

No. 10-7502

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES LEE REYNOLDS, PETITIONER

v.

J.E. THOMAS, WARDEN

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Bureau of Prisons was required to give effect to a state court's order that petitioner's state and federal sentences run concurrently.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-50) is published at 603 F.3d 1144. The order of the district court (Pet. App. 17-18) adopting the report and recommendation of the magistrate judge (Pet. App. 1-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2010. A petition for rehearing was denied on August 17, 2010 (Pet. App. 51). The petition for a writ of certiorari was filed on November 12, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the District of Montana, petitioner was convicted on one count of identity theft, in violation of 18 U.S.C. 1028(a)(7), and one count of bank fraud, in violation of 18 U.S.C. 1344. He was sentenced to 71 months of imprisonment, to be followed by five years of supervised release. Pet. App. 22, 24. The United States District Court for the District of Oregon denied a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241. Id. at 1-18. The court of appeals affirmed. Id. at 19-50.

1. In March 2002, four days into his term of probation on a Montana state conviction for forgery, petitioner began fraudulently obtaining and using several lines of credit. See 3:07-cv-01244-ST, Docket entry No. 10-2, at 3-4, 16 (D. Or. Feb. 15, 2008) (Entry No. 10-2). In May 2002, he was arrested and charged in state court for those crimes. Id. at 4, 18. Following his release on bond, however, petitioner continued to commit crimes throughout Montana, including identity theft, forgery, bank fraud, drug possession, and criminal endangerment. Id. at 5-9, 18-19. Following a high-speed car chase on October 3, 2002, petitioner was apprehended by Montana state police and eventually charged with several additional state crimes. Pet. App. 21. While he was awaiting trial on those state charges, the United States District Court for the District of Montana issued a writ of habeas corpus

ad prosequendum, pursuant to which petitioner was transferred to federal custody to answer federal charges growing out of his misconduct while released on bond. Id. at 22.

On May 22, 2003, petitioner pleaded guilty in federal district court to one count of identity theft, in violation of 18 U.S.C. 1028(a)(7), and one count of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 22. That same day, the district court sentenced petitioner to 71 months of imprisonment, to be followed by five years of supervised release. Id. at 3, 22. Petitioner was then returned to Montana state custody, and the federal judgment was filed with Montana authorities as a detainer. Id. at 3; 3:07-cv-01244-ST, Docket entry No. 20-2, at 3 (D. Or. June 19, 2008) (Entry No. 20-2). Following his return to state custody, petitioner pleaded guilty to various state offenses in two different state courts.

On August 1, 2003, the Montana First Judicial District Court sentenced petitioner to a total of 25 years of imprisonment, with five years suspended, for driving under the influence, forgery, fraudulently obtaining dangerous drugs, and theft of identity. Pet. App. 3-4. The court ordered that term to run concurrently with petitioner's federal sentence. See 3:07-cv-01244-ST, Docket entry No. 6-2, at 2, 19 (D. Or. Dec. 18, 2007) (Entry No. 6-2). On December 24, 2003, the Montana Fifth Judicial District Court sentenced petitioner to a total of ten years of imprisonment, with

five years suspended, for possession of drugs, criminal endangerment, and criminal mischief. Pet. App. 4. That court ordered that term to run concurrently with petitioner's other state sentence and his federal sentence. See Entry No. 6-2, at 2, 23-24.

2. On December 22, 2006, petitioner was paroled from state prison and, pursuant to the federal detainer, was released to the custody of federal authorities for satisfaction of his federal sentences. Pet. App. 23. Petitioner then sought credit against his federal sentences for his time spent in state prison. As relevant here, petitioner filed a request for an administrative remedy with the Federal Bureau of Prisons (Bureau), seeking credit toward his 71-month federal sentence for the time that he had spent in state custody. See 3:07-cv-01244-ST, Docket entry No. 10-4, at 15 (D. Or. Feb. 15, 2008) (Entry No. 10-4) (Bureau's response to petitioner's administrative request). Liberally construed, petitioner's request raised two claims.

