

# **FEDERAL SENTENCE COMPUTATION & INTERACTION OF FEDERAL AND NON-FEDERAL SENTENCES**

This information details how the Federal Bureau of Prisons (BOP) computes federal sentences generally. The information then focuses on the impact on the federal sentence computation when the defendant is under the primary jurisdiction of non-federal authorities. This is probably the single most confusing and least understood federal sentencing issue. Basic sentencing principles will be discussed and then applied to federal and non-federal sentencing interactions. The policy of the BOP concerning where the federal sentence is served will also be addressed.

## **BASIC FEDERAL SENTENCE COMPUTATION**

The BOP has long been responsible for federal sentence computation decisions. The statute governing sentence computations is 18 U.S.C. § 3585, which provides:

**§ 3585. Calculation of a term of imprisonment.**

**(a) Commencement of sentence.** - A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

**(b) Credit for prior custody.** - A defendant shall be given credit towards the sentence of a term of imprisonment for any time spent in official detention prior to the date the sentence commences -

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

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

that has not been credited against another sentence.

Section 3585 replaced 18 U.S.C. § 3568 (repealed), which specified the Attorney General made sentencing computation decisions.<sup>1</sup> Section 3585 did not identify who was responsible for sentence computation decisions. This omission caused a Circuit split to develop. This split was resolved by United States v. Wilson, 503 U.S. 329 (1992), in which the Court held that Congress did not intend to disturb the long standing practice that federal sentence computation was the responsibility of the Attorney General and delegated to the BOP under 28 C.F.R. § 0.96. The Court found "... it likely that the former reference to the Attorney General was simply lost in the shuffle." 503 U.S. at 336.

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<sup>1</sup> Section 3585 was part of the Sentencing Reform Act, which went into effect on November 1, 1987. Pub. L 98-473, Oct. 12, 1984, 98 Stat. 2001.

The BOP has two Federal Sentence computation manuals in its public website.<sup>2</sup> This article will address the basic principles the BOP follow to guide the majority of sentence computation issues. In any federal sentence computation, the BOP must make two separate decisions: when the federal sentence commences (§3585(a)) and to what extent the defendant is to receive credit for time spent in official detention prior to commencement of sentence (§3585(b)). When there are multiple federal sentences, the BOP must make a third decision: how to aggregate the sentences. Understanding these three steps is crucial in assessing the impact of a state sentence.

### **STEP ONE: COMMENCEMENT OF FEDERAL SENTENCE**

The date the federal sentence commences is the necessary first step. On the date the sentence commences, the defendant begins receiving “credit” for time in service of the federal sentence.<sup>3</sup> As addressed in the next section (Step Two), prior custody credit only applies to detention prior to the commencement of federal sentence. The underlying principle of § 3585(a) is that a federal sentence commences when the defendant is received by the United States for the purpose of serving a federal sentence.<sup>4</sup> For a defendant in exclusive federal custody, the federal sentence usually begins on date of imposition or on the date the defendant voluntarily surrenders to a designated institution.<sup>5</sup> The earliest date a federal sentence can commence is the date it is imposed; a federal sentence cannot be ordered to commence on a date prior to its imposition.<sup>6</sup>

### **STEP TWO: COMPUTE PRIOR CUSTODY CREDIT**

Under § 3585(b), prior custody credit can be awarded for time in official detention prior to the date the sentence began.<sup>7</sup> The most common credit provision is § 3585(b)(1): Credit is awarded for time in official detention in relation to the offense for which the sentence was imposed. Section 3585(b)(2) permits credit for unrelated time in detention for an arrest after the commission of the federal offense. Section 3585(b) prohibits prior custody credit when the time in custody was awarded towards another sentence.<sup>8</sup> This double credit prohibition does not

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<sup>2</sup> Under the policy/forms tab of the BOP website ([www.bop.gov](http://www.bop.gov)), there is a sentencing computation manual for 18 U.S.C. § 3585 sentences (Program Statement 5880.28) and a manual for 18 U.S.C. § 3568(repealed) sentences (Program Statement 5880.30). Each manual is over 200 pages.

<sup>3</sup> Service of a federal sentence may be interrupted by civil contempt, escape or court order of bail release.

