No. 19-7763

02/14/2020

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JEAN BERNIER,

Petitioner,

vs.

WARDEN HOLLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

JEAN BERNIER
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QUESTIONS PRESENTED

A

DOES THE FEDERAL BUREAU OF PRISONS EXCEED THE STATUTORY AUTHORITY CONFERRED UPON THE AGENCY BY CONGRESS IN 18 U.S.C. § 3585(a), WHEN IT COMMENCES A SENTENCE IN 1992, DECIDES ELEVEN YEARS LATER, IN 2003, THAT IT WAS STATE ERROR, WHICH HAS NOT BEEN SUBSTANTIATED, FOR PETITIONER TO HAVE BEEN PLACED IN FEDERAL CUSTODY, AND RETURNS PETITIONER TO STATE CUSTODY, AND UPON PETITIONER'S RETURN TO FEDERAL CUSTODY IN 2015, MAINTAIN THAT THE FEDERAL SENTENCE NEVER COMMENCED IN 1992, AND NOT COUNT ANY OF THE TIME IN THE TWENTY-THREE YEARS PRIOR TO 2015 AGAINST THE FEDERAL SENTENCE?

B

DID THE FEDERAL BUREAU OF PRISONS ERR WHEN IN CONSIDERING A BARDEN DETERMINATION PURSUANT TO 18 U.S.C. § 3621(b) CATEGORICALLY ALLOW ONE FACTOR OF A FIVE-FACTOR TEST MANDATED BY CONGRESS CONTROL THE DETERMINATION?

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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

The opinion of the United States court of appeals appears at Appendix A and is unpublished.

The opinion of the United States district court appears at Appendix C and is unpublished.

JURISDICTION

A) The date on which the United States Court of Appeals decided my case was July 2, 2019.

B) A timely petition for rehearing was denied by the United States Court of Appeals on September 10, 2019 and a copy of the order denying rehearing appears at Appendix B.

C) An extension of time to file the petition for a writ of certiorari was granted to and including February 6, 2020 on November 21, 2109 in Application No. 19A567.

D) The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE II, SECTION 2, Clause 1:

.....And he shall have power to grant Reprieves and Pardons for offenses against the United States, except in cases of impeachment.

18 U.S.C. § 924(c)(1)(A).....
.....

(D) Notwithstanding any other provision of law---
(i).....
(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking during which the firearm was used, carried or possessed.

18 U.S.C. § 3584(a):

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. § 3585(a) &(b):

See Appendix M

18 U.S.C. § 3621(b):

See Appendix N

BOP Program Statement 5160.05:

Primary Jurisdiction - See Appendix 011, 012
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STATEMENT OF THE CASE

Petitioner was arrested by New York state authorities on state robbery and weapons violations in June of 1990. In October of 1990, federal authorities took custody of the Petitioner by writ of habeas corpus ad prosequendum for prosecution of federal bank robbery and weapons violations.

Petitioner was tried and sentenced on the federal charges to a 35-year term of imprisonment in June, 1991. Upon satisfaction of the federal writ, Petitioner was returned to state custody immediately thereafter.

Subsequently, Petitioner was tried and sentenced by the state court to a 12½-25 year term of imprisonment in January, 1992. On January 28, 1992, New York state authorities relinquished primary jurisdiction over the Petitioner to federal authorities. This act by the state officials was accomplished by contacting the United States Marshals to pick up the Petitioner.

When the Marshals came to take the Petitioner into federal custody, the Marshals were given a letter detainer by the state authorities. The letter explained that the state was relinquishing primary jurisdiction over the Petitioner's custody for the express purpose of serving the federal sentence. See Appendix D.

Petitioner was transported to MCC New York by the Marshals and committed to the custody of the Federal Bureau of Prisons(BOP)

and the detainer lodged by the BOP. See Appendix E. In February, 1992, Petitioner was designated by the BOP to USP Lewisburg and transported there for the commencement of the federal sentence. Upon arrival at USP Lewisburg, Petitioner's sentence was computed by BOP officials and Petitioner's release date calculated as March, 2021. See Appendix F. The Petitioner would be designated and transferred to several federal penitentiaries in the following eleven years. See Appendix G.

In April, 2003, the Petitioner was taken by BOP officials to MDC Brooklyn and turned over to state authorities. The Petitioner was sent into the New York state prison system and began serving the state sentence. On June 18, 2015, Petitioner was released from state custody upon satisfaction of the state sentence. Petitioner was picked up by the Marshals on that day and turned over to BOP custody at MDC Brooklyn.

