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

CORRECTED OPENING BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Mr. Barnes appeals the final order and judgment of the United States District Court for the Southern District of West Virginia denying his 28 U.S.C. § 2241 petition for a writ of habeas corpus. JA 099-106, JA 145-150, JA 152, JA 154-155.

The district court had federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2241 because when Mr. Barnes filed his § 2241 habeas petition, he was incarcerated at the Federal Correctional Institute – McDowell in Welch, West Virginia, located in the Southern District of West Virginia. JA 006. *See Rumsfeld v. Padilla,* 542 U.S. 426, 428 (2004) (holding that § 2241 habeas petition should be filed "in the district of confinement"); *United States v. Little*, 392 F.3d 671, 680 (4th Cir. 2004) (holding that § 2241 habeas petition must be filed in the district where petitioner is being confined at the time of filing).

Mr. Barnes' subsequent transfer to a correctional facility in Louisiana does not strip the district court of jurisdiction. JA 095; *see Griffin v. Ebbert*, 751 F.3d 288, 290 (5th Cir. 2014) (holding that jurisdiction attached on the initial filing for habeas corpus relief and was

not "destroyed by the transfer of petitioner and accompanying custodial change"); *Zhenli Ye Gon v. Holder*, 992 F. Supp. 2d 637, 644 (W.D. Va. 2014) (quoting *Sweat v. White,* No. 87-6080, 1987 WL 44445, at *1 (4th Cir. Sept. 23 1987) (unpublished)) (noting the "'well-established' rule that 'jurisdiction attaches on the initial filing for habeas corpus relief, and it is not destroyed by a transfer of the petitioner and the accompanying custodial change.'"), *aff'd sub nom. Zhenli Ye Gon v. Holt*, 774 F.3d 207 (4th Cir. 2014).

Nor does such transfer preclude jurisdiction by this Court to review the § 2241 habeas appeal. *See Zhenli Ye Gon,* 992 F. Supp. 2d at 644 (noting that, even if petitioner were transferred, the Fourth Circuit would still consider his appeal and enforce orders regarding his custody).

The district court's final judgment and order was entered on December 7, 2016, and Mr. Barnes filed a timely notice of appeal on January 23, 2017. JA 152, JA 154-155; *see* 28 U.S.C. § 2244(d)(1).

This Court has jurisdiction over this § 2241 habeas appeal pursuant to 28 U.S.C. § 1291.[1]

[1] Appeals of § 2241 habeas petitions by federal prisoners do not require a certificate of appealability. *See* 28 U.S.C. § 2253. Final orders for habeas claims "shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. § 2253(a). Certificates of appealability are not required except in the following circumstances: "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1).

STATEMENT OF THE ISSUE

Did the district court err in concluding that 18 U.S.C. § 3585(b), the statute governing the Bureau of Prisons' award of prior custody credits, precludes implementation of a sentencing court's U.S.S.G. § 5G1.3(c) order imposing a concurrent federal sentence that runs from the start of a preexisting undischarged state sentence?

STATEMENT OF THE CASE

Mr. Barnes challenges in this appeal the Bureau of Prisons' ("BOP") failure to implement his concurrent federal sentence ordered by the sentencing court pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 5G1.3(c). Specifically, BOP refuses 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). The facts relating to the timing of the state and federal sentences are set forth below.

A. State Plea and Sentencing

On April 25, 2001, Maryland authorities arrested Robert Demetrius Barnes and held him in state custody.[2] JA 055. Shortly thereafter, Mr. Barnes was charged in the Circuit Court for Baltimore, Maryland (Case 01CR2280) for a prior robbery and handgun violation offense that had occurred on March 1, 2001 ("state charge").[3] JA 055, JA 087.

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[2] The state charge for this underlying offense was *nolle prossed* on December 2, 2002. JA 046, JA 087.

[3] After his April 25, 2001 arrest, Mr. Barnes was released on June 11, 2001, on his own recognizance. He was then arrested on June 12, 2001, for the state charge and held in state custody. JA 019.

After pleading guilty in Maryland to the state charge, Mr. Barnes received a fourteen-year state sentence on November 6, 2001.[4] JA 055, JA 058-059, JA 100.

