No. 17-6073

In The
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
The Honorable David A. Faber, United States District Judge

Response Brief of Appellee

CAROL A. CASTO
United States Attorney

Jennifer M. Mankins
Assistant United States Attorney
300 Virginia Street East, Suite 4000
Charleston, West Virginia 25301
(304) 345-2200
jennifer.mankins@usdoj.gov

Attorneys for the Appellee B. Masters, Warden

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B. Masters, Respondent-Appellee ("Appellee"), by the United States Attorney for the Southern District of West Virginia, files this brief in response to that of Petitioner-Appellant Robert Demetrius Barnes ("Appellant").

STATEMENT OF JURISDICTION

This appeal is from the judgment denying Appellant's petition for a writ of habeas corpus entered by the district court (Faber, J.) on December 7, 2016, J.A. 152. The district court's jurisdiction was invoked pursuant to 28 U.S.C. § 2241. Notice of appeal was timely filed on January 20, 2017, J.A. 154-55, thereby vesting this Court with jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the district court properly denied Appellant's § 2241 petition.

STATEMENT OF THE CASE

Appellee generally does not contest the facts set forth in Appellant's Statement of the Case. However, Appellee submits the following additional facts:

Federal Plea and Sentencing

At the federal sentencing hearing on June 13, 2003, the sentencing court found Appellant's sentencing guidelines range to be 130 to 162 months as to Count Two. J.A. 122.[1] Defense counsel informed the sentencing court that Appellant was

[1] The sentencing court found that the sentencing guidelines provided for a seven-year (84 month) consecutive sentence as to Count Three. J.A. 122.

currently serving a state sentence on another offense. J.A. 119. With respect to the interplay between Appellant's federal and state sentences, the sentencing court asked, "Anybody disagree that what we're dealing with is [United States Sentencing Guideline ("USSG") §] 5G1.3 in terms of whether this is consecutive or concurrent?" J.A. 120. Once the parties and sentencing court agreed that § 5G1.3(c) applied, J.A. 121-22, the court stated: "The only issue that remains has to deal with whether the sentence runs concurrently or consecutively, or some combination thereof, . . . , with regard to the state sentence." J.A. 122-23.

The sentencing court then asked the government, "Mr. Clarke, with regard to the 5G1.3c issue, does the government have a position as to whether this should be concurrent or consecutive with regard to the state matter?" J.A. 124. The government indicated that a sentence within the guidelines range was appropriate, but noted that it should not be at the top of the guidelines range as the sentence was a significant sentence (214 months total between the two Counts). The government also indicated that it was not opposed to the federal sentence being made to run concurrent with Appellant's state sentence. J.A. 125.

Defense counsel argued "that a sentence of the bottom of the guidelines made concurrent doesn't make light of these offenses . . ." J.A. 127. However, defense counsel never asked the sentencing court to adjust Appellant's federal sentence

downward or to give Appellant credit for time already served on his preexisting state sentence. *See* J.A. 117-32.

The sentencing court, in imposing the sentence, stated:

> Mr. Clarke's suggestion or recommendation that a sentence at the mid-range for the reasons that he articulated is entirely appropriate.
>
> With respect to Count Two, I'm going to impose a sentence of 146 months [out of a range of 130 to 162 months]; with respect to Count Three, 7 years, or 84 months, commitment to the Bureau of Prisons, running consecutive to the 146 months in Count Two. Those two sentences, however, to run concurrently with the sentence now being served in the state system.

J.A. 129.

The sentencing court never made any indication during the sentencing hearing that Appellant was to also receive credit for time already served on his state sentence. *See* J.A. 117-32.

The sentencing court's written judgment order (Judgment in a Criminal Case) contains the language:

> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 146 months as to Count 2; and 84 months as to Count 3, to run consecutive to the term imposed under Count 2. Sentences imposed under Counts 2 and 3 to run concurrent with the sentence now being served in the state system.

J.A. 135.

Again, there is no indication in the sentencing court's written order that Appellant was to receive credit for time already served on his state sentence. *See* J.A. 134-40.

Mr. Barnes in Federal Custody

While in federal custody after completing his state sentence, Appellant wrote a letter to the sentencing court dated June 30, 2011,[2] where he stated:

> Upon my family speaking with representatives of the B.O.P. they were informed that due to my current release from the D.O.C. I will now be serving not the remaining, but the totality of my federal sentence.
>
> Judge Nickerson, the B.O.P. representatives also informed my family that my state sentence of 14 years with the D.O.C. was at no time being accredited towards my federal sentence.

