

No. 10-7502

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES LEE REYNOLDS,

Petitioner,

v.

J. E. THOMAS,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Introduction

This case involves the most profound constitutional questions regarding respect due to a State judgment under the constitutionally-based doctrines of comity and full faith and credit, and punishment imposed outside well-established protections of procedural due process. The Bureau of Prisons (BOP) response gives short shrift to the extraordinary result approved in this case: an Executive Branch decision that a sentence be served consecutively that directly conflicts with a state judicial order, which required that the state sentence be served concurrently with the federal

sentence. The BOP's response on the merits fails to apply basic rules of statutory construction to the statutory text, relying on the lower courts' history of failing to recognize constitutional problems, rather than construing the relevant statutes to avoid obvious and serious constitutional issues. The BOP's invocation of mootness disregards the Ninth Circuit's direct reliance on this Court's holding in *United States v. Johnson*, 529 U.S. 53, 60 (2000). Further, the sole circuit to identify a mootness problem, where over-incarceration is at issue and the petitioner is on supervised release, reached its conclusion by adopting reasoning inconsistent with *Johnson*. This case is an excellent vehicle for addressing recurring, important sentencing issues that only this Court can resolve.

A. This Court's Grant Of Certiorari Would Serve The Central Purposes Of The Writ Because The Court Would Resolve A Mature Circuit Split, In A Frequently Encountered Area Of Sentencing Law, That Involves A Constellation Of Constitutional Interests And Protections.

The BOP treats the 18 U.S.C. § 3584(a) circuit split as a minor footnote and the constitutional issues as unworthy of serious rebuttal. Opposition at 18 n.3; 19-22. Contrary to this approach, this case presents issues in the mainstream of the considerations that warrant exercise of this Court's review authority.

First, the circuits are deeply split on the construction of § 3584(a). Petition at 11-12. This Court should interpret the statute as foreclosing a federal sentence consecutive to or concurrent with a sentence that has not been imposed. Petition at 13. The statute so construed should bar post-judgment action by the BOP – an Executive Branch agency – that *de facto* creates concurrent or consecutive sentences that the federal courts lack authority to impose. Petition at 13-14. In the absence of any other statutory authority, and without the protections of constitutional criminal procedure, the statutory finality of the sentence codified in 18 U.S.C. § 3582(c) bars post-sentencing

judicial – and executive – action to, in effect, modify the original sentence into a consecutive sentence. Petition at 15-17.

The only reason offered to the Court for declining to resolve the circuit split is that this Court has previously declined to review the issue. Opposition at 13. The repeated requests for review demonstrate the importance of the issue, while here, unlike for example *Waters v. United States*, No. 10-6431, the petitioner is represented by counsel, has thoroughly litigated the issues, and demonstrated the contextual importance of § 3484(a) in avoiding the constitutional issues.¹ Moreover, this case involves the execution of the sentence itself, so the issues are fully ripe for resolution. As stated by the Fifth Circuit, the conflicting views among the courts of appeal regarding § 3584(a) have been exhausted and any further consideration is best left to this Court. *United States v. Setser*, 607 F.3d 128, 131 n.2 (5th Cir. 2010).

In addition to minimizing the well-developed circuit conflict, the BOP deprecates the seriousness of the constitutional interests at stake. As briefed in the Petition, federal nullification of a state court criminal judgment regarding the appropriate punishment for the state offense (*i.e.*, whether the state interest is satisfied by the time served on the federal sentence) implicates an array of constitutional interests regarding the rights of defendants and the sovereign authority of state courts. Petition at 15-23. Even though this Court explicitly recognized the necessity of mutual respect in the face of dual sovereignty over criminal activity, the BOP's brief never mentions the case ignored by the lower courts: *Ponzi v. Fessenden*, 258 U.S. 254 (1922). The BOP also provides

¹ The dispute regarding BOP practices in the present case accentuates the importance of representation by counsel: much of the inadequate prior litigation regarding the constitutional questions at issue results from the fact that many prisoners must litigate *pro se* because there is no right to counsel under 28 U.S.C. § 2241. *See* 18 U.S.C. § 3006A(a)(2)(B) (providing only for discretionary appointment of counsel under the habeas statutes).

no answer to the interest in finality – implicating the interests protected by the double jeopardy clause – of 18 U.S.C. § 3582(c)(1), which only allows modification of a judgment where “expressly permitted by statute.” Petition at 15. Of course, the BOP points to no express statutory authorization for its conversion of the federal sentence into a consecutive sentence.²

