[u]nlike a writ of habeas corpus ad prosequendum issued by a federal district court ... a detainer merely puts the officials of the institution in which the prisoner is incarcerated on notice that the prisoner is wanted in another jurisdiction for trial upon his release from prison."²⁸ The Tenth Circuit has held that a detainer is an "affirmative showing" that the sovereign lodging it is relinquishing its primary jurisdiction to the other sovereign.²⁹

Isbell was not bound over for trial to state authorities as is the purpose of a writ, and as noted above, a detainer simply notifies officials that a prisoner "is wanted in another jurisdiction for trial[.]"³⁰

All criminal proceedings against Isbell - both state and federal - were complete before Isbell was released by the primary sovereign - the United States - to the physical custody of the Illinois Department of Corrections so that he could serve his state sentence. Accordingly, the last question for this Court to decide is this: Did the Sixth Circuit err in its holding that the United States did not relinquish primary jurisdiction over Isbell when it transferred him without writ to Illinois to serve his Illinois sentence, or is the Ninth Circuit correct in its intent analysis?

27. United States v. Green, 654 F.3d 637, 647 (6th Cir. 2011).

28. United States v. Mauro, 436 U.S. 340, 358 (1978)(footnote omitted).

29. Weekes, *Supra* at 1181. (See also Harris v. Hunter, 170 F.2d 552, 553 (10th Cir. 1948)).

30. Mauro, *Supra* at 358.

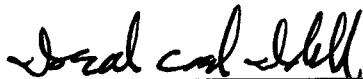
Conclusion

At the end of the day, the principles of law, and rules regarding jurisdiction were created to instill safeguards that should not be circumvented solely because an error may allow a prisoner to be released ahead of schedule. This Court held long ago that "when one [sovereign] takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."³¹ It is undisputed (and in fact admitted) that the United States surrendered Isbell to Illinois while he was serving his consecutive federal sentence without writ which would've maintained the United States' primary jurisdiction, so that he could serve his state sentence. The question before this Court is whether such a transfer resulted in a relinquishment of primary jurisdiction as was found by the Sixth, Seventh, and Tenth Circuit's, or whether the Ninth Circuit is correct. Lady Liberty does not wield the double edged sword for nothing. It is a symbol that the same law of the land that was used to convict and punish Isbell, must also apply and be followed when it is in his favor.

Lastly, this Court should grant review to resolve the Circuit split regarding primary jurisdiction, and to reverse the errors by both the Sixth Circuit, and the Bureau Of Prisons, and to remedy the violations of Constitutional Due Process found in this case.

Dated this the 1 of September, 2019.

Respectfully Submitted under the penalty
of perjury under 28 U.S.C. §1746:



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31 Ponzi, *supra* at 261