B. Federal Plea and Sentencing

While serving his state sentence, Mr. Barnes pleaded guilty in U.S. District Court for the District of Maryland to two federal charges: one for bank robbery and aiding and abetting in violation of 18 U.S.C. § 2113 and 18 U.S.C. § 2, respectively, ("Count 2"); and another for use of a weapon during a crime of violence and aiding and abetting in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2, respectively ("Count 3").[5] JA 056, JA 058-059, JA 100, JA 134.

At the federal sentencing hearing before Judge William M. Nickerson on June 13, 2003, defense counsel informed the court about the state sentence that Mr. Barnes was serving at the time and

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

[5] The federal charges did not include the March 1, 2001 offense underlying the state charge but rather were for similar offenses that took place in the March 2001 timeframe. JA 055, JA 087. According to BOP, the state charges were "related to the instant [federal] offense." JA 087.

specifically requested that the federal sentence run "concurrent with the decade and a half he's serving" on the state sentence. JA 119.

The sentencing court stated explicitly that U.S.S.G. § 5G1.3(c) was applicable and ordered the federal sentence to run concurrent to his state sentence under that guideline provision. JA 056, JA 121-125. The government agreed with the court's application of U.S.S.G. § 5G1.3(c). JA 121. When asked, the government did not oppose defense counsel's request for the concurrent sentence and urged the court to exercise leniency in the sentencing:

> [T]hat's still an extremely hefty sentence and he's going to be well into his forties by the time he gets out. And five years more, three years more, six years more is not going to make a difference, in the government's opinion. So we're not opposed to a sentence somewhere in the guideline range, concurrent to the state sentence he's serving.

JA 125.

The sentencing court imposed consecutive sentences totaling 230 months – 146 months for Count Two and 84 months for Count Three – with "[t]hose two sentences, however, to run concurrently with the sentence now being served in the state system." JA 129. Correspondingly, the court entered the following written order:

"Sentence imposed under Counts 2 and 3, to run concurrent with the sentence now being served in the state system." JA 135.

After these proceedings, federal authorities returned Mr. Barnes to Maryland state custody. The BOP designated the Maryland Department of Corrections as the state facility for the service of Mr. Barnes' federal sentence. JA 037. It made this *nunc pro tunc* designation as of June 13, 2003, the date of the federal sentencing. JA 037.

C. Mr. Barnes in Federal Custody

Upon the conclusion of his state sentence in 2011, Maryland state authorities transferred Mr. Barnes to federal custody in order to serve the remainder of his federal sentence. JA 056, JA 075. Mr. Barnes received prior custody credit towards his federal sentence for his time in state custody from the date of his arrest on April 25, 2001, until the date that his state sentencing on November 6, 2001.[6] JA 023, JA 025, JA 087. However, BOP did not count the nineteen months he had served on his state sentence — from November 6, 2001, through June 13, 2003 —

[6] A portion of that credit was awarded in part pursuant to *Willis v. United States*, 438 F.2d 923 (5th Cir. 1971) (per curiam), which provide for an exception to § 3585(b)'s double credit prohibition on BOP. JA 023, JA 025, JA 087. The 195 days of prior custody credit is not at issue here on appeal.

towards his federal sentence, notwithstanding the sentencing court's order. JA 087, JA 011-013.

As a result, Mr. Barnes immediately wrote a letter to the sentencing judge. JA 142. Judge Nickerson responded and confirmed Mr. Barnes' concurrent sentence:

> This responds to your letter of June 30, 2011. In that letter, you express concern about what representatives of the Bureau of Prisons have told members of your family about the potential calculation of your federal sentence. You relate that those representatives have indicated that you will not receive credit on your federal sentence for the time served on your recently completed state sentence. *You are correct that, when I announced your sentence on June 13, 2003, I indicated that the federal sentence that I was imposing was to run concurrent with the sentence you were then serving in the state system.* […] It is my hope that this error or misunderstanding can be quickly corrected and that your sentence will be calculated consistent with my announced intention.

JA 142 (emphasis added). The sentencing judge advised Mr. Barnes to exhaust his administrative remedies through BOP before filing a § 2241 habeas petition to correct the calculation error. JA 142.

