

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 2022

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**SHAWN KALEB DRAKE,**  
Petitioner

v.

**UNITED STATES OF AMERICA,**  
Respondent

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Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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JOHN A. KUCHERA  
210 N. 6th St.  
Waco, Texas 76701  
(254) 754-3075  
(254) 756-2193 (facsimile)  
johnkuchera@210law.com  
SBN 00792137

*Attorney for Petitioner*

### **Question Presented**

1. If a defendant requests that he be given credit towards his federal sentence for presentence detention time, is a district court – knowing that the court cannot actually give “credit” – thereby put on notice that the court has a duty to determine on its own whether or not the Bureau of Prisons will give credit for presentence detention time, and adjust the defendant’s sentence accordingly?

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Shawn Kaleb Drake respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### **Citation to Opinion Below**

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Drake's conviction and sentence is styled: *United States v. Drake*, \_\_\_ F. App'x \_\_\_, 2023 U.S. App. LEXIS 4998 (5th Cir. 2023).

### **Jurisdiction**

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Drake's conviction and sentence was announced on March 1, 2023 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes:

18 U.S.C. § 3585(a):

**Commencement of sentence.** – A sentence to a term of imprisonment 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 sentence is to be served.

18 U.S.C. § 3585(b):

**Credit for prior custody.** – A defendant shall be given credit towards 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.



## Sentencing Guideline

### **U.S.S.G. § 5G1.3(b)(1):**

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;

## Bureau of Prisons Program Statement Excerpts

### **BOP Program Statement 5880.28, pg. 1-12:**

If the prisoner is serving no other federal sentence at the time the sentence is imposed, and is in exclusive federal custody (not under the jurisdiction of a federal writ of habeas corpus ad prosequendum) at the time of sentencing on the basis of the conviction for which the sentence is imposed, the sentence commences on the date of imposition[.]

### **BOP Program Statement 5880.28, pg. 1-14F:**

“Official detention” is defined, for purposes of this policy, as time spent under a federal detention order.

**BOP Program Statement 5880.28, pg. 1-28:**

Under 18 U.S.C. § 3585 . . . a prisoner must be in official detention before the sentence commences, or before the prisoner may receive presentence time credit that can be applied to the sentence. Therefore, the sentence cannot run, or must stop running, whenever the prisoner is not in official detention. The BOP has no authority to grant time credit toward the service of a sentence when a prisoner is not in official detention.

**BOP Program Statement 5880.28, pg. 1-28:**

[A] prisoner is [not] in official detention [if] the prisoner is not in the custody of the Attorney General or the Bureau of Prisons.

## Statement of the Case

Drake was arrested November 5, 2021 by Odessa Police for possession of methamphetamine. He was held in the Ector County Detention Center on this Texas possession of a controlled substance charge. Drake was subsequently charged in federal court for the same conduct under Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). He was writted out of state custody into federal custody, to be returned to the custody of Ector County at the conclusion of federal proceedings. Drake's sentencing hearing herein did not take place until four and a half months after he was writted into federal custody. At issue herein is whether Drake's federal sentence should have been adjusted to account for this four and a half month period.

At sentencing, Drake was sentenced in the instant case (Cause number 7:21-cr-00364) and also sentenced in Cause No. 7:15-cr-00081 for a supervised release revocation. The following exchange took place just after Drake was sentenced in Cause Number 7:21-cr-00364, and prior to being sentenced in Cause Number 7:15-cr-00081:

Drake: Do I get all my back time from when I was [under a] Marshal['s] hold in Ector County to now?

District Court: You should. I mean, BOP calculates all that. I don't. But they should calculate from when you came in as federal custody. I mean, it would be unconstitutional not to give you that.

Drake: Last time I didn't get it . . . Because the Judge did not rule on it. And he didn't say it on the record . . . So when I got down there and filed . . . a grievance on appeal, . . . they didn't grant it to me because the judge was silent on the matter.

District Court: Yeah. And the one time I've said something about it, I got slapped on the wrist because I didn't calculate it. They do. And so if I try to calculate the date, I think I said on the record at the request of the attorneys the date. So I got slapped down for saying what date it started on because they decide that, not me. And so I don't think there's anything I can tell you.