In response, the sentencing court wrote a letter to Appellant dated July 13, 2011, which stated:

> 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

[2] Appellant did not include his letter as an exhibit to any of his filings; therefore, it is not contained in the Joint Appendix. The letter is available on Pacer: USDC MD, Case No.1:02-cr-00105-WMN, Doc. 51, filed July 6, 2011.

> 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.

J.A. 142.

There is no mention in the sentencing court's letter that Appellant's federal sentence was supposed to be retroactively concurrent with his state sentence or that Appellant was to receive credit for time he had already served on the state sentence at the time of his federal sentencing on June 13, 2003. *See id*.

STANDARD OF REVIEW

Appellant complains the district court erroneously denied his petition for a writ of habeas corpus. In an appeal from the denial of a habeas petition, this Court reviews the district court's conclusions of law *de novo* and its findings of fact for clear error. *Fontanez v. O'Brien*, 807 F.3d 84, 86 (4th Cir. 2015); *Billings v. Polk*, 441 F.3d 238, 243 (4th Cir. 2006); *Yi v. Federal Bureau of Prisons*, 412 F.3d 526, 530 (4th Cir. 2005). The Bureau of Prisons' determination regarding sentencing calculations is reviewed for an abuse of discretion. *Major v. Apker*, No. 13-7210, 576 F. App'x 284, 287 (4th Cir. 2014) (unpublished) (per curiam) (citing *Barden v. Keohane*, 921 F.2d 476, 478 (3d Cir. 1990)).

SUMMARY OF ARGUMENT

The district court properly denied Appellant's petition for a writ of habeas corpus, which challenged the Bureau of Prisons' computation of his federal sentence. Appellant contends that the Bureau of Prisons erred by failing to calculate his federal sentence to count the nineteen months he had served on an unrelated state sentence from November 6, 2001 (the date of his state sentencing) through June 13, 2003 (the date of his federal sentencing). In support of this argument, Appellant claims that the federal sentencing court ordered that his federal sentence run concurrently from the start of his preexisting state sentence and that the Bureau of Prisons erred by not crediting him for these nineteen months.

As an initial matter, the district court correctly determined that the federal sentencing court was precluded from making Appellant's federal sentence run concurrent from the start of his preexisting state sentence pursuant to 18 U.S.C. § 3585 (which governs computation of federal sentences by the Bureau of Prisons) and USSG § 5G1.3(c) (which governs federal sentencing courts).

Moreover, even assuming *arguendo* that it had the authority, the sentencing court, as evidenced by its pronouncements at the sentencing hearing and in its written judgment order, did not grant Appellant either an adjustment in his federal sentence or a fully retroactively concurrent sentence to account for the time spent serving his state sentence.

ARGUMENT

The District Court Properly Denied Appellant's Petition for a Writ of Habeas Corpus.

A. The District Court Correctly Determined That the Sentencing Court Was Precluded from Making Appellant's Federal Sentence Fully Retroactively Concurrent With His State Sentence.

Appellant argues that the district court erred in determining that he was not entitled to credit for the time period between November 6, 2001, and June 13, 2003, under 18 U.S.C. § 3585(b) because it was credited toward his state sentence and occurred prior to his federal sentencing. Appellant's argument is without merit, as the district court's ruling was correct.

The Attorney General is responsible for computing federal sentences for all offenses committed on or after November 1, 1987, *see* 18 U.S.C. § 3585; *United States v. Wilso*n, 503 U.S. 329 (1992), and has delegated that authority to the Director of the Bureau of Prisons under 28 C.F.R. § 0.96 (1992). *See United States v. Brann*, 990 F.2d 98, 103-04 (3d Cir. 1993). Computation of a federal sentence is governed by 18 U.S.C. § 3585 and is comprised of a two-step determination: first, the date on which the federal sentence commences and, second, the extent to which credit may be awarded for time spent in custody prior to commencement of the sentence ("prior custody credit"). *Chambers v. Holland*, 920 F. Supp. 618, 621 (M.D. Pa.), *aff'd*, 100 F.3d 946 (3d Cir. 1996).