D. Mr. Barnes' Section 2241 Federal Habeas Petition

Mr. Barnes pursued relief through BOP's administrative channels for its failure to count the nineteen-month period between November 6,

2001, and June 13, 2003. JA 017-027. After exhausting BOP's remedial avenues without success,[7] Mr. Barnes filed a § 2241 writ of habeas corpus petition on March 10, 2014. JA 006. Mr. Barnes submitted his petition in United States District Court for the Southern District of West Virginia, the district in which he was incarcerated at the Federal Correctional Institute – McDowell in Welch, West Virginia. JA 006-030. In his petition, Mr. Barnes argued that BOP circumvented Judge Nickerson's U.S.S.G. § 5G1.3 concurrent sentence order by refusing to include in its federal sentencing calculations the nineteen-month period for time served on his state sentence. JA 011-012.

The district court immediately referred Mr. Barnes' § 2241 petition to a magistrate judge. JA 003. However, it was not until October 12, 2016 — almost two and a half years after Mr. Barnes filed his habeas petition and eight days after Mr. Barnes' filed a notice of intent to seek mandamus relief — that the magistrate judge finally issued his

[7] It is undisputed that Mr. Barnes properly exhausted his administrative remedies before filing his § 2241 habeas petition at issue in this appeal. JA 007-008.

recommendation to deny Mr. Barnes' habeas petition.[8] JA 091, JA 099-106. In doing so, the magistrate judge concluded 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.

Mr. Barnes timely filed his objections on October 27, 2016, to the magistrate judge's proposed findings and recommendation, arguing that § 3585(b) did not apply and that the sentencing court correctly exercised discretion under U.S.S.G. § 5G1.3(c) to "correct the disparity that resulted from the happenstance of the dates of the federal and state sentencing proceedings." JA 110 (quoting *Rios v. Wiley*, 201 F.3d 257, 264 (3d Cir. 2000) (internal quotation marks omitted).

On December 7, 2016, approximately thirty-three months after the filing of Mr. Barnes' habeas petition, the district court denied the petition, holding that under § 3585(b), "prior custody credit cannot be granted if the prisoner has received credit toward another sentence." JA

[8] The magistrate judge issued his delayed recommendation only after Mr. Barnes had filed, on October 4, 2016, a notice of intent in district court to seek mandamus relief from this Court to compel the district court to issue a ruling on his habeas petition. JA 091.

147, JA 149-50, JA 152. Mr. Barnes filed a timely notice of appeal on January 20, 2017. JA 154.

Pursuant to the sentencing court's order to run the federal sentence concurrent from the start of the state sentence, Mr. Barnes' projected release date should be May 20, 2018. That would have made him eligible for community release on May 20, 2017.[9] However, under BOP's current sentencing calculations, which fail to include the nineteen-month period at issue toward his federal sentence, Mr. Barnes' projected release date is December 20, 2019.[10]

[9] Mr. Barnes is eligible to spend all or part of his final twelve months of incarceration in a community correctional facility, also known as a halfway house or residential reentry center. *See* 18 U.S.C. § 3624(c)(1); *see also* 28 C.F.R. § 570.21.

[10] This December 20, 2019 projected release date is based upon a recently generated BOP sentencing calculation document that is not in the record. The documents in the record contain a projected release date of either August 12, 2019 (JA 037) or September 16, 2019 (JA 077).

STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of a § 2241 habeas petition. *See Yi v. Federal Bureau of Prisons*, 412 F.3d 526, 530 (4th Cir. 2005); *United States v. Lurie*, 207 F.3d 1075, 1076 (8th Cir. 2000).

SUMMARY OF THE ARGUMENT

Pursuant to its discretion under U.S.S.G. § 5G1.3(c), the sentencing court here ordered Mr. Barnes' federal sentence to run concurrently from the start of his preexisting state sentence. However, in direct contravention of that order, BOP refused to include in its calculations of Mr. Barnes' federal sentence the nineteen months of time served on his prior state sentence between his state sentencing on November 6, 2001, and his federal sentencing on June 13, 2003. This appeal challenges BOP's failure to implement that concurrent sentence.

