No. 17-6073

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

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

## REPLY BRIEF OF APPELLANT


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The government limited its position before the district court[1] to an argument raised specifically under 18 U.S.C. § 3585. Accordingly, the government has waived any other arguments it now seeks to raise for the first time on appeal. And the narrow § 3585 claim the government does raise lacks merit. Accordingly, this Court should reverse.

Even if the government properly preserved these issues, this Court should reject those arguments. *See infra* Sections II and III. The sentencing court had authority to order a concurrent sentence from the start of Mr. Barnes' state sentence under § 5G1.3(c),[2] as part of the broader statutory scheme that imbues courts with sentencing authority to impose concurrent sentences under 18 U.S.C. §§ 3584 and 3553. The

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[1] In referring to the lower court proceedings in this case, Mr. Barnes uses "district court" to refer to the district court that reviewed his 28 U.S.C. § 2241 habeas petition and "sentencing court" to refer to the district court that imposed Mr. Barnes' federal sentence.

[2] U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c) (U.S. SENTENCING COMM'N (effective Nov. 1, 2002) [hereinafter *§ 5G1.3(c)*]. Unless otherwise noted, "§ 5G1.3(c)" in this brief refers to the version of § 5G1.3(c) applicable to Mr. Barnes.

record also shows the sentencing court intended to exercise its discretion under § 5G1.3 to impose a concurrent federal sentence from the start of Mr. Barnes' state sentence. Accordingly, this Court should reverse the district court's ruling and grant Mr. Barnes the relief requested in his petition.[3]

## I. THE GOVERNMENT WAIVED ALL ARGUMENTS EXCEPT THE NARROW ISSUE RAISED UNDER 18 U.S.C. § 3585, WHICH FAILS ON ITS MERITS.

### A. This Court Should Not Address the Government's Newly Raised Arguments.

The government confined its argument before the district court to a narrow claim that § 3585 precluded a fully concurrent sentence. It now seeks to raise two new arguments: 1) a legal challenge to a sentencing court's authority under § 5G1.3(c) to run a fully concurrent sentence; and 2) a claim that the sentencing court did not intend a fully concurrent sentence. Gov't Br. at 6, 12. The government waived these arguments, and this Court should decline to address them. *See, e.g., In re Under*

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[3] Any ruling in this case would be limited to the version of the § 5G1.3(c) guideline provisions applicable at the time of Mr. Barnes' sentencing and would not extend to cases relying on other versions of the guidelines.

*Seal*, 749 F.3d 276, 287 (4th Cir. 2014) (refusing to consider challenge to court's statutory authority where party failed to preserve that issue in district court); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (declining to review issue not raised before the district court).

In its Order to Show Cause, the district court directed the government to "file an Answer to the allegations contained in petitioner's section 2241 petition and to show cause, if any, why the writ of habeas corpus sought by petitioner should not be granted." JA 042-043. In response, the government failed to challenge the sentencing court's § 5G1.3(c) authority to run a fully concurrent sentence. The government likewise did not raise any objections at the sentencing hearing. Nor did the government dispute Mr. Barnes' allegation in his § 2241 petition that the sentencing court's "announced intention" included nineteen months of time served. JA 011, 013. Having failed to raise these arguments, the government cannot do so now.

Nor does the narrow argument the government *did* raise under § 3585 preserve the broader challenge to authority it now asserts. *See, e.g., Williams v. Ozmint*, 716 F.3d 801, 810-11 (4th Cir. 2013) ("fleeting references" do not preserve arguments for appeal) (citation omitted);

*United States v. Massenburg*, 564 F.3d 337, 342 n. 2 (4th Cir. 2009) ("an objection on one ground does not preserve objections on different grounds"); *Liberty Corp. v. NCNB Nat. Bank of S.C.*, 984 F.2d 1383, 1389-90 (4th Cir. 1993). Because the government waived these issues, this Court should reverse the district court, as the government's narrow claim under § 3585 lacks merit.

