No. 17-6073

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ROBERT DEMETRIUS BARNES,
Petitioner-Appellant,

v.

B. MASTERS,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of West Virginia

PETITION FOR REHEARING OR REHEARING EN BANC

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June 25, 2018

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Pursuant to Fed R. App. P. 35 and 40 and this Court's corresponding local rules, Appellant Robert Barnes petitions for panel rehearing or rehearing en banc of the decision in this case. The panel (Duncan, Keenan, and Thacker, J.J.) rendered its per curiam decision on May 10, 2018.

Panel rehearing or rehearing en banc is warranted because the panel's holding – namely, that United States Sentencing Guideline ("U.S.S.G.") § 5G1.3(c) [1] did not authorize the sentencing court to impose a fully concurrent sentence from the start of a pre-existing state sentence – directly conflicts with published Third Circuit precedent squarely addressing this issue. *See Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002) (holding that U.S.S.G. § 5G1.3(c) provides sentencing courts with authority to run a fully concurrent sentence from the start of pre-existing

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[1] Unless noted otherwise, references to the federal sentencing guidelines in this petition are to the 2002 Edition in effect at the time of Mr. Barnes' federal sentencing. Attached to this petition is an addendum with the text of U.S.S.G. § 5G1.3(c) and its accompanying application notes from the 2002 edition.

undischarged state sentence). Because the panel decision fails to address this conflict in its opinion, this Court should grant rehearing or rehearing en banc to address the scope of a sentencing court's authority under U.S.S.G. § 5G1.3(c) in light of *Ruggiano*. *See* 4th Cir. R. 40(b)(iii).

STATEMENT OF THE CASE

In this case, Mr. Barnes appeals the denial of his habeas petition under 28 U.S.C. § 2241, challenging the Bureau of Prisons' ("BOP") failure to implement his fully concurrent federal sentence ordered by the sentencing court pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 5G1.3(c). Specifically, BOP refused to calculate Mr. Barnes' federal sentence to count the nineteen months he had served on his state sentence from November 6, 2001 (date of his state sentencing) through June 13, 2003 (date of his federal sentencing). Affirming the district court's denial of Mr. Barnes' § 2241 habeas petition, the panel relied *inter alia* on the Second Circuit's decision in *United States v. Fermin*, 252 F.3d 102 (2nd Cir. 2001) but failed to address conflicting precedent in the Third Circuit. *See Barnes v. Masters*, No. 17-6073 (4th Cir. May 10, 2018) ("Slip Op.").

A. Statement of Facts

On April 25, 2001, Maryland authorities arrested Mr. Barnes and held him in state custody. Slip Op. at 3. Mr. Barnes pleaded guilty in

state court on a robbery and handgun violation offense and was sentenced on November 6, 2001, to 14 years of imprisonment.[2] *Id.* at 3.

While serving that state sentence, Mr. Barnes pleaded guilty to two federal charges: (1) bank robbery, and (2) a violation of 18 U.S.C. § 924(c).[3] *See id.* at 3-4. JA 134. On June 13, 2003, the sentencing court sentenced Mr. Barnes to 230 months of imprisonment—146 months for the bank robbery offense running consecutively with 84 months for the section 924(c) offense. *Id.* at 4. Explicitly invoking its authority under U.S.S.G. § 5G1.3(c), the sentencing judge further ordered that the federal sentence "run concurrent[ly] with the sentence now being served in the state system." *Id.* (quoting sentencing order).

Federal authorities then returned Mr. Barnes to Maryland state custody, and BOP designated the Maryland Department of Corrections as the state facility for service of Mr. Barnes' federal sentence beginning June 13, 2003, the date of the federal sentencing. JA 037. When Mr.

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[2] Mr. Barnes received credit towards this state sentence beginning on June 13, 2001. JA 055, JA 087.

[3] According to BOP, the state charges were "related to the instant [federal] offense." JA 087.

Barnes was returned to federal custody after completing his state sentence in 2011, BOP gave him prior custody credit towards his federal sentence for his time in state custody from his arrest on April 25, 2001, until his state sentencing on November 6, 2001. JA 023, JA 025, JA 087. Of critical importance, however, BOP failed to count the nineteen months he served on his state sentence from November 6, 2001, through June 13, 2003, notwithstanding the sentencing court's order. *See* Slip Op. at 4-5.