Upon Petitioner's return to the BOP, the Designation and Sentence Computation Center(DSCC) recomputed the Petitioner's sentence. The DSCC calculated a new release date for the Petitioner. Instead of the original March, 2021 date, the Petitioner was now projected to be released in December, 2045. After Petitioner got over the shock and anguish brought on by this newly computed release date, Petitioner contacted the DSCC and requested an explanation of the new computation.

The DSCC responded being that the state credited the time from 1990 to 2015 to satisfy the state sentence, the BOP would not credit any of the time towards satisfaction of the federal sentence, pursuant to 18 U.S.C.§ 3585(b). Petitioner countered to the DSCC that § 3585(b) did not apply to his circumstances.

Petitioner said the only time which § 3585(b) bars from being credited to a federal sentence is time credited to another sentence prior to the commencement of the federal sentence. Petitioner explained that his federal sentence had commenced in February, 1992 and all time subsequent to that date can be credited to the federal sentence without implicating § 3585(b). Petitioner requested that the time from 1990 to 2015 be credited toward his federal sentence.

The DSCC declined the Petitioner's request for the time credit explaining that pursuant to BOP policy, Program Statement 5160.05, when a prisoner has been determined to have been improperly committed to federal custody and primary jurisdiction resides with the state, the prisoner will be sent back to state custody. The return of the prisoner to state custody will render the federal sentence as not having commenced.

Petitioner countered to the DSCC that no error had been made in committing the Petitioner to federal custody in 1992. The state had expressly relinquished primary jurisdiction over Petitioner's custody for service of the federal sentence and that the BOP had indeed commenced the federal sentence.

The DSCC did not address Petitioner's contentions but instead construed the Petitioner's request for the credit as a Barden request. A Barden request is so named pursuant to Barden v. Keohane, 921 F.2d 476(3d Cir. 1990), which holds that a prisoner can be considered by the BOP for sentencing credit towards the federal sentence for time spent in state custody should the federal court judgment have been silent as to whether the federal sentence was to be concurrent or consecutive to a subsequently imposed state sentence. The BOP has incorporated Barden into P.S. 5160.05.

One of the steps of the BOP's determination of a Barden request is to contact the sentencing judge and solicit his opinion on the crediting of the time spent in state custody towards the federal sentence. The Honorable District Judge Robert Workman Sweet supported the request for credit.

An explanation of the Petitioner's sentencing structure would be enlightening in order to comprehend the BOP's Barden determination. Petitioner is convicted of armed bank robbery, 18 U.S.C. § 2113(a) & (d); three counts of felon in possession of a firearm, 18 U.S.C. § 922(g). Petitioner was sentenced to ten years as to each count of these convictions to run concurrent to each other.

Petitioner was also convicted of two counts of use of a firearm during a crime of violence, 18 U.S.C. § 924(c) and sentenced to five years on the first count and twenty years on the second count, to run consecutive to each other and to the above aforementioned other counts, per statute. Thus, the 35-year sentence. See Exhibit P.

The DSCC granted the Barden request only insofar as to grant credit towards the satisfaction of the non-924(c) sentences. Therefore, the DSCC adjusted the commencement date of the federal sentence from June 18, 2015 to October 1, 2006 as the basis of the sentence computation. That is approximately eight years and eight months credit granted, the amount of time a prisoner serves on a ten-year sentence. This new computation does not grant credit for the period of time from February, 1992 until September, 2006, a period of 14 years and 7 months.

Petitioner's release date was adjusted from 2045 to 2037 as a result of this new computation. This is the presently operative date for Petitioner's release. Should this computation stand, the Petitioner will be eighty years old after having served 47 years in prison. This scenario is untenable to the Petitioner.

The DSCC explained its reasoning in denying the credit towards the 924(c) sentences based on the statute stating that all 924(c) sentences must always necessarily run consecutive to all other sentences. The BOP allowed one the five factors contained in 18 U.S.C. § 3621(b) drive the administrative Barden determination to the exclusion of the other four factors contained in 3621(b).

Petitioner then exhausted his administrative remedies with the BOP. The DSCC determination was upheld by the Central Office of the BOP, the final stage of exhaustion.