This exchange establishes at least four things:

1. Drake wanted the presentence time he had spent in the Ector County Detention Center awaiting sentencing to count towards his federal sentences;
2. The district court believed the time Drake spent in the Ector County Detention Center should count towards his federal sentences;
3. The district court believed it had no authority to address Drake's concern; and
4. The district court believed that the BOP would give Drake the requested back time credit.

Following sentencing, Drake was booked back into Ector County and remains there at this time under his pending indicted state charges.

The district court's written judgment provides in relevant part:

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of One Hundred Fifteen (115) months. *This term to be . . . concurrent with any sentence imposed in Case No. B-22-0162-CR pending in the 161st Judicial Court of Ector County, Texas [possession of methamphetamine]with credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b).*

Drake argued on appeal that although the written judgment purported to give him “credit for time served while in custody for this federal offense pursuant to 18 U.S.C. § 3585(b),” the Bureau of Prisons (BOP) would not be able to give him credit for the four and a half months he spent at the Ector County Detention Center because he had not been in “official detention.” BOP Program Statement 5880.28, pgs. 1-14F, 1-28.

Drake noted that while a district court is not permitted to give “credit” for time a defendant has already served, citing *United States v. Taylor*, 973 F.3d 414, 418 (5th Cir. 2020), a sentencing court does “retain residual authority” to consider a defendant’s time in custody. *In re United States Bureau of Prisons*, 918 F.3d 431, 439 (5th Cir. 2019). One of the considerations a sentencing court must take into account in deciding whether to adjust a sentence downward is “if the court determines that

such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons.” U.S.S.G. § 5G1.3(b)(1). Obviously, this requires the district court to figure out whether the BOP will give federal credit. The district court herein didn’t do that.

Drake argued that because the BOP will not be able to give him credit for the four and a half months he spent in the Ector County Detention Center, the district judge should have reduced Drake’s sentence of imprisonment from 115 months to 110 months.

The Fifth Circuit simply held: “Drake has not shown any clear or obvious error with respect to his sentences or that any error affected his substantial rights.”

**First Reason for Granting the Writ:** *If Drake is ultimately convicted of his State possession of a controlled substance case, the BOP cannot credit him with the four and a half months because that time will have been credited against another sentence.*

Let's suppose that at some point in the future Drake is convicted in his pending Ector County possession of methamphetamine case (the same conduct for which he was federally convicted). The BOP would not be able to credit him for the four and a half months he spent in the Ector County Detention Center in that scenario because the BOP cannot award credit that has already "been credited against another sentence." 18 U.S.C. § 3585(b); *Smith v. McConnell*, 950 F.3d 285, 288 (5th Cir. 2020). Because the four a half months Drake spent in the Ector County Detention Center would be credited towards his state sentence, he could not be given federal credit for that time. *See Jones v. Winn*, 13 F. App'x 419, 421 (7th Cir. 2001) (BOP had no statutory authority to credit defendant for any additional days because Michigan authorities had credit the same period against his state sentence).

***Second Reason for Granting the Writ: If Drake is ultimately convicted of his State possession of a controlled substance case, the BOP cannot credit him with the four and a half months by designating the state facility as a place where Drake serves a portion of his federal sentence because Drake has not yet begun to serve a state sentence.***

The Government argued that the BOP has discretion to credit time in state custody by designating nunc pro tunc the state facility as a place in which the prisoner serves a portion of his federal sentence, citing *United States v. Melbert*, 410 F. App'x 750, 752 (5th Cir. 2010). That is true but with statutory limitations. And, as noted above, the written judgment provides that Drake's federal sentence is to be concurrent with any future sentence assessed in Drake's possession of a controlled substance case. But neither of those facts solves the problem. A federal sentence cannot commence prior to the date it is pronounced, even if made concurrent with a sentence already being served. *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980). This means that the earliest *state* sentence start date that the BOP could theoretically use to begin Drake's federal sentence is yet future because it hasn't happened yet. Yet, the four and a half month period at issue has already occurred. *See United States v. Gonzalez*, 192 F.3d 350, 355 (2d Cir. 1999) (A federal



district court cannot “backdate” a federal sentence to the beginning of a state prison term on related state charges.).

