FILED
United States Court of Appeals
Tenth Circuit

November 13, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN JAY POWERS,

Petitioner - Appellant,

v.

M.L. STANCIL,

Respondent - Appellee.

No. 19-1067
(D.C. No. 1:18-CV-01226-KMT)
(D. Colo.)

## ORDER AND JUDGMENT*

Before **LUCERO**, **O'BRIEN**, and **CARSON**, Circuit Judges.

John Jay Powers is a prisoner in the custody of the Federal Bureau of Prisons ("BOP"). Appearing pro se, Powers filed an application under 28 U.S.C. § 2241 challenging the BOP's computation of his sentences for numerous convictions in multiple jurisdictions. The district court denied Powers's application and he now appeals.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] The parties consented to the magistrate judge conducting all proceedings, including the entry of a final judgment. *See* 28 U.S.C. § 636(c).

## I. BACKGROUND

On February 22, 1990, Powers was sentenced in case number 89-61-Cr-T-13 (08) in the Middle District of Florida to eighteen months' imprisonment for possession of a stolen motor vehicle. That same day, the court entered a separate judgment against Powers for criminal contempt arising from his conduct in the trial on the stolen vehicle charge and sentenced him to five and one-half months' imprisonment. The judgment in the criminal contempt case does not state whether the sentence should run consecutive to or concurrent with the eighteen-month sentence.

The next day, February 23, also in case number 89-61-Cr-T-13 (08), another judgment was entered on two counts of bank robbery, and Powers was sentenced to concurrent terms of 236 months' imprisonment on each count. The judgment states those sentences run consecutive to the sentences for possession of a stolen motor vehicle and criminal contempt.

Then, on March 9, in case number 89-60-Cr-T-15B, also in the Middle District of Florida, Powers was sentenced to a total term of fifteen years' imprisonment for transportation of stolen vehicles, possession of a firearm by a convicted felon, possession of an unregistered and altered firearm, interstate transportation of stolen firearms, and possession of counterfeit security. The judgment directs the fifteen-year sentence to run consecutive to the term of imprisonment in case number 89-61-Cr-T-13 (08). More than seventeen years later, on October 5, 2017, the judgment in 89-60-Cr-T-15B was vacated and a new sentencing hearing was ordered.

Approximately two months later, on December 18, 2017, Powers was resentenced to concurrent terms of sixty-four months' imprisonment on each count. The judgment once again directs each sentence to run consecutive to the sentences imposed in case number 89-61-Cr-T-13 (08).

Next, on May 23, 1991, Powers was sentenced in the Southern District of Indiana in case number IP 90-145-CR-01 to sixty-six months' imprisonment for bank robbery. The judgment directs the sentence to run consecutive to the sentences being served by Powers in case numbers 89-61-Cr-T-13 (08) and 89-60-Cr-T-15B from the Middle District of Florida.

Powers escaped from custody while he was an inmate at a federal correctional facility in New Jersey. Following his capture and subsequent conviction for escape and transportation of a stolen vehicle, Powers was sentenced on October 1, 2001, in case number 1:99-CR-253 in the District of New Jersey, to concurrent terms of forty-five months' imprisonment. The judgment provides the sentences should run consecutive to the sentences in case numbers 89-61-Cr-T-13 (08) and 89-60-Cr-T-15B from the Middle District of Florida; however, it is silent as to whether it should run consecutive to or concurrent with the sentence in the Southern District of Indiana.

Last, on December 11, 2013, Powers was sentenced in case number 4:15-cr-00647-FRZ-EJM in the District of Arizona, to thirty-three months' imprisonment for assault on a federal officer. The judgment directs twenty months and thirty days of the sentence to run concurrent with all four previously imposed

sentences and twelve months and one day to run consecutive to any undischarged terms of imprisonment.

In the § 2241 proceedings, Powers asked the district court "to order the []BOP to do three things[.]" R. at 359. First, "to run the . . . sentence [for criminal contempt] in 89-61-cr-T-13B . . . *concurrent* with the possession of a stolen motor vehicle count in the same case." *Id.* (emphasis added). Second, "to run the sentence" for escape and transportation of a stolen vehicle in the District of New Jersey *concurrent* to the sentence in the case from the Southern District of Indiana. *Id.* And last, "(if necessary) to recalculate [his] sentence(s) according to the vacation of the entire judgment in 89-60-cr-T-15." *Id.* Powers maintained that properly calculated, he served the sentences in full on January 2, 2018, and should have been released from custody on that date. The court considered and rejected each argument.