At this time, Petitioner was undergoing knee replacement surgery

at the Federal Medical Center in Butner, North Carolina. Therefore, Petitioner filed his 28 U.S.C. § 2241 petition in the district court for the Eastern District of North Carolina. Petitioner raised three issues in his petition:

(1) That the BOP was mistaken in its assessment that the transfer of Petitioner from state custody to federal custody for the service of the federal sentence in February, 1992 was an error. Petitioner maintained that state authorities intentionally relinquished primary jurisdiction for service of the federal sentence and that BOP policy P.S. 5160.05 was not implicated in Petitioner's circumstances;

(2) That insofar as P.S. 5160.05 might be construed as being implicated in Petitioner's circumstances, the policy as applied to Petitioner was in excess of the statutory jurisdiction conferred upon the BOP by Congress in 18 U.S.C. § 3585(a), the statute which directs when a federal sentence commences;

(3) That the BOP's Barden determination was an abuse of discretion in allowing one of the five factors enunciated in 3621(b) dictate its determination and that this factor, the consecutive language of 924(c), did not handcuff the BOP, insofar the BOP was effectively using pardon power of the executive, which contains no restrictions.

The district court found for the BOP, ruling that the 1992 transfer to federal custody was in error and that primary jurisdiction was not relinquished by the state. The district court did not address the Petitioner's contention that P.S. 5160.05 was in excess of the

BOP's statutory jurisdiction. The district court also found that the BOP's Barden determination was not an abuse of discretion. See Appendix C. The Fourth Circuit Court of Appeals adopted the district court's decision, lock, stock and barrel. See Appendix A.

HERE WE ARE.

REASONS FOR GRANTING THE WRIT

PREFACE

Supreme Court Rule 10 which illustrates the character of the reasons the Court considers in whether or not to grant a writ of certiorari states at:

> 10(a) a United States court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter;....
>
> .....
>
> 10(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court,.....

Petitioner believes that this matter presently before the Court will satisfy both criteria.

INTRODUCTION

This application for a writ of certiorari focuses on two separate issues which concern the computation of the Petitioner's federal sentence.

The first issue concerns the commencement date of the Petitioner's sentence. Petitioner contends that his federal sentence commenced in February, 1992 when he was initially sent to the custody of the BOP by state authorities explicitly for the service of the federal sentence and held in federal custody for eleven years until 2003.

The BOP contends that the federal sentence did not commence

until June, 2015 when Petitioner was returned to federal custody from state custody, where he had been sent in 2003 , for service of the state sentence. The BOP bases its contention on its determination that Petitioner was sent into federal custody in 1992 erroneously and therefore the BOP never acquired primary jurisdiction of Petitioner. Pursuant to its policy, P.S. 5160.05, the BOP contends that upon return to state custody, the federal sentence is deemed to have not commenced in 1992.

Petitioner argues in this application that primary jurisdiction was relinquished by state authorities for service of the federal sentence and therefore P.S. 5160.05 does not apply to him. The Petitioner further argues that insofar as the policy is construed to apply to him, it is in excess of the BOP's staututory jurisdiction.

The second issue concerns the separate Barden determination made by the BOP concerning designating the state prison for service of the federal sentence nunc pro tunc. The Petitioner's contention on this issue is that the BOP, contrary to Supreme Court law, improperly did not consider all the factors dictated by statute and allowed one of the factors to control its Barden determination. Namely, its refusal to credit any time against the service of the 18 U.S.C. § 924(c) sentences.

The Petitioner maintains that the BOP is not limited by the statute's consecutive edict within the context of a Barden determination as it is exercising the executive pardon power in the Constitution which contains no restrictions on that power.

COMMENCEMENT OF SENTENCE

Following a federal conviction and sentencing, the United States Attorney General, acting through the BOP, is responsible for calculating a prisoner's term of confinement, including a determination of when the sentence commences. United States v. Wilson, 503 U.S. 329, 334(1992). A federal sentence 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 the sentence is to be served." 18 U.S.C. § 3585(a).

A straightforward application of the statute does not leave any doubt that the BOP chose to commence the Petitioner's federal sentence in February, 1992 when the BOP designated and transferred Petitioner to USP Lewisburg, lodged the detainer from New York State, computed the Petitioner's sentence with a March, 2021 release date. See Appendix D, E, F.

There is ample support in case law that once the unambiguous terms of § 3585(a) are met, that a federal sentence commences. See Weekes v. Fleming, 301 F.3d 1175, 1179(10th Cir. 2002); Boston v. Attorney General, 210 Fed. Appx. 190, 192(3d Cir. 2006); Cain v. Menifee, 269 Fed. Appx. 420, 424(5th Cir. 2008); Stephens v. Sabol, 539 F.supp.2d 489, 495(D.Mass. 2008); Luther v. Vanyur, 14 F.Supp.2d 773, 775(E.D.N.C. 1997); Green v. Woodring, 694 F.Supp.2d 1115, 1121 (C.D.Ca. 2010); Peterson v. Marberry, 2008 U.S. Dist. Lexis 117172 *31 (W.D.Pa.); Bond v. Lamanna, 2003 U.S. Dist. Lexis 27021 *17(W.D.Pa.).

