FILED
United States Court of Appeals
Tenth Circuit

July 30, 2020

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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SEBASTIAN L. ECCLESTON,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

Respondent - Appellee.

No. 20-2043
(D.C. No. 1:19-cv-00538-RB-CG)
(D. N.M.)

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**ORDER**

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Before **BRISCOE**, **BALDOCK**, and **CARSON**, Circuit Judges.

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Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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(D. N.M.)

## ORDER AND JUDGMENT*

Before **BRISCOE**, **BALDOCK**, and **CARSON**, Circuit Judges.

Petitioner Sebastian Eccleston, a federal prisoner appearing pro se, appeals from the district court's dismissal of his 28 U.S.C. § 2241 application for federal habeas relief. Exercising jurisdiction pursuant to 28 U.S.C. §1291, we affirm the dismissal, albeit on different grounds than the district court.

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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

I

On May 3, 1996, Eccleston pleaded guilty in the United States District Court for the District of New Mexico to carjacking, in violation of 18 U.S.C. § 2119(1), carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c), and violating the Hobbs Act, in violation of 18 U.S.C. § 1951(a). All three of those convictions arose out of crimes committed by Eccleston on December 15, 1994.

A few hours after pleading guilty in federal district court, Eccleston pleaded guilty in New Mexico state court to first-degree murder and conspiracy to commit first-degree murder. Those two convictions arose out of crimes committed by Eccleston on December 13, 1994.

The federal plea agreement was silent with respect to whether the federal and state sentences imposed on Eccleston would run consecutively or concurrently. The state plea agreement, in contrast, expressly provided that Eccleston's state sentence would run concurrently with any federal term.

Eccleston was sentenced in federal court on October 29, 1996. During that hearing, Eccleston's lawyer made no mention of concurrent sentencing or about where Eccleston would serve his federal or state sentence. The federal district court imposed a sentence of 417 months in prison, to be followed by three years of supervised release. The sentence made no reference to any state sentence.

On November 7, 1996, Eccleston was sentenced in New Mexico state court to life imprisonment, plus nine years. The sentence expressly stated that it would run

concurrently with Eccleston's federal sentence. Eccleston remained in state custody and began serving his state sentence.

Eccleston unsuccessfully appealed his federal sentence on the ground that, because he was only convicted as an accomplice, the federal district court erred in imposing sentences under § 924(c). *See United States v. Eccleston*, 132 F.3d 43 (10th Cir. 1997) (unpublished table decision).

In May 2001, Eccleston filed a pro se motion for relief under 28 U.S.C. § 2255, claiming that his counsel had been ineffective because he had induced Eccleston to plead guilty based on what Eccleston alleged was a false and inaccurate promise that Eccleston would serve his federal sentence in federal custody. The federal district court denied the motion as time-barred. Eccleston did not appeal that ruling.

In March 2004, Mr. Eccleston filed a second § 2255 motion. The district court construed the motion as seeking authorization to file a second-or-successive § 2255 motion and transferred it to this court. In October 2005, this court vacated the transfer order and remanded to the district court with instructions to treat the motion as an application for habeas relief under 28 U.S.C. § 2241. Thereafter, counsel entered an appearance for Eccleston in federal district court and contended that he should be committed to a federal rather than a state institution and that his prior service in a state institution should be credited to his federal sentence.

Eccleston also filed a state habeas proceeding raising the concurrent sentence issue. The state district attorney, in response, sought to resolve the issue by way of the

Federal Bureau of Prisons' (BOP's) Program Statement 5160.05 (the BOP Statement), which establishes procedures for a state to request the BOP to designate a state institution as the place to serve a federal sentence concurrently with a state sentence. In reliance on the BOP Statement, the state district attorney asked the United States Attorney to consent to a request by the state district attorney and Eccleston's state counsel for the BOP to designate the New Mexico Department of Corrections for the concurrent service of Eccleston's state and federal sentences and to give him retroactive credit on his federal sentence for time served in state custody since the imposition of his federal sentence. The United States Attorney's Office drafted letters to the court and the BOP consenting to the request and stating that Eccleston would terminate his state and federal habeas proceedings if the BOP granted the request. Eccleston's counsel submitted a response stating that Eccleston preferred to seek judicial relief before relying on the administrative procedures suggested by the state district attorney and the United States Attorney's Office.

In April 2007, the federal district court overseeing Eccleston's § 2241 petition dismissed as untimely Eccleston's request to be placed in BOP custody. The court then conducted a hearing on the concurrent sentence issue. Eccleston's counsel stated during the hearing that Eccleston was prepared to execute the proposed agreement with the United States Attorney's Office and the BOP if the agreement was without prejudice to his claim that he should serve his sentences in a federal facility. The court ultimately

denied the concurrent sentence claim without prejudice, concluding that Eccleston had not exhausted his available administrative remedies with the BOP.

Eccleston appealed to this court and we affirmed the district court's ruling. In doing so, we stated:

> We hold that Mr. Eccleston's § 2241 application fails to raise any viable claim. Mr. Eccleston asserts that he is entitled to serve his sentence in the custody of the BOP and that his federal and state sentences must be served concurrently. Yet nothing in his federal sentence suggests that it is to be served before or concurrently with any state sentence or that he is to serve his sentences in federal custody. Although Mr. Eccleston's state sentence provides for concurrent service of the federal and state sentences, the state court's decision cannot alter the federal-court sentence. As we stated in *Bloomgren v. Belaski*, 948 F.2d 688, 691 (10th Cir. 1991), the determination of whether a defendant's "federal sentence would run consecutively to his state sentence is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently-obtained state conviction."
>
> We also reject Mr. Eccleston's contention that 18 U.S.C. § 3584(a) requires concurrent service of his federal and state sentences. Section 3584(a) states:
>
> > If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. *Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively.* Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.
>
> (emphasis added). Even if we construe this provision as applying when one of the sentences was imposed by a state court, *but see Abdul–Malik v.*

> *Hawk–Sawyer*, 403 F.3d 72, 75 (2d Cir. 2005) (§ 3584(a) does not apply when state sentence imposed after imposition of federal sentence), the presumption of concurrent sentences affects only sentences "imposed at the same time," which was not the case with respect to Mr. Eccleston's federal and state sentences. Because Mr. Eccleston's federal sentence does not "affirmatively order" concurrent service of his federal and state sentences, it has not been executed unlawfully.

*United States v. Eccleston*, 521 F.3d 1249, 1253-54 (10th Cir. 2008).

At some point after this court's 2008 decision, Eccleston was transferred to the custody of the BOP and is currently housed in a federal correctional facility in New Jersey. According to Eccleston, he received partial, but not full, credit against his federal sentence for the time he served in state custody. ROA, Vol. 1 at 7.

Between 2009 and 2014, Eccleston continued to seek post-conviction relief in federal district court and this court. All of those efforts were unsuccessful.