## II. STANDARD OF REVIEW

"When reviewing the denial of a habeas petition under § 2241, we review the district court's legal conclusions de novo and accept its factual findings unless clearly erroneous." *al-Marri v. Davis*, 714 F.3d 1183, 1186 (10th Cir. 2013). Also, we construe Powers's pro se pleadings liberally and hold him "to a less stringent standard than . . . pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). "At the same time, we do not believe it is the proper function of the . . . court to assume the role of advocate for the pro se litigant." *Id.*

## III. ANALYSIS

### A. *Concurrent Versus Consecutive*

"After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for administering the sentence." *United States v. Wilson*, 503 U.S. 329, 335 (1992). Relevant here, Congress has determined how multiple sentences of imprisonment should be treated: "Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a).

The BOP has adopted a program statement to determine whether the terms of imprisonment were imposed by the court at the same time or at different times:

> Sentences that are imposed as the result of a single trial on the counts within a single indictment are considered to have been imposed at the same time, regardless of whether they are imposed at different times on the same date or on a later date.
>
> Sentences that are imposed on the same date, or on different dates, based on convictions arising out of different trials, are considered to have been imposed at different times even if the trials arose out of the same indictment.

BOP PS 5880.28, ch. 1, p. 32.

According to Powers, Program Statement 5880.28 "has been fully depleted by the ruling in" *Setser v. United States*, 566 U.S. 231 (2012), Aplt. Opening Br. at 13, which, he insists, "made clear that only the district courts have the authority to make the consecutive-vs.-concurrent decisions," *id.* at 12. To be sure, *Setser* reaffirmed the

courts—not the BOP—have the discretion to impose consecutive or concurrent sentences. 556 U.S. at 235-39. But Powers's reliance on *Setser* is misplaced because when the BOP determined the sentences imposed by the court on February 22, 1990, for motor vehicle theft and criminal contempt in case number 89-61-Cr-T-13 (08) were imposed at different times, it was not exercising the sentencing discretion reserved to the courts; rather, the BOP was administering the sentence as provided in § 3584(a) and the Program Statement. Similarly, when the BOP determined the sentence for escape and transportation of a stolen vehicle in case number 1:99-CR-253 should run consecutive to the sentence in the case from the Southern District of Indiana, the BOP was administering the sentence.

Powers also argues the sentences imposed on February 22, 1990, in case number 89-61-Cr-T-13 (08), should run concurrently because § 5G1.2 of the U.S. Sentencing Guidelines ("Guidelines") "seems to say that even sentences imposed on different indictments, when imposed in a consolidated sentencing proceeding, are imposed at the same time." Aplt. Opening Br. at 13 (emphasis omitted). We agree with the government "[§] 5G1.2 is not helpful to [Powers]." Aplee. Resp. Br. at 20. The commentary to the 1989 Guidelines under which Powers was sentenced provides: "*This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case.*" Powers was not charged in a multiple count case.

Next, Powers maintains Program Statement 5880.28 does not apply to the criminal contempt sentence because only sentences arising from different *trials* are

considered to have been imposed at different times, and there was not a separate trial on contempt. Specifically, Powers argues "[i]t is quite a stretch to hold that a summary finding of criminal contempt constitutes a 'trial' with the meaning of [BOP] policy." Aplt. Opening Br. at 13. Nonetheless, he concedes "[n]otwithstanding the general rule of deference extended to legitimate exerci[s]es of agency authority, the courts are the final authorities on statutory construction." *Id.* at 14. We agree with the district court's construction. Although there was not a separate trial because Powers "was held in summary contempt[,] . . . [his] conviction and sentence for criminal contempt was part of a separate prosecution that resulted in a separate Judgment and was [therefore] imposed at a different time within the meaning of [Program Statement 5880.28]." R. at 372. To interpret the BOP Program Statement as requiring an actual trial would mean, for example, a sentence imposed as a result of a guilty plea could not have been imposed at a different time. Moreover, Powers has not come forward with any authority that Congress intended to exclude sentences where there was no trial from the reach of § 3584(a).

Last, there is no merit to Powers's argument his sentence for escape and transportation of a stolen vehicle in case number 1:99-CR-253 in the District of New Jersey, should be interpreted to run concurrent with his sentence in the Southern District of Indiana because the court was *aware* of the undischarged Indiana sentence and chose not to run its sentence consecutively. There is no record evidence to support this claim. And because this sentence plainly was imposed at a different time, the district court properly concluded the sentences were to run concurrently.