18 U.S.C. § 3585 provides:

> (a) Commencement of sentence.-A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> (b) Credit for prior custody.-A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences-
>
> > (1) as a result of the offense for which the sentence was imposed; or
> >
> > (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> *that has not been credited against another sentence*.

18 U.S.C. § 3585(a), (b) (emphasis added).

Regarding the first step (when the federal sentence commenced), case law is clear that a federal sentence commences at its earliest on the day the prisoner is sentenced in federal court. *See United States v. McLean*, No. 88-5506, 1989 WL 5457 (4th Cir. Jan. 13, 1989) (unpublished) (per curiam) ("A federal sentence cannot commence prior to the date it is pronounced."). *See also Guzman-Fregoso v. Sanders*, No. CV 10-7809 JVS (MRW), 2011 WL 3962075 (C.D. Cal. Aug. 25,

2011) (noting the Ninth Circuit Court of Appeals in *Schleining v. Thomas*, 642 F.3d 1242, 1244 (9th Cir. 2011) made clear that a federal sentence cannot start until a prisoner is sentenced in federal court and that "a district court cannot 'backdate' a concurrent federal sentence to the beginning of a previous state prison term already being served.") (citations omitted); *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980) ("a federal sentence cannot commence prior to the date it is pronounced"); *Miramontes v. Driver*, 243 F. App'x 855, 856 (5th Cir. 2007) (unpublished) (per curiam) ("Even it intends to do so, a district court does not have the authority under § 3585(b) to order a federal sentence to run absolutely concurrently with a prior sentence."); *Demartino v. Thompson*, No. CIV-96-515-R, 1997 WL 362260 at *2 (10th Cir. Jul. 1, 1997) (unpublished) (logically a federal sentence cannot commence prior to the date it is pronounced, even if made concurrent with an existing sentence); *Rashid v. Quintana*, 372 F. App'x 260, 262 (3d Cir. 2010) (unpublished) (per curiam) ("a federal sentence cannot begin to run earlier than on the date on which it was imposed.") (citing *United States v. Labeille-Soto*, 163 F.3d 93, 98 (2d Cir. 1998)).

"Consequently, when a federal sentence is ordered to run concurrent with a sentence being served, it can only run concurrently with that part of the prior sentence remaining to be served." *United States v. McLean*, No. 88-5506, 1989 WL

5457 (4th Cir. Jan. 13, 1989) (unpublished) (referencing *Shelvy v. Whitfield*, 718 F.2d 441, 444 (D.C. Cir. 1983) and *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980)). Accordingly, the Bureau of Prisons correctly calculated that Appellant's federal sentence commenced on the date it was imposed (June 13, 2003).

Regarding the second step (prior custody credit), the United States Supreme Court has explained that when Congress enacted 18 U.S.C. § 3585(b), it "made clear that a defendant could not receive double credit for his detention time." *United States v. Wilson*, 503 U.S. 329, 337 (1992). *See also Davis v. Pettiford*, No. 9:07-1670, 2008 WL 2923188 at *4 (D.S.C. Jul. 23, 2008) (18 U.S.C. § 3585(b) "specifically precludes a defendant from receiving 'a double credit for his detention time.'"), *aff'd*, 325 F. App'x 225 (4th Cir. 2009); *McCollough v. O'Brien*, No. 7:06-cv-00712, 2007 WL 2029308 at *2 (W.D. Va. Jul. 10, 2007) ("This rule against double credit is clearly established.") (citing *Wilson* and *United States v. Brown*, No. 91-5877, 977 F.2d 574, *1 (4th Cir. 1992) (unpublished) (per curiam) (finding that defendant may receive credit against federal sentence for time in official detention unless it has been credited toward another sentence)).

Here, it is undisputed that Appellant received credit on his state sentence for the time period at issue. Under 18 U.S.C. § 3585(b), the Bureau of Prisons could

not credit Appellant for the time he had already served because it was credited against another sentence and would be an improper double credit.

The Bureau of Prisons' decision concerning the calculation of Appellant's sentence and the award of prior custody credit is mandated and limited by 18 U.S.C. § 3585(a) and (b). Here, the Bureau of Prisons correctly calculated the commencement date of Appellant's sentence and award of prior custody credit under the directives of 18 U.S.C. § 3585.