### B. 18 U.S.C. § 3585 Does Not Preclude Mr. Barnes' Fully Concurrent Sentence.

Nothing in §§ 3585(a) or (b) bars the fully concurrent sentence imposed by the sentencing court here. The government argues § 3585(b) prohibits a fully concurrent sentence because it precludes credit for time that has already been served on a state sentence. Gov't Br. at 10-11. That argument misses the mark. To be sure, § 3585(b) restricts Bureau of Prisons' ("BOP's") authority to calculate detention credits. But that restriction on BOP does not limit the sentencing court's § 3584 discretion to fashion a fully concurrent sentence because the sentencing court's § 3584 award differs from BOP's § 3585(b) detention credit. *See*

*Ruggiano v. Reish,* 307 F.3d 121, 127, 132-33 (3d Cir. 2002);[4] *United States v. Jones*, 233 F. Supp. 2d 1067, 1076 (E.D. Wis. 2002); *Secrest v. Bureau of Prisons*, 2016 WL 5539582 at *11 n. 10 (D.N.J. Sept. 29, 2016) (unpublished).

The Third Circuit in *Rios* recognized § 3585(b)'s credit restriction on BOP as distinct from a sentencing court's § 5G1.3 discretion:

> [A]n application of 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 v. Wiley*, 201 F.3d 257, 270 (3d Cir. 2000). In doing so, *Rios* emphasized that a sentencing court's role in imposing a concurrent sentence does not conflict with BOP's exclusive role with respect to

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[4] To the extent the government suggests that *Ruggiano* should not be considered by this Court because that decision was "abrogated" by the addition of Application Note 3(E) in a subsequent § 5G1.3(c) amendment, that argument is incorrect. Gov't Br. at 14. 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 version of § 5G1.3(c) that is at issue here.

§ 3585(b) credits. *Id.* Similarly, in *Ruggiano*, the Third Circuit again highlighted the distinction between § 3585(b) BOP credits and a § 3584 award by the sentencing court:

> 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 sentence is within the exclusive power of the sentencing court. Indeed . . . § 3585(b) specifically prohibits the BOP from awarding credit for time that has been credited against another sentence.

307 F.3d at 132 (citation omitted). That § 3584 award by the sentencing court – to be implemented by BOP in its calculations – is the mechanism by which the sentencing court here imposed Mr. Barnes' fully concurrent sentence.

To be sure, courts may use different words to denote this § 3584 award by the court. *See, e.g.*, *United States v. Brannan*, 74 F.3d 448, 452 (3d Cir. 1996) ("departure"); *Rios*, 201 F.3d at 266 ("adjustment"); *Ruggiano*, 307 F.3d at 134 ("credits" or "adjustment"); *Secrest*, 2016 WL 5539582 at *11 n. 10 ("credit"); *see also United States v. Dorsey*, 166 F.3d 558, 560 (3d Cir. 1999) (using the term "credits" in the context of

§ 5G1.3(b)). But the precise terminology – "credit" or "adjustment" or "departure" – matters not. Regardless of the language, BOP is required to implement a court's § 3584 fully concurrent sentence in its sentencing calculations. *See Ruggiano*, 307 F.3d at 136; *Rios*, 201 F.3d at 276. In failing to do so here, BOP violated its obligation to implement the fully concurrent sentence the sentencing court ordered under §§ 5G1.3(c) and 3584.

By way of background, § 3584 addresses the complexity of sentencing a defendant charged with multiple state and federal sentences where § 3585 and the fixed guideline ranges cannot account for time already served on a prior undischarged sentence. In those situations, a sentencing court, not BOP, has discretion under § 3584 and § 5G1.3(c) to include time that would not otherwise be credited to the federal sentence under § 3585(b). And it is the responsibility of BOP to appropriately calculate the concurrent sentence issued by the sentencing court, separate from its issuance of § 3585(b) credits. *See Ruggiano*, 307 F.3d at 136; *Rios*, 201 F.3d at 276.

The government also argues that § 3585(a) precludes a fully concurrent sentence for the time served on Mr. Barnes' state sentence.