First, petitioner requested credit under 18 U.S.C. 3585(b), which provides that, in certain circumstances, "[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" if that detention time "has not been credited against another sentence." See Entry No. 10-4, at 16. The Bureau denied petitioner's claim, because petitioner's time in state prison already had "been credited against another sentence"

-- namely, petitioner's state sentences. Petitioner's time in state custody therefore was not eligible for federal credit under Section 3585(b). See United States v. Wilson, 503 U.S. 329, 333 (1992) ("[T]he final clause of § 3585(b) allows a defendant to receive credit only for detention time 'that has not been credited against another sentence.'" (quoting 18 U.S.C. 3585(b))).

Second, petitioner requested that, under 18 U.S.C. 3621(b), the Bureau retroactively designate the Montana state prison as the place where petitioner began serving his federal sentence. Entry No. 10-4, at 14-15 (citing Barden v. Keohane, 921 F.2d 476 (3d Cir. 1990)); see Barden, 921 F.2d at 482-483 (explaining the Bureau's authority under Section 3621(b) to enter such nunc pro tunc designations). Section 3621(b) lists certain factors that the Bureau must consider in deciding any designation, including a nunc pro tunc designation. See 18 U.S.C. 3621(b)(1)-(5). In addition, the Bureau has adopted protocols governing when to grant a nunc pro tunc designation of a state prison as the place of federal imprisonment. See Pet. App. 61-73 (Program Statement No. 5160.05: Designation of State Institution for Service of Federal Sentence 5-6 (Jan. 16, 2003)). In making that determination, the Bureau gives considerable weight to the intent of the federal sentencing court, even if that intent is not embodied in the inmate's sentencing order. Id. at 66. When the court's intent is not embodied in the sentencing order, the Bureau consults directly with the

court by letter to ascertain its views on whether a nunc pro tunc designation should be granted. Ibid.

In this case, the Bureau followed that procedure and solicited the views of the federal district judge, the Hon. Charles C. Lovell, who had sentenced petitioner. See 3:07-cv-01244-ST, Docket entry No. 20-4, at 12-13 (D. Or. June 19, 2008). Judge Lovell informed the Bureau that he had "no comment on [the Bureau's] consideration of [petitioner] for retroactive designation of the state institution for service of the federal sentence." Id. at 14. The Bureau then denied petitioner's request in November 2007, based on the factors set forth in Section 3621(b). Specifically, the Bureau noted the nature and circumstances of the federal offenses, which involved a significant financial loss and attempted blackmail of petitioner's father; petitioner's extensive criminal history, including convictions for aggravated assault, domestic abuse, resisting arrest, fraudulently obtaining dangerous drugs, forgery, theft, and driving under the influence; Judge Lovell's statement during sentencing that petitioner "presents a significant danger to the community because of the career nature of his criminal activities, his apparent lack of regard for the safety and well-being of other individuals \* \* \* and high likelihood of recidivism"; and Judge Lovell's failure to indicate that a nunc pro tunc designation should be granted. Id. at 15-16; see Entry No. 20-2, at 6; Pet. App. 23-24.



3. Pursuant to 28 U.S.C. 2241, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon, where he was then confined. The magistrate judge recommended that the habeas petition be denied, Pet. App. 1-16, and the district court adopted that recommendation without modification, id. at 17-18.

The district court held that when the State of Montana arrested petitioner, it acquired primary jurisdiction over petitioner until his state sentence was satisfied. Pet. App. 7, 11. The State's primary jurisdiction was not altered, the court observed, by the federal authorities' issuance of a writ of habeas corpus ad prosequendum so that petitioner could appear in federal court to answer federal charges. Id. at 12; see Jake v. Herschberger, 173 F.3d 1059, 1061 n.1 (7th Cir. 1999) ("Because the receiving sovereign merely obtains limited jurisdiction over the 'borrowed' prisoner, the prisoner is still under the jurisdiction of the sending sovereign, and is considered to be in the custody of the sending sovereign not the receiving sovereign.").