The district court erroneously denied Mr. Barnes' request in his § 2241 habeas petition to order BOP to implement through its calculations the sentencing court's mandate for a fully concurrent sentence. In doing so, the district court incorrectly concluded that 18 U.S.C. § 3585(b) stripped the sentencing court of its sentencing discretion under U.S.S.G. § 5G1.3(c) to impose a concurrent sentence to run from the start of Mr. Barnes' state sentence.

The district court misconstrued § 3585(b) and misapplied this provision as a limit upon the sentencing court. Understood correctly, § 3585(b) does not curtail nor impinge upon a sentencing court's

U.S.S.G. § 5G1.3(c) discretion. That is because the BOP's award of § 3585(b) custody credits is separate and distinct from the sentencing court's obligation to determine an appropriate sentence under the federal Sentencing Guidelines.

Relatedly, the district court's reliance on *United States v. Wilson*, 503 U.S. 329 (1992), to support its § 3585(b) interpretation, is erroneous. As many courts have held, nothing in *Wilson* limits or restricts a sentencing court's discretion under U.S.S.G. § 5G1.3(c). It is the federal Sentencing Guidelines, and not § 3585(b), that speak to a sentencing court's discretion to run a concurrent sentence. Thus, § 3585(b) did not preclude or limit the sentencing court here from imposing a federal sentence to run concurrently from the start of his state sentence. To hold otherwise would fundamentally alter the statutory sentencing framework, thereby undermining the role of the sentencing court in crafting an appropriate sentence.

Accordingly, and in light of the district court's delay in ruling on his petition, Mr. Barnes respectfully requests an expedited decision from this Court to grant the relief requested in his petition, thus requiring BOP to

recalculate his sentence in accordance with the concurrent sentence Judge Nickerson imposed.

ARGUMENT

This Court should reverse the district court's erroneous denial of Mr. Barnes' habeas petition and order BOP to calculate his federal sentence to include the nineteen-month period for time served on his state sentence in accordance with the U.S.S.G. § 5G1.3(c) concurrent sentence ordered by Judge Nickerson.

The district court's error is premised upon its misinterpretation of 18 U.S.C. § 3585(b), as set forth below. This background section outlines the statutory sentencing framework to contextualize this error.

I. BACKGROUND

18 U.S.C. § 3584(a) allows a federal sentence to run concurrently with a previous undischarged term of imprisonment.[11] That discretion under § 3584(a) is subject to the applicable guidelines section, namely U.S.S.G. § 5G1.3, and its commentary in the Application Notes. *See* 18 U.S.C. § 3553.

At the time of Mr. Barnes' sentencing on June 13, 2003, U.S.S.G. § 5G1.3 contained three subsections governing terms of imprisonment

[11] 18 U.S.C. § 3584(a) provides that "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively."

imposed on defendants serving an undischarged term of imprisonment: (a) mandatory consecutive terms, (b) mandatory concurrent terms, and (c) discretionary concurrent, partially-concurrent, or consecutive terms.[12] In this case, Judge Nickerson explicitly relied upon U.S.S.G. § 5G1.3(c), which provided him with discretion to impose a federal sentence "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) (effective November 1, 2002). In doing so, Judge Nickerson ordered Mr. Barnes' sentence to run concurrently from the start of his preexisting state sentence and confirmed this concurrent sentence in his post-sentencing letter to Mr. Barnes. JA 068, JA 142. BOP was required to implement that sentence by including in its sentencing calculations the time served on the

[12] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (U.S. SENTENCING COMM'N 2002) ("Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing."). The language of 5G1.3(c) and its Application Notes has since been amended from the time of Mr. Barnes' 2003 sentencing. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3 (U.S. SENTENCING COMM'N 2002) (effective Nov. 1, 2002) *with* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3 (U.S. SENTENCING COMM'N 2003) (effective Nov. 1, 2003).

preexisting state sentence. *See, e.g., Rios v. Wiley*, 201 F.3d 257, 271, 276 (3d Cir. 2000) (requiring BOP to calculate federal sentence to include twenty-two months of time served on preexisting state sentence in its implementation of concurrent sentence imposed by sentencing court under U.S.S.G. § 5G1.3(c)); *Ruggiano v. Reish*, 307 F.3d 121, 136 (3d Cir. 2002) (requiring BOP to implement the concurrent sentence imposed under U.S.S.G. § 5G1.3(c) by counting towards the federal sentence the fourteen months of time served on preexisting state sentence).[13]