Gov't Br. at 8-9. But § 3585(a) simply governs BOP's determination as to when a defendant is "received in custody," an undisputed point here. It says nothing about precluding a sentencing court from imposing a fully concurrent sentence under §§ 5G1.3(c) and 3584, to be implemented by BOP in its sentencing calculations. *See, e.g., Ruggiano*, 307 F.3d 121 at 126, 131; *Rios*, 201 F.3d 257 at 265-66; *Secrest*, 2016 WL 5539582 at *11.

The government argues that because § 3585(a) precludes "backdating" a sentence prior to the date it is imposed, a concurrent sentence can only run concurrent with that part of the prior sentence remaining to be served. Gov't Br. at 9-10. In doing so, it relies on *United States v. McLean,* No. 88-5506, 1989 WL 5457 (4th Cir. Jan. 13, 1989) (unpublished) (per curiam). That reliance is erroneous for many reasons, including that it is an old case decided under a different statute and before the guidelines were in effect. *McLean,* an unpublished opinion issued long before the change in rules requiring consideration of unpublished opinions, carries no weight. *See* 4th Cir. R. 32.1 (noting that this Court "disfavors" citations to unpublished opinions issued before 2007). This Court, moreover, decided *McLean* under a completely different statutory regime from the one applicable to Mr. Barnes.

Because the offense in *McLean* was committed prior to November 1, 1987, neither §§ 3584 nor 3585 applied.[5] *McLean,* 1989 WL 5457 at *1 n. 1. Nor did the *McLean* court apply the federal sentencing guidelines, as they did not go into effect until November 1, 1987 (i.e. after the offense was committed). Finally, *McLean* relies on *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980), a Fifth Circuit case decided prior to the enactment of the 1984 Sentencing Reform Act or the 1987 Sentencing Guidelines. *See McLean,* 1989 WL 5457 at *1.

Nor can the government avail itself of the "backdating" cases it cites. Gov't Br. at 8-10. The government erroneously conflates the sentencing court's discretion to impose a fully concurrent order with the prohibition on "backdating" a sentence. The cases cited by the government for this "backdating" prohibition are largely unpublished and, like *McLean*, uniformly rely upon *Flores*. *Id.* In any event, any such prohibition on "backdating" is irrelevant here because it is undisputed

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[5] Instead of § 3585, *McLean* relied upon 18 U.S.C. § 3568, which was in effect for offenses prior to November 1, 1987. While § 3568 was subsequently repealed and replaced by § 3585, the statutes have significant differences. *See Rios,* 201 F.3d at 273 (finding the change in language between §§ 3568 and 3585 was material).

the sentencing judge did not backdate the sentencing order. Nor was there any such need to do so because the sentencing court exercised its discretion through the § 3584 award to run a concurrent sentence from the start of Mr. Barnes' state sentence. Courts may impose a fully concurrent sentence without backdating the federal sentence. *See, e.g., Ruggiano*, 307 F.3d at 136; *Rios*, 201 F.3d at 276.

## II. THE SENTENCING COURT HAD AUTHORITY UNDER § 5G1.3(c) AND 18 U.S.C. § 3584 TO RUN MR. BARNES' SENTENCE CONCURRENTLY WITH THE ENTIRE DURATION OF HIS STATE SENTENCE.

Should this Court choose to excuse the government's waiver and consider the government's new challenge to the sentencing court's § 5G1.3(c) authority to impose a fully concurrent sentence, that argument fails. The text of the statutes and guidelines, as well as relevant case law, demonstrate the sentencing court did have such authority. [6]

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[6] The government's brief fails to mention even once § 3584 ("Multiple Sentences of Imprisonment") or § 3553 ("Imposition of a Sentence"), upon which § 5G1.3's authority rests. Gov't Br. at iv. In doing so, the government ignores the statutory basis of the sentencing court's § 5G1.3(c) authority to impose a sentence that is fully concurrent with the entirety of a pre-existing state sentence. Section 3584, in conjunction

Section 5G1.3(c) and its underlying statutory framework provide sentencing courts discretion to run federal sentences concurrent to pre-existing state sentences. Under § 3584, "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." In making such determinations, § 3584(b) directs sentencing courts to consider the factors set forth in § 3553(a); this provision, in turn, directs the courts to consider "any pertinent policy statement . . . issued by the Sentencing Commission . . . in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(5).