Of those unsuccessful efforts, we note one in particular. On January 30, 2012, Eccleston filed with the district court a petition seeking relief pursuant to Federal Rule of Criminal Procedure 36. Eccleston argued in that petition that because his federal presentence report documented the provision in his state plea agreement that stated that his state sentence would run concurrently with his federal sentence, and because the federal district court adopted the factual findings in the presentence report when it sentenced him, Rule 36 required the federal district court to correct its sentence and order that he receive credit on his federal sentence for the time he served in state custody. The district court denied Eccleston's petition and Eccleston appealed to this court. This court affirmed the district court's denial. In doing so, this court stated, in pertinent part:

> We are not persuaded . . . that the district court's adoption of the PSR proves so much. The PSR did not say that Eccleston's federal and state sentences would run concurrently; it merely recited the fact that Eccleston's state plea agreement included a provision that his state sentence would run concurrently with his federal sentence. *See Eccleston*, 521 F.3d at 1251 ("The state plea agreement provided that Mr. Eccleston's state term of imprisonment would run concurrently with any federal term."). To say the district court adopted that recitation in the PSR doesn't say very much. Was the district court merely acknowledging the existence of a provision in Eccleston's state plea agreement or using that provision to inform its decision on how to run Eccleston's federal and state sentences? The answers to those questions are not readily apparent to us. In other words, we think the district court's adoption of the PSR sheds little light on whether the district court intended to run Eccleston's sentences concurrently or consecutively.
>
> Two other facts, however, do shed considerable light on the subject and persuade us that the district court intended Eccleston's federal sentence to run consecutively to his state sentence. First, the record contains a quotation from a letter the district court wrote to the Bureau of Prisons stating, "[i]t was my intent at sentencing that the federal sentence be served consecutively to [Eccleston's] state sentence and this remains my position." R. at 199. Second, when the district court sentenced Eccleston, the law in this circuit was that multiple terms of imprisonment imposed at different times were consecutive unless the district court ordered otherwise. *See United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995). Presumably aware of *Williams*, the district court knew that its silence meant Eccleston's sentences would run consecutively.
>
> Because the district court intended Eccleston's federal sentence to run consecutively to his state sentence, it understandably rejected Eccleston's request to amend the written judgment to make those sentences concurrent. In short, the district court denied Eccleston's motion to amend because there was no error or omission to amend. We don't see anything wrong with that.

*United States v. Eccleston*, 545 F. App'x 774, 776 (10th Cir. 2013).

II

On June 11, 2019, Eccleston initiated these proceedings by filing a pro se pleading entitled "Motion Seeking Equitable Relief." ROA, Vol. 1 at 3. The district court's clerk's office docketed the case as a § 2241 habeas proceeding. In a supporting memorandum, Eccleston asserted that he was seeking relief pursuant to Federal Rules of Civil Procedure 7(b) and 60(b)(6), "the inherent equitable power of this Court to remedy injustice," and "the equitable power conferred upon this Court under Section 11 of the Judiciary Act of 1789." *Id.* at 6. Eccleston alleged in the supporting memorandum that, although he received partial credit against his federal sentence for the time he served in state custody, he "still faces serving almost a decade of prison time in Federal jail even though he served every day of this part of his Federal Sentence in a New Mexico penitentiary." *Id.* at 7. Eccleston sought entry of an order "credit[ing] against his Federal Sentence all of the time [he] served in State Prison *nunc pro tunc* from the date (October 29, 1996) he was sentenced in Federal Court and explicitly committed to the custody of the BOP and the U.S. Marshal." *Id.* at 8.

On February 27, 2020, the district court issued a memorandum opinion and order denying Eccleston's motion. *Id.* at 76. The district court construed Eccleston's motion as "seek[ing] to vacate his guilty plea and/or correct his federal carjacking sentences so that they run concurrent with his state murder sentence." *Id.* at 78. The district court in turn concluded that it could only modify Eccleston's sentence or judgment under the specific circumstances outlined by Congress, that Eccleston "ha[d] already exhausted his

avenues for statutory relief by filing motions under every habeas statute . . . and 18 U.S.C. § 3582, and that, as a result, it "lack[ed] jurisdiction to 'resentence [Eccleston] based upon [any] desire to prevent a manifest injustice.'" *Id.* (quoting *United States v. Green*, 405 F.3d 1180, 1184 (10th Cir. 2005)). The district court also concluded that it was unable to afford Eccleston any relief under Federal Rule of Civil Procedure 60(b)(6). Ultimately, the district court dismissed the case without prejudice. Eccleston now appeals.

III

As a threshold matter, we construe the motion that Eccleston filed with the district court as a § 2241 application for federal habeas relief.[1] Although the district court construed the motion as seeking to vacate Eccleston's guilty plea or to correct his sentence, we believe the motion is more properly construed as an application under § 2241. The motion effectively seeks to have the BOP credit Eccleston with all of the time that he served on his state sentence prior to being taken into federal custody. As we have explained, "[t]he principal purpose of a § 2241 application is to challenge the execution, rather than the validity, of a federal prisoner's sentence." *Hale v. Fox*, 829 F.3d 1162, 1165 n.2 (10th Cir. 2016). This includes post-sentencing issues that "affect[]

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[1] The district court, in its order of dismissal, also purported to deny Eccleston a certificate of appealability. A federal prisoner such as Eccleston, however, is not required to obtain a certificate of appealability to seek review of a district court's denial of a habeas application under § 2241. *Eldridge v. Berkebile*, 791 F.3d 1239, 1241 (10th Cir. 2015).

the fact or duration of the prisoner's custody." *Id.* Even where, as here, a prisoner styles his sentence-execution challenge as something else, we construe it as a § 2241 application. *See, e.g., United States v. Miller*, 594 F.3d 1240, 1241–42 (10th Cir. 2010).

We in turn conclude that Eccleston is not entitled to federal habeas relief under § 2241. As this court concluded in its 2013 decision, the record of Eccleston's federal criminal proceedings makes clear that the district court that sentenced Eccleston in 1996 intended for his federal sentence to run consecutively to any state sentence he received. That determination, in our view, effectively resolves Eccleston's current claim for relief.

AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SEBASTIAN L. ECCLESTON,

Petitioner,

vs. No. 19-cv-538 RB-CG

UNITED STATES OF AMERICA,

Respondent.

**JUDGMENT OF DISMISSAL**

Pursuant to Federal Rule of Civil Procedure 58(a), and consistent with the Memorandum Opinion and Order filed contemporaneously herewith, the Court issues its separate judgment finally disposing of this case.

IT IS ORDERED, ADJUDGED, AND DECREED that this civil action is **dismissed without prejudice.**

ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SEBASTIAN L. ECCLESTON,

Petitioner,

vs. No. 19-cv-538 RB-CG

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

Before the Court is Sebastian Eccleston's *pro se* Motion to Redress Manifest Injustice. (Doc. 2.) In the same Motion, he also seeks leave to proceed *in forma pauperis*. (*Id.* at 1.) Eccleston has been challenging his federal carjacking sentence for the past 16 years. After failing to obtain relief on direct appeal and under each habeas statute (28 U.S.C. §§ 2241, 2254, and 2255), he now asks the Court to use its equitable powers to correct his federal sentence. Having carefully reviewed the Motion and Eccleston's prior cases, the Court finds no relief is available.