Because BOP refused to fulfill its obligation to implement Mr. Barnes' concurrent sentence, Mr. Barnes filed this habeas petition against BOP, which the district court erroneously denied. This Court should reverse that decision with all due haste because this case languished—through no fault of Mr. Barnes—in the district court for nearly three years. Should Mr. Barnes prevail here, he would already have been eligible for community release as of May 2017.[14]

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[13] U.S.S.G. § 5G1.3(c) and its Application Notes were amended in 2003. *See supra* note 12. *Ruggiano* and *Rios* both apply to the pre-2003 version of U.S.S.G. § 5G1.3(c) that also applies to Mr. Barnes.

[14] *See supra* notes 9-10 and accompanying text.

Therefore, Mr. Barnes respectfully requests that this Court grant his petition, or in the alternative, remand with instructions for the district court to require BOP to recalculate his sentence to conform to the concurrent sentence imposed by Judge Nickerson. After waiting two and a half years for a decision, Mr. Barnes filed with the district court a notice informing the court that he planned to file a writ of mandamus with this Court to require the district court to rule on his petition. JA 091. It was only after Mr. Barnes filed this October 4, 2016 mandamus notice that the magistrate judge finally issued his eight-page recommendation eight days later on October 12, 2016. JA 099. Ultimately, it took the district court thirty-three months after Mr. Barnes filed his habeas petition to issue its dismissal. Whatever the cause for the delays of the magistrate judge and district court, it is clear that Mr. Barnes bears no responsibility.

Given that Mr. Barnes should have been eligible for community release as of May 20, 2017, Mr. Barnes respectfully requests an expedited decision from this Court requiring BOP to recalculate his sentence in accordance with the concurrent sentence Judge Nickerson ordered.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT 18 U.S.C. § 3585(b) PRECLUDED THE SENTENCING COURT FROM EXERCISING ITS DISCRETION UNDER U.S.S.G. § 5G1.3(c) TO RUN MR. BARNES' SENTENCE CONCURRENTLY FROM THE START OF HIS STATE SENTENCE.

The sentencing court invoked U.S.S.G. § 5G1.3(c) explicitly and ran Mr. Barnes' federal sentence concurrently from the start of his state sentence. The government expressly stated that it did not oppose a concurrent sentence, and it agreed to the sentencing court's exercise of § 5G1.3(c) discretion.[15] JA 121-125. The district court nonetheless rejected Mr. Barnes' request in his habeas petition to order BOP to implement Judge Nickerson's mandate. In doing so, the district court erroneously concluded that 18 U.S.C. § 3585(b) stripped the sentencing court of its U.S.S.G. § 5G1.3(c) discretion to impose a concurrent sentence to run from the start of Mr. Barnes' state sentence. JA 147 (holding that since 18 U.S.C. § 3585(b) "takes discretion out of the hands of the [sentencing] court, that is the end of the inquiry.").

[15] The government at the sentencing hearing did not dispute the court's authority to impose this sentence; thus, that issue is not before this Court.

18 U.S.C. § 3585(b) allows a defendant to 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 "that has not been credited against another sentence." 18 U.S.C. § 3585(b). However, while § 3585(b) speaks to the parameters of BOP's exclusive authority in issuing sentencing credits for time in custody, *see United States v. Wilson*, 503 U.S. 329, 334-35 (1992), this provision does not apply to a sentencing court exercising its discretion under U.S.S.G. § 5G1.3(c) to fashion a sentence to run fully concurrent with the entirety of a preexisting state sentence. In concluding that "§ 3585(b) takes discretion out of the hands of the [sentencing] court," the district court improperly confused BOP's § 3585(b) crediting authority with the sentencing court's discretion to impose an appropriate sentence. JA 147.

