

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted September 15, 2022*

Decided September 20, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-2023

FAIRLY W. EARLS,
Petitioner-Appellant,

v.

FEDERAL BUREAU OF PRISONS,
Respondent-Appellee.

Appeal from the United States
District Court for the Western
District of Wisconsin.

No. 21-cv-377-wmc

William M. Conley,
Judge.

ORDER

Fairly Earls is serving a 30-year sentence imposed by Wisconsin's state judiciary. He also has a 5-year federal sentence, and the Bureau of Prisons has lodged a detainer with state officials. Earls wants the Bureau to rescind that detainer. He believes that his state and federal sentences run concurrently, so that, by the time his Wisconsin sentence ends, his federal sentence also will be over. The Bureau rejected that argument. Earls

* The appellee was not served with process and has not participated in this appeal, which we resolve without argument because appellant's brief and the record adequately present the matter. See Fed. R. App. P. 34(a); Cir. R. 34(f).

sought review by a petition under 28 U.S.C. §2241, and the district court, too, rejected his contention. 2022 U.S. Dist. LEXIS 98451 (W.D. Wis. June 2, 2022).

The federal judgment was imposed in 2011 in the Northern District of Indiana. It is silent with respect to the choice between concurrent and consecutive service. Earls did not (then) ask the judge to make an explicit choice, and he did not appeal from the judge's failure to do so. In 2015 the Bureau wrote a letter asking Judge Van Bokkelen, who had imposed the sentence, whether he intended concurrent or consecutive service; Judge Van Bokkelen replied that the absence of a provision for concurrent service implies consecutive service. He cited 18 U.S.C. §3584 and did not give any weight to his intent in 2011. We dismissed Earls's appeal. *United States v. Earls*, No. 15-3651 (7th Cir. Apr. 6, 2016) (nonprecedential disposition). Federal judges lose jurisdiction in criminal cases shortly after imposing sentence (unless a retroactive statute of Sentencing Guideline applies) and cannot modify or amplify their judgments by answering letters from the Bureau of Prisons years after the judgments have become final. See Fed. R. Crim. P. 35. Our 2016 decision observes that a district judge's response to an administrative inquiry is not a judicial order and cannot be appealed. We told Earls that the right way to obtain review of the Bureau's decision is to commence a proceeding under §2241.

Earls resisted. He asked the Supreme Court to review our 2016 decision (it declined). He asked us to reopen it (we declined). He filed additional claims of several kinds. In 2021 he finally sought relief under §2241, only to find that the district judge treated the sentencing judge's response to the Bureau's inquiry as if it amounted to an amended judgment in the federal criminal case, the very status that our 2016 decision holds it does not have.

Still, a remand is unnecessary. As Judge Van Bokkelen wrote in 2015, a statute provides what happens when a federal criminal judgment is silent on the choice between consecutive and concurrent service. A sentence that does not provide otherwise runs consecutively to any other sentence imposed at a different time. 18 U.S.C. §3584(a). The federal and state sentences were imposed at different times and so run consecutively, just as the Bureau has concluded. Earls is not entitled to relief under §2241.

AFFIRMED

WESTLAW**Earls v. Federal Bureau of Prisons**

United States District Court, W.D. Wisconsin. | June 2, 2022 | Slip Copy | 2022 WL 1800968 (Approx. 4 pages)

2022 WL 1800968

Only the Westlaw citation is currently available.

United States District Court, W.D. Wisconsin.

Fairly Wayne **EARLS**, Petitioner,

v.

FEDERAL BUREAU OF PRISONS, Respondent.

21-cv-377-wmc

Signed 06/02/2022

Attorneys and Law Firms

Fairly W. Earls, Black River Falls, WI, Pro Se.