As the district court further explained, petitioner's federal sentence did not commence when federal authorities returned him to state custody. Pet. App. 7. By statute, a federal sentence to a term of imprisonment "commences on the date the defendant is received in custody awaiting transportation to \* \* \* the official detention facility at which the sentence is to be served."

Ibid. (quoting 18 U.S.C. 3585(a)). After petitioner's federal sentencing on May 22, 2003, he was returned to state custody. Id. at 3. As a result, the district court recognized, petitioner was not awaiting transportation to any federally designated facility for service of his federal sentence, and his federal sentence therefore did not commence. Rather, the district court held, "petitioner was not received into federal custody for service of his federal sentence until December 22, 2006." Ibid.

The district court then rejected petitioner's claim that he was entitled to receive credit against his federal sentence for the time that he had spent in state custody. That period of time totaled approximately 51 months, from petitioner's arrest by state authorities on October 3, 2002, until his release from state prison on December 22, 2006. The court held that petitioner was not entitled to credit for that period under 18 U.S.C. 3585(b), because the time that petitioner spent "in Montana's jails and prisons between October 3, 2002, and his release to federal custody on December 22, 2006, was all credited toward his state sentence." Pet. App. 8. "Because 18 U.S.C. § 3585(b) explicitly provides that no prior custody credits will be awarded based on time credited toward the service of another sentence," the court reasoned, "petitioner is not entitled to such credit." Ibid.

Finally, the district court rejected petitioner's claim that the Bureau had abused its discretion or otherwise acted unlawfully

in declining to grant a nunc pro tunc designation. Pet. App. 8-9. The court noted that, after "full and fair consideration," id. at 14, the Bureau had denied "petitioner's nunc pro tunc designation request based on the comments of the sentencing court, his lengthy criminal history, and the career nature of his criminal activities." Id. at 10. Based on those factors, the court held that the Bureau "properly exercised its discretion." Id. at 14. Moreover, although the Montana courts had intended petitioner's state sentences to run concurrently with his federal sentence, the district court held that "the intentions of the state courts are not binding on the federal courts." Id. at 9; see id. at 13.

4. Petitioner appealed from the denial of his habeas petition. While that appeal was pending, petitioner renewed his administrative request for a nunc pro tunc designation. Pet. App. 24. The Bureau again sought the views of Judge Lovell, who this time responded that "since the objectives of sentencing have apparently been largely met in this case, [he had] no objection to [the Bureau's] suggestion for a retroactive designation (i.e., [he] would recommend that favorable treatment for [petitioner] at this time)." 08-35810, Docket entry No. 29-7, at 1 (9th Cir. Jan. 13, 2010). On November 18, 2009, in light of Judge Lovell's response, the Bureau granted petitioner's request. 08-35810, Docket entry No. 29-5, at 3 (9th Cir. Jan. 13, 2010); see Pet. App. 24.

On November 20, 2009, petitioner was released from federal custody.<sup>1</sup>

5. The court of appeals affirmed. Pet. App. 19-50.

a. As a threshold matter, the court held that petitioner's release from federal custody did not moot the case, because "petitioner remains on supervised release and '[t]here is a possibility that [petitioner] could receive a reduction in his term of supervised release.'" Pet. App. 25 (quoting Mujahid v. Daniels, 413 F.3d 991, 995 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006)). The court of appeals reasoned that petitioner "claims he is entitled to a recalculation of his release date to July 17, 2008, and asserts that he was overincarcerated for sixteen months: from July 17, 2008 to his actual release date of November 20, 2009." Ibid. According to the court of appeals, "[a] court could consider this alleged period of over-incarceration under 18 U.S.C.

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<sup>1</sup> Petitioner began serving his 71-month federal sentence in December 2006. Accounting for good time credit, petitioner was scheduled to be released in February 2012, after serving approximately 62 months of his term. But once the Bureau had granted the nunc pro tunc designation on November 18, 2009, the resulting credit for time that petitioner had spent in state custody meant that petitioner was past due for release. In that circumstance, the Bureau makes the designation "retroactive to a point in time that the sentence, when calculated in the same manner as any other sentence, results in a release date that affords the institution time to conduct normal release processing." Pet. App. 68-69. Here, the Bureau made the designation retroactive to a date approximately 62 months earlier -- specifically, September 26, 2004. That resulted in a release date of November 20, 2009 (two days after the Bureau had granted the designation), and petitioner was released on that date. Pet. App. 24.

