

## **Memo re: Concurrent vs. Consecutive Time (1)**

Fairly regularly, I hear from inmates asking all kinds of questions about their circumstances. One of the most frequently raised concerns comes from federal defendants who: (1) at the time of their federal sentencing were serving an undischarged state sentence; and (2) received a federal sentence concurrent with their state sentence. The inquiries typically suggest the inmate's sense that the BOP is swindling him out of his concurrent sentence. As is so often the case, the inmates tend to be half right: they are being swindled out of time but the fault lies with the sentencing process and not with the BOP's computations.

The relevant inquiry is hypertechnical and commences with the BOP's statutory authority. By way of 18 USC 3585, Congress has told the BOP that a federal sentence "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." What this effectively means is that Day 1 of a federal sentence does not begin until a custodial defendant is available for transport to his federal destination or a self-surrendering defendant shows up at a federal prison. So when a federal defendant shows up for his federal sentencing as a state prisoner with remaining time on his state sentence, simply persuading the federal judge to run the federal sentence concurrent with the remainder of the state sentence is absolutely ineffective unless further steps are taken.

The further necessary step involves invocation of 18 USC 3621(b) which provides that the BOP may designate the place of a federal defendant's imprisonment as "any available penal or correctional facility . . . , whether maintained by the Federal Government or otherwise." What this means for our concurrent sentence purposes is that the BOP may designate the federal defendant's place of state incarceration as the place of his federal imprisonment. It is this form of designation that is fundamental to ensuring that a federal sentence concurrent to an existing state sentence is given effect. This is because once the BOP designates the defendant's place of state incarceration as his place of federal imprisonment, the defendant "arrives" for purposes of Section 3585 at "the official detention facility at which the [federal] sentence is to be served."

Reinforcing the convoluted point: simply persuading a federal judge to run the federal sentence concurrent with the remainder of an existing state sentence is entirely ineffective unless the judgment also includes language whereby the federal judge "recommends to the United States Bureau of Prisons that it designate the defendant's place of state confinement as the official detention facility at which the federal sentence is to be served."

A further and related convoluted issue involves credit for time previously served in connection with the state sentence in place at the time of federal sentencing.

The relevant issue is perhaps best illustrated by way of example.

Let's say client is caught possessing a gun while on state probation arising from a felony conviction. Let's say that his state probation gets revoked, largely on the basis of his possession of the gun, and that he receives a three-year sentence upon revocation. While serving that sentence, he gets federally indicted on a felon-in-possession charge. While we deal with his federal gun charge, he remains a state prisoner serving the revocation sentence. Let's say that by the time we get our case to federal sentencing, client has served 18 months of his 36-month state revocation sentence (meaning that he has 18 months of state time left to serve). Let's also say that we get client a 36-month federal sentence. Let's also say that we convince the federal judge to run the federal sentence concurrent with the state revocation sentence (and that, as above, we perfect that aspect of the sentence by getting the recommendation that the BOP designate the state prison as the client's federal prison).

On the facts provided, the client's 36-month federal sentence will run concurrent only with the remaining 18 months of the client's state sentence. The client will not receive any credit for the 18 months of state time that he already served. This is so because of the confluence of Section 3585(a) and (b). As above, Section 3585(a) states basically that a federal sentence does not commence until the defendant physically arrives at (or is en route to) his place of federal imprisonment. Meanwhile, Section 3585(b) states that a defendant is entitled to credit for time previously served only when the time previously served "has not been credited against another sentence." So applied to our hypothetical, client's first 18 months in state custody: (1) occurred for purposes of Section 3585(a) prior to his physical arrival into federal custody; and (2) is, for purposes of Section 3585(b), being credited towards "another sentence" (that being the revocation sentence).