***Third Reason for Granting the Writ: If Ector County ultimately dismisses the possession of a controlled substance case against Drake, the BOP cannot credit Drake for the four and a half months because Drake has never been in “official detention” as that term is defined by the BOP.***

Let’s suppose that Drake’s pending Ector County possession of methamphetamine case is ultimately dismissed. Because Drake was temporarily writted – “borrowed” – from state custody via a federal writ of habeas corpus *ad prosequendum*, he was not therefore in “official detention,” and the BOP simply cannot give him credit for the four and a half months he spent in the Ector County Detention Center. The first sovereign – in this case Ector County – to take physical custody of a defendant retains “primary jurisdiction” until releasing that jurisdiction. *Elwell v. Fisher*, 716 F.3d 477, 481 (9th Cir. 2013). Generally, a sovereign relinquishes primary jurisdiction if one of four things happens: (1) release on bail, (2) dismissal of charges, (3) parole, or (4) expiration of sentence. *Id.* As for Drake, none of those things has happened. When Drake was

temporarily writted into federal custody, he remained in the primary jurisdiction of Ector County. *Id.* at 482. The prisoner's federal sentence commences once the prisoner is relinquished from the primary jurisdiction of the state and the prisoner is received into federal custody for service of the federal sentence. 18 U.S.C. § 3585(a); *Casteel v. Wilson*, 2020 U.S. Dist. LEXIS 96267, at \*7 (N.D. Tex. 2020). Drake was arrested by Odessa police on November 5, 2021. He has been and continues to be in the primary jurisdiction of Ector County.

***Fourth Reason for Granting the Writ: It needs to be made clear to sentencing courts that they have a duty to determine, on their own, whether the BOP will credit a defendant for presentence detention time.***

Drake's situation is not unique. Other district courts are neglecting their duty to determine on their own whether the BOP will give a defendant credit for presentence detention time. *See e.g., United States v. Young*, No. 20-30492, 2021 U.S. App. LEXIS 29683, at \*4-5 (5th Cir. 2021) (District court's response to defendant's request for a four month sentence reduction: "And of course the Bureau of Prisons determines credit for time served, not the Court."); *United States v. Mayle*, 763 F.

App'x 309, 310-11 (4th Cir. 2019) (District court committed procedural error in declining defendant's request adjust sentence under U.S.S.G. § 5G1.3(b)(1) for prior state sentence imposed for relevant conduct); *United States v. Ortiz*, No. 1:14-CR-2038-SAB-2, 2023 U.S. Dist. LEXIS 14452, at \*1-2 (E.D. Wash. 2023) ("The Court intended for Mr. Ortiz to receive credit for time served while he was in federal custody, between July 13, 2015 and January 27, 2017. It is apparent BOP will not calculate this time toward Mr. Ortiz's sentence. Thus, pursuant to § 5G1.3(b)(1), the Court will issue an Amended Judgment adjusting Mr. Ortiz's sentence to reflect his time served in federal custody."); *United States v. Jenkins*, 256 F. App'x 594, 595 (4th Cir. 2007) ("[W]hile the district court indicated that it had no role in the matter, the court should have considered and applied USSG § 5G1.3(b)(1) to adjust Jenkins' sentence."); *Cf. United States v. Nichols*, No. 88-cr-496, 2023 U.S. Dist. LEXIS 27474, at \*2-3 (E.D.N.Y. 2023) (District court: "I [can] overcome the manner in which the BOP calculates [defendant's] release date by sentencing him to 36 years, instead of 40 years[.]").

### Conclusion

For the foregoing reasons, Petitioner Drake respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera  
JOHN A. KUCHERA  
210 N. 6th St.  
Waco, Texas 76701  
(254) 754-3075  
(254) 756-2193 (facsimile)  
johnkuchera@210law.com  
SBN. 00792137  
*Attorney for Petitioner*

### Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 14th day of April, 2023.

/s/ John A. Kuchera

John A. Kuchera,

Attorney for Petitioner Shawn Kaleb Drake