B. Course of Proceedings and Disposition

After exhausting BOP's administrative remedies without success, Mr. Barnes filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. *Id.* at 5. In his petition, Mr. Barnes argued that BOP circumvented the district court's concurrent sentence order by refusing to include in its federal sentencing calculations the nineteen-month period between his state and federal sentencings. *Id.*

The magistrate judge recommended denying Mr. Barnes' habeas petition, concluding that "under [18 U.S.C. §] 3585(b), Petitioner is not entitled to credit for the time period between November 6, 2001, and June 13, 2003, which was credited toward his state sentence and occurred prior

to his federal sentencing." JA 105. After Mr. Barnes timely filed objections to the proposed findings and recommendation, the district court denied the petition, holding that "§ 3585(b) governs the situation" because "prior custody credit cannot be granted if the prisoner has received credit toward another sentence." JA 147, JA 149-50, JA 152.

Mr. Barnes filed a timely notice of appeal. *See* Slip Op. at 6. On appeal, he raised two arguments relevant to this petition that relied in large part upon Third Circuit precedent set forth in *Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002). First, responding to the government's argument that the sentencing court lacked authority to impose a fully concurrent sentence under U.S.S.G. § 5G1.3(c), Mr. Barnes invoked *Ruggiano* for its holding that U.S.S.G. § 5G1.3(c) provides sentencing courts with the authority to run a federal sentence fully concurrently with the entire duration of a prior undischarged state sentence. *See* Reply Brief of Petitioner-Appellant at 12, *Barnes v. Masters,* No. 17-6073 (4th Cir. Dec. 1, 2017) ("Reply Br.") (citing *Ruggiano*, 307 F.3d at 124).

Mr. Barnes also relied upon *Ruggiano* to argue that BOP's award of 18 U.S.C. § 3585(b) custody credits is separate and distinct from the

sentencing court's obligation to determine an appropriate sentence under the federal Sentencing Guidelines. *See* Opening Brief of Petitioner-Appellant at 24, *Barnes v. Masters,* No. 17-6073 (4th Cir. Nov. 9, 2017) ("Op. Br."); *see also* Reply Br. at 5-6.

However, relying instead on the Second Circuit's decision in *United States v. Fermin*, 252 F.3d 102 (2nd Cir. 2001), the panel held that U.S.S.G. § 5G1.3(c) "does not authorize the sentencing court to impose a fully retroactively concurrent sentence." Slip Op. at 7. The panel also concluded that U.S.S.G. § 5G1.3(c) does not "permit a sentencing court to override BOP's exclusive authority" under § 3585 to calculate prior custody credits. Slip Op. at 10.[4] In so holding, the panel failed to address (or even recognize) the Third Circuit's contrary holding in *Ruggiano.*

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[4] The panel decision also noted that Appellant's sentence could not be fully retroactively concurrent because "at least some portion of his 84-month sentence for the firearms offense would have impermissibly run concurrently to his 14-year state court sentence" in violation of 18 U.S.C. § 924(c). Slip Op. at 9-10. However, the government never raised this argument, and the panel does not appear to have relied upon it as dispositive. The record, moreover, demonstrates that the full 84-month term for the section 924(c) offense could be completed without running

ARGUMENT

THE PANEL DECISION DIRECTLY CONFLICTS WITH THIRD CIRCUIT PRECEDENT AND FAILS TO ADDRESS THIS CONFLICT.

Notwithstanding the fact that the panel's opinion conflicts with the Third Circuit's published opinion in *Ruggiano*, the panel opinion does not even acknowledge that conflict. Specifically, the panel held that U.S.S.G. § 5G1.3(c) "does not authorize the sentencing court to impose a fully retroactively concurrent sentence" from the start of a pre-existing state sentence.[5] Slip Op. at 7. The panel also held that U.S.S.G. § 5G1.3(c) does not "permit the sentencing court to override the BOP's exclusive

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concurrent to any other term of imprisonment. Mr. Barnes completed his state sentence on May 3, 2011. JA 036. If the full seven-year (84-month) sentence for the section 924(c) offense were calculated to run consecutively to his state sentence, that section 924(c) offense would begin on May 3, 2011, and would have terminated on May 3, 2018. Thus, the section 924(c) prohibition does not preclude the relief Mr. Barnes seeks here.