§ 3583(e) as a factor weighing in favor of reducing the term of supervised release." Ibid.<sup>2</sup>

On the merits, the court of appeals rejected petitioner's argument that the Bureau "had an obligation to comply with the state court's determination that [petitioner's] sentences should run concurrently with his federal sentence." Pet. App. 29-30. The court noted that petitioner's argument was foreclosed by its previous decision in Taylor v. Sawyer, 284 F.3d 1143 (2002), cert. denied, 537 U.S. 1119 (2003), which "upheld the [Bureau's] authority to decline to make a nunc pro tunc designation of a state prison notwithstanding a state court's contrary order." Pet. App. 30 (citing Taylor, 284 F.3d at 1149); see id. at 31 (characterizing arguments that the Bureau is bound by a state court's sentencing order "as having 'no persuasive support in constitutional principle, consistent practice, or established case law'" ) (quoting Taylor, 284 F.3d at 1151).

The court of appeals then held that the Bureau's denial of a nunc pro tunc designation was neither an abuse of discretion nor

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<sup>2</sup> Petitioner contends that he should have been released on July 17, 2008, but it is not clear how he calculates that date. That date would give petitioner credit for the 43-month period between his federal sentencing in May 2003 and his release from state prison in December 2006. But it would not give petitioner credit for the almost eight-month period between his state arrest in October 2002 and his federal sentencing in May 2003. Petitioner does not explain why he seeks credit for the former period but not the latter.

contrary to law. Pet. App. 32-34. First, the court rejected petitioner's argument that he was arrested in October 2002 under a federal warrant. Id. at 32. To the contrary, the court held, Montana arrested petitioner and acquired primary jurisdiction over him, after which petitioner was prosecuted in federal court pursuant to a writ of habeas corpus ad prosequendum. Id. at 33. Second, the court rejected petitioner's argument that the Bureau had abused its discretion by failing to consider Sentencing Guidelines § 5G1.3. Pet. App. 33. Third and finally, the court rejected petitioner's argument that the Bureau had abused its discretion in considering Judge Lovell's initial silence as weighing against a nunc pro tunc designation. Id. at 34.

b. Judge Fletcher concurred, stating that the Bureau had "acted properly in construing the sentencing judge's answer to the [Bureau's] letter, in which the judge refused to express a preference, as an indication that a consecutive sentence was appropriate." Pet. App. 34. But Judge Fletcher expressed his view that separation-of-powers concerns would arise if, in another case, the Bureau were to deny a nunc pro tunc designation that the federal sentencing judge supported. Id. at 34-50. Judge Fletcher urged "Congress to give its careful attention to the issues raised by the imposition of overlapping federal and state sentences." Id. at 50.

## ARGUMENT

Petitioner claims (Pet. 9-29) that the Bureau of Prisons was required to give effect to the state sentencing court's order that petitioner's state and federal sentences run concurrently. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. As the courts of appeals have uniformly recognized, the Bureau is not required to grant a nunc pro tunc designation simply because a state court orders a defendant's state sentence to run concurrently with a federal sentence. This Court recently declined to review this issue, see Waters v. United States, cert. denied, No. 10-6431 (Feb. 22, 2011), and the same result is warranted here.

1. As a threshold matter, petitioner's release from federal prison renders this case moot. The completion of a criminal defendant's sentence will not normally moot an appeal challenging the underlying conviction because criminal convictions generally have "continuing collateral consequences." Spencer v. Kemna, 523 U.S. 1, 7 (1998). The "presumption of collateral consequences," however, does not extend beyond the fact of a criminal conviction. Id. at 12. Thus, when a defendant challenges an action that has affected only the length of his term of imprisonment, his completion of that prison term moots his challenge, unless the defendant can show both that the challenged action continues to cause "col-

lateral consequences adequate to meet Article III's injury-in-fact requirement," id. at 14, and that those consequences are "likely to be redressed by a favorable judicial decision," id. at 7. Petitioner cannot make that showing here.