Understood correctly, § 3585(b) does not curtail or impinge on a sentencing court's authority under § 5G1.3. That is because the § 3585(b) authority exercised by BOP is separate and distinct from the sentencing court's obligation to determine an appropriate sentence under the Sentencing Guidelines. *See e.g.*, *United States v. Genao*, No. 99-4617, 2000 WL 530368, at *1 (4th Cir. May 3, 2000) (unpublished table

decision) (per curiam) (holding no conflict exists between U.S.S.G. § 5G1.3(b), including Application Note 2, and § 3585(b)); *United States v. Dorsey*, 166 F.3d 558, 565 (3d Cir. 1999) (holding that a sentencing court's U.S.S.G. § 5G1.3(b) discretion to award fully concurrent sentence does not conflict with BOP's § 3585(b) authority to award prior custody credit); *United States v. Kiefer*, 20 F.3d 874, 876 (8th Cir. 1994) (noting that BOP's authority to award § 3585(b) credits does not limit sentencing court's application of U.S.S.G. § 5G1.3(b)).

Furthermore, the district court mistakenly relied on *United States v. Wilson,* 503 U.S. 329 (1992), for the proposition that § 3585(b) precludes a sentencing court from imposing a concurrent sentence to include time served on a preexisting state sentence.[16] That reliance is misguided. *Wilson* held only that BOP, through the authority given to the Attorney General, possessed exclusive authority to award § 3585(b) custody credits. *Id.* at 334-35. But *Wilson* does not speak to a district court's discretion under U.S.S.G. § 5G1.3(c). Thus, its § 3585(b) holding cannot be interpreted as limiting or restricting a sentencing court's

[16] The magistrate judge's proposed findings and recommendation, which were adopted in full by the district court, relied on *Wilson*. JA 104, JA 149.

power. *See Rios*, 201 F.3d at 270 (holding "the Supreme Court's opinion in *Wilson* only meant to refer to the award of sentencing credit under section 3585(b) when it determined that the power to award that credit was entrusted exclusively to the BOP"); *United States v. Drake,* 49 F.3d 1438, 1440 (9th Cir. 1995) (holding that the language of the statute and guidelines "presumes that the district court will first sentence the offender – applying the relevant Sentencing Guidelines – before credit determinations shall be made by the Bureau of Prisons"); *Kiefer*, 20 F.3d at 876 (holding "nothing in *Wilson* suggest[s] that the Attorney General's authority under § 3585(b) limits a sentencing court's power to apply § 5G1.3 of the Guidelines").

In ordering BOP to count time served on a state sentence to implement a concurrent federal sentence, the Third Circuit highlighted this distinction between BOP's authority to issue § 3585(b) credits versus a sentencing court's U.S.S.G. § 5G1.3 discretion:

> An application of [U.S.S.G] section 5G1.3(b) or (c) and the commentary by the sentencing court, and the award of sentencing credit by the BOP under section 3585(b), may result in the same benefit to the defendant. Nevertheless, that the same outcome may be obtained either way does not alter the fact that the two benefits bestowed are distinct.

Rios, 201 F.3d at 270. In doing so, the *Rios* court emphasized that the role of the sentencing court in issuing a concurrent sentence does not conflict with BOP's exclusive role in issuing § 3585(b) credits. *Id.* In the instant case, the district court's interpretation of *Wilson* erroneously reduces the sentencing court's order to a "non-binding recommendation" which would have been of "little significance or more likely would have been totally meaningless." *Id.* at 269.

Ultimately, the federal Sentencing Guidelines, not § 3585, speak to a sentencing court's discretion to run a concurrent sentence.[17] *See United States v. Mosley*, 200 F.3d 218, 224-5 (4th Cir. 1999) (per curiam)

[17] Albeit unclear to what purpose, the district court also refers to 18 U.S.C. § 3585(a), which governs BOP's determination as to when a defendant is received in custody. To the extent that the district court relied upon this statutory provision in its denial of Mr. Barnes' habeas petition, that reliance is misguided in the same way that it was erroneous for the district court to rely on § 3585(b). BOP's determination of when a defendant has been received in custody for purposes of § 3585(a) is separate from the sentencing court's obligation to determine the sentence that BOP will implement. While BOP may determine the point at which the defendant is "received in custody," that is not relevant here. *See* 18 U.S.C. § 3585(a). Rather, what matters here is BOP's failure to implement the concurrent sentence imposed by Judge Nickerson. Nothing in § 3585(a) precludes a sentencing court from imposing a concurrent sentence to run from the start of the preexisting state sentence.