[5] U.S.S.G. § 5G1.3(c) provides that a federal sentence may be imposed "to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(C) (U.S. SENTENCING COMM'N 2002) (attached as Addendum hereto).

authority" under § 3585(b) to calculate prior custody credits. Slip Op. at 10. In reaching its decision, the panel decision relied upon *United States v. Fermin*, 252 F.3d 102, 109 (2nd Cir. 2001), in which the Second Circuit held that U.S.S.G. § 5G1.3(c) does not authorize sentencing courts to run a sentence fully concurrent from the start of a pre-existing state sentence.

Faced with this precise issue under the same version of the United States Sentencing Guidelines, the Third Circuit reached a contrary holding in *Ruggiano v. Reish*, 307 F.3d 121 (3rd Cir. 2002).[6] Similar to Mr. Barnes' case, *Ruggiano* involved a § 2241 habeas petition challenging BOP's refusal to count time already served on a pre-existing state sentence towards his federal sentence. *See* 307 F.3d at 124, 136. Vacating the district court's order denying § 2241 habeas relief, the Third

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[6] Before the panel, the government argued that *Ruggiano* should not be considered because it was "abrogated" by the addition of Application Note 3(E) in a subsequent § 5G1.3(c) amendment. Gov't Br. at 14. That argument is incorrect. While *Ruggiano* may not apply to cases decided under Application Note 3(E), it applies with full force and effect to Mr. Barnes' case involving the 2002 version of § 5G1.3(c) which is applicable here.

Circuit in *Ruggiano* held that the sentencing court had authority under U.S.S.G. § 5G1.3(c) to impose a fully concurrent sentence to include time already served on a prior state sentence "in a way that is binding on the BOP."[7] *Id.* at 124, 131, 136. The *Ruggiano* court further held that the type of "credit" granted by the sentencing court was "fundamentally different" from BOP's prior custody credits under 18 U.S.C. § 3585(b) and thus did not infringe upon BOP's exclusive authority over § 3585(b) prior custody credits. *Id.* at 124. *See also United States v. Brannan*, 74 F.3d 448, 452, n.2 (3rd Cir. 1996) (allowing sentencing court under 1994 version of U.S.S.G. § 5G1.3(c) to include in federal sentence time served on unrelated state sentence and noting that 1995 amendments would not affect the court's analysis); [8] *Rios v. Wiley*, 201 F.3d 257, 275 (3rd Cir. 2000) (holding that the 1994 version of U.S.S.G. § 5G1.3(c) and

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[7] *Ruggiano* recognized and rejected *Fermin*'s contrary holding that U.S.S.G. § 5G1.3(c) does not permit a sentencing court to run a fully concurrent sentence. 307 F.3d at 129-30.

[8] Under the pre-1995 guidelines, the sentencing court had authority to impose a fully concurrent sentence, albeit under a specific methodology. U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c), app. n. 3 (U.S. SENTENCING COMM'N 1994) (providing examples in "Illustrations of the Application of Subsection (c)").

Application Note 3 permitted the sentencing court to exercise discretion to run federal sentence concurrently so as to provide petitioner with a twenty-two month reduction on his federal sentence for time served on a prior undischarged state sentence).

However, although Mr. Barnes squarely raised *Ruggiano* and these related cases in his briefs, the panel decision relies upon the Second Circuit's decision in *Fermin* but fails to address the conflict raised by this contrary precedent in the Third Circuit. In fact, the panel decision fails to cite or in any way recognize the existence of contrary precedent in *Ruggiano*.

