Exhibit A

FOURTH CIRCUIT DECISION

A-1

02/14/2020

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6337

JEAN BERNIER,

Petitioner - Appellant,

v.

WARDEN HOLLAND; BUTNER FEDERAL MEDICAL CENTER,

Respondents - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:17-hc-02205-D)

Submitted: June 26, 2019 Decided: July 2, 2019

Before RICHARDSON and QUATTLEBAUM, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Jean Bernier, Appellant Pro Se. Genna Danelle Petre, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

A-2

02/14/2020

PER CURIAM:

Jean Bernier, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2241 (2012) petition. We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm for the reasons stated by the district court. *Bernier v. Holland*, No. 5:17-hc-02205-D (E.D.N.C. Feb. 28, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Exhibit B

FOURTH CIRCUIT DENIAL OF REHEARING

B

02/14/2020

FILED: September 10, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6337
(5:17-hc-02205-D)

JEAN BERNIER

Petitioner - Appellant

v.

WARDEN HOLLAND; BUTNER FEDERAL MEDICAL CENTER

Respondents - Appellees

ORDER

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

Entered at the direction of the panel: Judge Richardson, Judge Quattlebaum, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

Exhibit C

DISTRICT COURT DECISION

C-1

02/14/2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:17-HC-2205-D

JEAN BERNIER, Petitioner,	)	
v.	)	ORDER
WARDEN HOLLAND, Respondent.	)	

On February 11, 2019, Magistrate Judge Numbers issued a Memorandum and Recommendation ("M&R"), and recommended granting respondent's motion for summary judgment [D.E. 9] and dismissing Jean Bernier's ("Bernier") 28 U.S.C. § 2241 petition [D.E. 25]. On February 19 and 22, 2019, Bernier filed objections to the M&R [D.E. 26, 27].

"The Federal Magistrates Act requires a district court to make a de novo determination of those portions of the magistrate judge's report or specified proposed findings or recommendations to which objection is made." Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (emphasis, alteration, and quotation omitted); see 28 U.S.C. § 636(b). Absent a timely objection, "a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Diamond, 416 F.3d at 315 (quotation omitted). Moreover, the court need not conduct de novo review if a party makes "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). "Section 636(b)(1) does not countenance a form of generalized objection to cover all issues addressed by the

magistrate judge; it contemplates that a party's objection to a magistrate judge's report be specific and particularized, as the statute directs the district court to review only those portions of the report or specified proposed findings or recommendations to which objection is made." United States v. Midgette, 478 F.3d 616, 621 (4th Cir. 2007) (quotation and emphasis omitted).

Bernier argues that the BOP erred in determining the commencement date of his sentence and that his federal sentence commenced in February 1992. See [D.E. 26] 1–2; [D.E. 27] 1–2. Bernier also contends that the BOP erred in the "nunc pro tunc determination pursuant to 18 U.S.C. § 3621(b)." Id. at 1; see [D.E. 27] 2.

As for Bernier's first objection, New York authorities arrested Bernier on June 26, 1990, for bank robbery. See Johnson Aff. [D.E. 12-1] ¶ 4. During the pendency of Bernier's state charges, federal authorities brought armed robbery and firearm charges against him in the United States District Court for the Southern District of New York. See id. ¶ 5. On July 30, 1990, and on September 14, 1990, the United States Marshals Service took Bernier into temporary custody to permit Bernier to attend preliminary proceedings for his federal charges in the Southern District of New York. See id. ¶¶ 5–6. Bernier eventually proceeded to trial in the Southern District of New York and was found guilty. See Ex. 3 [D.E. 12-4] 2.

On June 11, 1991, the Southern District of New York sentenced Bernier to an aggregate term of 35 years' imprisonment. See Johnson Aff. [D.E. 12-1] ¶ 7; Ex. 3 [D.E. 12-4] 3. After sentencing, the Marshals Service returned Bernier to the primary custody of New York authorities, and lodged a detainer based on the federal judgment. See Ex. 1 [D.E. 12-2]. On January 16, 1992, the Supreme Court of New York County sentenced Bernier to between 12.5 and 25 years' imprisonment on his state charges. See Ex. 4 [D.E. 12-5]. The Supreme Court of New York County ordered Bernier's state sentence to run consecutively to his federal sentence. See id.