In light of the Bureau's grant of petitioner's nunc pro tunc designation request, the only challenged action by the Bureau is its determination that his federal sentence was completed in November 2009 rather than July 2008. That determination does not have collateral consequences that a judgment in petitioner's favor would likely redress. Petitioner has already been released from prison. By statute, petitioner's term of supervised release began in November 2009 when he was actually released. See 18 U.S.C. 3624(e) (term of supervised release "commences on the day the person is released from imprisonment"). Even if the Bureau were to determine that petitioner should have been released earlier, that would not change the date on which petitioner's term of supervised release began or entitle him to receive credit against that term. See United States v. Johnson, 529 U.S. 53, 54 (2000) (holding that a prisoner incarcerated past his proper release date is not entitled to receive credit against his term of supervised release).

This Court in Johnson recognized that a prisoner who has been incarcerated beyond his proper release date might persuade the sentencing court to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a



court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." See 529 U.S. at 60. The court of appeals, however, incorrectly reasoned that the mere possibility of a reduction in petitioner's supervised release term means that altering petitioner's past release date is sufficiently likely to afford him redress. Pet. App. 25 (quoting Mujahid v. Daniels, 413 F.3d 991, 995 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006)).

As the Third Circuit has recognized, "[t]he possibility that the sentencing court will use its discretion to modify the length of [petitioner's] term of supervised release under 18 U.S.C. 3583(e), \* \* \* is so speculative" that it does not present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149, cert. denied, 130 S. Ct. 458 (2009); see also Demis v. Sniezek, 558 F.3d 508, 514-515 (6th Cir. 2009); but see Levine v. Apler, 455 F.3d 71, 77 (2d Cir. 2006); Johnson v. Pettiford, 442 F.3d 917, 918 (5th Cir. 2006) (per curiam). At the least, that is true here because petitioner's challenge depends on the Bureau's purported failure to respect the federal sentencing judge's intent, see Pet. 15, and that is the same federal judge who is empowered to modify petitioner's term of supervised release, see 18 U.S.C. 3583(a) and (e). Petitioner does not need a retroactive change in his release date in order to request a modification of his term of supervised release from the federal sentencing judge.

2. In any event, petitioner's claim that the Bureau was required to select an earlier nunc pro tunc designation date in order to give effect to the state sentence is meritless. In this case, petitioner was sentenced in federal court to 71 months of imprisonment. He then received multiple state terms of imprisonment. He served his state prison sentences first, following which he was transferred to federal custody. The Bureau, which is authorized to administer a defendant's sentence, see United States v. Wilson, 503 U.S. 329, 335 (1992), determined that petitioner was not entitled to federal credit for his time in state custody under 18 U.S.C. 3585(b), because that time already had been "credited against another sentence," ibid. -- namely, petitioner's state sentences. Pet. App. 8. In addition, the Bureau initially declined to designate the Montana state institution where petitioner was confined as the location where petitioner's federal sentence commenced, because the federal sentencing judge, Judge Lovell, did not support such a designation. But once Judge Lovell supported such a designation, the Bureau granted the designation, made it retroactive to a date that would allow for petitioner's release, and released petitioner from custody. Id. at 24.

Petitioner has not demonstrated that any aspect of the Bureau's decisionmaking was arbitrary or capricious, an abuse of discretion, or otherwise contrary to law. Indeed, the courts of appeals routinely have affirmed the denial of habeas corpus peti-

tions under similar circumstances. See, e.g., Hunter v. Tamez, 622 F.3d 427, 430-432 (5th Cir. 2010) (affirming denial of habeas petition seeking a designation order that would credit time served in state prison against federal sentence, even though state court had ordered its sentence to run concurrently with a future federal sentence); Fegans v. United States, 506 F.3d 1101, 1102-1105 (8th Cir. 2007) (same); Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 75-76 (2d Cir. 2005) (same).