Leslie K. Herje, Timothy Craig Samuelson, United States Attorney's Office, Madison, WI,
for Respondent.**OPINION AND ORDER**

WILLIAM M. CONLEY, District Judge

*1 Petitioner Fairly Wayne Earls, who currently is incarcerated by the Wisconsin Department of Corrections ("DOC") at Jackson Correctional Institution, seeks post-conviction relief under 28 U.S.C. § 2241. Specifically, Earls seeks to challenge a decision by the Bureau of Prisons ("BOP") denying his request to release him from the federal detainer requiring him to serve his federal sentence once he has completed his state court sentences. This petition is before the court for initial review under Rule 4 of the Rules Governing Section 2254 Cases, which applies to petitions not brought under § 2254. See Rule 1(b), Rules Governing Section 2254 Cases. However, because it is plainly apparent that Earls is not entitled to the relief he seeks, the court is dismissing his petition.

BACKGROUND¹

In October of 2010, Fairly Earls was in the custody of the authorities of the State of Wisconsin, facing charges of first-degree sexual assault of a child and multiple counts of bail jumping. *State v. Earls*, No. 2005CF419 (Fond du Lac Cnty.); *State v. Earls*, No. 1997CF268 (Fond du Lac Cnty.).² Then, on November 16, 2010, Earls was charged in a federal criminal complaint in the Northern District of Indiana with multiple fraud and identity theft crimes. *United States v. Earls*, No. 2:10cr222-001 (N.D. Ind. Oct. 5, 2011). On January 4, 2011, a magistrate judge from the Northern District of Indiana granted the government's motion for a writ of habeas corpus ad prosequendum, authorizing the federal government to take physical custody of Earls for purposes of his criminal proceedings in Indiana federal court. *Id.*, dkt. #8.

On June 10, 2011, Fairly Earls was convicted in the Northern District of Indiana of lying in a passport application, aggravated identity fraud and identity theft. On October 5, 2011, he was sentenced to 60 months of imprisonment in the Northern District of Indiana. On October 12, 2011, that court granted the government's motion to return Earls to the State of Wisconsin to face pending criminal charges. *Id.*, dkt. #92. On August 7, 2012, Earls was convicted in Fond du Lac County of multiple counts of first-degree sexual assault of a child and multiple counts of bail jumping. Earls was sentenced to 30 years of imprisonment on the bail jumping counts, and 60 years of imprisonment on the sexual assault counts, to run concurrent to each other and any other sentence.

In 2015, Earls wrote a letter to the BOP asking that his federal sentence run concurrent with his state sentences. The BOP submitted a letter in Earls' federal case, explaining that only the federal sentencing court could make that designation and asking that court for guidance. *Earls*, No. 10-cr-222, dkt. #109. The sentencing judge responded that the court had *not* intended for the federal sentence to be served concurrently with the state

sentences, and instead the federal sentence should run consecutive to the state sentences.

*2 Earls then appealed the sentencing judge's response, which the Seventh Circuit dismissed since the district judge's guidance was not an appealable decision. *United States v. Earls*, No. 15-3651, dkt. #12 (7th Cir. Apr. 6, 2016). Earls filed a motion in the district court, which was denied. Earls appealed that denial, and the Seventh Circuit dismissed that second appeal, noting that Earls' motion should have been treated as a petition under § 2241, but finding that the district court could not address his petition because he was no longer confined within the Northern District of Indiana. After the district court dismissed Earls' petition without prejudice, Earls again appealed. On May 13, 2021, the Seventh Circuit again dismissed Earls' appeal for lack of jurisdiction, concluding that Earls could refile his § 2241 petition in this district court once he has exhausted his administrative remedies.

On May 10, 2021, the BOP's Designation and Sentence Computation Center ("DSCC") sent him a letter stating that the district judge lacked authority to alter his sentence. The DSCC explained that the BOP was denying his request to have his federal sentence run concurrent to his state sentence, since the federal district did not order the federal sentence to run concurrent to the state court sentence. (See dkt. #1-3, at 1.) The letter concluded: "Absent an amended order, your federal term of imprisonment will not begin until you have [been] released from state custody." (*Id.* at 2.)