Section 5G1.3(c) of the 2002 guidelines – which were in effect when Mr. Barnes was sentenced, as the government acknowledges – permitted sentencing courts to impose federal sentences "to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." Gov't Br. at 11 n. 3.

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with § 3553, provides sentencing courts with the authority to run a sentence concurrently or consecutively with a prior undischarged sentence.

This guideline, including its policy statement, is given full legal weight. *See United States v. Mosley*, 200 F.3d 218, 222 n. 5 (4th Cir. 1999) (per curiam) (recognizing that "[a]lthough § 5G1.3(c) is a policy statement, this Court enforces it like a guideline"); *see also United States v. Wiley-Dunaway*, 40 F.3d 67, 70-71 (4th Cir. 1994) (finding it "appropriate to enforce subsection (c) as if it were a guideline, but in a manner that affords the degree of discretion spelled out by the commentary and illustrations").

Although this Court has not reached this issue, the Third Circuit has consistently held that the version of § 5G1.3(c) applicable to Mr. Barnes authorizes sentencing courts to run sentences concurrently from the start of the pre-existing state sentence. *See, e.g.*, *Ruggiano*, 307 F.3d at 124 (holding the "sentencing court did have authority under U.S.S.G. § 5G1.3 to adjust Ruggiano's sentence for time served on his state sentence in a way that is binding on the BOP"); *Rios*, 201 F.3d at 275 (holding that § 5G1.3(c) and Application Note 3 permit a sentencing court to exercise discretion to run a federal sentence concurrently so as to provide petitioner with a twenty-two month reduction on his federal sentence for time served); *Jones*, 233 F. Supp. 2d at 1076 (recognizing

court's authority in a § 5G1.3(c) case to run a concurrent sentence to include time served on a prior sentence).

Contrary to the government's claims, nothing in § 5G1.3(c)'s text or application notes prohibits the sentencing court from running a fully concurrent sentence. *See United States v. Ashford*, 718 F.3d 377, 382 (4th Cir. 2013) (interpreting the sentencing guidelines under "ordinary rules of statutory construction" requiring examination of text, structure, and purpose of a guideline to determine its plain meaning) (citation omitted). Although § 5G1.3 does not explicitly define "concurrently," the plain meaning of "concurrent sentence" permits a sentence that is concurrent from the start of the preexisting sentence. *See Concurrent Sentences*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Two or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified").

The application notes also demonstrate the term "concurrently" encompasses a sentence fully concurrent with the entirety of Mr. Barnes' state sentence. Specifically, Note 2 in the commentary to § 5G1.3(b) provides that at the time of federal sentencing, the defendant's sentence

should run concurrently, not only with the undischarged term of imprisonment, but also with time already served on that sentence. To be sure, the sentencing court here applied subsection (c), not (b). JA 121-123. But if "concurrently" can mean "fully concurrent" in (b), the identical term in (c) should also be interpreted to provide courts discretion to impose a fully concurrent sentence. *See Sutherland Statutory Construction* § 46:6 (7th ed. 2016) ("Identical words used in different parts of the same, or a similar, statute usually have the same meaning"); *Ruggiano*, 307 F.3d at 130 ("It would be most anomalous if 'concurrent' were to mean retroactively concurrent in subsection (b), but could not mean the same in subsection (c)").

The government argues § 5G1.3(c)'s use of the term "undischarged term of imprisonment" means that a concurrent federal sentence can run concurrently only with the undischarged "portion" of the state sentence. Gov't Br. at 12. But the government ignores the fact that § 5G1.3(b) also uses the term "undischarged term of imprisonment" and undisputedly permits fully concurrent sentences. § 5G1.3(b), app. n. 2.