<sup>4</sup> Pinaud v. James, 851 F.2d 27 (2d Cir. 1988); Salley v. United States, 786 F.2d 546 (2d Cir. 1986); Chambers v. Holland, 920 F.Supp. at 621.

<sup>5</sup> A voluntary surrender order is often issued by the sentencing court as an outgrowth of an existing order of release and is referenced in § 3585(a) and 18 U.S.C. § 3146(a).

<sup>6</sup> United States v. Gonzalez, 192 F.3d 350 (2d Cir 1999); United States v. Labeille-Soto, 163 F.3d 93 (2d Cir. 1998). But see United States ex rel. Del Genio v. United States Bureau of Prisons, 644 F.2d 585, 589 (7th Cir. 1980), cert. denied, 449 U.S. 1084 (1981) (implying in dicta sentencing judge could order prior commencement).

<sup>7</sup> Official detention is considered by the BOP as time in custody pursuant to a detention order. Time a defendant is subject to restrictive conditions (e.g., house arrest or halfway house placement) by a release order issued by the court is not considered time in official detention under § 3585(b). Reno v. Koray, 515 U.S. 50 (1995).

<sup>8</sup> United States v. Wilson, 503 U.S. 329 (1992). Under repealed § 3568, a federal prisoner was not entitled to prior custody time credit towards a federal sentence for the period spent in state custody especially when the state provided credit for the same period towards a state sentence. Del Guzzi v. United States, 980 F.2d 1269 (9th Cir.

apply to time in service of the federal sentence under § 3585(a). If there were a double credit prohibition, concurrent sentences could not be imposed. Location of presentence detention (federal, state or foreign) is not relevant in deciding whether prior custody credit will be awarded.<sup>9</sup>

### **STEP THREE: AGGREGATE MULTIPLE SENTENCES THEN APPLY STEPS ONE AND TWO**

Under 18 U.S.C. § 3584(a), multiple terms of imprisonment imposed at the same time run concurrently unless ordered to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless ordered to run concurrently. Multiple federal terms of imprisonment are aggregated (when possible) and treated as one sentence for administrative purposes under 18 U.S.C. § 3584(c).<sup>10</sup> Consecutive sentences are easy to compute: add up the terms, compute the commencement date and then award prior custody credit. Concurrent sentences are complicated: a commencement date and full term date is computed for each term.<sup>11</sup> A concurrent sentence commences on date of its imposition not on the date of commencement of a prior sentence, or some earlier date.<sup>12</sup> The aggregate term is the difference between the earliest commencement date and latest full term date.<sup>13</sup> Prior custody credit is then computed.<sup>14</sup>

### **ADD STATE CUSTODY – IMPACT OF PRIMARY CUSTODIAL JURISDICTION**

Primary jurisdiction controls the analysis in state and federal sentencing interaction. The sovereign which first arrested the offender has primary jurisdiction over the offender; unless that sovereign relinquishes it to another sovereign by, for example, bail release, dismissal of the state charges, parole release, or expiration of state sentence.<sup>15</sup> When a prisoner is borrowed from the

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1992); United States v. Blankenship, 733 F.2d 433 (6th Cir. 1984); United States v. Grimes, 641 F.2d 96 (3d Cir. 1981); Siegel v. United States, 436 F.2d 92, 95 (2d Cir. 1970).

<sup>9</sup> The BOP relies heavily on the Presentence Report when reaching decisions on sentence computation. If a defendant has served time in detention in foreign or state custody, it is important to try to resolve, at sentencing, the dates of such detention and whether credit was awarded by the other custodian. It is difficult for the BOP to obtain and verify this information, especially when the credit question may arise years later.

<sup>10</sup> Although section 3584(c) permits aggregation of multiple terms of imprisonment, the BOP does not aggregate state sentences with federal sentences. The BOP has no authority to compute a state sentence.

<sup>11</sup> For example, a concurrent federal term of sixty months imposed on July 7, 2013 would, for purposes of this aggregation analysis, have a commencement date of July 7, 2013 and a full term date of July 6, 2018.