On January 28, 1992, New York authorities erroneously transferred Bernier into the physical custody of the Federal Bureau of Prisons ("BOP"). See Johnson Aff. [D.E. 12-1] ¶ 10. From February 1992 until April 2003, the BOP housed Bernier in Lewisberg, Pennsylvania. See id. ¶ 11. On April 18, 2003, after New York and the BOP realized the mistake, the BOP transferred Bernier back to the custody of New York authorities. See id. ¶¶ 12–13. The New York Department of Corrections credited to Bernier's state sentence all of the time that Bernier erroneously spent in the physical custody of the BOP. See Ex. 2, [D.E. 12-3].

On June 18, 2015, after Bernier completed his state sentence, the BOP took custody of Bernier. See Johnson Aff. [D.E. 12-1] ¶ 16; Ex. 8 [D.E. 12-9]. On September 15, 2015, under BOP Program Statement 5160.05, Bernier sought a nunc pro tunc designation of his time spent in state custody. See Johnson Aff. [D.E. 12-1] ¶ 18; Ex. 12 [D.E. 12-13]. On November 2, 2015, the BOP notified Bernier that, after a thorough review of Bernier's case and the relevant factors enumerated in 18 U.S.C. § 3621(b), the BOP decided to grant in part and deny in part his request. See Johnson Aff. [D.E. 12-1] ¶¶ 18–24. Specifically, the BOP permitted Bernier to serve a 10-year portion of his federal sentence that was unrelated to his sentence for violating 18 U.S.C. § 924(c) to run concurrently with his state sentence. See id. However, the BOP denied Bernier's request as to the 25-year consecutive portion of his federal sentence for violating 18 U.S.C. § 924(c). See id. ¶ 23. Accordingly, the BOP determined that Bernier's federal sentence commenced on October 1, 2006, and that his projected release date is March 29, 2037, and not December 14, 2045. See id. ¶¶ 18, 24; Ex. 11 [D.E. 12-12]; Ex. 16 [D.E. 12-17].

As for Bernier's objection concerning the date on which his federal sentence commenced, New York retained primary custody of Bernier between January 28, 1992, and April 18, 2003. See United States v. Cole, 416 F.3d 894, 896–97 (8th Cir. 2005); Thomas v. Deboo, No. 2:09cv134, 2010 WL 1440465, at *4 (N.D. W. Va. Mar. 8, 2010) (erroneous

C-4

02/14/2020

designation to a federal facility does not operate to commence a defendant's federal sentence or waive a state's primary jurisdiction), report and recommendation adopted, 2010 WL 1440693 (N.D. W. Va. Apr. 8, 2010), aff'd, 403 F. App'x 843 (4th Cir. 2010) (per curiam) (unpublished). Bernier's erroneous transfer to the physical custody of the BOP did not transfer primary jurisdiction. See, e.g., Thomas, 403 F. App'x at 843; Yeary v. Masters, No. 1:14-19114, 2016 WL 5852865, at *3–5 (S.D. W. Va. Sept. 30, 2016) (unpublished) (collecting cases); see also United States v. Evans, 159 F.3d 908, 912 (4th Cir. 1998) ("[F]ederal custody commences only when the state authorities relinquish the prisoner on satisfaction of the state obligation."). Moreover, New York has credited this time against Bernier's state sentence, and it cannot be credited against his federal sentence. See 18 U.S.C. § 3585(b); Rash v. Stansberry, No. 3:10CV836-HEH, 2011 WL 2982216, at *4 (E.D. Va. July 22, 2011), aff'd, 460 F. App'x 201 (4th Cir. 2011) (per curiam) (unpublished); Neal v. Drew, No. 2:09-0244-PMD-RSC, 2009 WL 6254710, at *4 (D.S.C. Nov. 5, 2009), adopted by, 2010 WL 1254873 (D.S.C. Mar. 23, 2010). Accordingly, the court overrules Bernier's first objection.