Moreover, the sentencing court did not have the authority under USSG § 5G1.3(c) (effective November 1, 2002) to make Appellant's federal sentence run concurrently *from the start of* his preexisting state sentence. Section 5G1.3(c) of the 2002 USSG (the guideline in effect at the time of Appellant's federal sentencing)[3] provides:

> 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.

Id. (emphasis added). The use of the term "undischarged" is key—the USSG clearly recognize that a sentencing court has no authority to commence a federal sentence

[3] *See* USSG Manual § 1B1.11(a) (U.S. Sentencing Comm'n 2002) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.").

prior to the date the sentence is imposed. The federal sentence may be ordered to run concurrent with a state sentence, but it will commence on the date the federal sentence was imposed and runs only to the undischarged portion of the state sentence, meaning from the date of the imposition of the federal sentence forward. Despite Appellant's assertion, § 5G1.3(c) does not authorize a sentencing court to impose a concurrent sentence to run from the start of a preexisting state sentence.

Although not addressed by this Circuit, the majority of appeals courts who have considered the issue have held that § 5G1.3(c) does not give the sentencing court the ability to make a federal sentence retroactively concurrent with a preexisting state sentence. In *United States v. Fermin*, 252 F.3d 102 (2d Cir. 2001), the Second Circuit Court of Appeals held that the sentencing court lacked the authority under § 5G1.3(c) to credit the defendant's federal sentence for the amount of time he had already served on his state sentence.[4] In reaching its decision, the Second Circuit noted that "Application Note 4 makes clear that concurrency determinations under subsection (c) apply to the *undischarged* portion of a defendant's sentence." *Id.* at 109 (emphasis added). The Second Circuit concluded that subsection (c) "provides considerable latitude to the sentencing court to fashion a consecutive, partially concurrent, or concurrent sentence as to the remaining

[4] *Fermin* applied the same version of § 5G1.3(c) that applies to Appellant.

portion of the preexisting sentence, but does not authorize a 'credit' or reduction for time already served." *Id*.

The *Fermin* decision has also been endorsed by the Sixth and Eighth Circuits. *See United States v. Reed*, 22 F. App'x 536 (6th Cir. 2001) (unpublished) (holding that the defendant could not receive credit under § 5G1.3(c) on his federal sentence for time already served on an unrelated state sentence); *United States v. Haye*s, 90 F. App'x 476, 477 (8th Cir. 2004) (unpublished) (per curiam) ("If Hayes's Maryland prison term was undischarged, the district court could have exercised its discretion to make the federal sentence concurrent or partially concurrent with the remaining portion of the undischarged term, *see* USSG § 5G1.3(c), p.s. (in any case not otherwise addressed by Guidelines § 5G1.3, sentence 'may be imposed to run concurrently, partially concurrently, or consecutively to' prior undischarged prison term to achieve reasonable punishment for instant offense), but could not have given Hayes credit for time already served in Maryland.").[5]

Only one appeals court—the Third Circuit—has ruled that a federal sentencing court had the authority under § 5G1.3(c) to order a federal sentence to run fully and retroactively concurrent with a state sentence that a defendant was

[5] *Reed* and *Hayes* applied the same version of § 5G1.3(c) that applies to Appellant.

already serving. *See Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002). However, the reasoning relied on by the Third Circuit in *Ruggiano,* which has never been adopted or discussed by this Court, goes against the express language of § 5G1.3(c) and its Application Notes, as well as the directives of 18 U.S.C. § 3585. Moreover, *Ruggiano* was effectively abrogated by a 2003 amendment to the § 5G1.3 Application Notes.[6] *See United States v. Destio*, 153 F. App'x 888, 893-894 (3d Cir. 2005) (unpublished) (acknowledging that the change to the guidelines abrogated *Ruggiano*).

Finally, the other cases relied on by Appellant—*United States v. Genao*, No. 99-4617, 2000 WL 530368 (4th Cir. May 3, 2000) (unpublished) (per curiam); *United States v. Dorsey*, 166 F.3d 558 (3d Cir. 1999); *United States v. Kiefer*, 20 F.3d 874 (8th Cir. 1994); and *United States v. Drake*, 49 F.3d 1438 (9th Cir. 1995)—are inapposite because they deal with USSG § 5G1.3(b), not § 5G1.3(c).[7] Unlike

[6] The amendment provided that subsection (c) does not authorize an adjustment for time served on a prior undischarged term of imprisonment, but that a sentencing court may consider a downward departure in extraordinary cases. *See* USSG.§ 5G1.3(c), cmt. n.3(E) (effective November 1, 2003) ("Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. . .").