The panel opinion accepts *Fermin*'s rationale for its holding that sentencing courts lack authority to impose a fully concurrent sentence under U.S.S.G. § 5G1.3(c) without ever addressing the contrary reasoning that led the Third Circuit to come to the opposite conclusion.[9]

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[9] *Fermin*'s analysis is somewhat suspect because it relied on *United States v. Whiteley*, 54 F.3d 85, 86, 91 (2nd Cir. 1995), which interpreted an earlier version of Section 5G1.3(c) not applicable here. *Fermin*, 52 F.3d at 111 (citing *Whiteley*, 54 F.3d at 86, 91). The version of

Comparing the text of U.S.S.G. § 5G1.3(b) governing sentences in cases involving relevant conduct and its application notes with that in U.S.S.G. § 5G1.3(c), the panel decision concludes that the term "concurrent" in those two sections could not mean "fully concurrent" in either section. Slip Op. at 8-9. But the Third Circuit's reasoning in *Ruggiano* demonstrates the flaw in that analysis. The Third Circuit noted that Comment 2 to § 5G1.3(b) explicitly contemplates that a concurrent sentence could run fully concurrent to include time already served on a pre-existing sentence. *Id.* at 129. Thus, the *Ruggiano* court concluded that if "concurrently" can mean "fully concurrent" in U.S.S.G. § 5G1.3(b), the identical term in U.S.S.G. § 5G1.3(c) should also be interpreted to provide courts discretion to impose a fully concurrent sentence. 307 F.3d at 130-31 (stating that the term "concurrently" in U.S.S.G. § 5G1.3(c) was "capable of meaning fully or retroactively concurrently"). In other words,

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Section 5G1.3(c) applicable to Mr. Barnes was amended to provide sentencing courts more discretion than the version addressed in *Whiteley*. *See Mosley*, 200 F.3d 218, 224 (4th Cir. 1999) (finding "the wording of the current [post-1995] version . . . certainly provides district courts more discretion than the wording of the former [pre-1995] version").

"[i]t would be most anomalous if 'concurrent' were to mean retroactively concurrent in subsection (b), but could not mean the same in subsection (c)". *See id.* at 130.

The panel decision likewise holds that BOP's exclusive authority to issue prior custody credits under 18 U.S.C. § 3585(b) precludes a sentencing court's U.S.S.G. § 5G1.3(c) authority to impose a fully concurrent sentence, Slip Op. at 10-11, without even mentioning the Third Circuit's contrary conclusion and reasoning. *See Ruggiano v. Reish,* 307 F.3d 121, 132-33 (3rd Cir. 2002). In *Ruggiano*, the Third Circuit recognized § 3585(b)'s credit restriction on BOP as distinct from a sentencing court's U.S.S.G. § 5G1.3(c) authority:

> The type of "credit" awarded by the sentencing court to Ruggiano, however, was completely different from the type of "credit" discussed in § 3585(b). While the latter is within the exclusive authority of the BOP to award, credit for time served on a pre-existing state sentence is within the exclusive power of the sentencing court.

307 F.3d at 132 (citation omitted); *see also Rios v. Wiley*, 201 F.3d 257, 270 (3rd Cir. 2000) (noting that a fully concurrent sentence under the 1994 version of U.S.S.G. § 5G1.3(c) "may result in the same benefit to the

defendant" as an award of sentencing credit under section 3585(b), but the fact that "the same outcome may be obtained either way does not alter the fact that the two benefits bestowed are distinct"). Thus, highlighting the distinction between § 3585(b) BOP credits and a § 3584 concurrent award by the sentencing court, the Third Circuit concluded that a sentencing court's role in imposing a fully concurrent sentence does not conflict with BOP's exclusive role with respect to § 3585(b) credits. *Ruggiano*, 307 F.3d at 132-33. The panel decision failed to address this precedent from the Third Circuit and makes no mention of it in its analysis.

