

APPENDIX A

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

April 23, 2021

**Christopher M. Wolpert
Clerk of Court**

SILIAIVAOESE FUIMAONA,

Petitioner - Appellant,

v.

D. HUDSON, Warden, USP -
Leavenworth,

Respondent - Appellee.

No. 20-3255
(D.C. No. 5:20-CV-03218-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

Before **McHUGH, KELLY**, and **BRISCOE**, Circuit Judges.**

Petitioner-Appellant Siliaivaoese Fuimaona, a federal inmate appearing pro se, appeals from the district court's judgment on his 28 U.S.C. § 2241 habeas petition, which sought credit on his federal sentence for time served on a prior Missouri state criminal sentence. See Fuimaona v. Hudson, No. 20-3218-JWL, 2020 WL 7186148 (D. Kan. Dec. 7, 2020).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

** 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.

In July 2014, Mr. Fuimaona was sentenced in state court for possession of a controlled substance, burglary, and theft/stealing. R. 51–54. On October 14, 2015, Mr. Fuimaona was charged with conspiracy to distribute methamphetamine in federal court. R. 56–63. On October 19, 2015, he was taken into federal custody on a writ of habeas corpus ad prosequendum and was later returned to Missouri custody on March 31, 2016. R. 65. Mr. Fuimaona was then transferred to federal custody on December 19, 2016 and on January 18, 2017, he entered a guilty plea to Count 1 of the federal indictment. R. 72. Mr. Fuimaona was returned to state custody on February 7, 2017 until he was released on parole on March 27, 2017. R. 67, 70. He was returned to federal custody on the same day. On May 25, 2017, petitioner was sentenced to a federal term of 144 months, concurrent with his state sentence. R. 80. The Federal Bureau of Prisons (BOP) awarded 65 days of federal credit for prior custody from February 6, 2014, through February 12, 2014, and from March 28, 2017, through May 24, 2017. R. 81.

Mr. Fuimaona seeks additional credit for time served on his prior Missouri state criminal sentence. However, a defendant can only be given credit toward a term of imprisonment if such credit “has not been credited against another sentence.” 18 U.S.C. § 3585(b). A defendant cannot receive presentence credit on a federal sentence for time that was already credited to a prior state sentence. See United States v. Wilson, 503 U.S. 329, 334 (1992); Goodface v. U.S. Att’y Gen., 802 F. App’x 397, 399 (10th Cir. 2020).

Mr. Fuimaona's federal sentence commenced on May 25, 2017, the date he was sentenced and received into federal custody. See Binford v. United States, 436 F.3d 1252, 1255 (10th Cir. 2006). His prior custody by the state of Missouri was already credited to his state court conviction. Therefore, the district court was correct that the BOP properly calculated Mr. Fuimaona's credit for prior custody.

Mr. Fuimaona also argues that he was entitled under U.S.S.G. § 5G1.3 to credit on his federal sentence for the time he served in connection with his Missouri state sentences. Aplt. Br. 4–10. That issue, we conclude, is not one that is properly raised in a § 2241 habeas petition. Rather, that issue, which effectively challenges the manner in which his federal sentence was calculated, can be considered only by the sentencing court by way of a motion to correct sentence filed pursuant to 28 U.S.C. § 2255.¹

We therefore AFFIRM the district court and GRANT the motion to proceed in forma pauperis.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

¹ Further, the sentencing transcript indicates that the district court did impose the federal sentence to run concurrently with the remainder of Mr. Fuimaona's state sentence in compliance with U.S.S.G. § 5G1.3. See Sentencing Transcript, United States v. Fuimaona, No. 4:15-cr-00101-BCW-6, at 20 (ECF No. 333).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SILIAIVAOESE FUIMAONA,

Petitioner,

v.

CASE NO. 20-3218-JWL

D (FNU) HUDSON, WARDEN,
USP-Leavenworth,

Respondent.

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed under 28 U.S.C. § 2241. Petitioner, a prisoner at the USP-Leavenworth, proceeds pro se. He seeks credit on his federal sentence for time served on a prior Missouri state criminal sentence. For the reasons set forth, the court concludes petitioner's sentence was calculated properly and that he is not entitled to relief.