## I. Background

In 1996, Eccleston pled guilty to carjacking in violation of 18 U.S.C. § 2119(1), using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c), interference with commerce by threat or violence against the victim in violation of 18 U.S.C. § 1951(a), and carrying a sawed-off shotgun in relation to interference with commerce in violation of 18 U.S.C. 924(c). (CR Docs. 34; 88.)[1] The Court (Hon. Leroy Hansen) sentenced Eccleston to 417 months of imprisonment. (CR Doc. 88.) Judgment on the conviction and sentence was entered

[1] All "CR Doc." references are to the related criminal case, 95-cr-00014.

on November 12, 1996. (*Id.*) The Tenth Circuit Court of Appeals affirmed the conviction and sentence on December 17, 1997. (CR Doc. 92); *United States v. Eccleston*, 132 F.3d 43 (10th Cir. 1997).

On May 4, 2001, Eccleston filed his first motion to vacate or correct sentence pursuant to 28 U.S.C. § 2255. (CR Doc. 93); *Eccleston v. United States*, 01-CV-00500-LH-WD. Eccleston argued his federal sentences should run concurrently with his state sentence for murder. The Court dismissed his federal § 2255 motion because it was barred by the one-year statute of limitations. (CR Doc. 96.) In 2003, Eccleston attempted to raise the same concurrent-sentence argument in a 28 U.S.C. § 2254 habeas petition. *See Eccleston v. Master*, 03-cv-00406 BB-DJS. However, that proceeding was also dismissed as time-barred. (Docs. 19; 21 in 03-cv-00406 BB-DJS.)

Between 2009 and 2014, Eccleston filed at least five petitions in the Tenth Circuit seeking permission to file a second or successive § 2255 motion. *See In re Eccleston*, No. 09-2022 (10th Cir. Jan. 23, 2009); *In Re Eccleston*, No. 10-2231 (10th Cir. Oct. 26, 2010); *In re: Sebastian L. Eccleston*, No. 10-2256 (10th Cir. Nov. 30, 2010); *In re: Eccleston*, No. 11-2215 (10th Cir. Nov. 1, 2011); *In re Eccleston*, No. 14-2092 (10th Cir. June 5, 2014). Some motions were construed under 28 U.S.C. § 2241, *see, e.g.*, No. 09-2022, but regardless of the construction, each motion was denied. *Id.* Eccleston also filed various motions in this Court under § 2255 and 18 U.S.C. § 3582. (CR Docs. 212; 218; 252.) To date, the Court has refused to alter his sentence. (CR Doc. 255.)

Eccleston filed the instant Motion on June 11, 2019. (Doc. 1.) He acknowledges his prior § 2255 proceedings were unsuccessful and seeks equitable relief from his federal sentence. (Doc. 2 at 3–4, 13.) The Court construes the Motion under 28 U.S.C. § 2241, which is the catch-all habeas

statute for alleged wrongs that are incapable of redress under other provisions of the law.[2] *See Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999). The Court also grants Eccleston's request to proceed *in forma pauperis* and waives the filing fee, and the matter is ready for initial review.

## II. Discussion

Eccleston asks the Court to use its "equitable powers to undo . . . manifest injustice." (Doc. 2 at 8.) Specifically, he seeks to vacate his guilty plea and/or correct his federal carjacking sentences so that they run concurrent with his state murder sentence. Eccleston's request fails as a matter of law. District courts do "not have inherent power to resentence defendants" or correct criminal judgments. *United States v. Blackwell*, 81 F.3d 945, 949 (10th Cir. 1996). The Court can only "modify a Defendant's sentence [or judgment] . . . in specified instances where Congress has expressly granted the court jurisdiction to do so." *Id.* Eccleston has already exhausted his avenues for statutory relief by filing motions under every habeas statute (28 U.S.C. § 2241, 2254, and 2255) and 18 U.S.C. § 3582.[3] Accordingly, this Court lacks jurisdiction to "resentence [Eccleston] based upon [any] desire to prevent a manifest injustice." *United States v. Green*, 405 F.3d 1180, 1184 (10th Cir. 2005).

Eccleston also appears to seek relief from all prior rulings under Federal Rule of Civil

[2] The construction of Eccleston's petition is academic and does not change the outcome of this case. As discussed below, the Court cannot run his sentences concurrently under any theory or statute.

[3] Although Eccleston exhausted every statutory avenue to argue that his state and federal sentence should run concurrently, he recently had some success with a different argument. After Eccleston filed the instant proceeding, the Tenth Circuit granted permission to pursue successive § 2255 relief from his firearm conviction under *United States v. Davis*, 139 S. Ct. 2319 (2019). (*See* Docs. 299; 304 in 95-cr-0014.) Eccleston filed a counseled *Davis* motion on December 20, 2019, which is still pending. This ruling has no impact on that proceeding.

Procedure 60(b)(6). (Doc. 2 at 17.) Rule 60(b)(6) contains a catchall clause allowing Courts to correct prior civil judgments (including habeas rulings) for "any . . . reason that justifies relief." However, Rule 60(b)(6) relief is "extraordinary," "difficult to attain," and only "appropriate . . . when it offends justice to deny such relief." *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1289, 1293 (10th Cir. 2005). Setting aside the fact that this Court cannot vacate multiple rulings by the Tenth Circuit, there is clearly no injustice in this case. Eccleston is convinced that his state and federal sentences should have run concurrently based on his own subjective belief at the time of the plea. However, as the Tenth Circuit repeatedly explained: "the federal government did not promise, either in the draft of the negotiated plea agreement or in the final plea agreement, that . . . Eccleston's federal sentence would run concurrently with the state sentence, nor did it promise where he would serve his sentences." *Eccleston v. United States*, 08-cv-1079 LH-LAM (Doc. 11) (quoting *United States v. Eccleston*, 521 F.3d 1249, 1251 (10th Cir), *cert. denied*, 129 S. Ct. 430 (2008)). Although his "state sentence provides for concurrent service of the federal and state sentences, the state court's decision cannot alter the federal-court sentence, which runs consecutively to, not concurrently with, the state sentence." *Id.* Rule 60(b)(6) relief is therefore not available in this case.

For these reasons, the Court will dismiss the Motion and this civil case without prejudice. To the extent necessary, the Court will also deny a certificate of appealability under Habeas Corpus Rule 11, as this Order is not reasonably debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (certificate of appealability can only issue in a habeas proceeding where petitioner "demonstrates that reasonable jurists would find the district court's assessment . . . debatable or wrong").

**IT IS ORDERED** that Eccleston's request to proceed *in forma pauperis* is **GRANTED**;

and any filing fee is **WAIVED.**

**IT IS FURTHER ORDERED** that Eccleston's Motion to Redress Manifest Injustice (Doc. 1) is **DISMISSED WITHOUT PREJUDICE**; a certificate of appealability is denied; and the Court will enter a separate judgment resolving the civil case.

ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

Updated, July 30, 2014

# Clemency Project 2014 Training Memo: The Interaction of Federal and State Sentences

By

JaneAnne Murray[1]

## Introduction

Some clemency applicants may have served or face state prison time that has a bearing on the length and computation of their federal sentence.[2] Indeed, because the bulk of clemency applicants will be low-level drug offenders, this issue is likely to exist in a significant number of cases, because these offenders often get arrested by state authorities first, and are only prosecuted in federal court to secure their cooperation.