Furthermore, Section 5G1.3(c)'s purpose aligns more closely with *Ruggiano.* U.S.S.G. § 5G1.3(c) is designed to allow sentencing courts to "correct the disparity that [may result] from the happenstance of the dates of the federal and state sentencing proceedings," over which Mr. Barnes had no control. *Rios*, 201 F.3d at 267 (internal quotation marks omitted). *Witte v. United States*, 515 U.S. 389, 405 (1995) (understanding that "U.S.S.G. § 5G1.3's operates to "mitigate the possibility that the fortuity of two separate prosecutions will grossly

increase a defendant's sentence"). The timing and nature of Mr. Barnes' state and federal charges illustrate this very scenario that U.S.S.G. § 5G1.3(c) was intended to prevent. Here, the state and federal charges both involved armed robbery offenses that occurred within a few weeks of each other in March 2001. Slip Op. at 3-4 (state offense on March 1, 2001, federal offense on March 21, 2001). But while sentencing for the state offenses took place in November 2001, the federal sentencing did not take place until June 2003, nineteen months after the state sentencing. JA 117. To preclude a fully concurrent sentence unduly punishes Mr. Barnes with an extra nineteen months of incarceration, in violation of the sentencing court's order.

CONCLUSION

For the reasons stated above, the Petition for Panel Rehearing or Rehearing En Banc should be granted.

Respectfully Submitted,

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June 25, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b) and 40(b) because it contains 2,791 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century, Size 14.

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on June 25, 2018, a copy of Petition for Rehearing or Rehearing En Banc was served via the Court's ECF system on:

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June 25, 2018

BARNES V. MASTERS

NO. 17-6073

SLIP OPINION, MAY 10, 2018

(ADDENDUM TO PETITION FOR REHEARING OR REHEARING EN BANC)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6073

ROBERT DEMETRIUS BARNES,

Petitioner - Appellant,

v.

B. MASTERS, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Bluefield. David A. Faber, Senior District Judge. (1:14-cv-11923)

Argued: March 20, 2018 Decided: May 10, 2018

Before DUNCAN, KEENAN, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Jennifer Safstrom, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Jennifer Maureen Mankins, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. **ON BRIEF:** Erica Hashimoto, Director, Anjali Parekh Prakash, Supervising Attorney, Appellate Litigation Program, Carleton Tarpley, Student Counsel, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Appellant. Carol Casto, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert Demetrius Barnes ("Appellant") appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241.[1] He asks us to order the Bureau of Prisons ("BOP") to recalculate the federal sentence he is presently serving to include the 19 months between his November 6, 2001 state court sentencing and his June 13, 2003 federal court sentencing. However, because a sentence logically cannot begin before the date on which it is imposed, Appellant's federal sentence cannot be made retroactively concurrent. Further, the sentencing court is prohibited from ordering the BOP to award credit toward a sentence for time served that has already been credited toward another sentence. Accordingly, we affirm.

I.

A.

Appellant was arrested on April 25, 2001, in Frederick County, Maryland, and held in state custody. He was ultimately convicted in Maryland state court of robbery and weapons offenses that occurred on March 1, 2001. He was sentenced in state court on November 6, 2001, to 14 years of imprisonment.

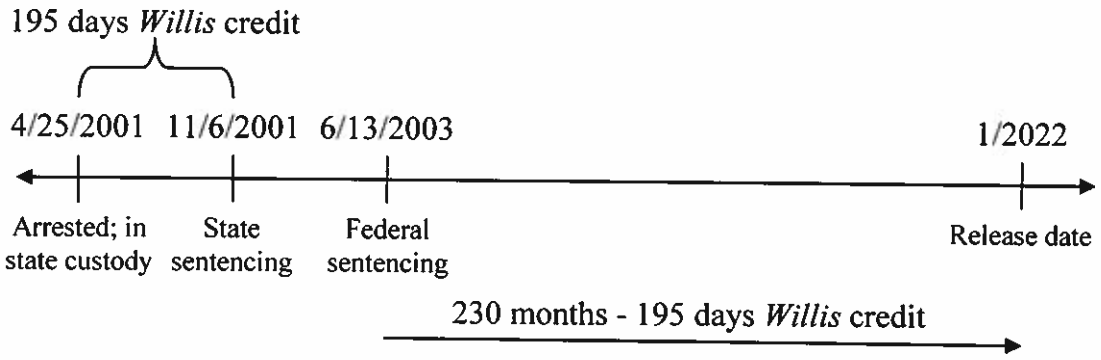
While Appellant was in state custody, federal authorities charged him with unrelated bank robbery and firearms offenses for conduct that occurred on March 21,

[1] "[T]he proper respondent to a [§ 2241] petition is 'the person who has custody over [the petitioner].'" *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (quoting 28 U.S.C. § 2242). At the time Appellant filed his petition, the warden of the facility in which he was detained was B. Masters ("Appellee").