[7] The remaining case cited by Appellant—*United States v. Mosley*, 200 F.3d 218

subsection (c), subsection (b), which applies to defendants serving preexisting sentences on related charges,[8] requires that the new sentence run concurrently with the remaining portion of the preexisting sentence of incarceration, and, more importantly, that the defendant be credited for time already served on the preexisting sentence. *See* USSG § 5G1.3(b), cmt. n.2 ("*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.") (emphasis added). "Subsection (c) does not provide the same 'credit' that is available under subsection (b) for time already served." *Fermin*, 252 F.3d at 109. The cases relied on by Appellant therefore do not apply.

(4th Cir. 1999) (per curiam)—is inapplicable because it did not address the issue at hand; instead, it considered whether the sentencing court incorrectly applied § 5G1.3(c) by failing to create a combined hypothetical sentencing range as required under the prior version of the guideline.

[8] Section 5G1.3(b) provides: "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."

Accordingly, the district court did not err in determining that the sentencing court did not have the authority to make Appellant's federal sentence fully retroactively concurrent with his state sentence.

B. Even Assuming *Arguendo* That It Had the Authority, the Sentencing Court Did Not Make Appellant's Federal Sentence Fully Retroactively Concurrent With His State Sentence.

Appellant contends that the sentencing court exercised its authority under USSG § 5G1.3(c) to grant Appellant either an adjustment in his federal sentence or a fully retroactively concurrent sentence to account for the time Appellant spent serving his state sentence. In essence, Appellant is making what is referred to as a *Ruggiano* argument.

In *Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002), the Third Circuit Court of Appeals held that a federal sentencing court had the authority under § 5G1.3(c) to order a federal sentence to run fully and retroactively concurrent with a state sentence that a defendant was already serving.[9] *Ruggiano*, 307 F.3d at 133. The Third Circuit found that the sentencing court's pronouncement, both orally at

[9] A sentencing court's authority to "adjust" a sentence under § 5G1.3(c) is distinct from the Bureau of Prisons' authority under 18 U.S.C. § 3585(b) to "credit" a sentence, even though the benefit may be the same. *Ruggiano*, 307 F.3d at 131-133. Confusion arises because of the different uses of the term "credit". A § 5G1.3(c) retroactively concurrent sentence is an adjustment rather than a credit. *Ruggiano*, 307 F.3d at 133 (citing *United States v. Dorsey*, 166 F.3d 558, 564-65 (3d Cir. 1999)).

sentencing and in the written judgment, that Ruggiano was to receive "credit for time served," was evidence of the sentencing court's intent, pursuant to § 5G1.3(c), to adjust the sentence downward to account for the preexisting sentence. *Ruggiano*, 307 F.3d at 132-33.

In another similar case in the Third Circuit, *Rios v. Wiley*, 201 F.3d 257 (3d Cir. 2000), the sentencing court ordered the prisoner's federal sentence to run concurrent with the state sentence and also ordered credit for time served. The Bureau of Prisons granted a *nunc pro tunc* designation and commenced the federal sentence the day it was imposed. Exploring the interplay between the roles of the sentencing court in determining the length of a sentence of incarceration to be served and the Bureau of Prisons in calculating when the sentence imposed will have been satisfied, the Third Circuit found that the sentencing court intended to correct the disparity that happened due to the dates of the federal and state proceedings. The determination was based on the sentencing court's order for credit for time served, as well as the colloquy between the sentencing court and counsel at sentencing. The Third Circuit held that the sentencing court had sufficient information upon which it could have concluded that § 5G1.3(c) applied and that the sentencing court was permitted to impose the sentence that it did. Ultimately, the Third Circuit ordered

the Bureau of Prisons to grant the credit to effectuate the intent of the sentencing court.

As set forth above, Appellee submits that § 5G1.3(c) does not allow fully retroactively concurrent sentences as held by the Second, Sixth, and Eighth Circuits. However, even assuming *arguendo* that this Court applies Third Circuit precedent, the outcome remains the same, as Appellant's sentencing court did *not* give Appellant credit for time he had already served on the state sentence and did *not* impose a retroactively concurrent sentence.