The state/federal sentencing interaction can arise in a number of ways. For example, the federal judge may have adjusted downwards at sentencing in order to reflect time the defendant had already served in a state facility. The federal or state judge may have ordered a sentence to run concurrent with one in the other jurisdiction. The Bureau of Prisons (the "BOP") may have designated the state facility for partial service of the federal sentence in order to effectuate a judge's decision on concurrency. Or one of the above did *not* happen because a judge or BOP official misapplied or misunderstood the relevant rules, or the rules were clarified or changed after the inmate was sentenced.

This memo proceeds in four parts. Part I explains how to determine if your case presents a potential state/federal interaction issue. Part II outlines the basic rules and precedents relating to the imposition and computation of federal sentences when the inmate has served or faces prison time in a state facility. Part III applies these rules to the clemency eligibility requirement that the inmate "have served at least 10 years of their sentence." Part IV applies these rules to the clemency eligibility requirement that the inmate "by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today."

This is a complex area that often frustrates those who encounter it. It certainly produces many disparities and much arbitrary unfairness, even when the rules are applied properly. It can, however, be mastered with a careful step-by-step analysis, and methodical cross-checking of your client's sentencing and custodial history with the issues raised in this memo.

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[1] Principal, Murray Law LLC, Minneapolis (jm@mlawllc.com). Please feel free to email the author with questions and suggestions.

[2] This memo focuses on state custodial time, which is the most common type of non-federal time. The issues addressed in this memo would also impact an inmate who had served time in tribal or foreign custody.

## Part I – Does Your Case Present this Issue?

Below are the key identifiers of time spent or faced in state custody that have a bearing on the computation of the federal sentence. If one of these identifiers exists, dig deeper to see if it implicates the issues addressed in this memo.

- Writ of Habeas Corpus: If the inmate was first arrested by state authorities and is then transferred into federal custody to face federal charges, you will typically see a reference to a writ in their federal docket sheet.

| | | |
|---|---|---|
| 07/21/2011 | 2 | MOTION to seal Indictment and related documents by USA as to (RFK) (Entered: 09/09/2011) |
| 07/21/2011 | 3 | ORDER granting 2 Motion to Seal Indictment and related documents as to (1). Signed by Magistrate Judge Thomas G. Wilson on 7/21/2011. (RFK) (Entered: 09/09/2011) |
| 09/09/2011 | 5 | MOTION to unseal Indictment by USA as to . (RFK) (Entered: 09/09/2011) |
| 09/09/2011 | 6 | ORDER granting 5 Motion to Unseal Indictment as to (1). Signed by Magistrate Judge Anthony E. Porcelli on 9/9/2011. (RFK) (Entered: 09/09/2011) |
| 09/09/2011 | 7 | INFORMATION TO ESTABLISH PRIOR CONVICTION as to (Palermo, Thomas) (Entered: 09/09/2011) |
| 09/29/2011 | 8 | DETAINER Against Sentenced State Prisoner Based on Federal Arrest Warrant as to (CD) (Entered: 09/30/2011) |
| 10/04/2011 | 9 | MOTION for Writ of Habeas Corpus ad prosequendum by USA as to (Palermo, Thomas) Motions referred to Magistrate Judge Anthony E. Porcelli. (Entered: 10/04/2011) |
| 10/05/2011 | 10 | WRIT of habeas corpus ad prosequendum issued as to for 10/27/11. Signed by Judge Magistrate Judge Anthony E. Porcelli: Arraignment set for |

The writ should also be referenced in their presentence report.

- References to Concurrent/Consecutive Sentencing: If the inmate was serving or facing a state sentence, it is most likely that the state sentence is referenced (perhaps in addressing a request for concurrent/consecutive sentencing) in the sentencing submissions, in the transcript of the sentencing hearing, and in the judgment.

- Reference to U.S.S.G. § 5G1.3: Those same documents may contain a reference to U.S.S.G. § 5G1.3, the sentencing guideline that deals with concurrent and consecutive sentencing, which is typically invoked when the inmate is facing dual sentences in state and federal jurisdictions.

- Proximate Period In State Custody: The inmate may have had a period of custody in a state system just prior to his encounter with the federal authorities – which can be determined from the criminal history section of his presentence report or from his rap sheet (his NCIC report).

- Related Period in State Custody: The inmate may have been convicted and served time at the state level for an offense that was related to the federal one (i.e. client did time for a street level drug sale, and his federal case is a larger conspiracy, spanning the same time and conduct). This can be determined by reviewing the descriptions of any state convictions in the presentence report, just prior to the federal case.

## Part II - A Primer on the Interaction of State and Federal Sentences

The issue of crediting prior custodial time to a federal sentence is a complex and evolving one. In fact, as the BOP notes on its website, crediting time spent in state custody is "probably the single most confusing and least understood sentencing issue in the Federal system."[3] Below, I outline the key rules and precedents in this area, including, where relevant, how these rules have changed such that many clemency applicants might, through their service of time in state custody or their time owed to a state jurisdiction, have satisfied either the "10-years-served" criterion or the "lower-if-sentenced-today" criterion.

### A. Commencement of the Sentence – Primary Custodian

At the heart of the complexities arising from the interaction of state and federal custody is the issue of setting the date of the commencement of the federal sentence. Indeed, the first step in sentence computation, which is the province of the BOP,[4] is to determine when the federal sentence commenced.

A federal sentence commences when the defendant is received by the Attorney General of the United States for service of his federal sentence. *See* 18 U.S.C. § 3585(a) ("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."). Note that the date of the commencement of the sentence is not necessarily the same as the date when the inmate starts accruing time towards service of the federal sentence. As addressed in the next section, once the date of the commencement is determined, the BOP will then address the issue of crediting prior custody, including time spent in pretrial detention.

A federal sentence cannot commence, nor time run on the federal sentence, when a federal defendant is produced for prosecution in federal court by a writ of *habeas corpus ad prosequendum* from state custody. *See United States v. Fermin,* 252 F.3d 102, 108 n. 10 (2d Cir.2001) ("[A] defendant held at a federal detention facility is not 'in custody' for the purposes of § 3585(a) when he is produced through a writ of *habeas corpus ad prosequendum*"). In that situation, the state authorities are the primary custodian and retain primary jurisdiction over the prisoner; federal custody does not commence until state authorities relinquish the prisoner, either because he has been bailed or released,

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[3] Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction*, at 1 (July 7, 2011), available at http://www.bop.gov/resources/pdfs/ifss.pdf; *see also* Henry J. Sadowski, *Federal Sentence Computation Applied to The Interaction of Federal And State Sentences*, The Champion, April 2014 (containing a series of helpful graphs to illustrate the computation process).

[4] *United States v. Wilson*, 503 U.S. 329, 336 (1992).

his state charges dismissed, or his state sentence completed. When a prisoner is borrowed from the primary custodian on a writ, principles of comity require the return of the prisoner to the primary custodian when the writ has been satisfied (typically, in this context, this means the federal prosecution has been completed).

Thus, when a federal defendant is first arrested, prosecuted, and held by state authorities, his/her primary custodian is the state authority. When transferred by writ to federal court, he/she does not accrue time on any potential federal offense until the state authority has released its hold. The imposition of a federal sentence does not alter this analysis. It merely triggers the defendant's return to physical state custody. Once the state hold has been satisfied (either by dismissal of the state case or service of the state sentence), the defendant is returned to federal custody to commence the federal sentence.