The BOP’s position on comity and full faith and credit rests on a simple failure of analysis: the BOP cites the same Ninth Circuit case upon which Mr. Reynolds relies without ever addressing the argument that no “limit” on the federal sentence occurs because Mr. Reynolds is obligated to serve the full 71 months imposed by the federal judge. *Compare* Petition at 20 *with* Opposition at 21-22. The BOP makes the unsupported statement that there is nothing in 28 U.S.C. § 1738, which applies the Full Faith and Credit Clause to the federal government, that requires the BOP “to give effect to a state court judgment requiring concurrent sentencing.” Opposition at 22. To the contrary, by its plain terms, the statute requires that every judgment “shall have the same full faith and credit in every court within the United States and its Territories and Possession.” 28 U.S.C. § 1738 (2006). There is simply no support for the proposition that the BOP, a federal agency, is authorized to ignore the criminal judgments of a state. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (“A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.”). The BOP’s interpretation of the relevant sentencing statutes as tacitly exempting the Executive Branch, but not the Judicial Branch, from respecting state court criminal judgments simply

² Similarly, the BOP never addresses the due process protections appropriate to post-judgment proceedings during which the administrative agency, based on factors largely indistinguishable from the sentencing factors listed in 18 U.S.C. § 3553(a), determines the actual time of incarceration by deciding whether to run the state time concurrently with or consecutively to the federal sentence. Petition at 21-22.

cannot be reconciled with the constitutionally-based principles of comity that underlie the relationship between the States and the federal government.

The BOP claims that any separation of powers concerns are resolved by its post-sentencing contact with the federal judge. Opposition at 22. This assertion fails factually and legally. Under the pellucid facts of this case, the federal judge, when first asked for his post-sentencing views by the BOP, first noted he made no reference at sentencing to the state judgments “because they did not yet exist.” Appendix A (Excerpts of Record at 291). Then, the judge simply declined to provide a comment: “In response to your inquiry, I have no comment on your consideration” of retroactive designation of the state institution. *Id.* This non-response does not constitute a federal judicial order that trumps the lawful concurrent state sentence, especially where the BOP only considered the statement but decided the issue by making an independent assessment of the offense and offender characteristics.

Legally, the separation of powers problems are in no way resolved by seeking the federal judge’s post-judgment opinion because the BOP disavows any obligation to adhere to the views of the sentencing judge. When deciding to disregard a state judgment of concurrency, the Executive Branch, through the BOP, asserts independent authority to determine whether state and federal sentences should run concurrently or consecutively, regardless of the federal judge’s retrospective view. The constitutional problem persists: the Executive Branch is making decisions that determine whether a sentence is to be served consecutively and, therefore, how long a prisoner will remain in prison. As this Court has stated, “the selection of either concurrent or consecutive sentences rests within the discretion of the sentencing judges.” *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009) (quoting A. Campbell, *Law of Sentencing* § 9:22 (3d ed. 2004)).

In contrast, here, the same branch of government that prosecuted Mr. Reynolds also determined that he should serve his federal sentence consecutively to the state sentence, even though the executive action nullified a valid state judgment and occurred with none of the normal procedural due process that accompanies a decision regarding the length of incarceration.³ This case directly and clearly raises fundamental constitutional issues that only this Court can effectively resolve.

B. The Government’s Statutory Arguments Are Undermined By The Failure To Recognize The Importance Of The Applicable Constitutional Principles.

The BOP’s statutory approach directly contradicts this Court’s teachings regarding statutory construction. With no statutory language conferring on the Executive Branch the authority to determine whether federal sentences should run consecutively or concurrently, the BOP reads the relevant statutes as barring any considerations of comity and procedural unfairness. Opposition at 17-19. The BOP affords no consideration to constitutional issues and implicitly grants to the agency authority over the amount of liberty lost beyond anything this Court has ever approved. The BOP failed to apply two of the most basic rules of construction: the use of statutory context and the doctrine of constitutional avoidance.