There does, however, exist a mechanism by which the client in our hypothetical can receive credit for the time previously served. Section 5G1.3(b) of the U.S. Sentencing Guidelines provides federal judges faced with circumstances like those in our hypo the ability not to "credit" the client for time previously served but, rather, to reduce (the cited guideline uses the phrase "adjust") the federal sentence by time already served. So if, in our hypo, our federal judge truly wished for the client's 36-month federal sentence to be entirely concurrent with the 36-month sentence previously imposed upon revocation of the client's state probation, the federal sentence would be imposed as follows: (1) a 36-month sentence would be announced; (2) the court would expressly apply Section 5G1.3(b) to adjust the 36-month federal sentence to reflect the 18 months already served that cannot otherwise be credited towards the federal sentence; (3) impose on that basis an 18-month term of federal imprisonment; (4) order that the 18-month term of federal imprisonment run concurrent with the undischarged portion of the pre-existing state sentence upon revocation; and (5) recommend to the U.S. Bureau of Prisons that the defendant's place of

current state confinement be designated as the place where his federal sentence will be served.

This stuff is complicated and convoluted but it's important that we be on top of it. Federal judges, AUSAs, and probation officers struggle with this stuff and don't have our motivation for knowing it. If you have a case in which the client, at the time of his federal sentencing, is serving an undischarged term of state imprisonment, please review this and please feel free to contact me if some further explanation might be helpful.

=====  
DANIEL W. STILLER  
Executive Director/Federal Defender  
Federal Defender Services of Wisconsin, Inc.  
517 East Wisconsin Avenue, Suite 182  
Milwaukee, Wisconsin 53202  
Telephone: (414)221-9900  
FAX: (414)221-9901  
E-mail: [daniel\\_stiller@fd.org](mailto:daniel_stiller@fd.org)

## **Memo re: Concurrent vs. Consecutive Time (2)**

Lawyers:

You'll recall an e-mail I sent in late April that attempted to address the many complications attendant to perfecting a federal sentence to run concurrently with a first-in-time undischarged state sentence. I received a lot of feedback in connection with that e-mail and I greatly appreciate those of you who've called to brainstorm your cases involving the relevant issue. The essential message communicated by that April e-mail was this: (1) an order that a federal sentence run concurrently with a first-in-time undischarged state sentence is essentially worthless without a judicial recommendation that the federal sentence be served at the place of state confinement; and (2) the only way to get federal credit for earlier time in state custody is to invoke Section 5G1.3 as a means of reducing the federal sentence by the time previously served.

All of the guidance provided in the April e-mail and briefly summarized above pertained to a specific scenario: federal representation of a client who, as of the date of federal sentencing, is serving a first-in-time state sentence.

Since the April e-mail, parallel scenarios, with their own complexities, have come to my attention. Those scenarios are addressed here.

The first parallel scenario involves the federal representation of someone in state custody where the federal sentence is imposed while the state matter is pending. In this scenario, the federal judge does not control the concurrent/consecutive determination because, generally, a court can't impose a sentence concurrent with or consecutive to another sentence not yet in existence. But the tricky part is this: unless we handle our business in a specific way before the federal court, we can eliminate the possibility of the subsequent state sentence running concurrent with our first-in-time federal sentence and do so even if the state judge orders the state sentence to run concurrent with our first-in-time federal sentence. Ouch. You'll recall from the April e-mail that, by federal statute, a federal sentence does not generally commence until the federal defendant either arrives at his place of federal imprisonment or becomes available for transport to the place of federal imprisonment. So when we show up for federal sentencing on behalf of our client in state custody in connection with a pending state case, the client's federal sentence will not start to run on the date it is imposed. Instead, client remains in state custody. When he appears in state court and the second-in-time state sentence is imposed, he remains in state custody (meaning he is neither at his place of federal imprisonment or available for transport to that place). So even if the state judge orders the second-in-time state sentence to run concurrent with our first-in-time federal sentence, the client will wind up serving the entirety of the state sentence before becoming available for transport to his federal destination (that being the date on which, by statute, the BOP will commence the

client's federal sentence).