### B. Awarding Prior Custody Credit

Once the date of commencement of the federal sentence has been determined, the BOP awards credit for prior custody (state or federal) that has not been credited to another sentence. *See* 18 U.S.C. § 3585. Where federal jurisdiction is primary – that is, the inmate was first arrested by federal authorities and detained by federal court order – this is typically a straightforward calculation. An inmate under primary federal custody receives credit for time spent in pretrial detention, and continues to receive credit towards any federal sentence even if "borrowed" by state authorities to answer state charges. Where, however, state jurisdiction is primary – that is, the state is the primary custodian and the inmate was merely "borrowed" from state custody on a writ to answer the federal charges – the inmate does not earn any credit towards the federal sentence until the state authorities relinquish the prisoner on satisfaction of the state obligation.

The manner in which the BOP can retroactively credit state custodial time is by designating the state correctional institution for service of the federal sentence. *See* 18 U.S.C. § 3621 (vesting in the BOP the power to designate the place of confinement, and setting forth factors to be considered in exercising this authority). This designation causes the sentence to begin. It can be made *nunc pro tunc* only as far back as the date of the federal sentencing, since the earliest date a federal sentence can commence is the date it is imposed. *See United States v. Labeille-Soto*, 163 F.3d 93, 98 (2d Cir.1998) (a federal sentence cannot begin to run earlier than on the date on which it is imposed).

Notably, as the Supreme Court noted in *Setser v. United States*, the BOP "sometimes makes this designation while the prisoner is in state custody and sometimes makes a *nunc pro tunc* designation once the prisoner enters federal custody." *See id.*, 132 S.Ct. 1463, 1468 n.1 (2012).

federal sentence, this punishment can be imposed consecutively to the state sentence, or it can be effectively aggregated with the state sentence by imposing it concurrently with the state sentence.

> *Example*: John is arrested by state authorities for burglary in a store and is sentenced to five years. He is transferred on a writ to federal court to answer federal drug trafficking charges. He pleads guilty in federal court and faces a guideline sentence of 10 years. The federal judge believes an incremental sentence of 10 years is appropriate for the federal offense. Taking into account the factors set forth in § 5G1.3, cmt. n. 3(A), the federal judge can either impose a sentence of 15 years, run concurrently with the state sentence, with a departure to reflect time already served on the state sentence, or a consecutive sentence of 10 years.

As a practical matter, in both alternatives, the inmate's time in state custody is taken into account in fashioning the federal sentence.

(3) Pre-*Setser* Federal Court Silent on Concurrency

In some cases where an inmate faces dual federal and state prosecutions, the federal court imposes its sentence before the state court imposes sentence, and does so without specifying whether the federal sentence is to be served consecutively or concurrently with the yet-to-be-imposed state sentence. When the state court later imposes sentence, it may explicitly order its sentence to be served concurrently with the federal sentence already imposed. In this situation, the BOP applies the factors set forth in 18 U.S.C. § 3621(b) relating to the determination of place of confinement, solicits the view of the federal judge on concurrency, and exercises its discretion to treat the sentences as concurrent or consecutive.[6]

> *Example*: Fred is arrested by state authorities on drug charges. He pleads guilty but prior to sentencing in state court, is transferred to federal court on a writ to answer federal drug trafficking charges. He pleads guilty in federal court and is sentenced to 15 years. The federal court is silent on the issue of whether the federal sentence should be consecutive or concurrent to his as-yet-unimposed state sentence. Fred is returned to state custody where he is sentenced

[6] *See* BOP Program Statement 5160.05 (January 16, 2003) (BOP will also consider "an inmate's request for pre-sentence credit toward a federal sentence for time spent in service of a state sentence as a request for a *nunc pro tunc* designation," and requires the BOP to ask the federal sentencing court if it has any objections to such designation); *see also* Government Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison (Feb. 2012) at 28.(noting that "of the 538 cases BOP reviewed in fiscal year 2011, 99 requests to serve sentences concurrently were granted, for a total of about 118,700 days of sentence credit, 386 were not granted, and 53 were still under review as of the end of fiscal year 2011").

to 10 years. The state court orders that the state sentence be served concurrently with Fred's federal sentence. Upon completion of the state sentence approximately 8 years later, Fred is transported to federal custody to complete his federal sentence. Fred petitions the BOP for *nunc pro tunc* designation of the state facility as the place of confinement for Fred's federal sentence. The BOP solicits the view of Fred's federal sentencing judge, who does not respond. In the absence of a clear statement of intent in favor of concurrency from the federal judge, and applying the factors set forth in 18 U.S.C. § 3621(b) the BOP denies the inmate's petition, thus *de facto* rendering the state and federal sentences consecutive.[7]

4. *Booker* and § 5G1.3(a) Consecutive Sentencing

§ 5G1.3 includes a provision for mandatory consecutive sentencing:

> 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.

*See* § 5G1.3(a). The requirements in § 5G1.3(a) are not statutory mandates, however, and since the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), the directives themselves are just advisory. While the federal sentencing judge must now consider these guideline provisions in fashioning the appropriate federal sentence, he/she is not required to follow them. *See United States v. Rainer*, 314 Fed.Appx. 846, 847 (6th Cir. 2009) ("[n]otwithstanding the seemingly mandatory language of U.S.S.G. § 5G1.3(a), we have recognized that the district court has discretion to impose consecutive or concurrent sentences pursuant to 18 U.S.C. § 3584 and U.S.S.G. § 5G1.3, upon consideration of the factors listed in 18 U.S.C. § 3553(a) and the applicable guidelines and policy statements in effect at the time of sentencing").

### D. Impact of *Setser v. United States*

In *Setser v. United States*, 132 S.Ct. 1463 (2013), the Supreme Court, emphasizing principles of comity and "our tradition for judicial sentencing," resolved a circuit court split and clarified that a federal judge may order a federal sentence to be concurrent to a yet-to-be-imposed state sentence. *Id.* at 1471. The Sentencing Commission has partially incorporated this ruling into a new

[7] *Cf. Galloway v. Warden of F.C.I. Ft. Dix*, 385 Fed.Appx. 59 (3d Cir. 2010) (BOP's denial of *nunc pro tunc* designation request from inmate where federal court was silent on issue of concurrency at sentencing and did not respond to BOP's solicitation of its view on inmate's application, was not arbitrary and capricious).

Guideline version of U.S.S.G. § 5G1.3, to take effect November 1, 2014, requiring that a federal sentence be imposed concurrently with an anticipated state sentence where the state offense is relevant conduct to the federal offense. *See* U.S.S.G. § 5G1.3(c) (effective November 2014). Where the anticipated state sentence does not arise from relevant conduct, *Setser* grants the federal court discretion to impose its sentence concurrently with the as-yet-unimposed state sentence. *Id.* 132 S.Ct. at 1471.

In a number of cases pre-*Setser*, courts did not order concurrency because prevailing precedent did not empower them to do so. *See, e.g., United States v. Zorn,* 487 Fed.Appx. 289 (6th Cir. 2012) (remanding after *Setser* for district court to use its discretion to order its sentence consecutive or concurrent to a later-imposed state sentence because the court had stated it "lacked authority to make Zorn's federal sentence run 'concurrently with a state sentence that has not been imposed'"). In addition, there are cases pre-*Setser* where the court did not order its sentence concurrent with an anticipated state sentence, but under the new § 5G1.3 amendment in November would not just be authorized to order concurrency, it would be *required* under the Sentencing Guidelines to so order, because the state sentence was for relevant conduct to the federal offense.