From the outset of this case, Mr. Reynolds has argued that the three sentencing statutes must be read *in pari materia* to require that the BOP respect the state court judgment. For example, he argued to the district court: “The BOP violates the plain meaning of the relevant federal statute and the basic rules of comity by disregarding the state judgment’s concurrent sentence, by refusing to

³ The BOP’s suggestion that the *nunc pro tunc* designation process is analogous to clemency is unsustainable. Opposition at 22 (citing *Hunter v. Tamez*, 622 F.3d 427, 431 (5th Cir. 2010)). The clemency power does not permit *aggravation* of the punishment. See *Schick v. Reed*, 419 U.S. 256, 267 (1974). In the present case, the BOP’s action lengthened the period of incarceration, beyond the punishment required by the federal and state court judgments, thereby aggravating the punishment.

commence the federal sentence under 18 U.S.C. § 3585(a), by failing to credit time spent serving the concurrent state sentence under § 3585(b), and by denying requests for *nunc pro tunc* designation to the state institution under § 3621(b).” Appendix B (Excerpts of Record at 120) (memorandum in support of relief before the district court). This Court has consistently instructed that the meaning of statutory terms depends on the statutory context. Petition at 26; *accord Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010). The BOP’s isolated and cramped reading of the statutes ignores the overall statutory structure.

Further, consistent with the BOP’s failure to acknowledge any constitutional issues surrounding its sentencing practices, the BOP does not apply the doctrine of constitutional avoidance. The Court should read the statutes assuming Congress had no intention to authorize unilateral federal agency action that nullifies state court judgments. *See Clark v. Martinez*, 533 U.S. 371, 380 (2005) (“[Constitutional avoidance] is a tool for choosing between competing plausible interpretations of statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”). The Executive Branch’s practice of, in effect, imposing a consecutive sentence, while nullifying a lawful and properly entered state judgment, implicates an array of constitutional rights and interests that this Court should vindicate or, at least, should not assume Congress blithely endangered.

C. This Court’s Decision In *Johnson* Establishes That The Present Case Is Not Moot Because Mr. Reynolds Suffered Over-Incarceration, Is Presently On Supervised Release, And Would Be Able To Move For Modification Of That Term Based On “Equitable Considerations Of Great Weight.”

This Court should reject the BOP’s claims regarding mootness because this Court held in *Johnson* that § 3583(e) provides a remedy where the petitioner spent more time incarcerated as a

result of the error under review and remains serving the term of supervised release. In *Johnson*, this Court held that a judicial determination that a person has suffered over-incarceration does not lead to an automatic reduction in the period of supervised release. *Johnson*, 529 U.S. at 59 (rejecting day-for-day reduction of supervised release where over-incarceration resulted from a conviction vacated under *Bailey v. United States*, 516 U.S. 137 (1995)). However, the determination regarding over-incarceration provided a potential predicate for a determination that the term of supervised release should be modified, reduced, or terminated in the “interest of justice” under 18 U.S.C. § 3583(e). *Johnson*, 529 U.S. at 60. The Court specifically noted that, where a court determines that over-incarceration has occurred, “equitable considerations of great weight” would support such a remedy. *Id.*⁴

As held by the Ninth Circuit, *Johnson* is controlling in this case. Mr. Reynolds is on supervised release and, if his legal position is correct, he suffered over-incarceration for about 16 months. Citing *Johnson*, the court held, “A court could consider this alleged period of over-incarceration under 18 U.S.C. § 3583(e) as a factor weighing in favor of reducing the term of supervised release.” *Reynolds v. Thomas*, 603 F.3d 1144, 1148 (9th Cir. 2010). In fact, the circuits generally recognize that challenges to the length of a sentence to imprisonment, which has already been served, is not mooted by commencement of supervised release in the context of direct sentencing appeals:

1. *First Circuit*: “Although [the defendant] has completed serving his term of imprisonment, this appeal has not become moot [I]f [the defendant] were to succeed with a claim that

⁴ In so describing this remedy, the Court followed the government’s invitation to consider § 3583(e) on the issues of reviewability and fairness. *See* Reply Brief for the United States at 10-12, *United States v. Johnson*, 529 U.S. 120 (2000) (No. 98-1696).

his sentence was improperly calculated, his three-year period of supervised release could be reduced on remand.” *United States v. Cruzado-Laureano*, 527 F.3d 231, 234 n.1 (1st Cir. 2008);