a. As an initial matter, petitioner does not cite (Pet. 26) any authority for his claim that 18 U.S.C. 3584(a) required the Bureau to grant a nunc pro tunc designation. Section 3584(a) does not address the designation process at all. Rather, that statute governs a district court's options in imposing sentence. Section 3584(a) provides that, except as otherwise required by law, a district court in imposing multiple terms of imprisonment may order those terms to run concurrently or consecutively. Section 3584(a) also provides for a default rule: "Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively." But by its terms, Section 3584(a) does not apply here. There is no dispute that petitioner received a single 71-month federal sentence. The question for the Bureau was whether to designate the Montana state prison as the place where petitioner began serving

his federal sentence, and Section 3584(a) says nothing in answer to that question.<sup>3</sup>

b. Likewise, petitioner does not cite (Pet. 27) any authority for his claim that, under 18 U.S.C. 3585(b), he is entitled to federal credit for the time that he spent in state custody. As the courts below recognized, Section 3585(b) expressly provides that federal credit is available only for detention time "that has not been credited against another sentence." Here, the time that petitioner spent in Montana state custody was "credited against another sentence," i.e., petitioner's state sentences. Petitioner argues (Pet. 27) that each of his state sentences was not "another sentence" within the meaning of Section 3585(b). But consistent with that provision's plain meaning, the courts of appeals have held that a state sentence is "another sentence" from a defendant's federal sentence. See, e.g., United States v. Labelle-Soto, 163 F.3d 93, 99 (2d Cir. 1998); United States v. Dennis, 926 F.2d 768, 770 (8th Cir. 1991) (per curiam). Moreover, petitioner

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<sup>3</sup> Petitioner notes (Pet. 11-12) that the courts of appeals are divided over whether a district court may order a federal sentence to run concurrently with a not-yet-imposed state sentence. But that issue is not presented here, because the district court did not specify in its judgment how petitioner's federal sentence would relate to any future state sentence. See 6:02-cr-00017-CCL-1, Docket entry No. 38 (D. Mont. May 28, 2003) (criminal judgment). In any event, this Court repeatedly has declined to review the issue. See, e.g., Ortiz-Coca v. United States, 130 S. Ct. 2730 (2010) (No. 09-7636); Aguilar-Mendez v. United States, 130 S. Ct. 2730 (2010) (No. 09-7639); Garcia-Quiroz v. United States, 130 S. Ct. 2730 (2010) (No. 09-7643); Mancilla-Lopez v. United States, 130 S. Ct. 2730 (2010) (No. 09-7644).

did not advance his unique interpretation of Section 3585(b) in the lower courts, and those courts therefore did not address it. See, e.g., Pet. App. 7-16, 21-34; Pet. C.A. Br. 17-50.

c. Petitioner also has not shown that the Bureau abused its discretion under 18 U.S.C. 3621(b) in declining to make its nunc pro tunc prison designation retroactive to the date of petitioner's federal sentencing. Petitioner concedes that "the [Bureau] has authority to make nunc pro tunc designations to state institutions under Section 3621(b)." Pet. 27. He cites nothing in that statute, however, to support his claim that it required the Bureau to implement the state courts' orders that his state and federal sentences run concurrently. Ibid. Section 3621(b) lists the factors that the Bureau must consider in making a designation decision, and the only reference in that list to a court's statements are to those of the federal sentencing court. See 18 U.S.C. 3621(b)(4).<sup>4</sup>

d. Finally, petitioner argues (Pet. 13-27) at length that the Bureau was required -- under the Constitution, various sentencing statutes, or common-law principles -- to effectuate the

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<sup>4</sup> Even assuming that the state courts had authority to order that petitioner's federal sentence run concurrently with his state sentences, that conclusion would not afford petitioner the full relief he seeks here. The earliest of the two state court orders was entered in August 2003, whereas petitioner seeks a declaration that his federal sentence commenced when he was returned to state custody three months earlier, upon his federal sentencing in May 2003. See p. 11 n.2, supra.

