

CONSECUTIVE VS. CONCURRENT SENTENCING, JOINT HOLDS AND PRETRIAL CREDIT

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Discussion Topics

- Rules
- Important Cases
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18 U.S.C. § 3584

(a) 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 already subject to an undischarged term of imprisonment, the terms may run concurrently *or* consecutively...

Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

18 U.S.C. § 3585(a)

Commencement of Sentence: 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.

18 U.S.C. § 3585(b)

Credit for Prior Custody: A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences –

(1) as a result of the offense for which the sentence as imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed

that has not been credited against another sentence.

18 U.S.C. § 3621(b)

The Bureau of Prisons 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*."

"Otherwise" includes state correctional facilities.

The federal judgment must include 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.

For other recommended language, see BOP Policy Statement 5160.05 at pg. 5.

Wis. Stat. § 973.15(3), (5)

- (3) Courts may impose sentences to be served in whole or in part concurrently with a sentence being served or to be served in a federal institution or an institution of another state.

- (5) A convicted offender who is made available to another jurisdiction under ch. 976 or in any other lawful manner shall be credited with service of his or her Wisconsin sentence or commitment under the terms of s. 973.155 for the duration of custody in the other jurisdiction.

Wis. Stat. § 973.155: Sentence Credit

- (1)(a) Convicted offender shall be given credit toward sentence for days spent in custody in connection with the *course of conduct* for which sentence was imposed.
- (2) After imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted.

U.S.S.G. § 5G1.3

Allows a district court to “adjust” the sentence to effectively credit the defendant for time already served on another sentence if that other sentence resulted from another offense that is relevant conduct to the instant offense of conviction.

Illustration: Application of U.S.S.G. § 5G1.3(b)

- Federal offense: 40 grams of cocaine
- Also held accountable for sale of additional 15 grams (U.S.S.G. § 1B1.3)
- Convicted and sentenced in state court for the 15 grams
- Received a nine-month sentence, has served six
- Guideline range: 12-18 months
- Court determines that a sentence of 13 months provides appropriate total punishment
- End result: Seven months, imposed to run concurrently with remaining three (already served six)

U.S.S.G. § 5K2.23

Policy Statement: Provides that a sentence below the applicable guideline range may be appropriate if the defendant has completed serving the term of imprisonment and § 5G1.3(b) would have provided an adjustment had the completed term been undischarged at the time of sentencing for the instant offense.

SUPERVISION

18 U.S.C. § 3624(e): The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.

United States v. Wilson

503 U.S. 329

- Federal district court may not award credit at sentencing
- Computation of credit must occur after defendant begins sentence
- Attorney General, through BOP, computes sentence credit
- Defendant cannot receive double credit for pretrial detention time
- Credit may be received not only for detention in connection with the offense of conviction, but “any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed.”

Setser v. United States

Argued Nov. 30, 2011

Question Presented: Whether the district court erred by directing that Setser's federal sentence be served consecutively to a state sentence that had not yet been imposed.

Opinion Below: Fifth Circuit affirmed district court's sentence of 151 months of imprisonment, ordered to run consecutive to whatever sentence Setser would receive in a 2006 state case, and concurrent to whatever sentence he'd receive in a 2007 state case.

Romandine v. United States

206 F.3d 731 (7th Cir. 2000)

- Federal sentencing judge does not have the ability to require a sentence to be served consecutively or concurrently to a state sentence that will be imposed in the future.
- The final sentence of § 3584(a) makes the federal sentence presumptively consecutive in all unprovided-for cases, and the effective decision then is made by the Attorney General (or the state judge) rather than the federal judge.
- Attorney General has discretion to designate the state facility as the place to serve the federal sentence , thereby making the sentence concurrent.