<sup>12</sup> Coloma v. Holder, 445 F.3d 1282 (11th Cir. 2006); Shelvy v. Whitfield, 718 F.2d 441, 444 (D.C.Cir. 1983); United States v. Flores, 616 F.2d 840, 841 (5th Cir. 1980).

<sup>13</sup> Assuming the sentence in footnote 8 is ordered concurrent with a 60 month term imposed on July 7, 2012. The aggregate would be a 72 month sentence commencing on July 7, 2012. Prior custody credit would then be awarded.

<sup>14</sup> The actual release date for the defendant would be the full term date (after adjusted by prior custody credit) minus good conduct time (GCT) under 18 U.S.C § 3624(b). The BOP method of GCT computation was approved in Barber v. Thomas, 560 U.S. \_\_\_; 130 S.Ct. 2499 (2010). Award of GCT is considered by the BOP for time spent serving the sentence under § 3585(a) and for presentence official detention if awarded by the BOP under § 3585(b).

<sup>15</sup> United States v. Cole, 416 F.3d 894 (8th Cir. 2005); Rios v. Wiley, 201 F.3d at 274; Taylor v. Reno, 164 F.3d 440 (9th Cir. 1998); United States v. Warren, 610 F.2d 680 (9th Cir. 1980); Chambers v. Holland, 920 F.Supp. at 622; United States v. Smith, 812 F.Supp. 368 (E.D.N.Y. 1993).

primary custodian via a writ of habeas corpus ad prosequendum, principles of comity require the return of the prisoner to the primary custodian when the prosecution has been completed.<sup>16</sup> The federal government is the primary custodian when the defendant is first arrested by federal authorities and the defendant is detained by federal court order. Primary custody may not be unilaterally taken by the secondary custodian. The primary and secondary custodian may also shift primary custody by mutual agreement.<sup>17</sup>

When a defendant is facing state and federal prosecution, the basic computation method is to determine which authority (state or federal) is the primary custodian and then follow the statute at 18 U.S.C. § 3585. When a federal sentence is imposed on a defendant in primary state custody, the federal sentence may commence when the BOP designates the state facility for service of the federal sentence.<sup>18</sup> Designation of the location for service of a federal sentence is explicitly vested by 18 U.S.C. § 3621 in the BOP.<sup>19</sup> A federal sentence does not begin to run when a federal defendant is produced for prosecution by a federal writ of habeas corpus ad prosequendum from state custody.<sup>20</sup> The state authorities retain primary jurisdiction over the prisoner; federal custody does not commence until the state authorities relinquish the prisoner on satisfaction of the state obligation.<sup>21</sup>

Time in custody of the United States Marshal or the BOP pursuant to a federal writ of habeas corpus ad prosequendum from state custody is not federal custody in connection with the

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<sup>16</sup> Delima v. United States, 41 F.Supp. 2d 359 (E.D.N.Y. 1999), aff'd, 213 F.3d 625 (2d Cir. 2000).

<sup>17</sup> United States v. McCrary, 220 F.3d 868 (8th Cir. 2000); Poland v. Stewart, 117 F.3d 1094, 1098 (9th Cir. 1997), cert. denied, 118 S.Ct. 1533 (1998). The sovereign with primary jurisdiction may elect under the doctrine of comity to relinquish it to another sovereign, if that sovereign accepts. This discretionary election is an executive function. Poland v. Stewart, supra. The defendant charged with crimes violating the laws of separate sovereigns has no standing to challenge which jurisdiction has primary jurisdiction. Bowman v. Wilson, 672 F.2d 1145, 1150 (3d Cir. 1982).

<sup>18</sup> Taylor v. Sawyer, 284 F.3d 1143 (9th Cir. 2001), cert. denied, 123 S.Ct. 889 (2003); Romandine v. United States, 206 F.3d 731 (7th Cir. 2000); Rogers v. United States, 180 F.3d 349 (1st Cir. 1999), cert. denied, 528 U.S. 1126 (2000); McCarthy v. Doe, 146 F.3d 118 (2d Cir. 1998); Barden v. Keohane, 921 F.2d 476 (3d Cir. 1990); United States v. Pungitore, 910 F.2d 1084, 1118-1119 (3d Cir. 1990), cert. denied, 111 S.Ct. 2009-2011 (1991).