We affirm the district court's decision the BOP properly determined Powers's criminal contempt sentence should run consecutive to the sentence for motor vehicle theft and his sentence for escape and transportation of a stolen vehicle should run consecutive to his sentence for bank robbery in the Southern District of Indiana.

**B.** ***The October 5, 2017 Order to Vacate the Sentence***

Powers also claimed in his habeas application the BOP erred by failing to recalculate his sentences immediately after the judgment in case number 89-60-Cr-T-15B was vacated on October 5, 2017. Had the BOP done so, Powers argued he would have received a more favorable sentence: "[T]he sentencing court . . . would have sentenced petitioner to 'time served' on 18 December 2017." R. at 101. Alternatively, Powers argued the new sentence imposed on December 18, 2017, "was not ordered to be served consecutive to any sentence other than 89-61-CR-T-13," *id.* at 102, and therefore should be interpreted as concurrent to all other undischarged sentences.

Powers cannot raise a claim he would have received a more favorable sentence in an application under § 2241; instead, a motion under 28 U.S.C. § 2255 is "[t]he exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996) (internal quotation marks omitted). And we have considered and rejected his second argument under the plain wording of § 3584(a), which provides: "Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." § 3584(a).

Powers also claimed in the district court that "[h]ad the []BOP re-calculated [his] sentence after the 5 October 2017 order vacating the judgment and sentence in 89-60Cr-T-(27)" and before he was resentenced in December 2017, his other sentences "would have automatically . . . discharged." R. at 114. But Powers has failed to present any evidence or authority to support this claim.

## IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Entered for the Court

Terrence L. O'Brien
Circuit Judge

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

JOHN JAY POWERS,

Petitioner - Appellant,

v.

M.L. STANCIL,

Respondent - Appellee.

No. 19-1067

**ORDER**

Before **LUCERO**, **O'BRIEN**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Kathleen M. Tafoya

Civil Action No. 18-cv-01226-KMT

JOHN JAY POWERS,

Applicant,

v.

M.L STANCIL,

Respondent.

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ORDER DENYING AMENDED APPLICATION FOR WRIT OF HABEAS CORPUS

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This matter is before this Court pursuant to the Order of Reference entered October 26, 2018, and the parties' unanimous consent to disposition of this action by a United States Magistrate Judge.

Applicant, John Jay Powers, is a prisoner in the custody of the Federal Bureau of Prisons ("BOP"). Mr. Powers has filed *pro se* an amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 8) (the "Amended Application") challenging the computation of his sentences. On October 4, 2018, Respondent was ordered to show cause why the Amended Application should not be granted. On October 25, 2018, Respondent filed a Response to Amended Application for Writ of Habeas Corpus (ECF No. 30). On November 13, 2018, Mr. Powers filed "Applicant Powers' Reply" (ECF No. 33). After reviewing the pertinent portions of the record in this case, the Court FINDS and CONCLUDES that the Amended Application should be denied and the case dismissed with prejudice.

## I. BACKGROUND

Mr. Powers' criminal history is complex and includes multiple convictions and sentences in multiple jurisdictions. On February 22, 1990, Mr. Powers was sentenced in case number 89-61-Cr-T-13 (08) in the Middle District of Florida to eighteen months in prison for possession of a stolen motor vehicle. (ECF No. 30-1 at ¶7; ECF No. 30-4.) The same day, a separate Judgment was entered in the same case for criminal contempt and Mr. Powers was sentenced to five and one-half months in prison on that count. (ECF No. 30-1 at ¶8; ECF No. 30-5.) The Judgment in the criminal contempt proceeding is silent with respect to whether that sentence should run consecutive to or concurrent with the sentence for possession of a stolen motor vehicle. (*Id.*) The next day, also in case number 89-61-Cr-T-13 (08), another Judgment was entered on two counts of bank robbery and Mr. Powers was sentenced to concurrent terms of 236 months on each count. (ECF No. 30-1 at ¶9; ECF No. 30-6.) The Judgment for the bank robbery counts directs that those sentences run consecutive to the sentences for possession of a stolen motor vehicle and criminal contempt. (*Id.*)

