

JUN 03 2021

OFFICE OF THE CLERK

No. 21-5639

IN THE  
SUPREME COURT OF THE UNITED STATES

Siliivaoe Se Fuimaona — PETITIONER  
(Your Name)

VS.

D. Hudson, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Tenth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Siliivaoe Se Fuimaona  
(Your Name)

U.S. Penitentiary - P.O. Box 1000  
(Address)

Leavenworth, Kansas 66048  
(City, State, Zip Code)

NA  
(Phone Number)

**ORIGINAL**

QUESTION(S) PRESENTED

1. Whether the U.S. Court of Appeals, for the Tenth Circuit, opinion, as well as the opinion of the U.S. District Court for the District of Kansas, are in direct conflict with this Court's holdings in Jones v. Cunningham, 371 U.S. 236 (1962), and Spencer v. Kenna, 523 U.S. 1 ~~1~~ (1998), when they held that the petitioner was not "in custody" of the State of Missouri by virtue of his parole?
2. Whether the Opinions of the U.S. Court of Appeals for the Tenth Circuit and the U.S. District Court for the District of Kansas, are ~~in~~ in direct conflict with this Court's holding in Setser v. United States, 566 U.S. 231 (2012), when they upheld the Federal Bureau of Prison's decision that his sentence was not "legally" concurrent, despite the original sentencing court's judgment order, that the sentences were imposed concurrent?

## LIST OF PARTIES

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

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

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	
STATEMENT OF THE CASE.....	
REASONS FOR GRANTING THE WRIT .....	
CONCLUSION.....	

## INDEX TO APPENDICES

APPENDIX A *Decision of the U.S. Court of Appeals*

APPENDIX B *Decision of the U.S. District Court*

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

JONES v. CUNNINGHAM,  
371 U.S. 236 (1962)

SETSER v. UNITED STATES,  
566 U.S. 231 (2012)

Spencer v. KEMNA,  
523 U.S. 1 (1998)

### STATUTES AND RULES

18 U.S.C. § 3621(b)

18 U.S.C. § 3585(b)

### OTHER

U.S. SENTENCING GUIDELINES,  
§ 5G1.3

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

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

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

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
☒ is unpublished.

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

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
☒ is unpublished.

[ ] For cases from **state courts**:

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

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

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

[ ] reported at \_\_\_\_\_; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

## JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was April 23, 2021.

No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_ A \_\_\_\_\_.

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

[ ] For cases from state courts:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3585(b) provides:

(b) Credit for prior custody. — A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences —

- (1) as a result of the offense for which the sentence was imposed; or
- (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence.

18 U.S.C. § 3585(b).

Title 18 U.S.C. § 3621(b) provides

## STATEMENT OF THE CASE

In July 2014, Siliaoese Fuimaona ("Fuimaona"), was sentenced to concurrent terms of five years imprisonment, in the Circuit Court of Jackson County, Missouri, for the offenses of possession of a controlled substance, burglary, and theft.

On October 14, 2015, Fuimaona was indicted, in the U.S. District Court for the Western District of Missouri, for conspiracy to distribute methamphetamine, based on the same drugs for which he was charged in the State of Missouri.

On October 19, 2015, Fuimaona was taken into custody of the U.S. Marshals, on writ of habeas corpus ad prosequendum. He was returned to the State of Missouri custody on March 31, 2016. Fuimaona was returned to federal custody on December 19, 2016. On January 18, 2017, he entered a plea of guilty to Count One of the indictment. Fuimaona was returned to Missouri custody on February 7, 2017. On March 27, 2017, he was transferred to the custody of the Missouri State Parole Board. He was returned to federal custody the same day.

On May 25, 2017, Fuimaona was sentenced to a federal term of 144 months imprisonment, to run concurrent with his State of Missouri sentence previously imposed.

The Federal Bureau of Prisons ("BOP") awarded 65 days of federal jail credit, from Feb. 6, 2014 through Feb. 12, 2014, and from March 28, 2017, through May 24, 2017.

Fuimaona filed a request to the BOP for 'nunc pro tunc' designation of his state of Missouri prison for service of his federal sentence, because the sentences were related, and imposed concurrently. The BOP denied his request because, they claimed he was not in State of Missouri custody when the U.S. District Court sentenced him to the concurrent sentence.