OPINION

Earls represents that the BOP credited the time he spent in federal custody, which was 13 months and ten days. He maintains that because he served the remaining 46 months and 20 days during his time incarcerated by the Wisconsin Department of Corrections, this court should reverse the BOP's denial of his request for credit towards his federal sentence. A petition for a writ of habeas corpus under 28 U.S.C. § 2241 is the proper vehicle for challenges to the administration or computation of a sentence. See *Walker v. O'Brien*, 216 F.3d 626, 629 (7th Cir. 2000); *Valona v. United States*, 138 F.3d 693, 694 (7th Cir. 1998); *Carnine v. United States*, 974 F.2d 924, 927 (7th Cir. 1992) (citations omitted). Under 18 U.S.C. § 3585(b), the Bureau of Prisons must apply sentence credit for "any time [the defendant] has spent in official detention prior to the date the sentence commences" and "that has not been credited to another sentence." *Id.*³

The BOP's decision not to deem Earls' federal sentence served is consistent with the law. While "the BOP may designate nunc pro tunc a state prison that once housed an inmate as the place of confinement for the inmate's federal sentence" under 18 U.S.C. § 3621, "effectively allowing the state and federal sentences to run concurrently[,] ... the BOP also has 'wide discretion' over that designation." *Taylor v. Lariva*, 638 F. App'x 539, 541 (7th Cir. 2016) (quoting *Barden v. Keohane*, 921 F.2d 476, 483 (3d Cir. 1990)). Here, the BOP did not abuse its discretion in declining Earls' request, since the federal sentencing court expressly stated that his federal sentence should run consecutive to his state sentences. Indeed, that is the default; under 18 U.S.C. § 3584(a), "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." Moreover, the BOP's decision to ask the district court for information about its intent in sentencing Earls was not an overreach. The Seventh Circuit has held that the BOP does not abuse its discretion by contacting a sentencing court for guidance when that court was silent as to whether the federal sentence should run concurrent with or consecutive to a state sentence. *Winters v. Kallis*, 766 F. App'x 393, 395 (7th Cir. 2019).

*3 Finally, the fact that the federal sentence was imposed prior to the state sentences does not change the fact that Earls has not served any additional portion of his federal sentence. The doctrine of primary custody dictates that an inmate's federal sentence commences only after the government exercises primary jurisdiction over him. *Pope v. Perdue*, 889 F.3d 410, 417 (7th Cir. 2018) (citing *Loewe v. Cross*, 589 F. App'x 788, 789 (7th Cir. 2014); *Elwell v. Fisher*, 716 F.3d 477, 481 (8th Cir. 2013); *Binford v. United States*, 436 F.3d 1252, 1256 (10th Cir. 2006)). The general rule is that the sovereign arresting a defendant first takes primary custody of him, and that same sovereign maintains primary custody "until [it] relinquishes its priority in some way." *Id.* (citing *United States v. Cole*, 416 F.3d 894, 897 (8th Cir. 2005)). At the time Earls' federal case began, he was in custody of the State of Wisconsin, and indeed only appeared in federal court

under a writ. There is no suggestion in Earls' federal proceeding that Wisconsin state authorities relinquished primary custody over Earls while his federal case was pending. To the contrary, just a week after Earls was sentenced in federal court, he was transferred back to Wisconsin to face his pending state court charges. Therefore, there is no basis to conclude that the BOP abused its discretion in declining to apply any time in state custody to his federal sentence. Accordingly, Earls' challenge to the BOP's determinations plainly lacks merit, and his petition must be dismissed.

ORDER

IT IS ORDERED that:

1. Petitioner Fairly Wayne Earls' petition for a writ of habeas corpus under 28 U.S.C. § 2241 is DENIED.
2. The clerk of court is directed to enter judgment and close this case.