On March 9, 1990, in another case in the Middle District of Florida, case number 89-60-Cr-T-15B, Mr. Powers was sentenced to a total term of fifteen years in prison for transportation of stolen vehicles, possession of a firearm by a convicted felon, possession of an unregistered and altered firearm, interstate transportation of stolen firearms, and possession of counterfeit security. (ECF No. 30-1 at ¶10; ECF No. 30-7.) The Judgment in case number 89-60-Cr-T-15B directs that the fifteen-year sentence run consecutive to the term of imprisonment imposed in case number 89-61-Cr-T-13. (*Id.*) Years later, on October 5, 2017, the Judgment in case number 89-60-Cr-T-15B was vacated and a new sentencing hearing was ordered. (ECF No. 30-

1 at ¶11; ECF No. 30-8.)[1] On December 18, 2017, Mr. Powers was resentenced in case number 89-60-Cr-T-15B to concurrent terms of sixty-four months in prison on each count. (ECF No. 30-1 at ¶12; ECF No. 30-9.) The sentences imposed on December 18, 2017, again were ordered to run consecutive to the sentence imposed in case number 89-61-Cr-T-13. (*Id.*)

On May 23, 1991, Mr. Powers was sentenced in the Southern District of Indiana in case number IP 90-145-CR-01 to sixty-six months in prison for bank robbery. (ECF No. 30-1 at ¶14; ECF No. 30-13.) The Southern District of Indiana ordered that the sentence run consecutive to the Middle District of Florida sentences Mr. Powers was serving. (*Id.*)

On October 1, 2001, Mr. Powers was sentenced in the District of New Jersey in case number 1:99-CR-253 to concurrent terms of forty-five months in prison for escape and interstate transport of a stolen vehicle. (ECF No. 30-1 at ¶16; ECF No. 30-16.) The District of New Jersey ordered the sentences to run consecutive to the Middle District of Florida sentences but makes no mention of the Southern District of Indiana sentence. (*Id.*)

Finally, on December 11, 2013, Mr. Powers was sentenced in the District of Arizona in case number 4:15-cr-00647-FRZ-EJM to thirty-three months in prison for assault on a federal officer. (ECF No. 30-1 at ¶17; ECF No. 30-18.) The District of Arizona ordered twenty months and thirty days to run concurrent with the previously imposed sentences and twelve months and one day to run consecutive to any undischarged terms of imprisonment. (*Id.*)

Mr. Powers claims in the Amended Application that the BOP has erred by: (1) treating the Middle District of Florida sentences for possession of a stolen motor vehicle and criminal

[1] The case number was changed at some point from 89-Cr-60-T-15B to 89-cr-60-T-27TGW. To avoid confusion, the Court will continue to use the original case number.

contempt imposed the same day in case number 89-61-Cr-T-13 (08) as consecutive sentences; (2) treating the District of New Jersey sentence as consecutive to the Southern District of Indiana sentence; (3) failing to discharge every sentence other than the sentence in Middle District of Florida case number 89-60-Cr-T-15B when the Judgment in that case was vacated in October 2017; and (4) computing his good conduct time for the periods from 1997-2002 and from 2006-2011 incorrectly. According to Mr. Powers, his sentences were served in full as of January 2, 2018, and he should have been released from custody on that date. In his Reply (ECF No. 33), Mr. Powers abandons the claim regarding computation of good conduct time.

## II. LEGAL STANDARDS

The Court must construe the Amended Application and other papers filed by Mr. Powers liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

An application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 "is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *see also McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997). Habeas corpus relief is warranted only if Mr. Powers "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

## III. DISCUSSION

### A. Middle District of Florida Case Number 89-61-Cr-T-13 (08)

Mr. Powers first contends the BOP has erred by treating the Middle District of Florida

sentences for possession of a stolen motor vehicle and criminal contempt imposed the same day in case number 89-61-Cr-T-13 (08) as consecutive sentences. He specifically contends the sentences for possession of a stolen motor vehicle and criminal contempt must be concurrent because the sentences arose out of the same criminal case and the sentencing court did not order those sentences to run consecutively. The Court is not persuaded.

The relevant statute provides that "[m]ultiple 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[,] [and] [m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a). As noted above, the Middle District of Florida entered separate Judgments of Conviction on the same day in case number 89-61-Cr-T-13 (08) for possession of a stolen motor vehicle and criminal contempt. (*See* ECF Nos. 30-4 & 30-5.) The Judgments do not specify whether the sentences should be concurrent or consecutive. Thus, the relevant question under § 3584(a) is whether the sentences were imposed at the same time or at different times, but § 3584(a) does not provide any guidance to determine whether separate judgments in the same case are entered at the same time or at different times.