As noted above, in the absence of a concurrency order or recommendation by the federal judge or a determination by the BOP applying the factors set forth in 18 U.S.C. § 3621(b) that concurrency is appropriate, the BOP created *de facto* consecutive sentences pre-*Setser* where state custody was primary and the state sentence was imposed after the federal one. In *Setser*, however, the Court indicated it would be disrespectful of the state's sovereignty for the BOP to decide *after* the state court has expressly decided to run its sentence concurrently and in the absence of contrary intent on the part of the federal judge, *not* to credit the state time served against the federal sentence. *Id.* 132 S.Ct. at 1471.

Thus, there will be clemency applicants whose time in state custody was not credited to the federal sentence, but would be credited today under *Setser* and the 2014 amended version of § 5G1.3. Moreover, their entitlement to this credit would mean they face a lower sentence if sentenced today.

### E. Good Time Credits On Adjusted Sentences

Courts have interpreted the "full sentence" after a § 5G1.3 adjustment to consist of the actual sentence imposed, plus the adjustment. Thus, where a federal court adjusts below a mandatory minimum sentence of 10 years, and imposes, for example, a 7-year sentence in order to achieve concurrency with a state sentence, this sentence does not violate the mandatory minimum statute, because courts have held that the full sentence for the purposes of the mandatory minimum

included the adjustment to achieve the fully concurrent sentence (in our example, the additional 3 years reflected in the adjustment).[8]

Despite this well-established interpretation of § 5G1.3, the BOP will only award good time credit on the post-adjustment portion of the sentence, not the full sentence. Thus, if a 10-year mandatory minimum sentence is adjusted by three years to account for three years spent in state custody serving a concurrent state sentence, BOP will award good time credit only on seven years of the sentence.[9] To date the courts have denied relief.[10] The silver lining from the so far unsuccessful BOP litigation is a useful government concession: The government in both *Lopez* and *Schleining* asserted that the sentencing court has the discretion to grant a variance based on the good time credit not awarded.[11] And it makes powerful sense to grant this variance because, without the credit, the court creates unwarranted sentencing disparity based on the irrational factor of the order of custody. Without the variance for good time credits, identically situated defendants will serve different time in custody for the same federal punishment.

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[8] *See, e.g.*, *United States v. Ross*, 219 F.3d 592, 594-95 (7th Cir.2000); *United States v. Rivers*, 329 F.3d 119, 122 (2d Cir.2003); *United States v. Kiefer*, 20 F.3d 874 (8th Cir.1994).

[9] The purported reason – good time credit can only be awarded for time served in BOP custody – is undercut by the BOP's policy of routinely awarding good time for presentence time spent in non-BOP custody, and for the time spent serving the concurrent portion of the federal sentence in the state institution.

[10] *See, e.g.*, *Lopez v. Terrell*, 654 F.3d 176 (2d Cir. 2011); *Schleining v. Thomas*, 642 F.3d 1242 (9th Cir. 2011).

[11] Brief of Respondent, *Lopez*, No.10-2079, 2011 WL 680803, *8 ("A defendant may request a variance based on good behavior while serving a state sentence for related criminal conduct, a mechanism consistent with the statutory goal of making good conduct time retrospective rather than prospective."); Brief of Respondent, *Schleining*, No. 10-35792, 2011 WL 991513, *30 ("A defendant whose federal sentencing has been long delayed may seek a variance based on the lost opportunity for good conduct time credit, which the sentencing court has the discretion to grant.").

## Part III – State/Federal Interaction and "10-Years-Served" Requirement

In this section, I lay out the key scenarios under which a federal inmate whose time in state custody should count towards the "10-years-served" requirement of clemency eligibility.

### *A. Documents Required*

- Docket Sheet
- BOP sentence computation data
- Inmate's NCIC report (rap sheet)
- Presentence Report
- Transcript of federal sentencing hearing
- Judgment and SOR in federal case
- State Judgment
- Transcript in state sentencing proceeding

### *B. Counting State Time Towards "10-Years Served" Requirement*

An inmate's service of time in state custody can be included in the analysis of the "10-years-served" component of clemency eligibility in several ways. Note that more than one of the scenarios outlined below could apply to an individual inmate.

#### *1. State Custody Was Primary and Federal Judge Ordered Federal Sentence Concurrent with State Sentence*

Where the inmate was in primary state custody at the time of his federal sentence – that is, he was before the federal court on writ of *habeas corpus ad prosequendum* – he does not accrue time on the federal case until the state relinquishes its custody or the federal court imposes a concurrent sentence. As noted in our primer, the earliest the court can order concurrency to be effective (and the earliest the BOP can designate the state facility for service of the federal sentence) is the date of the federal sentencing. (Concurrency for time served prior to the federal sentence is discussed infra in the context of 5G1.3 adjustments.)

Accordingly, if the inmate was in primary state custody when sentenced in the federal case (a fact that could be indicated by reference to a writ on the docket sheet, or statements made during the sentencing proceeding or in the sentencing judgment), proceed as follows:

- Determine from the sentencing transcript and/or judgment if the federal judge ordered the federal sentence concurrent to the state sentence.

- If so, determine from the BOP sentence computation data if the BOP designated the state facility for service of the federal sentence *nunc pro tunc* to the date of federal sentence.[12]

- All time in state custody served after the imposition of a concurrent federal sentence counts towards the federal sentence, and, thus, towards the 10-years-served requirement. [See below for a discussion of whether the state time *prior* to the imposition of the federal sentence should be credited to the federal sentence under § 5G1.3.]

### 2. *State Custody Was Primary and Federal Judge Would Likely Have Ordered Federal Sentence Concurrent with State Sentence Under Setser*

As noted in our primer, in some cases involving an inmate in primary state custody at the time of the federal sentence, the state sentence had not yet been imposed, and, in imposing the federal sentence, the federal judge was silent on the issue of concurrency or deferred the issue to the state judge. Since the Supreme Court's holding in *Setser*, however, it is now clear that the federal judge has the power to order the federal sentence concurrent to a not-yet-imposed state sentence.

In such cases, proceed as follows:

- Determine from the sentencing transcript and/or judgment if the federal judge believed he/she did not have the authority to order the federal sentence concurrent to the anticipated state sentence.

- If the federal judge was silent on the issue of concurrency, analyze the sentencing transcript for indicia that, with the benefit of *Setser*, the federal judge would have ordered the federal sentence concurrent to the anticipated state sentence.[13]

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[12] Note that this process will not necessarily be a straightforward one, as the sentencing data provided by the Bureau of Prisons will be aggregated – providing a single figure for time served credited to the inmate's federal sentence, including pre-trial detention, time served in the inmate's designated BOP facility(ies); concurrent time served in a state facility, and *nunc pro tunc* time served in a state facility credited towards their federal sentence. Thus, clemency lawyers must (a) first calculate how much state time should be (or should have been) credited to the inmate's federal sentence, and then (b) compare this calculation to the BOP's computation. If the latter is lower than the former, there is likely a failure properly to credit the inmate's state custodial time. Refer to the memo on records. In addition, CP2014 will provide legal experts to assist you in this analysis, and clemency lawyer volunteers are encouraged to reach out to them. Note also that in a case where an inmate has a state/federal interaction, if his SENTRY PSCD (sentencing information record from the BOP) indicates that his sentence began on the *same* date it was imposed, this likely reflects a *nunc pro tunc* designation by the BOP.