2001. On April 17, 2003, Appellant pled guilty to these offenses. And on June 13, 2003, he was sentenced in federal court to 146 months of imprisonment for the bank robbery offense and 84 months of imprisonment for the firearms offense. The sentencing court ordered these two sentences to run consecutively, for a total sentence of 230 months of imprisonment, and further ordered that the federal sentence "run concurrent[ly] with the sentence now being served in the state system." J.A. 135.[2]

Appellant's state sentence concluded early on May 3, 2011, and he was released to BOP custody. In calculating Appellant's federal sentence, the BOP determined that his term of federal imprisonment began on June 13, 2003, the date of his federal sentencing. The BOP also awarded Appellant 195 days of prior custody credit pursuant to *Willis v. United States*, 438 F.2d 923, 925 (5th Cir. 1971) (holding that federal prisoner may receive sentence credit for time spent in presentence custody), for the time he spent in state custody between April 25, 2001, the date of his arrest, and November 6, 2001, the date of his state sentencing. Thus, according to the BOP's calculation, Appellant's federal sentence of 230 months of imprisonment would be fully served in January 2022.

[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.



B.

On March 10, 2014, Appellant, proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that the BOP "improperly calculat[ed]" his term of imprisonment by "denying him Federal credit for time served despite Sentencing Judge intending the Federal sentence to run concurrently with State sentence." J.A. 7. Specifically, Appellant asserted that the BOP failed to award him prior custody credit for the 19 months he spent in state custody between November 6, 2001, the date of his state sentencing, and June 13, 2003, the date of his federal sentencing.

The magistrate judge issued a report recommending that Appellant's petition be denied because 28 U.S.C. § 3585(b) prohibits the BOP from awarding "double credit" for time spent in prior custody that has been credited toward another sentence. Appellant timely filed objections to the magistrate judge's report, arguing that the sentencing court

had intended, pursuant to U.S.S.G. § 5G1.3,[3] to give him credit for the entirety of his state sentence. The district court adopted the magistrate judge's proposed findings and recommendation, reasoning that Appellant could not receive credit for the 19 month period because it had been credited toward his state sentence. The district court declined to consider the sentencing court's intent "because § 3585(b) governs the situation." J.A. 147. Therefore, the district court denied Appellant's petition. Appellant timely appeals.[4]

II.

A.

When sentencing a defendant "who is already subject to an undischarged term of imprisonment," the sentencing court may order that the sentence run concurrently to the undischarged term. 18 U.S.C. § 3584(a). In making this determination, the sentencing court considers the 18 U.S.C. § 3553(a) factors. *See id.* § 3584(b). In addition, the sentencing court is guided by U.S.S.G. § 5G1.3(c), which specifies when a defendant is subject to a permissive concurrent sentence. *See United States v. Mosley*, 200 F.3d 218, 222 (4th Cir. 1999) (per curiam). U.S.S.G. § 5G1.3(c) governs the imposition of concurrent sentences when the federal offense is unrelated to the offense for which the

[3] All references to the U.S.S.G. are to the 2002 edition in effect at the time of Appellant's federal sentencing.

[4] The district court's order denying Appellant's petition also denied him a certificate of appealability. But as Appellant points out, a certificate of appealability is not necessary in this case because Appellant filed his petition pursuant to § 2241. *See* 28 U.S.C. § 2253(c)(1) (providing that a certificate of appealability is required to appeal "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court" or "the final order in a proceeding under [§] 2255").

defendant is serving an undischarged term of imprisonment.[5] It provides that the sentencing court may impose a sentence "to run concurrently" or "partially concurrently" to the undischarged term "to achieve a reasonable punishment for the . . . offense." U.S.S.G. § 5G1.3(c).

B.