All Citations

Slip Copy, 2022 WL 1800968

Footnotes

- 1 The court draws the following facts from Earls' petition and attached exhibits, as well as publicly available records of Earls' criminal proceedings.
- 2 The court has drawn details about Earls' state court charges from the electronic docket of these proceedings, available at Wisconsin Circuit Court Access, <https://wcca.wicourts.gov> (last visited June 1, 2022).
- 3 The BOP's exhaustion procedures do not apply in Earls' circumstances since he is in confined in a non-federal facility. See 28 C.F.R. § 542.10.

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Date: 10/20/2011
Time: 1:25:15 PM

Federal Bureau of Prisons
TRU/FACS
Inmate PAC Number
Sensitive But Unclassified

Facility: CCC

Inmate Reg#: 10759089
Inmate Name: EARLS, FAIRLY W
Housing Unit: CCC-G-A

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Phone Access Code (PAC): 844220280 PIN: 9775

Direct Dialing

Local = area code + phone number + PAC
Long Distance = 1 + area code + phone number + PAC
Most International = 011 + country code + city code + phone number + PAC

Collect or *Prepaid Dialing

0 + area code + phone number + PAC

To transfer funds, check cost of your last call, or check available usage, dial
118 + PAC and follow voice prompts

* Called parties that cannot receive collect calls may contact Value Added Communications (VAC) at 1-800-913-6097 to set-up a prepaid account. International called parties can contact VAC by dialing 972-535-0549.

International parties with prepaid accounts can be called by dialing
01 + country code + city code + phone number + PAC.

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Local = código de área + número de teléfono + PAC
Teléfono de larga distancia = 1 + código de área + número de teléfono + PAC
Más internacional = 011 + código de país + código de la ciudad + número de teléfono + PAC

Reúnase o Marcación Pagada por adelantado

0 + código de área + número de teléfono + PAC

Para transferir fondos, compruebe el coste de su llamada pasada, o compruebe el uso disponible,
marca

118 + PAC y siga los avisos de la voz

* Los partidos llamados que no pueden recibir reciben llamadas pueden entrar en contacto con las comunicaciones de valor añadido (VAC) en 1-800-913-6097 para establecer una cuenta pagada por adelantado. Los partidos llamados internacionales pueden entrar en contacto con el VAC marcando 972-535-0549.

Los partidos internacionales con cuentas pagadas por adelantado pueden ser llamadas marcando
01 + código de país + código de la ciudad + número de teléfono + PAC

§ 5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Ter...

FSG § 5G1.3 United States Code Annotated Federal Sentencing Guidelines (Approx. 2 pages)

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Five. Determining the Sentence (Refs & Annos)

Part G. Implementing the Total Sentence of Imprisonment

Unconstitutional or Preempted Limited on Constitutional Grounds by U.S. v. Booker U.S. Jan. 12, 2005

USSG, § 5G1.3, 18 U.S.C.A.

§ 5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

Currentness

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant 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.

(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1991; November 1, 1992; November 1, 1993; November 1, 1995; November 1, 2002; November 1, 2003; November 1, 2010; November 1, 2013; November 1, 2014; November 1, 2016.)

COMMENTARY

<Application Notes:>

<1. Consecutive Sentence--Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.>

<2. Application of Subsection (b).-->

CERTIFICATE OF SERVICE

I Certify under Penalty of Perjury pursuant to Section 28 U.S.C. 1746 that all Statements contained herein as cited are True and Correct. Further on this Date a copy of the Writ of Certiorari has been sent to the Attorney of Record via the U.S. Postal Service with postage prepaid.

Dated: 12-10-2022

Sincerely,

Fairly W. Earls

Wisconsin Dept. of Justice
p.o. Box 7857
Madison, WI. 53707

Fairly W. Earls 369129
Jackson Correctional
P.O.Box 233
Black River falls, WI. 54615

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 7, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

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No. 21-cv-377-wmc

William M. Conley,
Judge.

ORDER

Petitioner-Appellant filed a petition for rehearing on October 3, 2022. All the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.