When facing a *Ruggiano* or *Rios*-type challenge, "the appropriate starting point is to ascertain the meaning that [] should [be] ascribe[d] to the sentencing court's directives . . ." *Rios*, 201 F.3d at 264. In the case at hand, the sentencing court found Appellant's sentencing guidelines range to be 130 to 162 months as to Count Two. J.A. 122. Defense counsel informed the sentencing court that Appellant was currently serving a state sentence on another offense. J.A. 119. With respect to the interplay between Appellant's federal and state sentences, the sentencing court asked, "Anybody disagree that what we're dealing with is [USSG §] 5G1.3 in terms of whether this is consecutive or concurrent?" J.A. 120. Once the parties and sentencing court agreed that § 5G1.3(c) applied, J.A. 121-22, the court stated: "The only issue that remains has to deal with whether the sentence runs concurrently or

consecutively, or some combination thereof, . . . , with regard to the state sentence." J.A. 122-23.

The sentencing court then asked the government, "Mr. Clarke, with regard to the 5G1.3c issue, does the government have a position as to whether this should be concurrent or consecutive with regard to the state matter?" J.A. 124. The government indicated that a sentence within the guidelines range was appropriate, but noted that it should not be at the top of the guidelines range as the sentence was a significant sentence (214 months total between the two Counts). The government also indicated that it was not opposed to the federal sentence being made to run concurrent with Appellant's state sentence. J.A. 125.

Defense counsel argued "that a sentence of the bottom of the guidelines made concurrent doesn't make light of these offenses . . ." J.A. 127. However, defense counsel never asked the sentencing court to adjust Appellant's sentence downward or to give Appellant credit for time already served on his preexisting state sentence. *See* J.A. 117-32.

The sentencing court, in imposing the sentence, stated:

> Mr. Clarke's suggestion or recommendation that a sentence at the mid-range for the reasons that he articulated is entirely appropriate.
>
> With respect to Count Two, I'm going to impose a sentence of 146 months [out of a range of 130 to 162

> months]; with respect to Count Three, 7 years, or 84 months, commitment to the Bureau of Prisons, running consecutive to the 146 months in Count Two. Those two sentences, however, to run concurrently with the sentence now being served in the state system.

J.A. 129.

The Judgment in a Criminal Case contains the language:

> The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 146 months as to Count 2; and 84 months as to Count 3, to run consecutive to the term imposed under Count 2. Sentences imposed under Counts 2 and 3 to run concurrent with the sentence now being served in the state system.

J.A. 135.

The instant case is distinguishable from *Ruggiano* and *Rios*. The Third Circuit in those cases relied heavily upon the sentencing courts' pronouncements both orally at sentencing and in the written judgments that the defendants were to receive credit for time served as evidence of the courts' intent to adjust the sentences downward to account for the preexisting sentences.[10]

[10] Appellant's reliance on the sentencing court's July 13, 2011 letter to Appellant is unavailing as well. The letter, which was written in response to Appellant's incorrect claims that his state sentence "was at no time being accredited towards my federal sentence" and that he "would be serv[ing] not the remaining, but the totality of his federal sentence," *see supra* note 2, simply reaffirmed that Appellant's federal sentence was to run concurrent with the state sentence he was then serving, J.A. 142. There is no mention in the sentencing court's letter that Appellant's federal sentence

Although the sentencing court imposed Appellant's sentence to run concurrent with the sentence imposed by the state, unlike in *Ruggiano* and *Rios*, the judgment and sentencing transcript reveal no intention to give Appellant credit for time he had already served on the state sentence, and no intent to impose a retroactively concurrent sentence.[11]

It is clear, as shown in Appellant's sentencing order and hearing transcript, that the sentencing court used the term "concurrent" to convey only an intent to run Appellant's federal sentence concurrent with the state sentence from the date of the federal sentencing. There is no additional language or evidence that the sentencing court intended for the federal sentence to be retroactively concurrent with the state

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was supposed to be retroactively concurrent with his state sentence or that Appellant was to receive credit for time he had already served on the state sentence at the time of his federal sentencing on June 13, 2003. *See id*.