Appellant argues that U.S.S.G. § 5G1.3(c) allows the sentencing court to impose a sentence that is fully retroactively concurrent with the undischarged term of imprisonment the offender is serving at the time of his federal sentencing. Essentially, Appellant argues that the sentencing court may order the federal sentence being imposed and the undischarged term of imprisonment to have the same start date. But U.S.S.G. § 5G1.3(c) does not authorize the sentencing court to impose a fully retroactively concurrent sentence.

1.

As an initial matter, Appellant asserts that we cannot consider Appellee's counterarguments, claiming that Appellee waived these issues by failing to raise them below. But Appellant's argument that U.S.S.G. § 5G1.3(c) allows the sentencing court to impose a fully retroactively concurrent sentence was far from clear until he filed his pro se objections to the magistrate judge's report. Moreover, the district court did not order Appellee to respond to these objections, and Appellee did not do so. Therefore, Appellee

[5] "Although § 5G1.3(c) is a policy statement, [we] enforce[] it like a guideline." *Mosley*, 200 F.3d at 222 n.5 (citing *United States v. Wiley-Dunaway*, 40 F.3d 67, 70–71 (4th Cir. 1994)).

raises these counterarguments now, at his first opportunity since they were fully presented.

2.

The earliest date on which a federal sentence may commence is the date on which the sentence is imposed. "[A] federal sentence cannot commence prior to the date it is pronounced, *even if made concurrent with a sentence already being served.*" *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980) (emphasis supplied); *see Schleining v. Thomas*, 642 F.3d 1242, 1244 (9th Cir. 2011) ("[A] federal sentence cannot commence until a prisoner is sentenced in federal district court . . . ."); *Caloma v. Holder*, 445 F.3d 1282, 1285 (11th Cir. 2006) (quoting *Flores*, 616 F.2d at 841); *United States v. Gonzalez*, 192 F.3d 350, 355 (2d Cir. 1999) (holding that a sentencing court cannot "backdate" a sentence in order "to give [a defendant] credit for the time spent in custody"). Nothing in the language of U.S.S.G. § 5G1.3(c) authorizes the sentencing court to maneuver around this commonsense notion.

3.

Moreover, U.S.S.G. § 5G1.3(b)'s application notes clarify that a concurrent sentence "run[s] concurrently with the . . . months remaining" on the undischarged term of imprisonment. U.S.S.G. § 5G1.3 cmt. 2; *see Shelvy v. Whitfield*, 718 F.2d 441, 444 (D.C. Cir. 1983) ("[T]he second sentence runs together with *the remainder* of the one then being served." (emphasis in original)). Specifically, the application notes instruct the sentencing court to make an adjustment, pursuant to § 5G1.3(b), to the sentence ultimately imposed to account "for any period of imprisonment already served . . . if the

court determines that the period of imprisonment will not be credited to the federal sentence by the [BOP]." U.S.S.G. § 5G1.3 cmt. 2. If "concurrently" as used in § 5G1.3(b) meant "fully retroactively concurrently," then there would be no need for such an adjustment because a concurrent sentence would commence on the same date as the sentence the offender is already serving.

Thus, "concurrently" clearly does not mean "fully retroactively concurrently" in § 5G1.3(b), and there is no reason why the term "concurrently" should have a different meaning in § 5G1.3(c). *See Gregg v. Manno*, 667 F.2d 1116, 1117 (4th Cir. 1981) ("When the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place."). U.S.S.G. § 5G1.3(c) does not permit the imposition of a fully retroactively concurrent sentence. *See United States v. Fermin*, 252 F.3d 102, 109 (2d Cir. 2001) (noting that § 5G1.3(c) "provides considerable latitude to the sentencing court to fashion a consecutive, partially concurrent, or concurrent sentence *as to the remaining portion of the preexisting sentence*" (emphasis supplied)). Therefore, a concurrent sentence imposed pursuant to U.S.S.G. § 5G1.3(c) also runs concurrently with the remaining portion of the undischarged term of imprisonment.

C.