Fuimaona filed his administrative remedies claiming he was, in fact, in custody of the State of Missouri by virtue of his being in custody of the State of Missouri Parole Board. The administrative remedies were denied.

Fuimaona filed a petition for writ of habeas corpus in the U.S. District Court for the District of Kansas, claiming the BOP had incorrectly decided he was not in custody, by reason of his State of Missouri Parole custody. The district court denied his petition.

Fuimaona filed a timely appeal to the U.S. Court of Appeals for the Tenth Circuit. On 4/23/21 the Court of Appeals denied his appeal. This petition follows.

## REASONS FOR GRANTING THE PETITION

The decisions of the Federal Bureau of Prisons, the U.S. District Court, and the U.S. Court of Appeals are all in conflict with this Court's holdings in Jones v. Cunningham, 371 U.S. 236 (1962); Setser v. United States, 566 U.S. 231 (2012); as well as Spencer v. Kenna, 523 U.S. 1 (1998).

As set forth in the statement of case, Siliaivaoese Fuimaona ("Fuimaona") was sentenced in the State of Missouri for drug and theft charges. Fuimaona was then indicted in the U.S. District Court, for the Western District of Missouri for the same drugs as in the State case. Fuimaona entered a plea of guilty in the U.S. District Court. At sentencing, Fuimaona's counsel argued the drug charges were "related." The Court agreed. Therefore, the District Court did not assess the three points under criminal history, and the District Court imposed its sentence to run concurrent with Fuimaona's State of Missouri sentence.

When Fuimaona arrived in federal prison, he was told that the sentences were not concurrent, despite the judgment order. Fuimaona filed a request to have his state prison designated for service of his federal sentence "nunc pro tunc," under 18 U.S.C. § 3621(b), and Fed. B.O.P. Program Statement 5160.05. The BOP denied his request, citing 18 U.S.C. § 5585(b), claiming because the time was credited towards Fuimaona's State of Missouri sentence, "it could not be credited towards his federal sentence." Fuimaona appealed, pointing out that the U.S. District Court had imposed the federal sentence to run concurrent to the State of Missouri sentence. The BOP responded that the District Court's sentence was not legal, because the State of Missouri had paroled him before the imposition of the federal sentence. Therefore, Fuimaona was not "in custody" for purposes of a concurrent sentence. The regional appeal was denied. Fuimaona appealed, pointing out

(Continued on following pages)

(a)

## **STATEMENT OF THE CASE**

## REASONS FOR GRANTING THE PETITION (cont.)

he was "in custody" by virtue of his State of Missouri parole. The national appeal was denied.

Fuimaona filed a Petition for Writ of Habeas Corpus, under 28 U.S.C. 32241, to the U.S. District Court for the District of Kansas. He pointed out that the BOP had erred because his sentencing Court had imposed a concurrent sentence, and the BOP claimed it was wrong to do so, because he wasn't in the custody of the State of Missouri when the federal court sentenced him. He pointed out that according to this Court's holding in *Jones*, a person was still "in custody" while on parole. The district court ignored this Court's precedent and agreed with the BOP, that Fuimaona was not "in custody" in Missouri, because he had been paroled. Fuimaona appealed to the U.S. Court of Appeals for the Tenth Circuit. Once again Fuimaona pointed out that under *Jones*, he was "in custody" in the State of Missouri, because of his being released "to the custody of

REASONS FOR GRANTING THE PETITION  
the State of Missouri Parole Board. The U.S. Court of Appeals, without even addressing the "in custody" question, this Court's holding in Jones, or the fact that the original sentencing court had imposed the federal to run concurrent to the State of Missouri sentence, denied his appeal based on 8 3585 (b).

The BOP's decision that his sentencing courts imposition of concurrent sentences was incorrect runs afoul of this Court's holding in Setser that "[18 U.S.C.] 3362 (b) - which is a conferral of authority on the Bureau of Prisons, but does not confer authority to choose between concurrent and consecutive sentences, Id. 566 U.S. at 237.

The District Court's decision, upholding the BOP's claim that Fuimaona was not "in custody" for purposes of a concurrent sentence, runs afoul of this Court's holding in Jones, and Spencer.

The U.S. Court of Appeals decision, that under 18 U.S.C. 33585(b) he was

(c)

REASONS FOR GRANTING THE PETITION (cont.)

not entitled to credit under § 3585(b),  
ignored this Court's holding in Jones.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Silivaoe Fuimaona

Date: 5/28/2021