

## VERTICAL CONFLICTS IN SENTENCING PRACTICES: CUSTODY, CREDIT, AND CONCURRENCY

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### INTRODUCTION

Miguel Taylor is a drug dealer and a killer. He was sentenced in federal court to seventeen and one-half years in prison for drug trafficking. Shortly thereafter, he was sentenced in Oregon state court to nine and one-half years in prison for manslaughter. The Oregon state court judge, when imposing sentence on Taylor, evaluated the totality of Taylor's criminal activity and personal history and concluded that the state sentence he was imposing should run concurrently with the undischarged federal sentence, in order to reflect most appropriately the debt to society this particular defendant owed. Accordingly, this judge included an order of concurrent service when imposing sentence on Taylor. Despite this explicit order, Taylor must serve his federal and state sentences consecutively because of what amounts to a loophole in federal sentencing procedures.

Federal sentencing is a determinate system allocating and dispersing authority in an effort to balance national homogeneity with situational discretion. In situations unanticipated by its designers, however, the system functions with some difficulty because it lacks the concentrated discretion necessary to improvise. One such area arises when the federal government and a state both assert contemporaneous jurisdictional claims over the same individual. Here, a process of jurisdictional priorities is triggered, dividing and allocating authority between each sovereign. This process developed in a largely ad hoc manner across the nation, beginning first with loose agreements among various states and culminating today in the two-pronged system of the Interstate Agreement on Detainers on the one hand and writs of *habeas corpus ad prosequendum* on the other. Because of its developmental history and diffusion of authority, this

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priorities system operates with some difficulty when prisoners are shuffled from one sovereign to the next and back again. In essence, legal rules can align to deny a prisoner recognition for time served during transfers of primary and temporary custody.

In situations where both the federal government and a state contemporaneously claim jurisdiction over the same individual for purposes of trial or incarceration, procedural technicalities must be satisfied at every stage. Careless oversight or innocent inattention can have drastic consequences because these “technicalities” establish prerequisite jurisdictional relationships. Without the necessary relationship between a sovereign and a prisoner or defendant, service of penal or custodial obligations often cannot be recognized. Taylor’s situation exemplifies this. There, the federal government lacked the appropriate jurisdictional relationship with Taylor to commence his federal sentence in accordance with the state sentencing judge’s expectations. Without it, this judge’s order of concurrent service could not be implemented by the Federal Bureau of Prisons.

This article critically examines federal sentencing through the lens of interjurisdictional operation by examining how the federal system interfaces with a state system with contemporaneous jurisdictional claims. The omnipresent paradigm of incarceration that will serve as a backdrop is one in which a single prisoner or defendant is either being detained for trial or for penal incarceration in one jurisdiction and, contemporaneously, a second jurisdiction lays claim to that same individual. The discussion locates the common source of conflict in interjurisdictional custody, credit, and concurrency in the diffusion and fragmentation of authority that generates systemic rigidity and entrenchment. Following each examination and critique, a change in existing practice is proposed. These proffered enhancements tend to concentrate authority, importing the flexibility necessary to address the distinct problem areas discussed.

I begin with a general discussion of the interface between federal and state governments with contemporaneous claims over the same defendant or prisoner. Section I explores the various ways by which people are shuffled from one sovereign to the other and back again, traces the effect on custody that thereby results, and highlights potential pitfalls that may complicate custodial transfers and the attendant service of detention time imposed by each jurisdiction. The goal is to impart a foundational understanding of transactions between the federal system and a state with contemporaneous jurisdictional claims over the same person. At the same time, this section highlights the enduring quality of primary juris-

diction within this diversified system of custodial priorities and advocates the exercise and proliferation of executive branch authority to overcome its resulting entrenchment.

The discussion then introduces the remedial options available to prisoners ensnared by this interjurisdictional web. In Section II, the authority of the federal courts and the Federal Bureau of Prisons, both in their own rights and with respect to one another, to affect a sentence at specific times and in specific ways is reviewed. The goal here is to build upon the foundational understanding of interjurisdictional dynamics forged thus far with an awareness of the divided authority of the two central actors within the federal sentencing system. In the process, this section presents the remedial options currently available as inadequately slow and inefficient, and calls for a change in existing law that would expand the authority of the federal district court to address the relevant concerns directly and promptly.