Bernier also argues that the BOP erred in partially denying his request for a nunc pro tunc designation. See, e.g., [D.E. 27] 6. The BOP may apply a nunc pro tunc designation if the BOP designates a non-federal facility as the place of confinement for a prisoner's federal sentence when, at the time of the prisoner's federal sentencing, the prisoner was in custody at a non-federal facility. See Barden v. Keohane, 921 F.2d 476, 481–82 (3d Cir. 1990); see also Evans, 159 F.3d at 911–12. The factors relevant to the BOP's determination are codified at 18 U.S.C. § 3621(b). The BOP has "broad discretion" in reviewing requests for nunc pro tunc designation. Barden, 921 F.2d at 478, 481–82; see Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 75 (2d Cir. 2005). The BOP fully considered the section 3621(b) factors, including the view of the federal court that sentenced Bernier, and did not abuse its discretion by partially denying

C-5

02/14/2020

Bernier's request. See Johnson Aff. [D.E. 12-1] ¶¶ 19–23; Exs. 12–15 [D.E. 12-16].

In sum, the court OVERRULES Bernier's objections [D.E. 26, 27], ADOPTS the conclusions in the M&R [D.E. 25], GRANTS respondent's motion for summary judgment [D.E. 9], and DISMISSES Bernier's petition. The court DENIES a certificate of appealability. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 483–84 (2000). The clerk shall close the case.

SO ORDERED. This 28 day of February 2019.

JAMES C. DEVER III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:17-HC-02205-D

Jean-Gabriel Bernier,

Petitioner,

v.

Warden Holland,

Respondent.

Order &
Memorandum & Recommendation

Petitioner Jean-Gabriel Bernier[1], a federal inmate proceeding pro se, seeks relief from this court under 28 U.S.C. § 2241. This matter is currently before the court on Respondent Holland's motion for summary judgment (D.E. 9). Also before the court are Bernier's motion for judicial notice (D.E. 17) and motion for hearing (D.E. 19). After reviewing the parties' submissions, the court allows Bernier's motion for judicial notice and denies his request for a hearing. And the undersigned recommends that the district court grant Holland's summary judgment motion and dismiss Bernier's petition.

I. Background

Law enforcement officers in New York arrested Bernier in June 1990 for bank robbery and criminal possession of a weapon. Johnson Aff. ¶ 4, D.E. 12–1. Federal authorities later also initiated armed robbery and firearm related charges against Bernier in the Southern District of New York. *See United States* v. *Bernier*, Case No. 1:90-cr-00653-RWS-1 (S.D.N.Y. filed Oct. 4, 1990). In July1990, the United States Marshals Service took Bernier into temporary custody for one day under a writ of habeas corpus ad prosequendum. Johnson Aff. ¶ 5, D.E. 12–1. The Marshals

[1] Bernier is also known as "Charles Watson." Johnson Aff. ¶ 3, D.E. 12-1.

Service took temporary custody of Bernier again in September 1990 for further proceedings on his federal charges. *Id.* ¶ 6.

A jury found Bernier guilty of his federal charges. *Id.* ¶ 7. On June 11, 1991, United States District Judge Robert W. Sweet sentenced Bernier to 35 years imprisonment. Resp't. Ex. 3, D.E. 12–4. Among other things, this sentence included two counts of using a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c). *Id.* Judge Sweet imposed a five-year sentence on the first § 924(c) violation, and a twenty-year sentence on the second, ordering that he serve them consecutively. *Id.* at 3. On June 21, 1991, the Marshals Service returned Bernier to the primary custody of state authorities, and lodged a detainer based on the federal judgment. Resp't. Ex. 1, D.E. 12–2.

On January 16, 1992, the Supreme Court of New York County sentenced Bernier to twelve and a half to twenty-five years imprisonment on his state charges. Resp't. Ex. 4, D.E. 12–5. Bernier's state sentence ran consecutively with his federal sentence. *Id.*

Shortly thereafter, New York state authorities erroneously transferred Bernier into federal custody. Johnson Aff. ¶ 10, D.E. 12–1.[2] In February 1992, the Federal Bureau of Prisons ("BOP") accepted Bernier and incarcerated him at the United States Penitentiary in Lewisburg, Pennsylvania. *Id.* ¶ 11. The BOP realized this mistake in April 2003 and transferred Bernier back into the physical custody of New York state authorities. *Id.* ¶¶ 12–13.