Section 5G1.3(c)'s legislative history also supports this meaning of concurrent. The 1995 amendments to § 5G1.3(c) provided sentencing

courts more discretion to impose a sentence fully concurrent to the start of the pre-existing state sentence. *See Mosley*, 200 F.3d at 224 (finding "the wording of the current [post-1995] version . . . certainly provides district courts more discretion than the wording of the former [pre-1995] version"). Before 1995, § 5G1.3(c) stated: "[T]he sentence . . . shall be imposed to run *consecutively* to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense." *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c) (U.S. SENTENCING COMM'N 1994) (emphasis added).[7] In 1995, the Commission amended § 5G1.3(c) to provide more discretion: "[T]he 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." (emphasis added). *See Mosley*, 200 F.3d at 224; U.S.S.G. App. C, Amend. 535 (1995) (explaining the 1995 amendment to

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[7] 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)").

§ 5G1.3(c) "affords the sentencing court additional flexibility to impose, as appropriate, a consecutive, concurrent or partially concurrent sentence"). Subsequent amendments to § 5G1.3(c) continue to authorize courts to run a concurrent sentence to include time already served on an undischarged state sentence, albeit in more limited circumstances than the pre-2003 version of 5G1.3(c) applicable to Mr. Barnes. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c) app. n. 4(E) (U.S. SENTENCING COMM'N 2016) (permitting departure in order "to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings").

The Supreme Court has understood § 5G1.3's purpose as "mitigat[ing] the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence." *Witte v. United States*, 515 U.S. 389, 405 (1995). The timing and nature of Mr. Barnes' state and federal charges illustrates the very scenario that *Witte* envisioned § 5G1.3 could mitigate. Here, the BOP explicitly determined that the state charges were "related to the instant [federal] offense." JA 087. Both sets of charges involved armed robbery offenses and the underlying offenses occurred within a few weeks of each other in March 2001. JA

055-056 (state offense on March 1, 2001); JA 087 (federal offense on March 21, 2001). But while sentencing for the state offenses took place in November 2001, the federal sentencing was not scheduled until June 2003, nineteen months after the state sentencing. JA 117. To preclude a fully concurrent sentence would unduly punish Mr. Barnes with an extra nineteen months of incarceration. The "actual time of his imprisonment should not turn on happenstance of the scheduling of sentencing dates," over which Mr. Barnes had no control. *Dorsey*, 166 F.3d at 563.

The government cites *United States v. Fermin*, 252 F.3d 102 (2d Cir. 2001), to argue that § 5G1.3(c) does not permit time served on a pre-existing state sentence to be counted towards a defendant's federal sentence. Gov't Br. at 12-13. *Fermin* heavily relied on *United States v. Whiteley*, 54 F.3d 85, 91 (2d Cir. 1995). *See* 52 F.3d at 111. But *Whiteley* interpreted the pre-1995 version of § 5G1.3(c). *See* 54 F.3d at 86. By contrast, in Mr. Barnes' case, the 1995 amendments were in effect and support the fully concurrent interpretation adopted by other courts. *See Ruggiano*, 307 F.3d at 129; *Rios,* 201 F.3d at 271; *Secrest*, 2016 WL 5539582 at *8-9. Also, the court failed to compare the meaning of

"concurrently" across the different subsections and application notes of § 5G1.3 in its analysis. *See* 252 F.3d at 109.

In sum, the term "concurrently" in § 5G.13(c) authorizes a fully concurrent federal sentence that runs from the start of the state sentence. Even if the meaning of "concurrent" in the sentencing guidelines were deemed to be ambiguous, this Court should afford deference to Mr. Barnes' interpretation. *See United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994) (noting that the Rule of Lenity "may be applied in the context of the sentencing guidelines" in cases of "grievous ambiguity or uncertainty" (citing *Chapman v. United States*, 500 U.S. 453, 463 (1991)).