state courts' orders that petitioner's state sentences run concurrently with his federal sentence. The court of appeals correctly rejected those arguments, Pet. App. 30-32, and this Court recently declined to review whether a state court has the authority to order the Bureau to issue a nunc pro tunc designation, see Waters, supra. As the government explained in Waters, the circuits have uniformly recognized that a state court has no authority to compel federal authorities, either judicial or executive, to allow a federal sentence to run concurrent with a state sentence. See, e.g., Hunter, 622 F.3d at 430-431 (noting uniformity of circuits); United States v. Eccleston, 521 F.3d 1249, 1254 (10th Cir.), cert. denied, 129 S. Ct. 430 (2008); Fegans, 506 F.3d at 1104; Abdul-Malik, 403 F.3d at 75; Taylor, 284 F.3d at 1151-1152; Jake v. Herschberger, 173 F.3d 1059, 1065-1066 (7th Cir. 1999); Del Guzzi v. United States, 980 F.2d 1269, 1270 (9th Cir. 1992) (per curiam); Meagher v. Clark, 943 F.2d 1277, 1282 (11th Cir. 1991); Pinaud v. James, 851 F.2d 27, 30 (2d Cir. 1988).

As those courts have recognized, the Bureau is not required to grant a nunc pro tunc designation simply because a state court orders a defendant's state sentence to run concurrently with a federal sentence. The courts of appeals therefore have likewise rejected claims that the Bureau's failure to abide by a state court's sentencing order violates a defendant's federal due process rights. See, e.g., Leal v. Tombone, 341 F.3d 427, 427-430

(5th Cir. 2003) (per curiam) (rejecting defendant's claim that because the state court had ordered concurrent sentences, "federal authorities [had] violated his due process rights by failing to credit his federal sentence with approximately nine months during which he was incarcerated in state prison"); Pinaud, 851 F.2d at 28-32 (rejecting claim that "the denial of credit violates" a defendant's due process rights, as "any violation of his rights is the responsibility of the state, and it is to the state that he must look for redress"). If a State wishes to advance the date on which a previously imposed federal sentence will commence, the State may attempt to relinquish primary jurisdiction over the defendant or it may adjust the length of the state sentence (or suspend a portion of that sentence) to account for the time that the defendant subsequently will serve in federal custody.

Petitioner contends that the Bureau's decision not to make its nunc pro tunc designation retroactive to the date of petitioner's federal sentencing "raises serious questions under the Full Faith and Credit Clause." Pet. 19. By its terms, however, the Full Faith and Credit Clause imposes obligations on the States, not on the federal government. See Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) ("The Full Faith and Credit Clause is of course not binding on federal courts."); see also Taylor, 284 F.3d at 1152 ("The Full Faith and Credit Clause is not violated if the [Bureau], a federal government agency, chooses not

to give effect to a state court judgment requiring concurrent sentences." ). Congress has provided in 28 U.S.C. 1738 that a state court judgment "shall have the same full faith and credit" in federal courts as it would have in any court of that State, but a state criminal judgment does not bind other States or the United States. See Nelson v. George, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment."); Taylor, 284 F.3d at 1152-1153 & n.11; id. at 1153 ("We hold that [Section 1738] does not apply to an attempt to enforce a state criminal sentence to limit a federal sentence for a federal crime."). Accordingly, petitioner does not cite any authority for the proposition that Section 1738 requires the Bureau to give effect to a state court judgment requiring concurrent sentences.

Finally, petitioner's separation-of-powers claim (Pet. 20-21) lacks merit. Even assuming petitioner is correct that only the federal judiciary can determine how a federal term of imprisonment relates to a later-imposed state sentence, but see Hunter, 622 F.3d at 431-432 (holding that the Bureau's designation process is analogous to a grant of clemency, which is an executive function), the Bureau here both requested and adhered to the views of the federal sentencing judge. As Judge Fletcher explained in his concurrence, this is not a case "in which the [Bureau] has not solicited the view of the sentencing judge or, having done so, has



disregarded that view." Pet. App. 50. Accordingly, this case does not present any separation-of-powers concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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