Bernier then instituted an action in New York, seeking credit for his time in federal custody towards his state sentence. *See* Resp't. Ex. 9, D.E. 12–10. After conferring with the BOP, the New York Department of Corrections ("NYDOC") credited all of the time from June 26, 1990 until

[2] In transferring Bernier to federal custody, the State of New York relied on a statute which would have only applied if his state and federal sentences were concurrent. Resp't. Ex. 6, D.E. 12-7 (referring to N.Y. Penal Law § 70.20).

May 6, 2003 towards Bernier's state sentence. Resp't. Ex. 2, D.E. 12–3. In doing so, the NYDOC also certified that Bernier was in state custody during this time. *Id.*

The BOP correctly took physical custody of Bernier on June 18, 2015, after the completion of his state sentence. Johnson Aff. ¶ 16, D.E. 12–1. In September 2015, Bernier sought a nunc pro tunc designation of his time spent in state custody, under BOP Program Statement 5160.05. Resp't. Ex. 12, D.E. 12–13.

The BOP fully considered this request. First, the BOP contacted Judge Sweet to determine his position on Bernier's nunc pro tunc request. In consulting with Judge Sweet, the BOP stated that "[s]hould the Court indicate [Bernier's federal] sentence is to run concurrent with the state term, the [BOP] will commence the sentence in above judgment on October 1, 2006, to maintain to the integrity of . . . 18 U.S.C. § 924(c). This would result in . . . Bernier's release from custody on or about March 29, 2037." Resp't. Ex. 13, D.E. 12–14. Judge Sweet responded to the BOP by entering an order retroactively declaring Bernier's federal sentence concurrent with his state sentence. *Bernier*, Case No. 1:90-CR-00653, (D.E. 20) (S.D.N.Y. October 15, 2015). In his order, Judge Sweet did not address the BOP's caveat about § 924(c).[3]

Along with contacting Judge Sweet, the BOP also completed a work sheet, fully analyzing these considerations: (1) the resources of the facility contemplated for nunc pro tunc designation; (2) the nature and circumstances of Bernier's federal and state offenses; and (3) Bernier's personal history and characteristics. Resp't. Ex. 15, D.E. 12–16. The BOP also reiterated its policy determination to maintain the integrity of § 924(c). *Id.* at 2. The BOP relied particularly on § 924(c)(D)(ii) which states "no term of imprisonment imposed on a person under this subsection

[3] Bernier does not challenge the validity of his federal sentence, only its execution. A counseled § 2255 petition challenging the validity of Bernier's federal conviction given *Johnson v. United States*, 135 S. Ct. 2551 (2015) is still pending in his sentencing court. *See Bernier*, Case No. 1:90-CR-00653, (D.E. 21) (S.D.N.Y. June 24, 2016).

shall run concurrently with any other term of imprisonment imposed on the person." *See* Johnson Aff. ¶¶ 23, D.E. 12–1. Based on that language, the BOP determined that Bernier's § 924(c) convictions were "to be served consecutively to all other counts and thus could not be served concurrently to [his] state sentence." *Id.* ¶ 22.

After considering these factors, the BOP partially allowed Bernier's request for a nunc pro tunc designation. The BOP allowed Bernier to serve the 10-year portion of his sentence that was unrelated to § 924(c) concurrently with his state sentence. *Id.* Bernier's 25-year federal sentence for his violations of § 924(c), however, would continue to run consecutively to his state sentence. *Id.* Because of this determination, the BOP changed the commencement date of Bernier's federal charges to October 1, 2006. *Id.*; Resp't. Ex. 16, D.E. 12–17. Doing so changed Bernier's projected release date from December 2045 to March 2037. Johnson Aff. ¶¶ 17, 23; Resp't Ex. 11, D.E. 12–12; Resp't Ex. 16, D.E. 12–17.

Bernier filed this petition in November 2017, alleging the BOP miscalculated his release date (D.E. 1). In February 2018, United States District Judge James C. Dever III dismissed Butner Federal Medical Center ("Butner")[4] as a respondent and then allowed the petition to proceed (D.E. 4). Respondent moved for summary judgment in April 2018 (D.E. 9). Bernier responded (D.E. 16) and respondent replied (D.E. 18). Along with his response Bernier moved for judicial notice (D.E. 17), in which he essentially seeks to amend his pleadings. Later, Bernier filed a motion requesting a hearing on his petition (D.E. 19).