The BOP has adopted a Program Statement that addresses this question. In particular, the BOP's Sentence Computation Manual, found in BOP Program Statement 5880.28, in relevant part recites the statutory language from § 3584(a) and further provides as follows with respect to whether sentences are imposed at the same or different times:

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

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

(ECF No. 30-19 at p.2 (emphasis in original).) A BOP Program Statement is entitled to "some deference" if it represents a permissible construction of the relevant statute. *See Reno v. Koray*, 515 U.S. 50, 61 (1995). The Court finds that the guidance provided in BOP Program Statement 5880.28 for determining whether separate judgments in the same case are entered at the same time or at different times is a permissible construction of 18 U.S.C. § 3584(a).

Based on the portion of BOP Program Statement 5880.28 quoted above, the Court agrees with the BOP that the sentences for possession of a stolen motor vehicle and criminal contempt were imposed at different times. Mr. Powers alleges the conduct resulting in the criminal contempt conviction occurred while he represented himself at trial in case number 89-61-Cr-T-13 (08). Thus, it is apparent that the criminal contempt count could not have been charged in the same indictment as the possession of a stolen motor vehicle count. Furthermore, although Mr. Powers asserts there was no separate trial or hearing for contempt, that is not surprising because he concedes he was held in summary contempt as authorized under Rule 42 of the Federal Rules of Criminal Procedure. However, the absence of a separate "trial" does not mean the criminal contempt count was not a separate proceeding. Therefore, the Court concludes the conviction and sentence for criminal contempt was part of a separate prosecution that resulted in a separate Judgment and was imposed at a different time within the meaning of the BOP Sentencing Manual. Because the sentences were imposed at different times, the Court further concludes the BOP properly has determined the sentences for possession of a stolen motor

vehicle and criminal contempt in Middle District of Florida case number 89-61-Cr-T-13 (08) are consecutive.

**B. District of New Jersey Sentence**

The Court next will address Mr. Powers' claim that the BOP has erred by treating the District of New Jersey sentence as consecutive to the Southern District of Indiana sentence. Mr. Powers is correct that the Judgment in the District of New Jersey case specifically directs the sentence to be consecutive to the Middle District of Florida sentences and does not mention the Southern District of Indiana sentence. (*See* ECF No. 30-16.) However, he mistakenly concludes the lack of direction from the District of New Jersey with respect to the Southern District of Indiana sentence necessarily means the sentences must be concurrent. As discussed above, [m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a). There is no dispute that the sentences in the Southern District of Indiana and in the District of New Jersey were imposed at different times. (*See* ECF Nos. 30-13 & 30-16.) Therefore, pursuant to § 3584(a), the BOP properly has determined those sentences are consecutive.

**C. Middle District of Florida Case Number 89-60-Cr-T-15(B)**

Mr. Powers finally claims the BOP erred by failing to discharge every sentence other than the sentence in Middle District of Florida case number 89-60-Cr-T-15B when the Judgment in that case was vacated in October 2017. The record before the Court establishes that Mr. Powers originally was sentenced in Middle District of Florida case number 89-60-Cr-T-15B to a total term of fifteen years in prison (ECF No. 30-7); that on October 5, 2017, the Judgment in that case was vacated and a new sentencing hearing was ordered (ECF No. 30-8); and that on

December 18, 2017, he was resentenced in that case to a total term of sixty-four months in prison (ECF No. 30-9). According to Mr. Powers, the BOP should have recalculated all of his sentences immediately after the sentence in Middle District of Florida case number 89-60-Cr-T-15B was vacated on October 5, 2017. He contends the failure to recalculate his sentences at that time, instead of waiting to do so until after he was resentenced on December 18, 2017, is significant because

> if the FBOP had done this th[en] every other "undischarged" sentence would have automatically discharged. Then, when the new sentence was imposed on 18 December 2017 in 89-60-cr-T-15 (M.D. Fla.), it would have been the only [Sentence Reform Act] sentence (indeed the only sentence period) in existence, and this would have resulted in a much more favorable position for Powers in terms of [good conduct time] calculations (because the [Prison Litigation Reform Act] sentences and their attendant disallowances of [good conduct time] would be "off the board" and the credits remaining would, of necessity, have to be applied to the new sentence).