State v. Carter,

2010 WI 77

- Carter pled guilty to first degree recklessly endangering safety (Wis. Stat. § 941.30(1))
- Prior to WI proceedings, Carter was held in presentence custody in IL on an unrelated armed robbery charge but also detained in part as a result of WI warrant
- Carter sought credit for IL presentence time, claiming the custody was in connection with the course of conduct for which sentence was imposed in WI as well as being in connection with the robbery charge in IL
- Ultimately, Carter was credited for time held in IL prior to IL sentencing (§ 973.155(1))

Primary/Secondary Jurisdiction

- **Primary jurisdiction:** sovereign that made the arrest, until relinquished (*ex. bail release, dismissal of state charges, parole release, expiration of state sentence*)
- **BOP:** if an individual's presence in federal court is pursuant to a writ, he remains from BOP's perspective in the "primary jurisdiction" of the state throughout the federal case.

Key Differences in Sentence Credit

Wisconsin: Court determines credit at time of sentencing

Federal: BOP determines credit after sentencing

Wisconsin: If court does not indicate the sentence is consecutive, it is concurrent

(Ex Parte McDonald, 178 Wis. 167 (1922))

Federal: Generally, if the court does not indicate the sentence is concurrent, BOP will presume it is consecutive but has the discretion to run concurrent

Federal: Even if Court orders concurrent sentences, the federal sentence will not run while a defendant serves state time unless the BOP designates the state facility as the place to serve the federal sentence

Illustration: State and Federal Charges Pending

- Jan. 1: State arrest
- Feb. 1: Federal charges added, remains in primary state jurisdiction
- GOALS:
 - Avoid elevating guidelines
 - Obtain concurrent sentences
 - Maximize sentence credit

Illustration: A federal defendant shows up for his federal sentencing as a state prisoner with remaining time on his state sentence.

- Gun possession while on state probation
- Three-year revocation sentence
- Indicted as felon-in-possession
- Remains state prisoner during federal proceedings
- At the time of sentencing, served 18 months of state sentence

Illustration: A defendant shows up for his federal sentencing while his state matter is still pending and state has primary jurisdiction.

- State charge: reckless endangerment
- Federal charge: felon-in-possession
- State detainee, arrives in federal court on a writ
- 24-month sentence on federal gun case
- Later, 24-month sentence on state case, ordered to run concurrent with first-in-time federal sentence
- State sentence running as of the date of imposition, with jail credit
- Unless BOP designates state facility as official detention facility, federal sentence has yet to start

Illustration: A defendant arrives at federal sentencing hearing as a state prisoner with ongoing state revocation proceedings.

- First-in-time 57-month federal sentence, no mention of concurrent vs. consecutive time because no other sentence existed
- State custody, ALJ revoked extended supervision and imposed a 6-year sentence
- Serving revocation time in state prison, federal sentence had yet to commence
- What went wrong? Defendant appeared for federal sentencing as a state prisoner (appeared via writ)
- Ask federal court to recommend that the BOP designate state facility as place where federal sentence will be served

References

- Bureau of Prisons
 - General: www.bop.gov
 - Sentence Computation Information:
http://www.bop.gov/inmate_programs/sentence_computations.jsp
 - Program Statement, Designation of State Institution for Service of Federal Sentence
 - http://www.bop.gov/policy/progstat/5160_005.pdf
 - Designation and Sentence Computation Center (DSCC):
(972) 352-4425

References, cont'd.

- Federal Defender

- General Information: www.fd.org
- Federal Defender Services of Wisconsin, Inc.: www.fdswi.org
 - Milwaukee: (414) 221-9900
 - Green Bay: (920) 430-9900
 - Madison: (608) 260-9900
- Sentence Computation Publications:
 - <http://fdset.org/cms/images/BOP%20Presentation%20Materials%20USSC%20Conference.pdf>
 - Henry J. Sadowski, BOP, Interaction of Federal and State Sentences when the Federal Defendant is Under State Primary Jurisdiction
http://www.fd.org/pdf_lib/federal%20and%20state%20sentences.pdf

- Other

- Dodge Correctional Institution Records: (920) 324-5577