II. Discussion

A. Motion for Judicial Notice

[4] When Bernier filed his petition, the BOP housed him in this district at FCI Butner. *See* Pet. at 1, D.E. 1. Bernier now resides at the Federal Correctional Institution in Allenwood, Pennsylvania. *See* (D.E. 24); *See* Bureau of Prisons Inmate Locator, Jean Bernier, Reg. No. 29463-054, https://www.bop.gov/inmateloc/ (last visited February 8, 2019).

Bernier requests that the court take judicial notice of certain facts under Federal Rule of Evidence 201. Although styled as request for judicial notice, Bernier essentially seeks to supplement his pleadings and the summary judgment record with more exhibits and argument. Given the liberal policy in favor of amendment, the court grants his motion. *See* Fed. R. Civ. P. 15(a)(2). In preparing this Order and Memorandum and Recommendation, the undersigned considered all of Bernier's filings.

B. Summary Judgment

Summary judgment is appropriate when an examination of the pleadings, affidavits, and other proper discovery materials before the court shows that "there is no genuine dispute as to any material fact," thus entitling the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Tolan* v. *Cotton*, 572 U.S. 650, 656–57 (2014). In making this determination, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." *News & Observer Publ'g Co.* v. *Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010) (quoting *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999)); *accord Tolan*, 572 U.S. at 656–57.

The movant carries the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a factual dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant discharges this burden by identifying "an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. In response, the non-movant must identify specific facts showing there is a genuine issue for trial. *Id.* at 323. In so doing, the non-movant may rely on a verified complaint

when allegations in the document are based on personal knowledge. *Williams* v. *Griffin*, 952 F.2d 820, 823 (4th Cir. 1991). Conclusory allegations and speculation do not suffice. *Thompson* v. *Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002). If the non-movant fails to introduce evidence contradicting a fact supported by the movant's evidence, the court may "consider the fact undisputed for summary judgment purposes." Fed. R. Civ. P. 56(e)(2). If the non-movant fails to meet his burden, summary judgment must be granted. *Celotex*, 477 U.S. at 322.

Bernier argues the BOP improperly calculated the start of his sentence. Pet. at 1, D.E. 1. First, Bernier argues the BOP improperly applied 18 U.S.C. § 3585(b). *See* Pet. at 4, D.E. 1. Under federal law, the Attorney General, acting through the BOP is responsible for calculating the duration of an offender's federal sentence. *See United States* v. *Wilson*, 503 U.S. 329 (1992). When undertaking this calculation, the BOP must consider "two separate issues"—"the commencement date of the federal sentence and . . . the extent to which a defendant can receive credit for time spent in custody prior to commencement of sentence." *Binford* v. *United States*, 436 F.3d 1252, 1254 (10th Cir. 2006).

As for the first element, an offender's term of imprisonment begins "on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a). Sometimes an offender serving a state sentence may be temporarily transferred to federal custody as part of federal proceedings. But this transfer does not trigger the commencement date for the defendant's federal sentence. *United States* v. *Evans*, 159 F.3d 908, 912 (4th Cir. 1998). Under the doctrine of primary jurisdiction, the state retains custody of the defendant who is considered on loan to the federal government. *Id.* Instead, "[f]ederal custody

commences only when the state authorities relinquish the prisoner on satisfaction of the state obligation." *Id.*

After determining when the federal sentence starts, the BOP must also determine how much credit an inmate should receive for "time he has spent in official detention prior to the date the sentence...." 18 U.S.C. § 3585(b). This determination involves consideration of two factors. First, a defendant may receive credit for time he was held in custody "as a result of the offense for which the sentence was imposed...." *Id.* § 3585(b)(1). Second, he may also receive credit for time spent in custody "as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed...." *Id.* § 3585(b)(2). But a defendant can only receive credit for time in custody if it "has not been credited against another sentence." *Id.* § 3585(b).