Further, Appellant's sentence could not be fully retroactively concurrent because he was sentenced to 84 months of imprisonment for a firearms offense that cannot "run concurrently with any other term of imprisonment imposed on the person," whether state or federal. 18 U.S.C. § 924(c)(1)(D)(ii); *United States v. Gonzales*, 520 U.S. 1, 11

(1997). Appellant was sentenced in state court to a term of 14 years of imprisonment. The federal sentencing court sentenced Appellant to 146 months of imprisonment for the bank robbery offense, which is fewer than 14 years of imprisonment. Therefore, if Appellant's federal sentence commenced on the same date as his state sentence, at least some portion of his 84 month sentence for the firearms offense would have impermissibly run concurrently to his 14 year state court sentence. *See* 18 U.S.C. § 924(c)(1)(D)(ii). And at the time of Appellant's federal sentencing, the sentencing court had no way of knowing that Appellant would be released early from his state sentence.

D.

Of particular note, U.S.S.G. § 5G1.3(c) does not permit the sentencing court to override the BOP's exclusive authority, pursuant to 18 U.S.C. § 3585(b), to calculate the amount of prior custody credit to which a federal offender is entitled. It merely grants discretion to the sentencing court to impose an appropriate sentence.

"After a district court sentences a federal offender, the [BOP] has the responsibility for administering the sentence." *United States v. Wilson*, 503 U.S. 329, 335 (1992). This responsibility includes the calculation of prior custody credit pursuant to 18 U.S.C. § 3585(b). *See id.* The BOP must give a defendant "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," as long as that time "has not been credited against another sentence." 18 U.S.C. § 3585(b). Thus, the BOP cannot credit the 19 months

toward Appellant's sentence because that period has been credited toward another sentence. *See id.*

The sentencing court has no authority "to compute the amount of the credit" or "to award credit at sentencing." *Wilson*, 503 U.S. at 333–34; *see United States v. Dorsey*, 166 F.3d 558, 560 (3d Cir. 1999) ("In *Wilson*, the Supreme Court held that, despite the ambiguity as to who was to award credit for time served, only the BOP has the authority under [§] 3585(b) to award such credit."). Therefore, the sentencing court cannot order the BOP to award prior custody credit, which effectively means that the sentencing court cannot pronounce a sentence and order "credit for time served." If the sentencing court cannot order the BOP to award credit for time served, it stands to reason that we are likewise powerless to do so. As a result, the district court properly denied relief to Appellant.

III.

For the foregoing reasons, the district court's order is

AFFIRMED.

U.S. SENTENCING GUIDELINES MANUAL

§ 5G1.3

(U.S. SENTENCING COMM'N 2002)

(with Application Notes)

ADDENDUM

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 287 and 288); November 1, 1994 (see Appendix C, amendment 507); November 1, 1998 (see Appendix C, amendment 579); November 1, 2000 (see Appendix C, amendment 598); November 1, 2002 (see Appendix C, amendment 642).

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

(a) 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.

(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. *Consecutive sentence - subsection (a) cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.*

2. *Adjusted concurrent sentence - subsection (b) cases. When a sentence is imposed pursuant to subsection (b), the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons. Example: The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of*

seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guideline range because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody that will not be credited to the federal sentence under 18 U.S.C. § 3585(b).

3. *Concurrent or consecutive sentence - subsection (c) cases. In circumstances not covered under subsection (a) or (b), subsection (c) applies. Under this subsection, the court may impose a sentence concurrently, partially concurrently, or consecutively. To achieve a reasonable punishment and avoid unwarranted disparity, the court should consider the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a)) and be cognizant of:*

   (a) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;

   (b) the time served on the undischarged sentence and the time likely to be served before release;

   (c) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

   (d) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

4. *Partially concurrent sentence. In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence (A) when the defendant is released from the prior undischarged sentence, or (B) on a specified date, whichever is earlier. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.*

5. *Complex situations. Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.*

6. *Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release. See §7B1.3 (Revocation of Probation or Supervised Release) (setting forth a policy that any imprisonment penalty imposed for violating probation or supervised release should be consecutive to any sentence of imprisonment being served or subsequently imposed).*

7. *Downward Departure Provision.—In the case of a discharged term of imprisonment, a*

downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Background: In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465); November 1, 1993 (see Appendix C, amendment 494); November 1, 1995 (see Appendix C, amendment 535); November 1, 2002 (see Appendix C, amendment 645).