## III. THE SENTENCING COURT INTENDED MR. BARNES' FEDERAL SENTENCE TO RUN FULLY CONCURRENT FROM THE START OF HIS STATE SENTENCE AND EXPLICITLY INVOKED ITS § 5G1.3(C) AUTHORITY.

Should this Court excuse the government's waiver and address the sentencing court's intent, the record demonstrates that the sentencing court intended to exercise authority and discretion under § 5G1.3 to fashion a concurrent federal sentence running from the start of Mr. Barnes' state sentence. Specifically, the sentencing court imposed the

concurrent sentence in direct response to defense counsel's explicit request that the federal sentence run concurrent with the "decade and a half" that Mr. Barnes was serving on his state sentence. JA 119.

The question of "exactly what the sentencing judge intended in issuing his sentencing order" has been characterized as "essentially legal in nature" and, therefore, is appropriate for this Court's plenary review and determination. *Ruggiano*, 307 F.3d at 126-27 (citation omitted); *accord Rios*, 201 F.3d at 262 (reviewing *de novo* the issue of sentencing court's intent). And because this case languished in the district court for nearly three years, through no fault of Mr. Barnes, remand would only further compound the egregious delay. JA 006, 150. Remand would be particularly inappropriate because if Mr. Barnes prevails, he would have already have been eligible for community release as of May 2017.[8] *See* JA 037, 077; 18 U.S.C. § 3624(c)(1); 28 C.F.R. § 570.21.

When determining whether a sentencing court intended to impose a sentence fully concurrent with the start of a state sentence, this Court

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[8] This projected eligibility date for community release is based upon a recently generated BOP sentencing calculation document that is not in the record.

must view the language of a sentencing court's order in the context of the overall proceeding. *See Rios*, 201 F.3d at 269; *Ruggiano*, 307 F.3d at 134 (explaining that "in interpreting the oral statement, we have recognized that the context in which this statement is made is essential"). The record — specifically the sentencing court's framing of the issue and defense counsel's unopposed request that the sentence run concurrent with the entirety of the fifteen-year state sentence — demonstrates the sentencing court ran Mr. Barnes' federal sentence concurrently from the start of his state sentence, explicitly invoking its discretion under § 5G1.3(c). JA 119, 121-123.

### A. The Sentencing Court's Choice of Language in Framing the Issue Supports a Fully Concurrent Sentence under § 5G1.3(c).

In addressing the question of concurrent sentences, the sentencing court framed the issue as follows: "The only issue that remains has to deal with whether the sentence runs concurrently or consecutively, or some combination thereof, I guess, with regard to the state sentence." JA 122-123. This framing demonstrates the sentence was meant to run concurrently with the entire state sentence.

First, that language illustrates that the sentencing court understood that § 5G1.3(c) was the "discretionary part" that required him to determine both whether, as well as the extent to which, the sentence should run concurrent to the state sentence. JA 122. Additionally, his juxtaposition of "concurrently" versus "consecutively" versus "some combination thereof" indicates that the judge used the term "concurrently" to mean concurrent with the full duration of the state sentence and "some combination thereof" to mean a sentence that was less than fully concurrent.[9] JA 122-123. Against this backdrop, the sentencing court expressed an intent for the federal sentence be fully concurrent with nothing less than the entire duration of the state sentence and not "some combination thereof" when the court imposed the 230-month federal sentence "to run concurrently with the sentence now being served in the state system." JA 122-123, 129.

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[9] At least one court has explicitly defined § 5G1.3's term "concurrent" to mean "fully concurrent" and the term "partially concurrent" to mean "concurrent going forward." *See Secrest*, 2016 WL 5539582 at *11. This Court need not accept these definitions in order to grant relief to Mr. Barnes. But the sentencing court here may well have had that same understanding of these terms.

### B. Defense Counsel Requested Mr. Barnes' Federal Sentence Run Concurrent with the "Decade and a Half" He Was Serving on the State Sentence and the Government Did Not Oppose That Request.