Finally, Section III presents and unpacks a specific, structural problem in the interjurisdictional operation of federal sentencing, whereby the particular fragmentation of authority that exists results in extended federal incarceration despite specific state court orders to the contrary. This result offends comity between the federal government and the states and yields fundamentally unfair bureaucratic extensions of penal incarceration. The discussion presents these unfair bureaucratic extensions, too, as the product of fragmented authority and attendant entrenchment and proposes a simple change in existing law to eliminate it, an expansion not of judicial power but of consideration by the Bureau of Prisons to bridge this dispersed authority. Section III concludes by applying and assessing custody, credit, and concurrency relief options, both existing and proposed, to this specific, defined factual scenario.

## I

### CUSTODY AND TRANSFER

A priorities system accommodates overlapping demands in situations where multiple sovereigns contemporaneously claim jurisdiction over a single individual. Provisions for temporary transfer exist in order to accommodate the sovereign (or sovereigns) whose claim of jurisdiction enjoys a lesser priority. Custodial authority in this way is hierarchically distributed among the various sovereigns laying jurisdictional claim to the same person at the same time. This section traces these priorities of jurisdiction and custody, reviews the tools by which transfers are effected, and highlights common areas of confusion surrounding these overall structures. It

presents the priorities system as revolving around a jurisdictional relationship, called primary jurisdiction, so enduring that even its purported beneficiary has difficulty terminating it. Consequently, mistakes in tracking jurisdictional relationships within this priorities system are not easily corrected. A specific manifestation of executive branch power, which can be observed in a select few jurisdictions, is the best way to clarify the jurisdictional significance of custodial transfers and alleviate systemic entrenchment.

#### A. *Primary Custody*

Central to the tracking of custody and its transfer is the concept of “primary jurisdiction” or “primary custody.” These terms refer to the priority of service regarding a defendant’s contemporaneous obligations to multiple sovereigns, whereby a defendant will fulfill his obligations to the sovereign with primary jurisdiction over him before any others. “A lack of ‘primary jurisdiction’ does not mean that a sovereign does not have jurisdiction over a defendant. It simply means that the sovereign lacks priority of jurisdiction for purposes of trial, sentencing and incarceration.”<sup>1</sup>

Primary jurisdiction is usually, at least initially, tied to physical possession of a defendant. In *Clark v. Floyd*, defendant Clark was convicted in federal court and sentenced to probation.<sup>2</sup> Subsequently, he was arrested on state charges and convicted, which, in turn, resulted in the revocation of his federal probation.<sup>3</sup> The Ninth Circuit determined that Clark was to remain in state custody and complete his state obligations before answering to federal authorities because the federal system waived primary jurisdiction over Clark when it released him on probation.<sup>4</sup> Similarly, in *Taylor v. Reno*,<sup>5</sup> federal agents arrested defendant Taylor, who then pleaded guilty to federal drug charges. He was released on his own recognizance pending sentencing, during which time he was arrested on state murder charges.<sup>6</sup> According to the Ninth Circuit, when the district court released Taylor on his own recognizance it waived primary jurisdiction so that when Oregon police officers

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1. *Taylor v. Reno*, 164 F.3d 440, 444 n.1 (9th Cir. 1998), *cert. denied*, 527 U.S. 1027 (1999).

2. 80 F.3d 371, 372 (9th Cir. 1996).

3. *Id.*

4. *See id.* at 373.

5. 164 F.3d at 440.

6. *Id.* at 443.

later arrested him, Oregon gained primary jurisdiction over him.<sup>7</sup> Other courts have stated the link between primary jurisdiction and physical possession more explicitly: “[t]he controlling factor in determining the power to proceed as between two contesting sovereigns is the actual physical custody of the accused.”<sup>8</sup>