Background

In July 2014, petitioner was sentenced to concurrent terms of five years in the Circuit Court of Jackson County, Missouri, for the offenses of possession of a controlled substance and burglary and theft/stealing. He received credit for time served.

On October 14, 2015, an indictment in the United States District Court for the Western District of Missouri charged petitioner with conspiracy to distribute methamphetamine. On October 19, 2015, he was taken into custody on a writ of habeas corpus ad prosequendum. He was returned to Missouri custody on March 31, 2016.

Petitioner was transferred to federal custody on December 19, 2016. On January 18, 2017, he entered a guilty plea to Count 1 of the

federal indictment. He was returned to state custody on February 7, 2017, and on March 27, 2017, he was released to parole. He was returned to federal custody on the same day.

On May 25, 2017, petitioner was sentenced to a federal term of 144 months, concurrent with his state sentences.

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

Standard of Review

A petition under 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." *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). This remedy extends to challenges to the computation of an applicant's sentence. See *Atkins v. Garcia*, 816 F. Supp. 2d 1108, 1110-13 (D. Colo. 2011). Relief under § 2241 is proper only if the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

Analysis

The BOP is responsible for the calculation of a federal prisoner's sentence. *United States v. Wilson*, 503 U.S. 329, 335 (1992) ("After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for administering the sentence.") (citing 18 U.S.C. § 3621(a)).

A federal prisoner's sentence begins on the day the prisoner either is received in custody for transport or arrives voluntarily at the designated correctional institution. 18 U.S.C. § 3585(a). See

Binford v. United States, 436 F.3d 1252, 1255 (10th Cir. 2006) ("A federal sentence does not commence until a prisoner is actually received into federal custody for that purpose.").

Prior custody credit is determined under 18 U.S.C. § 3585(b), which 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).

Therefore, if the BOP applies presentence credit to a state sentence, it cannot apply that credit to a concurrent federal sentence.

Petitioner's federal sentence commenced on May 25, 2017, the day it was imposed. Because petitioner had been released from Missouri state prison on March 27, 2017, the BOP gave him credit for the days he was in federal custody. This period included seven days jail credit from February 2014 that had not been credited elsewhere and the time between his release from Missouri custody and the commencement of his current federal sentence.

The United States Sentencing Guidelines provide that if another term of imprisonment arose from an offense that is relevant conduct to the present offense and conviction, the sentence for the present offense shall be imposed as follows:

- (1) The court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such

- period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
- (2) The sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

U.S.S.G. § 5G1.3.

This provision does not allow any additional credit on petitioner's federal term because at the time his federal sentence was imposed, he had been released from prison on the Missouri state sentence and, in effect, there was no "undischarged term of imprisonment". See *Isles v. Chester*, No. 08-3028-RDR, 2009 WL 1010553, at *5 (D. Kan. Apr. 15, 2009) ("Concurrent sentences normally mean that the sentence being imposed will run concurrently with the undischarged portion of a previously imposed sentence.") (citing *Shelvy v. Whitfield*, 718 F.2d 441, 444 (D.C.Cir.1988) "[A] federal sentence made concurrent with a sentence already being served does not operate in a 'fully concurrent' manner. Rather, the second sentence runs together with the remainder of the one then being served.")).

Finally, the BOP has a mechanism that allows a prisoner to request the designation of a state institution for service of a concurrent federal sentence. Under BOP Program Statement 5160.05, the BOP may designate a state institution for concurrent service of a federal sentence, and a prisoner also "may request a nunc pro tunc designation" of the state institution as the place of confinement. However, because petitioner was released from his state sentence before his federal sentence was imposed, the BOP could not make such a designation.

Conclusion

For the reasons set forth, the Court concludes the BOP properly calculated petitioner's sentence and he is not entitled to relief.

IT IS, THEREFORE, BY THE COURT ORDERED the petition is dismissed and all relief is denied.

IT IS SO ORDERED.

DATED: This 7th day of December, 2020, at Kansas City, Kansas.

S/ John W. Lungstrum

JOHN W. LUNGSTRUM
U.S. Senior District Judge