("[A] district court need only consider the relevant factors that § 5G1.3(c) directs it to consider."). Under the guidelines in effect at the time of Mr. Barnes' sentencing, Application Note 3 of U.S.S.G. § 5G1.3(c) provided for concurrent sentences "[t]o achieve a reasonable punishment and avoid unwarranted disparity." Even the subsequent amendments to the Sentencing Guidelines continue to allow a concurrent sentence to include time already served on a state sentence, albeit in more limited circumstances, "to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings." U.S. SENTENCING GUIDELINES MANUAL § 5G1.3, Application Note 3(E) (U.S. SENTENCING COMM'N 2003); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3, Application Note 4(E) (U.S. SENTENCING COMM'N 2016).

Interpreting § 3585 to preclude a fully concurrent sentence would render the sentencing process an arbitrary exercise because the actual time in prison would be determined by the random scheduling of sentencing dates. In *Dorsey*, the Third Circuit reflected on this exact dilemma and noted:

> [I]f New Jersey had sentenced the appellant on September 22, 1997, or October 22, 1997, rather than on August 22, 1997, appellant would have received credit on his federal sentence for the additional one or two-month period because this was time that he was not yet serving on his state sentence and hence allowable as a credit against the federal sentence.

166 F.3d at 563.

The *Dorsey* court held that the concurrent sentence imposed by the sentencing court included the period of imprisonment before the federal sentence was imposed but after the state sentence began. *Id.* at 558. That court concluded that the "[a]ctual time of imprisonment should not turn on the happenstance of the scheduling of sentencing dates."[18] *Id.* at 563. If this Court does not intervene, Mr. Barnes' sentence will be determined by the state and federal courts' calendars, undermining the appropriate and just punishment crafted by Judge Nickerson. The text and intent of 18 U.S.C. § 3584 and 18 U.S.C. § 3553, coupled with the language and purpose of U.S.S.G. § 5G1.3, do not contemplate or permit such arbitrariness in sentencing.

[18] Although the provision disputed in *Dorsey* relates to subpart (b) of U.S.S.G. § 5G1.3, the analysis of the overarching purpose of § 5G1.3 by the Third Circuit in *Dorsey* applies with equal force to Mr. Barnes' case.

III. CONCLUSION

In summary, Mr. Barnes is entitled to relief on his habeas petition here because BOP has failed to include the nineteen-month period for time served in its calculation of his federal sentence, in contravention of the sentencing court's order. *Rios*, 201 F.3d at 271 (holding that BOP's failure to include time served to implement a concurrent sentence warranted § 2241 habeas relief). Therefore, this Court should grant Mr. Barnes' petition or, in the alternative, remand to the district court with instructions to direct BOP to count the nineteen-month period towards his federal sentence. *See, e.g., Ruggiano*, 307 F.3d at 136 (vacating and remanding with instructions that the district court direct the BOP to count towards the federal sentence imposed under § 5G1.3(c) the fourteen months defendant served on his state sentence prior to the imposition of sentence on his federal conviction); *Rios*, 201 F.3d at 271 (affirming district court's order granting habeas petition and its direction to BOP to include twenty two months of time served towards calculation of federal sentence where sentencing court imposed concurrent sentence pursuant to § 5G1.3(c)).

The sentencing court here, pursuant to its statutory discretion, ordered Mr. Barnes' federal sentence to run concurrently from the start of his state sentence. As discussed above, § 3585(b) did not preclude the sentencing court from crafting an appropriate and just punishment, but rather spoke only to BOP's distinct role in issuing § 3585(b) custody credits. Not only did the district court misapply § 3585, but its reasoning would fundamentally alter the statutory sentencing framework, undermining Congress' statutory directives.

Accordingly, Mr. Barnes respectfully requests this Court grant his petition, or in the alternative, remand to the district court with instructions that the district court direct BOP to implement the federal sentence by counting the nineteen-month period from November 6, 2001, to June 13, 2003, in its calculation of his federal sentence, in accordance with the concurrent sentence Judge Nickerson imposed.

Respectfully Submitted,

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November 8, 2017

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a), Mr. Barnes respectfully requests oral argument in this case and submits that oral argument will aid in the just resolution of his petition for habeas corpus and will assist the Court in its decision making process.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,236 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 November 8, 2017, a copy of Corrected Opening Brief of Appellant was served via the Court's ECF system on:

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