In accordance with the priority implications of primary jurisdiction and with the largely determinate relationship between primary jurisdiction and physical custody, the Federal Bureau of Prisons will not commence the sentence of a defendant with obligations to another jurisdiction in the absence of bail, parole, dismissal of charges, or completion of the undischarged sentence.<sup>9</sup> For purposes of trial, however, a federal judge can issue a writ of *habeas corpus ad prosequendum* to the state authorities compelling them to produce the defendant in federal court.<sup>10</sup> Writs of *habeas corpus ad prosequendum* do not affect primary jurisdiction; they require that the receiving sovereign return the prisoner to the sending sovereign, who all the while retains primary jurisdiction over its prisoner.<sup>11</sup> Accordingly, a federal judge cannot use this writ to assume custody over a defendant.<sup>12</sup> If a defendant is produced in court on a writ of *habeas corpus ad prosequendum* and is sent directly to the receiving sovereign’s prison system to begin his sentence, this time served normally will not count toward the prison term imposed by the receiving sovereign because its jurisdictional claim was not pri-

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7. *Id.* at 445; *see also In re Liberatore*, 574 F.2d 78, 89 (2d Cir. 1978) (stating that “the sovereignty which first arrests the individual acquires the right to prior and exclusive jurisdiction over him . . . and this plenary jurisdiction is not exhausted until there has been complete compliance with the terms of, and service of any sentence imposed by, the judgment of conviction . . .”).

8. *United States v. Vann*, 207 F. Supp. 108, 111 (E.D.N.Y. 1962).

9. *See Shumate v. United States*, 893 F. Supp. 137, 141 (N.D.N.Y. 1995); *United States v. Smith*, 812 F. Supp. 368, 371 n.2 (E.D.N.Y. 1993). As a matter of federal sentencing practice, the commencement of a defendant’s federal sentence presupposes primary jurisdiction. *See* 18 U.S.C. § 3585(a) (1994).

10. *See* 28 U.S.C. § 2241(c)(5) (1994) (“The writ of habeas corpus shall not extend to a prisoner unless . . . [i]t is necessary to bring him into court to testify or for trial.”).

11. *See Thomas v. Whalen*, 962 F.2d 358, 360 (4th Cir. 1992); *Flick v. Blevins*, 887 F.2d 778, 781 (7th Cir. 1989); *In re Liberatore*, 574 F.2d at 89.

12. *See Crawford v. Jackson*, 589 F.2d 693, 695 (D.C. Cir. 1978).

When an accused is transferred pursuant to a writ of *habeas corpus ad prosequendum* he is considered to be ‘on loan’ to the federal authorities so that the sending state’s jurisdiction over the accused continues uninterrupted. Failure to release a prisoner does not alter that ‘borrowed’ status, transforming a state prisoner into a federal prisoner. This is so despite any administrative entries to the contrary made by the receiving state.

mary.<sup>13</sup> Instead, this time normally will be credited to any obligations owed to the sending sovereign.<sup>14</sup> Of course, if the detention by the receiving sovereign exceeds in length the prisoner's obligations to the sending sovereign, then this difference normally will not be credited at all (absent some ex post remedial measure). Such needless incarceration resulting from bureaucratic error is fundamentally unfair.<sup>15</sup>

Nor can a federal judge assume primary jurisdiction from a state by so decreeing at sentencing. In *Taylor*, a defendant in primary state custody appeared in federal court pursuant to a writ of *habeas corpus ad prosequendum* for sentencing. The sentencing judge's oral statements and written order show that he intended to assert federal jurisdiction over the defendant.<sup>16</sup> On appeal, however, it was held that "[t]he district court did not have the power to commence Taylor's federal sentence, regardless of whether the court intended to do so and regardless of what the court said."<sup>17</sup>

### B. Interstate Agreement on Detainers

Prior to 1970, the transfer of prisoners and defendants from one jurisdiction to another was far more complicated than it is today. Typically, the receiving sovereign's governor would request that the prisoner be formally extradited by the governor of the sovereign enjoying primary jurisdiction.<sup>18</sup> The governor with primary jurisdiction would then conduct his own inquiry into the circumstances surrounding the prisoner's charges in the requesting state

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13. See *id.* at 695-96.

14. See *United States v. Wilson*, 503 U.S. 329, 331 (1992).

15. If the receiving sovereign is the federal government, the Bureau of Prisons, under 18 U.S.C. § 3585(b) (1994), may choose to credit this excess detention period as time served that has not been credited toward any other sentence, but nothing requires that this be done.