The BOP has voided the commencement of the sentence based on what it contends was an error in the transfer of custody from the state to federal custody in 1992. The BOP maintains once it found the error and the Petitioner returned to state custody, pursuant to policy, the federal sentence is deemed to have never commenced, after having served eleven years of the federal sentence.

The basis of the BOP's reasoning is that it never obtained primary jurisdiction over the Petitioner's custody and therefore did not have exclusive custody of Petitioner in order for the federal sentence to commence. The petitioner maintains that the BOP did have exclusive custody of the Petitioner as the state had explicitly and expressly relinquished primary jurisdiction over the Petitioner's custody. This was done through the state calling the United States Marshals and having them pick up the Petitioner and by giving the Marshals the letter detainer stating that the Petitioner was being turned over to federal custody to serve the federal sentence.

In Weekes v. Fleming, 301 F.3d 1175(10th Cir. 2002), the court adjudicated whether or not the state of Idaho had relinquished primary jurisdiction over Weekes in order for the federal sentence to have commenced when Weekes was transferred to federal custody. As the first arresting sovereign, Idaho initially had primary custody of Weekes and the right to maintain or relinquish control of him. Weekes, supra at 1180. The court found affirmative acts in the record to relinquish.

The court cited that Idaho allowed the United States to take exclusive physical custody of Mr. Weekes without having to present

either a written request for temporary custody or a writ of habeas corpus ad prosequendum. In the Petitioner's case, the transfer of custody was explicitly done by New York state through the detainer letter which stated that Petitioner was being sent to federal custody to serve the federal sentence. Appendix D. The letter further asked that the BOP contact the state upon completion of the federal sentence.

A few years after the Petitioner's commitment to the BOP, the top legal officer would reaffirm the state's relinquishment of the Petitioner's primary custody to serve the federal sentence. Appendix H. Petitioner's record evidence of relinquishment of primary custody of the Petitioner is even stronger than that in Weekes as it shows intent and not error or inadvertence as in Weekes.

The BOP, for its part, accepted the custody of Petitioner, computed the Petitioner's sentence, Appendix F, acknowledged the detainer and agreed to notify the State when the Petitioner's sentence was completed, Appendix E, and consistently designated Petitioner to several federal penitentiaries for eleven years. Appendix G.

There can be no doubt that the actions of both New York and and the United States triggered the commencement of the Petitioner's federal sentence pursuant to 18 U.S.C. § 3585(a). Once the State relinquished primary jurisdiction over the Petitioner and the BOP commenced the sentence, it is the United States who made the error in returning the Petitioner to state custody as it was under no duty to return Petitioner to state custody. Weekes, supra at 1181.

In the instant matter, the Fourth Circuit Court of Appeals adopted the reasoning of the district court and offered no analysis for its affirmance of the district court decision denying the writ. Appendix A. The district court opinion found, despite the record showing the state's affirmative acts of relinquishing primary custody of Petitioner and the BOP commencing the sentence, that it was an error in transfer of custody and therefore the federal sentence had not commenced in 1992. Appendix C.[1/]

The district court cites some cases as support for its holding that an erroneous transfer into federal custody does not serve to commence a federal sentence. Then cases are inapposite to the Petitioner's circumstances: Thomas v. Deboo, 2010 WL 1440465(N.D. W.Va); Yeary v Masters, 2016 WL 5852865(S.D.W.Va.) are cases where the United States Marshals Service erroneously placed petitioners into BOP custody after they had been borrowed from the state. The analysis in both cases supports the Petitioner's position that when the state relinquishes primary jurisdiction through affirmative acts, the federal sentence commences. There were no affirmative acts by the state in those cases to relinquish primary jurisdiction.

1/. The BOP, the Government nor the district court point to any authoritative source to support their contention that the Petitioners transfer to federal custody in 1992 was an error. A state law is cited, but the Petitioner has produced a letter from the state's top legal corrections counsel stating otherwise. Moreover, when does a statute dictate the actions of the federal government? Appendix H.

The district court did not engage in any analysis to distinguish Weekes from the Petitioner's case, as it very well could not. So, it avoided addressing the Petitioner's arguments. One of the cases cited by the district court, Yeary v. Masters, lists a number of cases and each case cited found there was no affirmative act by the state officials to relinquish primary custody. Furthermore, most of the stays in federal custody were short, weeks or months. Nowhere near the eleven years spent by the Petitioner in federal custody. See Yeary, supra at *12.