2. *Second Circuit*: Although finding a narrow exception over then-Judge Sotomayor’s dissent, noting that “we may assume that in the typical case . . . an appellate court could fairly deem it likely enough that, if the merits issue were decided in favor of the defendant, the district court would use its discretion on remand to modify the length of a term of supervised release.” *United States v. Blackburn*, 461 F.3d 259 & n.2 (2d Cir. 2006);
3. *Third Circuit*: Release from prison does not moot a challenge to a term of imprisonment because relief could affect the term of supervision. *United States v. Afuwajomo*, 258 Fed. Appx. 434, 436-437 (3d Cir. 2007);
4. *Fourth Circuit*: “Although his release from prison has foreclosed the possibility of a shorter period of incarceration, the parole ineligibility finding still may affect the length of his parole.” *Townes v. Jarvis*, 577 F.3d 543, 547 (4th Cir 2009);
5. *Fifth Circuit*: “Lares-Meraz’s challenge to his sentence [is not] moot because he remains subject to a term of supervised release, an element of the overall sentence.” *United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006);
6. *Sixth Circuit*: “Even when an appellant has been released from custody, his case is not moot so long as the appeal ‘potentially implicates’ the length of the appellant’s supervised release term.” *United States v. Maken*, 510 F.3d 654, 656 n.3 (6th Cir. 2007);
7. *Seventh Circuit*: Recognizing that although this Court held in *Johnson* that “a person held too long in prison” is not automatically “given credit against his term of supervised release,”

the fact that a “district judge would have discretion to shorten the term of supervised release” is enough to keep the controversy live. *United States v. Trotter*, 270 F.3d 1150, 1152-53 (7th Cir. 2001);

8. *Ninth Circuit*: “If he were to prevail, in decreasing his total offense level, he could be resentenced to a shorter period of supervised release Thus, Verdin has a ‘personal stake in the outcome’ of this appeal, and it is not moot.” *United States v. Verdin*, 243 F.3d 1174, 1178-79 (9th Cir. 2001);

9. *Tenth Circuit*: “[U]nder ordinary circumstances, a defendant who has served his term of imprisonment but is still serving a term of supervised release may challenge his sentence if his unexpired term of supervised release could be reduced or eliminated by a favorable appellate ruling.” *United States v. Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007);

10. *Eleventh Circuit*: “Because success for Dawson could alter the supervised release portion of his sentence, his appeal is not moot.” *Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir. 1995);

11. *D.C. Circuit*: Finding petitioner’s action not mooted by her release from prison because resentencing was “relevant to [defendant’s] supervised release” and “clearly could benefit [her].” *United States v. McCoy*, 313 F.3d 561, 564 (D.C. Cir. 2002).

Over-incarceration due to the executive agency’s unlawful action is indistinguishable from, if not worse than, correction of judicial error on direct appeal. The only district with jurisdiction to make the predicate ruling regarding over-incarceration by the BOP’s execution of the sentence is the place of custody under 28 U.S.C. § 2241. The sentencing court has no authority to make the

predicate determination that is necessary to establish the “equitable considerations of great weight” under § 3583(e).

The BOP places sole reliance on a Third Circuit case involving discretionary administrative early release for participation in BOP programming. *Burkey v. Marberry*, 556 F.3d 142, 149 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 458 (2009). But *Burkey* flows from the incorrect premise that a determination that a prisoner over-served his term of imprisonment would not have any significant effect on the likelihood of success on a § 3583(e) motion. This flawed analysis is inconsistent with *Johnson* as demonstrated by the following juxtaposition:

- *Johnson*, 529 U.S. at 60: “There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term. The statutory structure provides a means to address these concerns in large part. The trial court, as it sees fit, may modify an individual’s conditions of supervised release.”
- *Burkey*, 556 F.3d at 149: “From a practical, and legal, standpoint, we . . . doubt whether a sentencing judge, having imposed a specific term of imprisonment and supervised release, would alter his view as to the propriety of that sentence because the BOP required the defendant to serve it.”

The Third Circuit’s belief that § 3583(e) is not available – legally or practically – as an equitable remedy for over-incarceration contradicts the holding of *Johnson* and makes little sense. *See United States v. Montenegro-Rojo*, 908 F.2d 425, 431 n.8 (9th Cir.1990) (“[T]he extra time Montenegro-Rojo spent in jail should, in fairness, be counted towards the year of supervised release. Incarceration, after all, is surely even a severer punishment than supervised release.”). Further, unlike *Burkey*, which involved a discretionary BOP program for early release, this case involves the

BOP's execution of a sentence different from the one imposed: the BOP modified the original silent sentence to run consecutively to the state sentence. While there is no right to day-for-day reduction of the supervised release term, the judicial determination that the BOP violated constitutionally-based statutory rights constitutes an "equitable consideration of great weight" in deciding a request for modification of the term under § 3583(e).