[11] This case is similar to that of *Butler v. O'Brien*, No. 7:08-CV-00470, 2009 WL 187693 (W.D. Va. Jan. 26, 2009), where the district court found that Butler's sentencing court did not order any type of retroactive concurrent sentence that would award him credit for time served. In reaching its decision, the district court distinguished *Rios*, where the Third Circuit relied on the sentencing court's use of the language "credit for time served", supported by other evidence in the record, to find the court's intent was to adjust the sentence to account for time Rios was detained on a federal writ while serving a state sentence.

sentence or to grant an adjustment of sentence for the time already served on the state sentence.[12]

The pronouncement and the written judgment make clear that the sentencing court had no intent to make a *Ruggiano* or *Rios*-type adjustment: there is no discussion of credit for time served, nor is there any suggestion, anywhere in the record, that Appellant sought such an adjustment or that the sentencing court intended to go beyond imposing a standard concurrent sentence and instead imposed a sentence that was retroactively concurrent to the state sentence. Accordingly, Appellant is not entitled to relief.[13]

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[12] Moreover, the sentencing court imposed a sentence at the mid-range (146 months) of the sentencing guidelines range (130 - 162 months) for Count Two. If the sentencing court had intended to adjust Appellant's sentence to take into account the time Appellant had already spent serving his state sentence, the sentencing court would have imposed a sentence at the low end or even below the sentencing guidelines range to adjust the sentence for the time Appellant had spent serving his state sentence.

[13] Section 5G1.3 is a provision implemented by a judge at sentencing, not by the Bureau of Prisons in calculating the length of a sentence. In this case, Appellant seeks to apply § 5G1.3(c) to have a fully retroactively concurrent sentence, something the sentencing court did not do at the time of sentencing. Appellant's challenge, then, is to the imposition of the sentence by his sentencing court in Maryland, not to the manner in which his sentence is currently being executed by the Bureau of Prisons. A request for this type of habeas relief must be made to the sentencing court pursuant to 28 U.S.C. § 2255, not to a court in the district in which Appellant is housed pursuant to 28 U.S.C. § 2241. Furthermore, if this Court were to find that § 2241 is an appropriate remedy because § 2255 relief is unavailable, the Court would need to find that the remedy lies in § 5G1.3(c), which requires the

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

CAROL A. CASTO
United States Attorney

By: s/Jennifer M. Mankins
Assistant United States Attorney
Attorney for Appellee

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sentencing court to grant the "credit" by adjusting the overall sentence, and that the remedy does not lie in ordering the Bureau of Prisons to provide the credit under 18 U.S.C. § 3585, as that "credit" would violate the statutory language precluding double credit. *See Ruggiano,* 307 F.3d at 132 (granting credit pursuant to § 3585 is within the exclusive authority of the Bureau of Prisons and precludes the Bureau of Prisons from awarding credit for time that has been credited against another sentence; under § 5G1.3(c), "credit for time served on a pre-existing state sentence is within the exclusive power of the sentencing court."). *See also United States v. Dorsey,* 166 F.3d 558, 560 (recognizing that the period between state sentencing and federal sentencing cannot be credited to federal sentence as it was time served on the state sentence); *Rios*, 201 F.3d at 272 (22 months spent serving the state sentence prior to the imposition of the federal sentence could not be credited under § 3585(b)); *United States v. Genao,* No. 99-4617, 2000 WL 530368 (4th Cir. May 3, 2000) (unpublished) (per curiam) (remanding case to sentencing court because: a) the Bureau of Prisons determines § 3585(b) credit and b) the sentencing court's authority to adjust a sentence is under § 5G1.3(b) and its Application Note); *Crudup v. Williamson*, No. 1-CV-06-2329, 2007 WL 1875676 (M.D. Pa. Jun. 28, 2007) (noting a sentencing court's authority under § 5G1.3(c) to adjust a sentence is distinct from the Bureau of Prisons' authority under § 3585(b) to credit a sentence, even though the benefit to the defendant may be the same, citing *Ruggiano*).

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 4415 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments).

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 the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

s/Jennifer M. Mankins
Assistant United States Attorney
Attorney for Appellee

Date: November 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, I electronically filed the foregoing "RESPONSE BRIEF OF APPELLEE" with the Clerk of Court using the CM/ECF System, which will send notice of such electronic filing to registered CM/ECF users. I further certify that on November 17, 2017, I filed four paper copies of the foregoing "RESPONSE BRIEF OF APPELLEE" *via* U.S. mail pursuant to the Court's Order of October 23, 2017.

s/Jennifer M. Mankins
Assistant United States Attorney
Attorney for Appellee