The district court also failed to distinguish a case which addressed Petitioner's issues, Luther v. Vanyur, 14 F.Supp.2d 773 (E.D.N.C. 1997), a case out of the same district and division as that of the district court. A case cited by Weekes, supra at 1181. Luther found that three years, four months and five days very well constituted a complete and final transfer for purposes of primary custody and commencement of the federal sentence. Luther, supra at 778.

The district court also cites United States v. Cole, 416 F.3d 894, 896-97(8th Cir. 2005) for the proposition that there are only four ways to exclusively transfer primary jurisdiction: 1) release on bail; 2) dismissal of charges; 3) parole, or 4) expiration of sentence. Appendix C3. The district court misreads Cole, First, Cole qualifies its listing with the preface of generally. Second, Cole cites United States v. Smith, 812 F.Supp. 368, 370 fn. 2(E.D.N.Y.

1993).

One finds at fn. 2 of Smith the above referenced listing. But, at the end of that listing, this statement is found: "the sovereign with priority of jurisdiction may elect under the doctrine of comity to relinquish it to another sovereign", citing United States v. Warren, 610 F.2d 680, 684(9th Cir. 1980).2/

It is the district court's failure to fundamentally grasp the principle that a sovereign can elect to relinquish primary custody through an affirmative act that undergirds the flawed reasoning in its holding. Once the state authorities relinquished primary jurisdiction over the Petitioner's custody affirmatively through the detainer letter and the BOP accepted the Petitioner's custody, transported him to Lewisburg to commence the sentence and calculated the Petitioner's sentence, the BOP had exclusive custody of the Petitioner and was under no duty to transfer the Petitioner back into state custody before expiration of the federal sentence. It is the BOP who committed the error in this matter and are now forced to engage in this legal fiction that the sentence never commenced to justify holding the Petitioner beyond his originally calculated release date of March, 2021.

2/. Petitioner filed a Motion For Judicial Notice of a Government Report. The Report was issued by the Inspector General of the Justice Department in its audit of BOP sentence computation errors. The Report cites an agreement between sovereigns as a means of relinquishing primary jurisdiction. Appendix I. The BOP necessarily reviewed the Report and did not object to this finding, and yet maintain a contrary position in this matter. The district granted the motion but ignored the Report's finding.

The district court holding which ignores the affirmative actions of both sovereigns to commence the sentence and which was adopted by the Circuit Court, is in direct coonflict with the holding in Weekes. The Fourth Circuit holding is also in direct with the Court's holding in Ponzi v. Fessenden, 258 U.S. 254(1922), that it is within the discretion of the state executive to relinquish primary jurisdiction. See Stephens v. Sabol, 539 F.Supp.2d 489, 493(D. Mass. 2008).

PROGRAM STATEMENT 5160.05

Assuming arguendo, that it was the state authorities who committed the error in this matter in relinquishing primary jurisdiction and not the BOP in sending the Petitioner back to state custody, as the Petitioner contends, it is a distinction without a relevant difference for the purposes of resolving this matter. In this area, courts have held executives to a negligence standard. See Stephens v. Sabol, supra at 495. The state's error in relinquishing primary jurisdiction or if it was the BOP's error in sending the Petitioner back to state custody after serving eleven years of the federal sentence, would be clearly negligent in either scenario, as executives are held to the plain import of their actions. See id. at 496.

The language of 18 U.S.C. § 3585(a) is clear, precise and unambiguously dictates when a federal sentence commences. The intent of Congress is clear in the statute, and when such clarity is apparent

in the statute, that is the end of the matter, for the Court as well for the agency, must give effect to the unambiguously expressed intent of Congress. See I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 445, fn. 29(1987).

When Congress passes an Act empowering an agency to administer governmental activities, the power of those agencies is circumscribed by the authority granted. See Stark v. Wickard, 321 U.S. 288, 309 (1944). The Tenth Circuit has held that this authority given to the BOP to determine the commencement date of a sentence is subject to statutory restrictions. See Weekes v. Fleming, supra at 301 F.3d 1179.

The language of § 3585(a) circumscribes the BOP's authority to a certain set of criteria which triggers commencement of a sentence. Once Petitioner met those criteria and his sentence commenced, the BOP did not possess the statutory authority to void the commencement of the sentence, Especially, after Petitioner had served the first eleven years of the sentence in BOP custody.

The BOP acted contrary to law when it applied P.S. 5160.05 to the Petitioner's circumstances, in excess of its statutory jurisdiction. See Emily's List v. F.E.C., 581 F.3d 1, 26(D.C. Cir. 2009). It is further noted that an administrative interpretation of a statute contrary to the language of the statute as we find in the BOP's interpretation of the statute through P.S. 5160.05 is not entitled to deference. See Demarest v. Manspeaker, 494 U.S. 184, 190(1990).