Moreover, reliance on *Burkey* is especially improper because the Third Circuit misread *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), to require a showing of collateral consequences to avoid mootness. *Burkey*, 556 F.3d at 148-49. Under *Spencer*, when a person is still on parole – or supervised release as is the case here – his sentence has not yet expired and the collateral consequences doctrine does not apply: "Once the convict's sentence has expired, . . . some concrete and continuing injury other than the now-ended incarceration or parole – some 'collateral consequence' must exist." *Spencer*, 523 U.S. at 7. Where, as here, a habeas petitioner is still serving a term of supervised release, he is suffering a "concrete injury" that renders collateral consequences unnecessary. *Blackburn*, 461 F.3d at 269 (Sotomayor, J., dissenting) ("*Spencer* does not control the resolution of this case because [petitioner's] entire sentence has not expired.>").

The Third Circuit also misapplied the "likelihood" standard. Petitioners need not demonstrate that a motion under § 3583(e) likely will be granted. Rather, they need only show that there would be a "change in legal status" and that a "practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Utah v. Evans*, 536 U.S. 452, 464 (2002). The Ninth Circuit's mootness holdings are correct because a favorable ruling authoritatively establishing that a prisoner was unlawfully over-incarcerated would significantly increase the chances of shortening the term of

supervision. *See, e.g., Tablada v. Thomas*, 533 F.3d 800, 802 n.1 (9th Cir. 2008); *Arrington v. Daniels*, 516 F.3d 1106, 1111 n.4 (9th Cir. 2008); *Serrato v. Clark*, 486 F.3d 560, 565 (9th Cir. 2008); *Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005); *Gunderson v. Hood*, 268 F.3d 1149, 1153 (9th Cir. 2001); *see also Levine v. Apkar*, 455 F.3d 71, 77 (2nd Cir. 2006); *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006); *Dawson v. Scott*, 50 F.3d 884, 886 (11th Cir. 1995).

The Court should also reject the BOP's mootness argument as a reason to deny certiorari because doing so would insulate a broad area of important constitutional issues from effective review. This office has represented hundreds of prisoners in cases challenging BOP policies and practices, many of which have resulted in vindication of petitioners' rights or, at least, rulings on the merits of cases involving substantial issues. One of the reasons the Ninth Circuit has ruled at least seven times that release to supervision does not moot a case is because of the realities of prisoner litigation: many issues regarding sentence calculation do not mature until close to the prisoners' projected release date; prisoners frequently and appropriately avail themselves of the time-consuming administrative remedies system; and the district courts and appellate courts need time to consider and to rule on the issues raised. The BOP's position would basically remove this Court from effective review of most of the practices that directly affect a prisoner's time in custody.

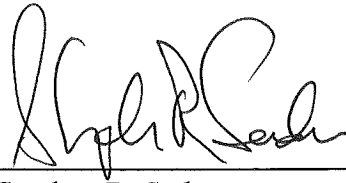
Invocation of *Burkey* is especially inappropriate because this case presents an excellent vehicle for reaching the extremely important statutory and constitutional issues. Mr. Reynolds is represented by counsel experienced in BOP litigation; he raised all relevant issues and fully briefed them at all stages of the litigation; and the two post-sentencing contacts between the BOP and the federal judge sharply illustrate the capriciousness of the present system. And Mr. Reynolds's trial counsel perfectly demonstrated the need for this Court's intervention when he quoted the BOP's own

website in describing the implementation of consecutive and concurrent sentences as “probably the single most confusing and least understood sentencing issue in the Federal system.”

Conclusion

For the foregoing reasons and those stated in the petition for certiorari, we respectfully request that the Court grant the writ.

Dated this 14th day of March, 2011.

A handwritten signature in black ink, appearing to read "Stephen R. Sady", is written over a horizontal line. A vertical line extends downwards from the right end of the horizontal line.

Stephen R. Sady
Attorney for Petitioner

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CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within Reply to Brief for the United States In Opposition on the counsel for the respondent by causing to be hand delivered on March 14, 2011, a true, exact, and full copy thereof to 600 United States Courthouse, 1000 S.W. Third Avenue, Portland, Oregon 97204-2902, to:

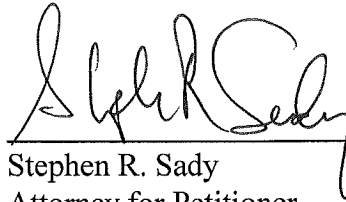
Kelly A. Zusman
U.S. Attorney
1000 SW Third, Suite 600
Portland, OR 97204

and by depositing at a Federal Express Office, in Portland, Oregon on March 14, 2011, for priority overnight service, a true, exact and full copy thereof addressed to:

Neal K. Katyal
Acting Solicitor General
Room 5614
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950 Pennsylvania Avenue, N. W.
Washington, DC 20530

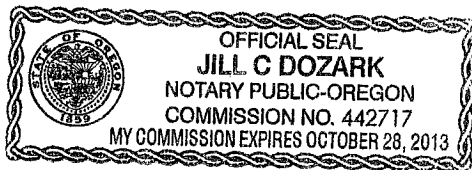
Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them at a Federal Express Office for priority overnight service, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 14th day of March, 2011.

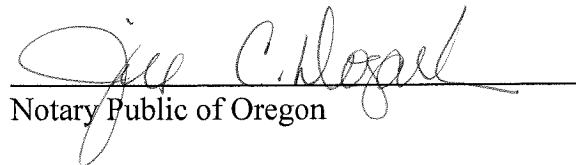
Dated this 14th day of March, 2011.



Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 14th day of March, 2011.





Notary Public of Oregon

UNITED STATES DISTRICT COURT

DISTRICT OF MONTANA
901 FRONT STREET - SUITE 3100
HELENA, MONTANA 59626

CHAMBERS OF
CHARLES C. LOVELL
SENIOR UNITED STATES DISTRICT JUDGE

October 24, 2007

Delbert G. Sauers, Chief
Designation & Sentence Computation Center
Federal Bureau of Prisons
346 Marine Forces Drive
Grand Prairie, Texas 75051

Re: United States v. Charles Lee Reynolds, Jr.,
CR 02-17-H-CCL
Reg. No. 03034-046

Dear Mr. Sauers:

I am in receipt of your letter dated September 17, 2007,
seeking my position on your contemplated retroactive designation
of state institution for service of Defendant Reynolds' 71-month
federal sentence.

When I sentenced Defendant Reynolds on May 22, 2003, I was
aware, of course, that he was then pending sentencing both in
Lewis and Clark County (Montana First Judicial District) and also
in Madison County (Montana Fifth Judicial District). I made no
reference to the Defendant's state sentences because they did not
yet exist.

In response to your inquiry, I have no comment on your
consideration of Defendant Reynolds for retroactive designation
of the state institution for service of the federal sentence.

Sincerely,


Charles C. Lovell

cc: Defendant Reynolds
J. Blaine Anderson, Jr.
Michael Lahr, AUSA (for Michael Yurkanin)
Mark Piskolich, USPO

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HELENA, MONTANA

him. The Marshals waited until the expiration of his state sentences before taking him into custody. Mr. Reynolds' federal sentence commenced despite the United States Marshal's failure to accept custody. *Cozine*, 15 F.Supp.2d at 1009 (“[T]his court finds that Cozine’s federal sentence commenced to run (assuming, for the moment, that it had not already done so earlier) when the federal authorities *should* have accepted custody of him to begin serving his federal sentence.”) (emphasis original)).

II. The Plain Meaning Of 18 U.S.C. § 3584(a) And The Rules Of Statutory Construction Foreclose The BOP’s Interpretation Of The Statute Because Silence In The Federal Judgment Cannot Be Presumed To Intend A Sentence Consecutive To A Non-Existent State Term Of Imprisonment.

The BOP violates the plain meaning of the relevant federal statute and the basic rules of comity by disregarding the state judgment’s concurrent sentence, by refusing to commence the federal sentence under 18 U.S.C. § 3585(a), by failing to credit time spent serving the concurrent state sentence under § 3585(b), and by denying requests for *nunc pro tunc* designation to the state institution under § 3621(b). The BOP purports to find authority under § 3584(a) as providing the sentencing court with the authority to sentence prospectively:

On occasion, a federal court will order the federal sentence to run concurrently with or consecutively to a not yet imposed term of imprisonment. Case law supports a court’s discretion to enter such an order and the federal sentence shall be enforced in the manner prescribed by the court.

If the federal sentence is silent, or ordered to run consecutively to the non-existent [state] term of imprisonment, then the federal sentence shall not be placed into operation until the U.S. Marshal’s Service or the Bureau of Prisons gains exclusive custody of the prisoner.