<sup>19</sup> Setser v. United States, 132 S.Ct. 1463 (2012) held § 3621 did not confer the authority on the BOP to make concurrent vs. consecutive sentencing decisions. The designation authority nonetheless is the administrative method the BOP uses to cause a federal concurrent sentence to commence for a defendant in primary state custody. The triggers to commence a federal sentence include arrival at, or awaiting transportation to, a designated institution for service of a federal sentence. 18 U.S.C. § 3585(a). Setser recognized that the BOP has a role when sentence computation issues arise and the BOP may be involved in computation of such sentencing orders. 132 S.Ct. at 1473.

<sup>20</sup> United States v. Cole, 416 F.3d 894 (8th Cir. 2005); United States v. Evans, 159 F.3d 908 (4th Cir. 1998); Thomas v. Whalen, 962 F.2d 358 (4th Cir. 1992); Thomas v. Brewer, 923 F.2d 1361 (9th Cir. 1991); Barden v. Keohane, 921 F.2d 476 (3d Cir. 1990); Salley v. United States, supra; Hernandez v. United States Attorney General, 689 F.2d 915 (10th Cir. 1982); Roche v. Sizer, 675 F.2d 507 (2d Cir. 1982); Chambers v. Holland, 920 F.Supp. at 622.

<sup>21</sup> Rios v. Wiley, 201 F.3d 257, 274 (3d Cir. 2000); Jake v. Herschberger, 173 F.3d 1059 (7th Cir. 1999); Del Guzzi v. United States, 980 F.2d 1269 (9th Cir. 1992); Thomas v. Whalen, 962 F.2d 358 (4th Cir. 1992); Hernandez v. United States Attorney General, supra; Roche v. Sizer, supra; Crawford v. Jackson, 589 F.2d 693 (D.C.Cir. 1978), cert. denied, 441 U.S. 934 (1979); Cobb v. United States, 583 F.2d 695 (4th Cir. 1978); Chambers v. Holland, supra; Shumate v. United States, 893 F.Supp. 137 (N.D.N.Y. 1995); Miller v. United States, 826 F.Supp. 636 (N.D.N.Y. 1993). See also Bowman v. United States, 672 F.2d 1145, 1153-154 (3d Cir. 1982).

federal offense.<sup>22</sup> The Supreme Court noted that under § 3585(b), "Congress made clear that a defendant could not receive double credit for his detention time." United States v. Wilson, 502 U.S. at 336. Under § 3585(b), prior custody credit cannot be granted if the prisoner has received credit towards another sentence.<sup>23</sup> There are some limited exceptions,<sup>24</sup> but the general rule for state primary defendants is no prior custody credit is afforded towards a federal sentence if credit has been given for the same period of custody towards a state sentence.

If a defendant is under primary federal custody, then the insertion of a secondary state charge would have little impact on the federal sentence computation. If the state "borrows" the defendant by writ or Interstate Agreement of Detainers, the defendant is still in federal primary jurisdiction. The federal sentence computation would not change. The BOP does not apply the double credit prohibition for prior custody credit if the State affords credit for time in primary federal custody. Thus, a defendant in primary federal custody would receive prior custody credit for all time in official detention in relation to the federal offense.

### **CONCURRENT VERSUS CONSECUTIVE SERVICE OF FEDERAL SENTENCE WITH STATE SENTENCE**

As in the commencement decision, the order in which sentences are served is governed by the concept of primary jurisdiction. If state and federal sentences are imposed on an offender, the general rule is that the sentence imposed by the sovereign with primary jurisdiction is served first. Generally, decisions concerning concurrent or consecutive service of a federal sentence with a state sentence are not dependent on the order of sentence imposition.<sup>25</sup> If the federal judgment and commitment order is silent and if the state authorities have primary jurisdiction over the defendant, the default by the BOP is to compute the federal sentence as consecutive with the state sentence regardless of which sentence was imposed first.<sup>26</sup> Under 18 U.S.C. § 3584, the federal sentencing judge may specifically order the federal sentence to run consecutively with a state sentence.<sup>27</sup> Section 3584 also permits the federal judge to order concurrent service with an existing state sentence.<sup>28</sup> In Setser v. United States, 132 S.Ct. 1463

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<sup>22</sup> E.g., United States v. Mills, 501 F.3d 9 (1st Cir. 2007); Rios v. Wiley, 201 F.3d at 271-74; Thomas v. Whalen, supra; Chambers v. Holland, 920 F.Supp. at 622; Miller v. United States, supra; United States v. Smith, 812 F.Supp. 368 (E.D.N.Y. 1993). But see Brown v. Perrill, 28 F.3d 1073 (10th Cir. 1994). The production of a defendant via writ is a strong indication that the authority issuing the writ is not the primary custodian.

<sup>23</sup> Rios v. Wiley, 201 F.3d at 272; Tisdale v. Menifee, 166 F.Supp. 2d 789 (S.D.N.Y.2001)

<sup>24</sup> See Kayfez v. Gasele, 993 F.2d 1288 (7th Cir. 1993).

<sup>25</sup> In contrast, when the defendant is facing multiple federal prosecutions, the timing of sentence imposition is important since the federal judge who sentences last often controls the concurrent or consecutive decision under 18 U.S.C. § 3584(a).

<sup>26</sup> This default is drawn from 18 U.S.C. § 3584(a) which generally requires consecutive service of sentence imposed at different times unless the court specifies concurrent service.

<sup>27</sup> United States v. Williams, 46 F.3d 57 (10th Cir. ), cert. denied, 116 S.Ct. 92 (1995); United States v. Ballard, 6 F.3d 1502 (11th Cir. 1993); United States v. Hardesty, 958 F.2d 910 (9th Cir. 1992); Pinaud v. James, 851 F.2d 27 (2d Cir. 1988); Salley v. United States, 786 F.2d 546 (2d Cir. 1986).

<sup>28</sup> United States v. Fuentes, 107 F.3d 1515, 1519 n.6 (11th Cir. 1997).

(2012), the Court held that a federal sentencing court has inherent authority to order a federal sentence be served either concurrently with or consecutive to a state sentence yet to be imposed. To allow the federal sentence to commence, the BOP designates the state correctional institution (the primary custodian) for service of the federal sentence. Since the earliest date a federal sentence can commence is the date it is imposed, this designation may be made nunc pro tunc no earlier than the date of federal sentencing. A sentence may not be ordered to run concurrently with a sentence which has been served.<sup>29</sup>

The Setser decision does not have a major impact on the practices of the BOP. Setser rejected the argument that the BOP (not the judge) had the authority to decide how a federal sentence is to be served with a state sentence yet to be imposed. Setser is consistent with the post Booker shift to increase the discretion afforded federal sentencing judges.<sup>30</sup> Nevertheless, Setser recognized the BOP has the responsibility to compute the federal sentence and that disputes should be resolved through the BOP administrative remedy process or through habeas corpus petitions.<sup>31</sup> While the BOP would rather not be in the position to second guess the intent of a federal sentencing judge, unfortunately, sentencing orders are not always clear, forcing the BOP to make an interpretation.<sup>32</sup> The overall impact of Setser may be more delineation of the federal sentencing judge's intention in the Judgment and Commitment order. This delineation would be helpful to the BOP whose practice is to try to follow (to the extent possible) the intent of the federal sentencing judge. Finally, Setser does not apply to multiple federal sentences imposed at different times, which is directly governed by 18 U.S.C. § 3584.<sup>33</sup>

### **PLACE OF INCARCERATION**

The primary custodian is responsible for the custody of the defendant, until primary jurisdiction is relinquished. If a defendant has been arrested by state authorities and the state never relinquished custody (by bail, dismissal of charges, parole, etc.), the defendant must serve his state sentence in state custody. Production of the defendant via a federal writ of habeas corpus ad prosequendum does not shift the primary jurisdiction of custody to federal authorities.<sup>34</sup> After the writ is satisfied (i.e., federal sentence is imposed), the United States Marshal must return the "borrowed" defendant back to the state, the primary custodian. Primary jurisdiction is not affected by the order of imposition of federal and state sentence.

The jurisdiction which is the primary custodian is responsible for the costs of

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<sup>29</sup> United States v. Labeille-Soto, supra.

<sup>30</sup> Booker (add cases)

<sup>31</sup> See Elwell v. Fisher, No. 12-2594 (8th Cir. June 6, 2013); Heddings v. Garcia, 491 F. App'x 896, 900 (10th Cir. 2012).

<sup>32</sup> Indeed the actual federal sentencing order under review in Setser is an excellent example of an order calling for an interpretation by the BOP. The defendant was under the primary jurisdiction of the state. The federal judge ordered the federal sentence to be concurrent with one yet to be imposed state sentence but consecutive to a second yet to be imposed state sentence. The state sentences were imposed to be concurrent with one another, making precise application of the federal judge's intent difficult for the BOP.

<sup>33</sup> United States v. Garcia, No. 12-10367 (5th Cir. March 11, 2013); United States v. Quintana-Gomez, 521 F.3d 495, 498 (5th Cir. 2008); United States v. Smith, 472 F.3d 222 (4th Cir. 2006).

<sup>34</sup> See footnote 12.

incarceration. When the federal authorities are the primary custodian of the prisoner, the United States bears the costs of incarceration. When the state authority is primary custodian, the state bears the costs of incarceration. When the state has primary jurisdiction over a defendant, the federal sentencing judge may not order the delivery of the defendant for service of sentence in a federal institution. This order is tantamount to a transfer of custody beyond the jurisdiction of the federal court.<sup>35</sup> Similarly, when the state has primary jurisdiction, the state sentencing judge cannot order that the state prisoner be transported to a federal institution to serve his state sentence.<sup>36</sup> A state court has no authority to order how a federal sentence is to be computed or served.<sup>37</sup>

There are several ways in which the BOP may accept a prisoner in primary state custody. First, under a contract pursuant to 18 U.S.C. § 5003, the state authority could request transfer of the prisoner to the federal authorities with the understanding that the costs of incarceration are reimbursed to the United States. A request to transfer under a contract is usually initiated by the correctional authority of the state with primary jurisdiction. The existence of a contract between the state in question and the BOP must be checked. Secondly, the United States Attorney's Office may sponsor the placement of a state prisoner in the witness protection program under 18 U.S.C. § 3521. Finally, the BOP will accept a state defendant when the state authorities relinquish primary jurisdiction by parole, bail, dismissal, etc. The act relinquishing primary jurisdiction usually requires the United States Marshal to assume custody pursuant to an outstanding detainer. The Marshal then transfers the prisoner to a federal facility designated by the BOP. If the United States obtains a state inmate under the Interstate Agreement of Detainers Act (instead of through a writ), the same concepts discussed herein apply: the production of an inmate under the IAD does not shift primary jurisdiction.

### **IMPACT OF SENTENCING GUIDELINE 5G1.3**

At sentencing, it is important to determine to what extent U.S.S.G. § 5G1.3 applies to the defendant. In certain circumstances, 5G1.3 permits the court to make an adjustment or a downward departure for time spent in detention which would not be awarded towards the federal sentence by the BOP under 18 U.S.C. § 3585(b). Section 5G1.3 has been modified several times, so it is crucial to determine which version applies to the defendant.<sup>38</sup> The present version of 5G1.3 permits an adjustment (non-departure) if the time in detention is related to the federal

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<sup>35</sup> United States v. Warren, 610 F.2d 680 (9th Cir. 1980); Moore v. Schuetzle, 486 F.Supp. 2d 969 (D.N.D. 2007); Fisher v. Goord, 981 F.Supp. 140, 176 (W.D.N.Y. 1997); United States v. Smith, 812 F.Supp. 368 (E.D.N.Y. 1993).

<sup>36</sup> Leal v. Tombone, 341 F.3d 427 (5th Cir. 2003); Taylor v. Sawyer, 284 F.3d 1143 (9th Cir. 2001), cert. denied, 123 S.Ct. 889 (2003); Del Guzzi v. United States, 980 F.2d 1269 (9th Cir. 1992).

<sup>37</sup> Fegans v. United States, 506 F.3d 1001, 104 (8th Cir. 2007); Leal v. Tombone, supra; Taylor v. Sawyer, supra; Jake v. Herschberger, 173 F.3d at 1065; United States v. Yates, 58 F.3d 542, 550 (10th Cir. 1995); Pinaud v. James, 851 F.2d 27, 32 (2d Cir. 1988); United States v. Sackinger, 704 F.2d 29, 32 (2d Cir. 1983).

<sup>38</sup> There have been disagreements among circuits concerning different applications of § 5G1.3. Research in the respective circuit case law is also crucial. Precise nuances of the Sentencing Guidelines are beyond the intention and the scope of this memorandum. The section was included to alert the reader of this other area of sentencing law which may be impacted when a defendant is subject to state and federal prosecutions.

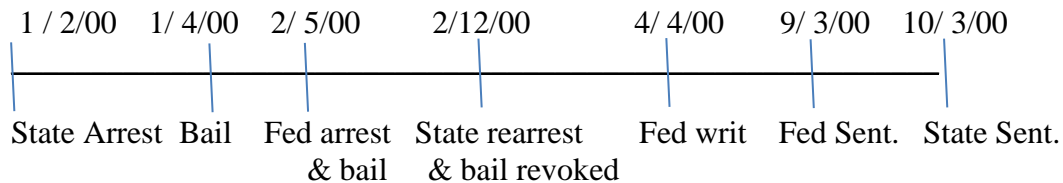
offense (5G1.3(b)). If the court finds an adjustment is justified based on a discharged sentence, the adjustment is to be via downward departure. If the federal sentencing judge invokes 5G1.3, it is crucial for the Judgment and Commitment order to delineate exactly how the court determined the sentence. For example, if the court applied an adjustment, a reference to 5G1.3(b) and the amount of adjustment should be noted on the Judgment and Commitment order. This reference assists the BOP in resolving issues concerning the court's intent, which issues often arise years after the sentence was imposed. It is important to note the BOP will apply the prior custody credit standards of 18 U.S.C. § 3585(b) to every federal sentence. Any reference in the Judgment and Commitment order to credit for time served is unnecessary and superfluous, and directly contrary to United States v. Wilson, 503 U.S. 329 (1992).



## Interaction of State and Federal Sentences - Examples

### Example one:

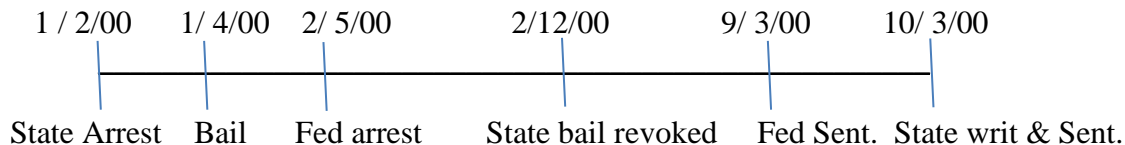
January 2, 2000 State Arrest  
January 4, 2000 State Bail  
February 5, 2000 Federal arrest and bail  
February 12, 2000 State rearrest of same charges, bail revoked  
April 4, 2000 Inmate produced to U.S. Marshal via Federal writ of habeas corpus ad pros  
September 3, 2000 Federal sentence to 60 months, inmate returned to state  
October 3, 2000 State sentence of 10 years



State is primary custodian - responsible for last arrest without relinquishment of jurisdiction. State sentence is primary. Federal sentence may be consecutive or concurrent to state term. Usual rule - No prior custody credit on federal sentence for time credited towards state sentence. If federal sentence not specific, default under 18 U.S.C. § 3584 is sentence is consecutive. Ascertain intent of federal judge – check sentencing transcript. BOP will follow intent of federal sentencing judge to the extent possible. If concurrent, federal sentence may begin on date it is imposed (September 3, 2000), but not earlier. If consecutive, federal sentence will begin on completion of state sentence.

### Example two:

January 2, 2000 State Arrest  
January 4, 2000 State Bail  
February 5, 2000 Federal arrest, no bail  
February 12, 2000 State bail revoked  
September 3, 2000 Federal sentence to 60 months  
October 3, 2000 Inmate produced in state court via state writ, State sentence of 10 years



Federal is primary custodian - responsible for last arrest without relinquishment of jurisdiction. State bail revocation has no impact. Federal sentence is primary. Federal sentence begins on date it is imposed (September 3, 2000). Prior custody credit given for time from February 5, 2000 federal arrest until September 2, 2000. Whether state sentence is concurrent or consecutive is question for state authorities.

**Example three:**

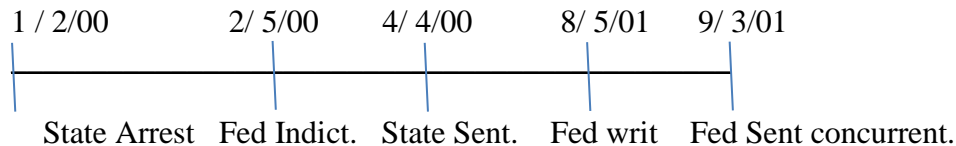
January 2, 2000 State Arrest

February 5, 2000 Federal indictment for related offense

April 4, 2000 State sentence of 10 years

August 5, 2001 Inmate produced to U.S. Marshal via Federal writ of habeas corpus ad pro

September 3, 2001 Federal sentence of 60 months concurrent with state sentence, inmate returned to state



State is primary custodian - responsible for last arrest without relinquishment of jurisdiction. State sentence is primary. Federal sentence may be consecutive or concurrent to state term. Usual rule - No prior custody credit on federal sentence for time credited towards state sentence. Concurrent federal sentence may begin on date it is imposed (September 3, 2001).

**Note:** This could be a case for application of Sentencing Guideline 5G1.3(b): Federal and state offenses are related, and presumably the state offense conduct was considered in assessing the guidelines. The Bureau of Prisons will not award the inmate credit for time in detention from January 2, 2000 to September 2, 2001 (20 months). Note 2 to 5G1.3 suggests the federal sentence may be adjusted for the period of time not credited by the Bureau of Prisons. This would be an adjustment towards guideline satisfaction. Assuming a guideline range of 70-87 months and assuming the court wanted a total sentence of 80 months, the court could adjust the sentence by 20 months, impose a sentence of 60 months, and not be a downward departure. Judgment of Commitment order should reference 5G1.3 and note the adjustment for credit towards guidelines. After the term of sentence, the order can read: "I hereby adjusted the sentence under 5G1.3 by the 20 months in detention which would not be awarded by the Bureau of Prisons."

Bonus Queries: Assume state sentence in Example 3 expired on August 10, 2001.

Can federal sentence run concurrently with the state sentence? No, federal sentence cannot run concurrently or consecutively with expired term.

Can federal judge make the same adjustment? 5K2.23

How much prior custody credit is awarded on federal sentence? Prior custody credit from August 10, 2001 through September 2, 2001.

**Example four:**

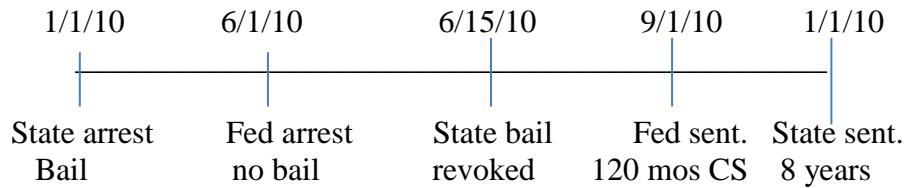
State arrest and bail 1/1/2010

Federal arrest 6/1/2010

State bail revoked 6/15/2010

Federal sentence 120 months 9/1/2010 consecutive to state sentence

State sentence 8 years 11/1/2010



Federal is primary custodian. State bail revocation is a non-event and does not shift custodial jurisdiction. Usually Federal sentence commences on imposition. State, as secondary custodian, controls consecutive or concurrent service. When federal sentence is finished, inmate is given to State, if there is any time remaining on state term. State court could order concurrent or consecutive. Here BOP could attempt to make fed sent consecutive (as contemplated by Setser) by requesting the state authority to accept primary jurisdiction (primary jurisdiction may be shifted through agreement by the parties). If state agrees to assume primary jurisdiction, defendant would receive prior custody credit towards federal sentence for time in primary federal jurisdiction (from June 1, 2110 until date primary jurisdiction is shifted to the state). Federal sentence would commence on release by the state. If the state refuses to shift primary jurisdiction, the BOP will have to commence the federal sentence on date of imposition.