In Cain v. Menifee, 269 Fed. Appx. 420, 424, fn.5(5th Cir. 2008), the court had occasion to confront this same argument by the BOP concerning the interpretation of the word "commence" in § 3585(a) and the BOP's further argument, also in the instant case, that § 3585(b) prohibited the giving of the credit. The court rejected the arguments tied in one neat bow:

> "The fact that Missouri may have credited Cain's sentence with such time does not alter Cain's entitlement to credit on his federal sentence. To hold otherwise would mean that Cain's sentence commenced but never began to run despite his incarceration in federal prison. Such a result would render the word commence in § 3585(a) meaningless." Cain, id.

The court in Stephens v. Sabol, supra at 539 F.Supp.2d 497, went on to rebuff the same arguments posited by the BOP:

> "The Government's reliance on 18 U.S.C. § 3585(b) also fails. The statute dictates whether the defendant receives credit 'for any time he has spent in official custody prior to the date the sentence commences.... that has not been credited against another sentence." The Government heavily emphasizes the fact that Florida credited Stephens' time in federal custody, but it is the prior clause that controls. By its terms, § 3585(b) only applies to time in detention 'prior to the date the sentence commences.' Because the court concludes that Stephens' sentence began on September 20, 2001, § 3585(b) does not govern time in detention after that date."

In Petitioner's case, the BOP has went outside the contours of both § 3585(a) & (b) to achieve its desired result of keeping

Petitioner in prison longer than what was the sentencing court's intent.

As the Court remarked in Setser v. United States, 132 S.Ct. 1463, 1473(2012), it is not sentencing authority that the BOP is exercising but the authority to determine how long the district court's judgment and commitment authorizes it to continue a prisoner's confinement. The BOP can not commence a sentence, interrupt that sentence eleven years into its service, deem the sentence as never commenced and restart the sentence twelve years later, without counting any of the previous twenty five years in prison, not even the time in its actual custody, based on the same judgment and commitment.

It is a generally recognized principle that a prisoner can not be required to serve his sentence in installments. See Bond v. lamanna, 2003 U.S. Dist. Lexis 27021 *19(W.D.Pa.)(citing Weekes, supra at 301 F.3d 1180) and Luther v. Vanyur, supra at 14 F.Supp.2d 773(holding that a federal sentence commenced on date that prisoner was received into federal custody to begin federal sentence and ran continuously, and granting credit for time prisoner was temporarily released to finish serving unrelated state sentence).

Not receiving any time prior to 2015 based on the BOP's interpretation of the statute is untenable and grossly unfair to the Petitioner.

BARDEN DETERMINATION

Should the Court find that the section of P.S. 5160.05 which addresses primary jurisdiction and the commencement of a sentence is not in excess of the BOP's statutory authority as applied to Petitioner and the Petitioner's circumstances fall under the aegis of the regulation, then Petitioner submits that the BOP has abused its discretion in implementing the section of P.S. 5160.05 which applies to the administering of requests for nunc pro tunc designations of a state facility for the service of the federal sentence.

In Barden v. Keohane, 921 F.2d 476(3d Cir. 1990), the court held that the BOP had the obligation to consider a request for a nunc pro qtunc designation of a state facility for the service of a federal sentence. This procedure is undertaken when a prisoner is first sentenced in a federal court and subsequently sentenced by a state court, and the federal judge did not order whether the federal sentence was concurrent or consecutive to the subsequent state sentence. The state sentence is served first and the grant of the nunc pro tunc designation effectively renders the federal sentence concurrent to the state sentence. See Setser, supra at 132 S.Ct. 1468, fn. 1.

The BOP uses the five factors delineated in 18 U.S.C. § 3621(b) as the schema for its Barden determination:

(1) the resources of the facility contemplated;
(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;
(4) any statement by the court that imposed the sentence--
    (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
    (B) recommending a type of penal or correctional facility as appropriate; and
(5) any pertinent policy statement issued by the Sentencing Commission pursuant to § 994(a)(2) of Title 28.

As part of the determination, the BOP contacts the sentencing court for input concerning the granting of the designation. The Hon. Robert Workman Sweet, who the Petitioner believes to be 102 years old, God Bless His Soul, supported the granting of the designation.

The BOP only partially granted the nunc pro tunc designation. The BOP granted the designation as to the non-924(c) sentences, the five counts of concurrent ten year sentences. The commencement date of the Petitioner's sentence was reset to October 1, 2006 from June 18, 2015 and Petitioner's release date was rolled back from December 14, 2045 to March 29, 2037. So, Petitioner was given approximately eight years and eight months sentencing credit, the time one would serve on a ten-year sentence with good time sentence credit. The time from February 13, 1992 to September 30, 2006 was charged to the game and not credited by the BOP.

The BOP based the denial of any time being credited against the service of the 924(c) sentences on the fact that the statute directs that a 924(c) sentence be consecutive to any other sentence. Petitioner posits that the BOP's consideration of only one of the

five 3621(b) factors - the nature and circumstances of the offense - as the controlling factor in making the Barden determination is an abuse of the agency's discretion. See Trowell v. Beeler, 135 Fed. Appx. 590, 594(4th Cir. 2005)(citing Pub. Serv. Co. v. ICC, 749 F.2d 753, 763(D.C. Cir. 1984)(noting that agencies exercising discretion under federal statutes with multi-factor tests must take each factor into account and cannot select any one factor as controlling)).

Although the statute grants the BOP broad discretion to deny or grant nunc pro tunc sentence credits, that discretion is not unfettered however, and its consideration of such requests is guided by the five factors containe din § 3621(b). See Trowell, id. Title 5 § 706(2)(A) of the Administrative Procedure Act(APA) requires a finding that the actual decision made by the agency was not arbitrary, capricious or otherwise not in accordance with law. To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of law. See Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 416(1971).

Under the APA, a reviewing court must rely on the administrative record to assess the validity of the agency's action. See Camp v. Fritts, 411 U.S. 138, 142(1973). The BOP in making its decision found three of the five § 3621(b) factors relevant:

(2) the nature and circumstances of the offense:

the BOP cites the consecutive aspect of § 924(c) as the rationale for its relevance;

(3) the history and characteristicsof the offender:

the BOP cites "your criminal history";

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

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

the BOP cites "correspondence with the sentencing court which has the court advising that the federal sentence is retroactively determined to be concurrent with the state sentence."

See Exhibit J.

The BOP did not discuss and analyze factors three and four in any detail to indicate that those factors were realistically taken into consideration by the BOP in making its Barden determination. The only explanation given refers to the second factor two and maintaining the "integrity of the mandatory consecutive 18 U.S.C. § 924(c) count." Petitioner was not aware that the integrity of § 924(c) was being questioned.

It is apparent from the meager record of the consideration of the relevant factors by the BOP, that the BOP failed to truly consider factors three and four, the Petitioner's characteristics and the statements made by the sentencing court as to the warrant for the sentence of imprisonment, respectively. An agency action would be arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem. See Motor Vehicle Manufacturers Assn. v. State Farm Mutual, 463 U.S. 29, 43(1983).

When the agency has failed to set forth, discuss and analyze all the factors its own guidelines require, the agency has abused

its discretion by failing to adequately explain the rationale underlying its decision. Before the court can make a proper assessment of the agency's decision, the court should remand the matter to the agency for further proceedings. See Woods Petroleum Corp. v. Dept. of Interior, 47 F.3d 1032, 1041(10th Cir. 1995).

Upon remand, the BOP should be instructed that the fact that § 924(c) directs consecutive sentences is not the controlling factor to the exclusion of the other relevant § 3621(b) factors in making its Barden determination. Petitioner further posits that BOP considered itself constrained by the § 924(c) statute and did not fully consider the import of the other two factors it found relevant.

In Setser, supra at 132 S.Ct. 1473, the Court discussing the BOP's authority in making nunc pro tunc decisions found that the BOP was not exercising sentencing authority but the authority to determine how long the district court's sentence authorized it to continue the confinement. The BOP's nunc pro tunc authority has been deemed tantanount to a request for post sentencing leniency exercised pursuant to the discretionary pardon power vested in the executive by the United States Constitution, Art. II, § 2, cl. 1. See Hunter v. Tamez, 622 F.3d 427, 431-32(5th Cir. 2010).

Article II, § 2, cl. 1 provides that the executive "shall have the power to reprieves and pardons for offenses against the United States except in cases of impeachment." The Court explained

the contours of this power in Ex Parte A.H. Garland, 18 L.ED. 366, 371(1867):

> "The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any after its commission, either before legal proceedings are taken, or during their pendency or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The begnign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

If indeed that is the authority being exercised by the BOP, then it follows that the BOP is not constrained by the § 3621(b) factor - the nature and circumstances of the offense - the § 924(c) statute, as a controlling factor in its Barden determination, to the exclusion of the other two relevant factors.

Petitioner believes that the other two factors found relevant by the BOP if analyzed and assessed fairly and in full will lead to a very different result in the Barden determination. The factor of the Petitioner's history and characteristics of the prisoner. As to that factor the BOP just mentions criminal history without any explanation or analysis of the import of the history in its decision.

The sentencing court delineates Petitioner's criminal history in its sentencing memorandum. See Appendix K3. The criminal record is rather pedestrian without anything heinous. Petitioner has not incurred any criminal charges or had any serious diciplinary infractions in his thirty years in prison.

The BOP ignores the second aspect of that factor - characteristics of the prisoner - namely the Petitioner's age. The Petitioner is presently 62 years old and with a 2037 release date, the Petitioner is projected to be leaving prison at the age of 80, if he survives the 47-year ordeal. It is a virtual life sentence or death sentence.

Courts have struggled with the implication of a sentence, although a term of years, is likely or even certain to be a de facto life sentence. See United States v. Johnson, 685 F.3d 660 673(7th Cir 2012). It is additionally noted that an offender is less prone to recidivism as he ages, especially in his 60's and beyond, In the Petitioner's case, for the BOP not to analyze and assess the impact of its decision within the context of Petitioner's lifespan is surely an abuse of discretion.

Moreso, when the other factor found relevant by the BOP is examined - any statements made by the court as to the warrant for the sentence - it becomes quite clear that the BOP did not seriously consider these two factors in its Barden determination. The BOP did state that the sentencing court directed that the federal sentence be retroactively concurrent to the state sentence, in response to the BOP's letter requesting the sentencing court's input.

What the BOP did not consider is Judge Sweet's sentencing memorandum which spoke explicitly to the magnitude of the sentence being meted out and the court's opinion as to its reluctance:

"Here the operation of congressionally mandated minimum

> sentences more than doubles the appropriate Guidelines sentence and consigns Bernier to a virtual life sentence. While the Guideline sentence itself exceeds what this court would have imposed, the mandatory minimums disort both the judgment of the court and the sentencing scheme devised by the Sentencing Commission. This distortion in addition produces an economic as well as a personal consequence: the sentence will cost the taxpayers in the neighborhood of $680,000."
> See Appendix K5.[3/]

It has been shown that the propensity to commit crime declines with age. See Johnson, supra at 685 F.3d 661. If indeed as Setser held that the BOP's function is to determine how long the district court's sentence authorizes it to continue the Petitioner's confinement, then it seems that the BOP by denying the full nunc pro tunc designation has went against the district court's intent and mandate.

Moreover, for the BOP to feel compelled to consider the § 924(c) statute as the controlling factor in its decision to the exclusion of the other relevant factors is disingenuous. The Barden determination itself ignores teh dictates of § 18 U.S.C. 3584(a) - which directs consecuitive sentences for sentences imposed at different times - when it grants a nunc pro tunc designation. The BOP is similarly not hidebound by § 924(c) as the controlling factor in Petitioner's Barden determination.

1/. The irony of this whole matter is that Congress clarified when the second and susequent § 924(c) offense can be further enhanced. Petitioner would have received five years for the second § 924(c) conviction not twenty years.

CONCLUSION

Both questions presented to the Court seek to invoke partly the Court's supervisory powers over the federal courts and federal agencies, and their administration of federal statutes. In United States v. Mead, 533 U.S. 218, 234(2001), the Court spoke of the value of uniformity in administrative and judicial understanding understanding of what a national requires.

As to the first question presented concerning the BOP's interpretation of 18 U.S.C. § 3585(a) and its understanding that it can void the commencement of a sentence after the service of eleven years of that sentence must necessarily give one pause as to the correctness of such an action and whether or not the BOP possesses such a power. Guidance is certainly needed as to the definitive meaning of the statute. For if the BOP is incorrect in its presumption, the Petitioner is being made to suffer a great injustice, many years beyond what his sentence calls for.

What is even more troubling to the Petitioner is the BOP's disparate treatment of prisoners in administering the statute. The BOP has either previously granted the credit in circumstances similar or by court order. See Appendix L for listing of cases. This is no way for an agency to function: arbitrary application of a statute depending on geography or the individual.

As to the second question presented to the Court concerning whether or not the BOP is compelled to have the § 924(c)

consecutive sentence provision necessarily control the Barden determination, Petitioner contends that the Barden power should definitively elaborated upon as to its moorings and its contours. Decisionmaking becomes arbitrary and capricious when the source of the authority being exercised is ill-defined.

Lastly, the Petitioner asks the Court to pierce through the Petitioner's ignorance and get at the gist of the substance the Petitioner has attempted to convey.

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Respectfully Submitted,

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