Bernier formally entered federal custody on June 18, 2015, with his commencement date later amended to October 1, 2006. Undoubtedly, Bernier's premature transfer to a BOP facility in February 1992 confused matters. But despite this mistake, the sovereign that first arrests an offender is the sovereign that obtains primary jurisdiction over the offender, and that sovereign retains primary jurisdiction until it relinquishes him. *See, e.g.*, *Trowell* v. *Beeler*, 135 F. App'x 590, 594 n.2 (4th Cir. 2005). New York arrested Bernier first, and retained legal custody of him. *See United States* v. *Cole*, 416 F.3d 894, 896 (8th Cir. 2005) ("Primary jurisdiction continues until the first sovereign relinquishes its priority in some way. Generally, a sovereign can only relinquish primary jurisdiction in one of four ways: 1) release on bail, 2) dismissal of charges, 3) parole, or 4) expiration of sentence."); *Thomas* v. *Deboo*, No. CIVA2:09CV134, 2010 WL 1440465, at *4 (N.D.W. Va. Mar. 8, 2010) ("An erroneous designation does not constitute a waiver of primary jurisdiction for purposes of commencing a federal sentence" (citation omitted)), *adopted by*, No.

CIVA2:09CV134, 2010 WL 1440693 (N.D.W. Va. Apr. 8, 2010), *aff'd*, 403 F. App'x 843 (4th Cir. 2010). Moreover, officials corrected this mistake, and credited all of the time from June 26, 1990, until May 6, 2003, toward Bernier's state sentence. Along with this adjustment to his sentence, the NYDOC also certified Bernier was in state custody during this time. Thus, any attempt by Bernier to receive credit for this time towards his federal sentence must fail because this time has already been "credited against another sentence." *See* 18 U.S.C. § 3585(b); *Rash* v. *Stansberry*, No. 3:10CV836-HEH, 2011 WL 2982216, at *4 (E.D. Va. July 22, 2011), *aff'd*, 460 F. App'x 201 (4th Cir. 2011); *Neal* v. *Drew*, No. C/A 2:09–0244-PMDRSC, 2009 WL 6254710, at *4 (D.S.C. Nov. 5, 2009), *adopted by*, No. CIV.A. 2:09–244-PMD, 2010 WL 1254873 (D.S.C. Mar. 23, 2010).

Although Bernier cites § 3585, the crux is argument is that the BOP improperly handled his request for a nunc pro tunc designation. *See* Pet. at 11, D.E. 1 (seeking "review of the BOP's *Barden* determination for abuse of discretion."). A nunc pro tunc designation may be applied if the BOP designates a non-federal facility as the place of confinement for a prisoner's federal sentence when, at the time of the prisoner's federal sentencing, the prisoner was in custody at a non-federal facility. *See Barden* v. *Keohane*, 921 F.2d 476, 481–82 (3d Cir. 1990); *see also United States* v. *Evans*, 159 F.3d 908, 911–12 (4th Cir. 1998) (citations omitted) ("When a federal court imposes a sentence on a defendant who is already in state custody, the federal sentence may commence if and when the Attorney General or the Bureau of Prisons agrees to designate the state facility for service of the federal sentence."). The BOP has "broad discretion" in reviewing requests for nunc pro tunc designation. *Barden*, 921 F.2d at 478, 481–82; *accord Abdul–Malik* v. *Hawk–Sawyer*, 403 F.3d 72, 75 (2d Cir. 2005).

In raising this claim, Bernier cites *Barden*. There, a federal prisoner brought a § 2241 habeas petition to gain credit for time served in a state prison by having that state facility designated a federal facility nunc pro tunc. *See Barden*, 921 F.2d at 478. At first, the BOP declined to recognize that it had the statutory authority to make such a designation. The *Barden* court held that the petitioner was "entitled to have his request considered by the agency with the statutory power to grant it and that 28 U.S.C. § 2241 is available to compel that consideration." 921 F.2d at 484. After *Barden*, the BOP began to analyze requests for retroactive designation pursuant to 18 U.S.C. § 3621(b). In addition, BOP Policy Statement 5160.05 specifically references *Barden* with respect to inmate requests for nunc pro tunc designation.