(ECF No. 33 at pp.3-4.) Mr. Powers also asserts in the Amended Application that, "[h]ad the FBOP recalculated petitioner's sentence computation after the 5 October 2017 order vacating the entirety of the sentence in 89-60-CR-T-15 (27), the sentencing court in Tampa, Florida, would have sentenced petitioner to 'time served' on 18 December 2017." (ECF No. 8 at p.7.) He also contends in the Amended Application that the new sentence in Middle District of Florida case number 89-60-Cr-T-15B "was not ordered to be served consecutive to any sentence other than 89-61-CR-T-13 (USDC, M.D. Fla.)." (ECF No. 8 at p.8.)

The Court notes initially that Mr. Powers has specifically "abandon[ed] his claims for Good Conduct Credits that were, in his view, wrongfully disallowed." (ECF No. 33 at p.1.) Therefore, whatever claim he may be asserting with respect to his sentence in Middle District of

Florida case number 89-60-Cr-T-15B that implicates his claims regarding good conduct time credits also is abandoned. In any event, the Court finds that Mr. Powers fails to demonstrate his constitutional rights have been violated with respect to good conduct time credits. In fact, the entirety of Mr. Powers' claims regarding good conduct time credits in the Amended Application is the following:

> As of 21 February 2018 petitioner was eligible for a total of 1566 days of good conduct credits (54 days per year times 29 years). Though petitioner did lose some of those days, he did not lose the amount claimed by the FBOP in its calculations.
>
> The reason that petitioner did not lose the amount of [good conduct time] calculated by the FBOP is because the FBOP did not follow its own mandatory procedures in discontinuing the [good conduct time].
>
> More specifically, the Disciplinary Hearing Officer (DHO) is required to file a form that certifies the discontinuation of [good conduct time] within 14 days of the vested date. (See Exhibit 5, Sentence Computation Manual)
>
> The proper certifications were not filed for the years 1997-2002. Additionally, the [good conduct time] for years 2005-2011 was supposed to have been re-credited due to procedural errors (i.e., these reports were issued at the ADX and were not subject to proper clearance by the psychology department there). This was being coordinated by Chris Synsvoll, the Attorney Advisor for the Florence Federal Prison Complex as late as January 2018.

(ECF No. 8 at pp.19-20.) These four paragraphs do not persuade the Court that Mr. Powers "is in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), with respect to the calculation of his good conduct time credits.

Next, to the extent Mr. Powers is asserting the new sentence imposed at his resentencing in December 2017 would have been different if the BOP had recalculated his sentences prior to the resentencing, the claim challenges the validity of the sentence imposed and may not be raised

in this habeas corpus action. "A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity" and "[a] 28 U.S.C. § 2255 petition attacks the legality of detention." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). Furthermore, a habeas corpus petition pursuant to § 2241 "is not an additional, alternative, or supplemental remedy, to the relief afforded by motion in the sentencing court under § 2255." *Williams v. United States*, 323 F.2d 672, 673 (10th Cir. 1963) (per curiam). Instead, "[t]he exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective, is that provided for in 28 U.S.C. § 2255." *Johnson v. Taylor*, 347 F.2d 365, 366 (10th Cir. 1965); *see* 28 U.S.C. § 2255(e). Mr. Powers fails to demonstrate the remedy available in the sentencing court is inadequate or ineffective with respect to his claim challenging the validity of the sentence imposed in Middle District of Florida case number 89-60-Cr-T-15B in December 2017. Therefore, the Court lacks jurisdiction to consider that claim.

Finally, to the extent Mr. Powers is challenging the BOP's calculation of his sentences because the new sentence in Middle District of Florida case number 89-60-Cr-T-15B was ordered to be consecutive only to his sentence in Middle District of Florida case number 89-61-Cr-T-13 (08) and not to any other sentence, the claim lacks merit for the reasons discussed above in Part III.B. regarding the District of New Jersey sentence. In short, because the December 2017 sentence in Middle District of Florida case number 89-60-Cr-T-15B was imposed at a different time than the other sentences and does not specify the sentence is concurrent with the other sentences, the BOP properly has determined the sentences are consecutive. *See* 18 U.S.C. § 3584(a).

## IV. CONCLUSION

In summary, the Court finds that Mr. Powers is not entitled to relief and the Amended Application will be denied. Accordingly, it is

**ORDERED** that the amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 8) is denied and this case is dismissed with prejudice.

DATED February 5, 2019.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge