Federal Bureau of Prisons Frequently Asked Questions

Q: What is the earliest date a federal sentence can start to run?

A: Under 18 U.S.C. § 3585(a), a sentence commences when the defendant arrives at the facility where he will serve his sentence, or is detained in custody while waiting to be transported to that facility. Accordingly, a federal sentence cannot begin to run any earlier than the date on which it was imposed.[1]

Q: What if the defendant is already serving a state sentence and the federal court imposes a concurrent term?

A: A federal sentence cannot commence prior to the date it is pronounced, even if the sentence is ordered to run concurrently with a sentence already being served.[2]

Q: But what about the Bureau's *nunc pro tunc* process? I thought that means the federal sentence can become retroactively concurrent with the state sentence.

A: The Bureau has the exclusive authority under 18 U.S.C. § 3621(b) to designate any appropriate facility as the place for an inmate to serve his federal term of imprisonment.[3] As the result of the decision in *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990), the Bureau considers an inmate's request to apply credit for time spent in service of a state sentence as a request for a *nunc pro tunc* (retroactive) designation. If, after writing to the sentencing court and applying the factors listed in § 3621(b), the Bureau determines a *nunc pro tunc* designation to the state facility where the inmate was incarcerated is appropriate, the inmate's sentence will be calculated as commencing concurrently on the date of its imposition or on a later date that will not cause to the inmate to be a late release.

Q: What, if anything, can the sentencing court do to make a sentence retroactively concurrent?

A: United States Sentencing Guidelines §§ 5G1.3 and 5K2.23 allow sentencing courts to make adjustments or downward departures to account for time the defendant spent on an undischarged or discharged term, respectively, that will not be credited by the Bureau under 18 U.S.C. § 3585(b).[4] By reducing the federal sentence by the amount of time the

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[1] *McCoy v. Stephens*, 2014 WL 4809946 at *3 (W.D. Tenn. Sept. 26, 2014); *United States v. Wells*, 473 F.3d 640, 645 (6th Cir. 2007); *Rashid v. Quintana*, 372 F. App'x 260, 262 (3d Cir. 2010).

[2] *See, e.g.*, *Peterson v. Marberry*, 2009 WL 55913 at *3–5 (W.D.Pa. Jan. 5, 2009); *Blecher v. Cauley*, 2009 WL 464932 at *2 (E.D.Ky. 2009) ("[E]ven where a sentencing court orders a federal sentence to run concurrently only with a pre-existing state sentence, the federal sentence is deemed to run concurrently only with the undischarged portion of the prior state conviction.").

[3] *See, e.g., United States v. Williams*, 65 F.3d 301, 307 (2d Cir. 1995).

[4] The current version of U.S.S.G. § 5G1.3, subsection (b), allows courts to adjust a sentence to account for time spent on an undischarged sentence in cases where the prior offense involved relevant conduct, while subsection (d)

defendant has already spent in custody, sentencing courts can achieve an effectual retroactive concurrency with one exception: the defendant would not earn Good Conduct Time toward his federal sentence under 18 U.S.C. § 3624(b) for the period of time of the sentence adjustment or departure. Note: the Bureau does not ordinarily receive sentencing hearing transcripts, so the agency ordinarily becomes aware of an adjustment or departure under § 5G1.3 or 5K2.23 only if it is included on the Judgment in a Criminal Case, as recommended by United States Sentencing Commission in the Application Notes to § 5G1.3.

Q: May a sentencing court order prior custody credit?

A: In *United States v. Wilson*, 503 U.S. 329, 334 (1992), the Supreme Court specifically held that § 3585(b) "does not authorize a district court to compute [prior custody] credit at sentencing," as the decision to grant or deny credit for time served prior to the date of sentencing lies with the Attorney General, who has delegated that authority to the BOP. Furthermore, the BOP may not base a decision to grant or deny prior custody credit based on the recommendations of the sentencing court.[5]

Q: What prior custody credit will the Bureau not count toward a defendant's sentence?

A: The application of prior custody credit is governed by § 3585(b), which directs the application of prior custody credit for any time spent in "official detention" before the sentence commences as a result of the offense that resulted in the sentence or any other charge the defendant was arrested for after commission of the instant federal offense. Notably, § 3585(b) does not allow such credit if it has already been applied to another sentence.[6]

Q: Are there any exceptions to the "no dual credit" rule of § 3585(b)?

A: Consistent with the decisions in *Willis v. United States*, 438 F.2d 923 (5th Cir. 1971) and *Kayfez v. Gasele*, 993 F.2d 1288 (7th Cir. 1993), the Bureau's national sentence computation policy allows an inmate to receive credit from two sovereigns for a particular stretch of incarceration under a narrow set of circumstances involving the raw Effective Full Term (EFT), the full sentence length without including any potential time credits, of each sentence. *Willis* credit applies if the state and federal sentences are running concurrently and the state EFT is equal to or shorter than the federal EFT. *Kayfez* credit applies if both sentences are running concurrently, the state EFT is greater

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allows for a downward departure in other situations "to achieve a reasonable punishment for the instant offense." Section 5K2.23 allows for a downward departure where the defendant has already completed serving a term of imprisonment and § 5G1.3(b) would have provided an adjustment if the prior term had been undischarged at the time of sentencing for the instant offense.

[5] *Mehta v. Wigen*, 597 Fed.Appx. 676, 680 (3d Cir. 2015).

[6] *See, e.g., Nguyen v. Department of Justice*, 173 F.3d 429 (6th Cir. 1999); *Ransom v. Morton*, 68 F.3d 481 (9th Cir. 1995); *Sinito v. Kindt*, 954 F.2d 467 (7th Cir. 1992).

than the federal EFT, and the state EFT is less than the federal EFT after including "qualified presentence time." Qualified presentence time is time spent in non-federal custody from the date of the federal offense to the date the first sentence, either federal or non-federal, begins to run, excluding any time already credited pursuant to § 3585(b).

Q: What does § 3585(b)'s use of the term "official detention" mean?

A: The U.S. Supreme Court held in *Reno v. Koray*, 515 U.S. 50 (1995), that time spent under restrictive conditions of release, such as home detention or at a halfway house, does not constitute "official detention" as that term is used in § 3585(b). Regardless of the severity or degree, restrictive release conditions of bond, release on own recognizance, probation, parole, or supervised release will not be credited under § 3585(b).

Q: What authority does the sentencing court have to order prior custody credit under § 3585(b)?

A: This issue was decided by the U.S. Supreme Court in *United States v. Wilson*, 503 U.S. 329, 334–35 (1992), in which the Court held the exclusive authority to calculate a federal prisoner's period of incarceration for the federal sentence imposed and to provide credit for time served is delegated to the Attorney General, who acts through the Bureau.

Q: My client was arrested by the state, then the U.S. Marshals took custody of him via writ of habeas corpus to face federal prosecution. After federal sentencing, he was returned to the state. Why won't the Bureau award prior custody credit for the time spent in federal custody?

A: If the inmate was in the primary custodial jurisdiction of the state and the state subsequently credited him for time spent on writ, § 3585(b) precludes the Bureau from crediting that time because it was applied toward another sentence.

Q: I thought a writ transfers primary custodial jurisdiction of a defendant from one sovereign to another. Is that correct?

A: Producing an individual in state custody pursuant to a writ of habeas corpus ad prosequendum to answer federal charges does not relinquish state custody.[7]

[7] *See, e.g., Thomas v. Brewer*, 923 F.2d 1361, 1366–67 (9th Cir. 1991); *Salley v. United States*, 786 F.2d 546, 547–48 (2d Cir. 1986); *United States v. Cole*, 416 F.3d 894, 896–97 (8th Cir. 2005) ("If, while under the primary jurisdiction of one sovereign a defendant is transferred to the other jurisdiction to face a charge, primary jurisdiction is not lost but rather the defendant is considered to be 'on loan' to the other sovereign.") (citation omitted).

Q: If a writ doesn't transfer primary custodial jurisdiction of a defendant, what does?

A: The concept of primary custodial jurisdiction is grounded in *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1992), in which the United States Supreme Court held the question of who exercises custodial jurisdiction over an individual charged with crimes against two sovereigns was a matter to be resolved by the two sovereigns.[8] Primary custodial jurisdiction remains vested in the sovereign that first arrests a defendant until that sovereign relinquishes its priority by: 1) release on bail, 2) dismissal of charges, 3) parole, or 4) expiration of sentence.[9] Additionally, 18 U.S.C. § 3623 allows the Director of the BOP to authorize a transfer of a federal inmate to the primary custody of a state if certain conditions are met.

Q: Is it possible for a defendant to receive a sentence where he is to serve time only on weekends so he can keep working at his job during the week?

A: Under 18 U.S.C. § 3621(a), a convicted defendant is to be committed to the custody of the BOP "until the expiration of the term imposed" unless he is released earlier due to good behavior, as authorized by § 3624(b).[10] Logically, the prospect of an inmate released to the public for five days out of a week is not consistent with the statutory language of § 3621(a); however, Congress specifically authorized intermittent or weekend confinement as a condition of an inmate's first year of probation under 18 U.S.C. § 3563(b)(10). It may also be imposed as a condition of supervised release, but only when facilities are available and when a violation of a supervised release condition has been committed during the first year of supervised release.[11]

Q: May a court sentence a defendant to a halfway house or home confinement as part of a term of imprisonment?

A: Similar to intermittent confinement, community confinement (residence in a community treatment center, halfway house, rehabilitation center, etc.) or home detention may be imposed as conditions of probation or supervised release under U.S.S.G. § 5C1.1 for defendants convicted of offenses listed in Zones B and C of the Sentencing Table. The BOP may only place an inmate on home confinement as part of his term of imprisonment for the shorter of 6 months or 10% of the sentence.

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[8] *See also United States v. McCrary*, 220 F.3d 868, 870 (8th Cir. 2000); *Poland v. Stewart*, 117 F.3d 1094, 1098 (9th Cir. 1997); *Jake v. Hershberger*, 173 F.3d 1059 (7th Cir. 1999).

[9] *See, e.g., United States v. Smith*, 812 F.Supp. 368, 370 n.2 (E.D.N.Y. 1993).

[10] *See also Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) ("…unless interrupted by fault of the prisoner (an escape, for example) a prison sentence runs continuously from the date on which the defendant surrenders to begin serving it"); *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930) ("A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments.").

[11] *See* 18 U.S.C. § 3583(d); U.S.S.G. § 5F1.8; *United States v. Magana*, 837 F.3d 457 (5th Cir. 2016).