[13] For example, the federal judge sentenced the inmate to the lowest possible sentence available, or granted the inmate a substantial downward departure from the applicable guideline range.

- If the above analysis yields evidence that the federal judge would have ordered concurrency under *Setser*, the clemency application should contain an argument that all time in state custody served after the imposition of the federal sentence should count towards the federal sentence, and, thus, towards the 10-years-served requirement). [See below for a discussion of whether the state time prior to the imposition of the federal sentence should be credited to the federal sentence under § 5G1.3.]

### *3. State Custody Was Primary and State Judge Ordered State Sentence Concurrent with Federal Sentence*

In some cases where state custody was primary, the federal judge was silent on concurrency but the state judge ordered the state sentence concurrent with the federal sentence. In these cases, and in response to a request from the inmate for *nunc pro tunc* designation, the BOP will solicit the view of the federal judge on concurrency and if there is no response, will typically default to treating the state and federal sentences as consecutive. As noted in our primer, in *Setser*, however, the Court indicated it would be disrespectful of the state's sovereignty for the BOP to decide *after* the state court has expressly decided to run its sentence concurrently and in the absence of contrary intent on the part of the federal judge, *not* to credit the state time served against the federal sentence. *Id.* 132 S.Ct. at 1471.

Accordingly, in cases where the state court expressly ordered that its sentence run concurrent to the federal one, and the federal court was silent on the issue of concurrency, the clemency application should contain the argument that under *Setser*, the state time is properly credited towards the federal sentence, and, thus, towards the 10-years-served requirement.

### *4. State Custody Was Primary and Federal Judge Would Likely Not Have Followed Guideline Mandate of Consecutive Sentencing Under Booker*

As noted in our primer, U.S.S.G. § 5G1.3(a) mandates consecutive sentencing in cases where the defendant committed the offense while serving, or just before commencing, another sentence. This mandate is now advisory. *See Rainer*, 314 Fed.Appx. at 847. Thus, if the defendant was sentenced prior to *Booker* and was subject to consecutive sentencing under § 5G1.3(a), analyze the sentencing transcript and/or judgment for evidence that with the benefit of *Booker*, the sentencing judge would have ordered the federal sentence concurrent or partially concurrent to the state sentence. The clemency application should then contain an argument that time in state custody served after the imposition of the federal sentence should count towards the federal sentence, and, thus, towards the 10-years-served requirement.

### 5. *Inmate Served State Time that Should be Credited to the Federal Sentence Under 18 U.S.C. § 3585(b)*

What if the inmate's state time prior to his appearance in federal court on the federal charges was never credited to any state sentence (i.e. the state charges were dismissed)? 18 U.S.C. § 3585(b) mandates that an inmate "shall" receive credit against his federal sentence for time spent in "official detention" that is not credited to any other sentence, and is either "as a result of the offense for which the sentence was imposed" or "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.*

Analyze the inmate's NCIC report (rap sheet), presentence report and BOP sentencing computation data to determine if the inmate's state time was credited to another sentence, or was credited by the BOP towards service of the federal sentence. If the state time is unaccounted for, the clemency application should contain an argument that this time is properly credited towards the federal sentence, and, thus, towards the 10-years-served requirement.[14] It might even be faster and more efficient to request the BOP to credit this time via the administrative remedy process, which would take about two months.

### 6. *Inmate Served State Time that Should be Credited to the Federal Sentence Under U.S.S.G. §§ 5G1.3 and 5K2.23*

As discussed in our primer, the Sentencing Guidelines require the federal judge to impose concurrent sentences in certain circumstances, and to adjust or depart downwards from the intended federal sentence in order to achieve full concurrency. This adjustment and departure power includes the power to sentence below a mandatory minimum, as long as the aggregate sentence (counting state time) is equal to the mandatory minimum sentence required. The adjustment or departure is in fact part of the federal sentence – essentially, a method of rendering the state sentence retroactively concurrent with the federal time.[15] Thus, the clemency application should argue that the state time represented by the adjustment or departure should count towards the "10-years-served" requirement.

To analyze these provisions in cases where the inmate faced dual state and federal prosecutions:

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[14] While this memorandum focuses on the interaction between state and federal sentences, it should be noted that time spent in foreign custody awaiting extradition on the federal charges is also properly credited towards the federal sentence under 18 U.S.C. § 3585(b).

[15] *See, e.g., United States v. Ikner*, 175 Fed.Appx. 83, 84 (7th Cir. 2006) ("district court may adjust a defendant's federal sentence to account for time served on related charges so long as the defendant's total period of incarceration is equal to or greater than the statutory minimum").

- Determine if the federal court granted an adjustment under § 5G1.3(b) or a departure under §§ 5G1.3(c) or 5K2.23 in the federal sentence, by reviewing the sentencing transcript and/or the judgment. If so, the time represented by that adjustment/departure should count towards the 10-years-served requirement.

- Determine also if the adjustment/departure was adequate. For example, under the amended version of §§ 5G1.3(b), effective November 2014, there is no longer a requirement that the relevant conduct that was the subject of the state offense operated to increase the offense level of the federal sentence.

- If there was no § 5G1.3 adjustment/departure, determine if there should have been one. In other words, was the state offense relevant conduct to the federal one?

- If a mandatory minimum was involved, determine whether the federal judge understood his/her power to adjust/depart below the mandatory minimum to achieve full concurrency under § 5G1.3.

- Finally, consider whether there is a fall-back, catch-all position: Is there an alternative argument – that without making a formal § 5G1.3 adjustment or departure, the court took the state sentence into account in fashioning the "incremental" punishment, and as such, the state time should therefore count towards the "10-years-served" requirement.

## Part IV – State/Federal Interaction and "Lower Sentence" Requirement

In this section, I lay out the key scenarios under which a federal inmate who has served or faces time in state custody would "by operation of law, likely . . . receive[.] a substantially lower sentence if convicted of the same offense today."[16]

### *A. Documents Required*

- Federal docket sheet
- BOP sentence computation data
- Inmate's NCIC report (rap sheet)
- Presentence Report
- Transcript of federal sentencing hearing
- Judgment and SOR in federal case
- State Judgment

[16] D.O.J. Press Release, April 23, 2014, available at http://www.justice.gov/opa/pr/2014/April/14-dag-419.html.

- Transcript in state sentencing proceeding

### *B. State Time and "Lower-if-Sentenced-Today" Requirement*

#### *1. Concurrency With Anticipated State Sentence Under Setser*

If an inmate anticipated a state sentence at the time of his federal sentence, and the federal court was either silent on the issue of concurrency or expressly indicated its understanding that concurrent sentencing was not available, such inmate may face a lower aggregate sentence today as a result of the Supreme Court's ruling in *Setser v. United States*, 132 S.Ct. 1463 (2013), and the revisions to U.S.S.G. § 5G1.3, to take effect November 1, 2014. Under *Setser*, the federal judge is now permitted to order a federal sentence concurrent to a yet-to-be-imposed state sentence. Indeed, under the revised version of § 5G1.3, effective November 1, 2014, the judge is *required* to order a federal sentence concurrent with an anticipated state sentence where the state offense is relevant conduct to the federal offense.