At the federal sentencing hearing, defense counsel alerted the sentencing court to the state sentence that Mr. Barnes was serving and specifically requested that the federal sentence run concurrent with the *entire fifteen-year duration* of his state sentence:

> Actually, we are probably more sincerely interested in the issue of whether the time runs concurrent or consecutive, which was also made mention of originally when we took the plea, plea agreement, **as he is serving 15 years now in the Division of Correction from about the same time as when he was arrested on these charges. . . . So we would . . . hope this Honorable Court would make the sentence, whatever it is, concurrent with the decade and a half he's serving in the Division of Correction at this moment.**

JA 119 (emphasis added). When asked, the government explicitly stated that it did not oppose defense counsel's request for the concurrent sentence, urging the court to exercise leniency in the sentencing. JA 124-125 (stating it was "not opposed . . . to that sentence being made to run concurrent with his state sentence").

Furthermore, defense counsel underscored the time Mr. Barnes had served on his state sentence:

> [T]hese robberies were over a period of about a month. **He's been incarcerated now for the last two years**, drug free, trying to do the best he can. … The 17, nearly 18 years that he faces, as a minimum, we hope this Honorable Court would run concurrent with the time he is doing.

JA 127 (emphasis added).

Defense counsel's request for the federal sentence to run concurrently with the "decade and a half he's serving in the Division of Correction at this moment" (JA 119), as well as the government's statements that it did not oppose a concurrent sentence (JA 125, 127), demonstrate the "concurrent" question before the court was whether the federal sentence should run concurrent with the entire duration of the state sentence. *See Rios*, 201 F.3d at 267 ("The juxtaposition of the actual words used in pronouncing the sentence and the discussion between the attorneys on the one hand and the court on the other demonstrates that the sentencing court was cognizant of the time Rios had spent in pre-sentence incarceration, and further that Rios sought consideration for

that time from the court in its determination of the sentence to be imposed").

Also, both parties used the word "concurrent" in addressing the court's query as to whether the sentence under § 5G1.3(c) should run "concurrently or consecutively, or some combination thereof." JA 122-123. The use of "concurrent" in their oral statements, not "partially" or "some combination," indicates that the "concurrent" issue being discussed at the sentencing hearing was whether the entire nineteen-month period should be calculated towards his federal sentence under § 5G1.3(c).

Defense counsel specifically highlighted that the fact that Mr. Barnes "has been incarcerated now for the last two years." JA 127. Defense counsel did not focus on the time remaining on Mr. Barnes' state sentence, but instead referenced the entire fifteen-year duration of the state sentence in his request. JA 119. Thus, the sentencing court was cognizant of both the total length of Mr. Barnes' pre-existing state sentence as well as the specific amount of time Mr. Barnes had served on his state sentence as of his federal hearing — from June 2001 to June 2003. The fact that the government did not oppose defense counsel's request for a concurrent sentence only further confirms that the parties

at the sentencing hearing were addressing whether the federal sentence should run fully concurrent with the entire duration of the state sentence.

### C. The Sentencing Court's Final Oral and Written Order Supports a Fully Concurrent Sentence to Run from the Start of the State Sentence.

The sentencing court imposed a sentence of 146 months for Count 2 to run consecutive to a sentence of 84 months for Count 3 with "those two sentences, however, to run concurrently with the sentence now being served in the state system." JA 129. That sentence was in response to counsel's request to count the entirety of Mr. Barnes' state imprisonment towards his federal term. *See Rios*, 201 F.3d at 269 (emphasizing the need to "view the sentencing court's language in the context of the overall proceeding"). Accordingly, the court entered a written judgment confirming its intention that the federal sentence run concurrently with the state sentence: "Sentence imposed under Counts 2 and 3, to run concurrent with the sentence now being served in the state system." JA 135; *see Ruggiano*, 307 F.3d at 132 (noting the sentencing court's parallel statements in both the written judgement and oral statement).

### D. Sentencing Courts Have Flexibility and Discretion in the Language and Methodology They Employ to Impose a Fully Concurrent Sentence.