To illustrate the scenario, let's say our client faces state charges for reckless endangerment, a federal charge of felon-in-possession of a firearm, and is a state detainee who arrives to federal court on a writ. Let's say that the federal sentencing hearing occurs today, a day on which the state reckless endangerment charges have yet to be resolved. We get our client a 24-month sentence in his federal gun case. Our federal judge cannot make this 24-month sentence either concurrent with or consecutive to any sentence that may subsequently be imposed in state court. Tomorrow, our client appears in state court and, there, the judge imposes a 24-month sentence, ordering it to run concurrent with our first-in-time federal sentence. Because the client is in state custody, his state sentence is running as of the date of its imposition, with jail credit for his time in custody prior to the imposition of the state sentence. But the first day of his federal sentence has yet to occur because, as above, he has not yet arrived at his place of federal imprisonment or become available for transport to that place. So by default, the Bureau of Prisons' application of the federal statute will result in the federal sentence being consecutive to the state sentence even though: (1) the federal judge did not (and could not) order the federal sentence to be consecutive; and (2) the state judge ordered the state sentence to run concurrently with our federal sentence.

Avoiding the described absurdity can be accomplished in only one way: asking the federal judge, at the time our first-in-time federal sentence is imposed upon our client in state custody, to recommend that the Bureau of Prisons designate the client's place of state confinement as the place where his federal sentence will be served. Doing this has no effect on the federal sentence: it will begin on the date of its imposition and be served in full. What it does accomplish, however, is preserving the state court's ability to fashion the second-in-time state sentence as it sees fit and to ensure that the state court's wishes are carried out. If our client is serving his first-in-time federal sentence at his place of state confinement, the second-in-time state sentence will be concurrent if either the state judge orders it so or is silent on the issue. On the other hand, the state judge retains the authority and ability to order that the second-in-time state sentence be served consecutively to the first-in-time federal sentence.

Please note that much of what's been shared thus far (and in the referenced e-mail from April) turns upon a client being in "state custody" during the period of our federal representation. The notion of "state custody" presents its own nuances that can be botched to a client's meaningful detriment. This is because the notion of state versus federal custody has different meanings depending upon whether the inquiry is being conducted by our magistrate judges and marshal service or being contemplated by the Bureau of Prisons.

When someone in state custody (whether it be detention during the pendency of a state

case or imprisonment while serving a state sentence) arrives by way of writ for a first appearance in federal court, our magistrate judges speak in terms of state versus federal custody. At this stage and in this posture, the issue is where the defendant will lay his head and who will fund the defendant's lodging. If the defendant in federal court via a writ remains in federal custody, the marshal service will put him in the local jail of its choice and fund his stay there. On the other hand, if the defendant in federal court via a writ returns to state custody, the client will sleep at the state institution where he'd been up until the time of the writ and the state/county will continue funding the defendant's confinement.

The pertinent nuance is this: even when the state detainee/prisoner appearing in federal court on a writ remains in federal custody, as that concept is utilized by our magistrate judges and marshal service, the Bureau of Prisons, when ultimately called upon to review the matter, views things differently. From a BOP perspective, the issue is not one of where a defendant is laying his head or who is paying for confinement. Instead, the BOP focuses on "primary" versus "secondary" custody. The key point is this: **if your client's presence in federal court is pursuant to a writ, he remains from BOP's perspective in the "primary custody" of the state throughout the federal case and notwithstanding that the marshal service may be housing him in the local county jail.** This bold-faced proposition matters in connection with my referenced April e-mail and the scenario set forth above because a person in the "primary custody" of the state is viewed by the BOP as a state prisoner for purposes of all of the crediting issues discussed above and in the April e-mail.

I apologize again for the denseness of this stuff but again stress the importance of our being on top of these things that constitute traps for the unwary, capable of undoing our otherwise good negotiating and sentencing work. And, as always, please feel free to reach out to me for assistance in working through and around these issues. I can't promise the availability of clear answers but access to a second-set of informed eyes is never a bad thing.

=====  
DANIEL W. STILLER  
Executive Director/Federal Defender  
Federal Defender Services of Wisconsin, Inc.  
517 East Wisconsin Avenue, Suite 182  
Milwaukee, Wisconsin 53202  
Telephone: (414)221-9900  
FAX: (414)221-9901  
E-mail: daniel\_stiller@fd.org