Accordingly, if the inmate was sentenced in a federal case prior to a sentencing in a state case, proceed as follows:

- Determine from the sentencing transcript and/or judgment the federal judge's ruling, if any, on whether the federal sentence would run concurrent or consecutive to the anticipated state sentence.

- Determine if the state offense was relevant conduct to the federal offense. If it was, and the federal judge did not order the federal sentence to run concurrent to the state sentence, the clemency application should contain an argument that under the revised version of § 5G1.3 (effective November 1, 2014), the federal judge was required to run the federal sentence concurrent to the state sentence.

- If the state offense was not relevant conduct and the federal judge believed his/her hands tied on the issue of ordering the federal sentence concurrent to the state one, the clemency application should contain an argument that under *Setser*, the court would likely have ordered the federal sentence concurrent to the anticipated state sentence.

- If the state offense was not relevant conduct and the federal judge was silent on the issue of ordering the federal sentence concurrent to the state one, scour the record for any indication that had the federal judge addressed the issue, he/she would have ordered the federal sentence concurrent to the anticipated state

one.[17] To the extent possible, the clemency application should contain an argument that under *Setser*, the court would likely have ordered the federal sentence concurrent to the anticipated state sentence.

### 2. *Addressing "De Facto" Consecutive Sentences Where State Court Ordered Concurrency*

As noted in our primer, in some cases involving state and federal sentences, the federal court was silent and/or deferred the issue of concurrency, while the state court ordered the state sentence concurrent to the federal one. In these instances, and where state custody was primary, the BOP has often created *de facto* consecutive sentences – refusing to grant *nunc pro tunc* designations when the inmate is transferred to federal custody upon the completion of the state sentence. This position is contrary to *Setser*, in which the Court indicated it would be disrespectful of the state's sovereignty for the BOP to decide *after* the state court has expressly decided to run its sentence concurrently and in the absence of contrary intent on the part of the federal judge, *not* to credit the state time served against the federal sentence. *Id.* 132 S.Ct. at 1471.

Accordingly, in cases where (a) the inmate spent time in state custody prior to his transfer to federal custody; (b) the state court ordered its sentence concurrent with the federal one and the federal court was silent on the issue or deferred the issue to the state court; and (c) the BOP did not grant the inmate a *nunc pro tunc* designation, the clemency application should contain an argument that, under *Setser*, the state time should be credited towards the federal sentence. As such, the inmate's aggregate sentence would be lower if sentenced today.

### 3. *Changes in § 5G1.3 Adjustments/Departures*

An inmate who at the time of his federal sentence was serving or had served a state sentence for an offense that was relevant conduct to the federal offence may face a shorter sentence today.

U.S.S.G. § 5G1.3(b), the guideline governing mandatory adjustments to achieve concurrency with state offenses that are relevant conduct to the federal one, has undergone several revisions over the years. Most notably, for 12 years, it required that an adjustment was only authorized if the state offense increased the inmate's base offense level. This requirement is not included in the iteration that takes effect November 1, 2014. In addition, several circuits have held over the years that in implementing U.S.S.G. § 5G1.3(b), the sentencing judge may impose a sentence below a mandatory minimum sentence.[18] Also, in 2003, the Sentencing Commission added § 5K2.23, authorizing downward departures where

[17] For example, the federal judge sentenced the inmate to the lowest possible sentence available, or granted the inmate a substantial downward departure from the applicable guideline range.
[18] *See* cases cited in n.7 *supra*.

a defendant had completed serving a state sentence that would otherwise have entitled him to an adjustment under§ 5G1.3.

Accordingly, if at the time of the federal sentence, the inmate was serving or had served a state sentence that was relevant conduct to the federal sentence, proceed as follows:

- Determine the version of § 5G1.3(b) in effect at the time of the inmate's sentencing and compare it to the version that will be effective November 1, 2014. If the latter produces, or could have produced, a lower sentence, the clemency application should contain an argument that the federal judge would have imposed a lower sentence under the newly-amended § 5G1.3(b).

- If the inmate was subject to a mandatory minimum, and the federal judge did not adjust below the mandatory minimum to achieve concurrency under § 5G1.3(b), the clemency application should contain an argument that under current precedent, the federal judge is empowered to adjust below the mandatory minimum to achieve concurrency, and that if imposing the sentence today, would impose a lower sentence on this basis.

- If the federal sentence was imposed prior to 2003, and, at the time, the inmate had completed the state sentence for the relevant conduct, the clemency application should contain an argument that under §5K2.23, the inmate would likely receive a shorter sentence today, because the sentencing judge is now empowered to take the discharged sentence into account.

### 4. *Federal Judge Would Likely Not Have Followed Guideline Mandate of Consecutive Sentencing Under Booker*

As noted in our primer, U.S.S.G. § 5G1.3(a) mandates consecutive sentencing where the defendant committed the federal offense while serving, or just before commencing, another sentence. This mandate is now advisory. *See Rainer*, 314 Fed.Appx. at 847. Thus, if the defendant was sentenced prior to *Booker* and was subject to consecutive sentencing under § 5G1.3(a), analyze the sentencing transcript and/or judgment for evidence that with the benefit of *Booker*, the sentencing judge would have ordered the federal sentence concurrent or partially concurrent to the state sentence. The clemency application should then contain an argument that the inmate would likely receive a shorter aggregate sentence today, because the sentencing judge is now empowered to sentence the federal sentence concurrent to the state sentence.

### 5. *Good Time Credits*

As noted in our primer section, when a court adjusts or departs downward under § 5G1.3 to achieve concurrency with a state sentence, the BOP will only award good time credit on the adjusted sentence, not on the full sentence. The government only recently conceded in the course of litigating *Lopez* and *Schleining* that the sentencing court has the discretion to grant a downward variance based on the good time credit not awarded.

Accordingly, where an inmate has received an adjustment or departure under § 5G1.3 or a departure under § 5K2.23, and that adjustment or departure did not reflect good time credit (which it most likely did not), the clemency petition should contain an argument that if sentenced today, the federal judge would have granted an additional variance to account for lost good time credit. Before making this argument, make sure the inmate's conduct in state custody would have earned good time credits.

### 6. *Mistakes Made at Federal Sentencing*

In reviewing the materials related to the federal sentencing, it is possible that the parties or judge failed to address an issue relating to sentencing credit or concurrency that could have been made under then prevailing law, or that the BOP failed to give credit for the inmate's service of state time that should have been credited towards the federal sentence. While no intervening change in law occurred, these omissions or mistakes should nonetheless be outlined in the clemency application as grounds for concluding that the inmate's sentence would be lower if sentenced today. In particular, if the error at issue was made by defense counsel, the argument may be made that defense counsel was ineffective under the standards recently-enunciated in *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012), which held that a defendant had a right to effective assistance of counsel during plea bargaining.