The government argues that because the sentencing court did not incant the precise words used in *Ruggiano*, namely that the petitioner receive "credit for time served," he must not have intended a fully concurrent sentence. Gov't Br. at 16-17. That argument fails.[10]

The government's position effectively elevates "credit for time served" into a mandatory prerequisite for designating a fully concurrent sentence. That is incorrect. *Rios* recognized that the sentencing court's intent could have been expressed in a number of different ways. *See* 201 F.3d at 266-68. Accordingly, the sentencing court was not confined to a particular recitation of words to express its intent. *See United States v. Saldana*, 109 F.3d 100, 104 (1st Cir. 1997) (holding that the "spontaneous remarks [of a sentencing judge] are addressed primarily to the case at hand and are unlikely to be a perfect or complete statement of all of the surrounding law"); *United States v. Margiotti*, 85 F.3d 100, 105 (2d Cir.

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[10] Nothing in the record — transcript, written order, or letter — indicates any intention to exclude the nineteen months in question from the concurrent sentence. JA 117-132, 134-140, 142-143.

1996) (finding § "5G1.3(c) simply does not require the use of any particular verbal formula or incantation").

Rather, to determine the intent of the sentencing court, this Court should focus on "the overall context in which the court imposed the sentence and the information before the court at that time." *See Rios,* 201 F.3d at 268. That context — including defense counsel's explicit and unopposed request for a concurrent sentence to include the "decade and a half" for his state sentence — demonstrates that the concurrent sentence imposed was intended to run from the start of the state sentence.

Furthermore, the government argues the sentencing court should have implemented the calculation methodology from § 5G1.3(b) by subtracting the nineteen-month period at issue to impose an adjusted sentence below the sentencing guidelines range. Gov't Br. at 22 n. 12. That argument fails for two reasons.

First, the government incorrectly presumes the sentencing court was required to perform calculations, when no such requirement existed. *Mosley*, 200 F.3d 218, 225. While a calculation methodology was illustrated in the commentary of the pre-1995 version of § 5G1.3(c), the

1995 amendments removed these illustrations and replaced with a list of factors, which provided the district court with "more discretion than the wording of the former version." *Id.* at 224-25 (holding consideration of the factors under the post-1995 guidelines did not require a sentencing court to engage in the previous method for calculating a combined guideline range calculation); *see* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c) (U.S. SENTENCING COMM'N 1994).

Second, Mr. Barnes' sentencing guideline range for Count 2 was 130-162 months; thus, subtracting nineteen months from his 146-month sentence on Count 2 would have resulted in a sentence below the guideline range. JA 122; § 5G1.3, app. n. 2 (noting that the effect of a concurrent sentence is "not a departure from the guideline range"). Downward departure language was not added to § 5G1.3(c)'s commentary until November 1, 2003 — after Mr. Barnes' sentencing. *See* U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c), app. n. 3(E) (U.S. SENTENCING COMM'N 2003). In the absence of such language, downward departures were not clearly authorized under § 5G1.3(c). Thus, the sentencing court's failure to depart and subtract the nineteen months

from the 230-month federal sentence says nothing about the court's intent to impose a fully concurrent sentence.

In sum, the court's sentencing order – both written and oral – communicates the intention that the federal sentence was to run concurrently with the full duration of Mr. Barnes' state sentence. Furthermore, defense counsel made multiple unopposed requests at the sentencing hearing for the federal sentence to run concurrently with the fifteen-year state sentence. That context demonstrates that the sentencing court intended its § 5G1.3(c) concurrent sentence to run the full fifteen-year duration of the state sentence.

## CONCLUSION

For the foregoing reasons, and those presented in Mr. Barnes' opening brief, this Court should grant Mr. Barnes' habeas petition, ordering 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 imposed. In the alternative, Mr. Barnes requests a remand with identical instructions to the district court to direct BOP to do the same.

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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 5,801 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 December 1, 2017, a copy of Reply Brief of Appellant was served via the Court's ECF system on:

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