As noted, 18 U.S.C. § 3621(b) grants the BOP discretion to select the place of a federal prisoner's confinement, stating that the agency may "designate any available penal or correctional facility that meets minimum standards of health and habitability . . . [regardless of] whether [the facility is] maintained by the Federal Government or otherwise . . . , that [BOP] determines to be appropriate and suitable." 18 U.S.C. § 3621(b). "The phrase 'or otherwise' refers to the BOP's authority to designate federal prisoners to state prisons." *Jefferson* v. *Berkebile*, 688 F. Supp. 2d 474, 486 (S.D.W. Va. 2010) (citing *Evans*, 159 F.3d at 911–12). The statute specifically directs the BOP to consider five factors in making this 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 purpose for which the sentence to imprisonment was determined to be warranted; or
>
> (B) recommending a type of penal or correctional facility as appropriate; and

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

18 U.S.C. § 3621(b).[5] Under this statute, the BOP has the power to order a nunc pro tunc designation of a state facility as the place of imprisonment for a federal prisoner, essentially allowing for a retroactive concurrency through which the federal prisoner can receive credit against his federal sentence for time already served in the state facility. *Jefferson*, 688 F. Supp. 2d at 487 (citing *Woodall* v. *Fed. Bureau of Prisons*, 432 F.3d 235, 245–46 (3d Cir. 2005)).

The BOP's policy on designating a non-federal institution for the service of a federal sentence is set forth in BOP Program Statement 5160.05. "Normally, designating a non-federal institution for the inmate is done when it is consistent with the federal sentencing court's intent." *See* BOP Program Statement 5160.05; *see also Moorning* v. *Purdue*, No. 3:14-CV-1, 2015 WL 774280, at *6 (N.D.W. Va. Feb. 24, 2015), *aff'd*, 611 F. App'x 149 (4th Cir. 2015). Notably, however, "section 3621(b) dictates only that the BOP 'consider' any statements by the sentencing court. The BOP is not statutorily required to honor the wishes of the sentencing judge regarding whether a federal sentence is concurrent or consecutive to a state sentence which has not yet been imposed." *Jefferson*, 688 F. Supp. 2d at 487–88.

The court reviews BOP's nunc pro tunc determination for abuse of discretion, and its findings are afforded substantial deference and entitled to a presumption of regularity. *See Trowell*, 135 Fed. Appx. at 593 (citing *Barden*, 921 F.2d at 478); *Jefferson*, 688 F. Supp. 2d at 496. Here, the BOP fully considered the five factors required, and its application of those factors was

[5] The First Step Act of 2018 ("FSA") amended § 3621 by adding a new subsection. This new subsection does not alter the provisions of § 3621(b). *See* First Step Act of 2018, PL 115-391, December 21, 2018, 132 Stat 5194, § 102. The FSA also amended § 924(c). But those amendments only apply to offenses committed before enactment of the FSA "if a sentence for the offense has not been imposed as of such date of enactment." *Id.* at § 403(b).

reasonable. *See* Johnson Aff. ¶¶ 19–23, D.E. 12–1; Resp't. Ex. 12–15, D.E. 12–16. Thus, the BOP did not abuse its discretion.

For these reasons, the district court should grant respondent's summary judgment motion and dismiss Bernier's petition dismissed. Because of this recommendation, Bernier's request for a hearing (D.E. 19) is denied.

III. Conclusion

For the reasons discussed above, the court allows Bernier's motion for judicial notice (D.E. 17) and denies his motion for a hearing (D.E. 19).

And the court recommends allowing respondent's summary judgment motion (D.E. 9) and dismissing Bernier's petition.

The Clerk of Court must serve a copy of this Memorandum and Recommendation ("M&R") on each party who has appeared in this action. Any party may file a written objection to the M&R within 14 days from the date the Clerk serves it on them. The objection must specifically note the portion of the M&R that the party objects to and the reasons for their objection. Any other party may respond to the objection within 14 days from the date the objecting party serves it on them. The district judge will review the objection and make their own determination about the matter that is the subject of the objection. If a party does not file a timely written objection, the party will have forfeited their ability to have the M&R (or a later decision based on the M&R) reviewed by the Court of Appeals.

Dated: February 11, 2019

Robert T. Numbers, II
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.