16. The federal sentencing judge remarked that "with the imposition of this sentence you are now in federal custody." *Taylor v. Reno*, 164 F.3d 440, 443 (9th Cir. 1998), *cert. denied*, 527 U.S. 1027 (1999). His written order stated that "[w]ith the imposition of this sentence, the defendant is now in federal custody." *Id.*

17. *Id.* at 446. See *Scott v. United States*, 434 F.2d 11, 20 (5th Cir. 1970); *United States v. Gonzalez*, S-1 94 Cr. 313 (CSH), 1998 U.S. Dist. LEXIS 15300, at \*8 (S.D.N.Y. Sept. 30, 1998) (stating that "it is clear that it is beyond this Court's authority to interrupt the state incarceration by ordering the Defendant to serve out his federal sentence first"). Again, federal sentencing practice presupposes primary jurisdiction for the commencement of a defendant's federal sentence, and commencement is determined by the Bureau of Prisons. See 18 U.S.C. § 3585(a) (1994).

18. See *United States v. Mauro*, 436 U.S. 340, 355-56 n.23 (1978).

and decide whether to comply with the request.<sup>19</sup> Because formal extradition was so lengthy and uncertain, individual states began to negotiate agreements with other states on prisoner transfers. But because this network of agreements varied from one sovereign to the next, it too was unreliable in the long run.<sup>20</sup> States seeking transfers soon began filing detainers with the sovereign with primary jurisdiction.

Detainers, at that time, were informal notices that the requesting state sought custody of the prisoner upon completion of his obligations to the sovereign with primary jurisdiction.<sup>21</sup> This informal detainer process often resulted in prisoners being held without sufficient cause by the sovereign with primary jurisdiction, upon satisfaction of his obligations thereto, on behalf of the requesting sovereign.<sup>22</sup> Similarly, once a detainer was lodged, a prisoner often was restricted in his choice of work assignments and other rehabilitative programs while incarcerated by the sovereign with primary jurisdiction.<sup>23</sup> Sentencing and parole decisions also were unfairly affected by the mere existence of a detainer.<sup>24</sup>

To alleviate such cumbersome and unfair consequences of this informal detainer process, Congress in 1970 passed the Interstate Agreement on Detainers Act.<sup>25</sup> This Agreement is the most common tool for transferring primary jurisdiction, and it provides a faster, easier, and uniform framework for prisoner transfers that applies to all states agreeing to abide by it, as well as the federal government.<sup>26</sup> For purposes of this Agreement, Congress intended

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19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* at 358 n.25.

23. *See id.* at 359.

24. *See id.* at 360.

25. 18 U.S.C. app. §§ 1-9 (1994).

26. *See id.* § 2, art. I, which states:

The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

“detainer” to mean “a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.”<sup>27</sup> As the Supreme Court elaborates, detainers can be filed by judges, prosecutors, and law enforcement officials and merely provide notice to the sovereign with primary jurisdiction and custody.<sup>28</sup> They alone do not compel any immediate or proximate presentation of the prisoner absent fulfillment of his obligations to the sovereign with primary jurisdiction.<sup>29</sup>

The Agreement specifies an added procedure that compels the member state with primary jurisdiction to “lend” a prisoner to another member state prior to the completion of his primary obligations.<sup>30</sup> Once a detainer has been lodged, providing notice to the sovereign with primary jurisdiction, the prosecutor requesting the prisoner’s presence must follow up with a “written request for temporary custody or availability.”<sup>31</sup> Once this written request is received, the sovereign with primary jurisdiction grants temporary custody to the requesting sovereign, although the sending sovereign’s primary jurisdiction over the prisoner remains intact and unaffected.<sup>32</sup> That is, the sending sovereign retains primary jurisdiction over the prisoner even though it authorizes the receiving sovereign to take temporary physical custody of him in order to

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27. INTERSTATE AGREEMENT ON DETAINERS ACT OF 1970, H.R. REP. NO. 91-1018, at 2 (1970); S. REP. NO. 91-1356, at 2 (1970).

28. See Mauro, 436 U.S. at 358.

29. See *id.*

30. “State” in this context should be interpreted broadly to include the federal government.

31. Article IV(a) provides:

The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available . . . upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

18 U.S.C. app. § 2, art. IV(a) (1994).

32. See *id.* art. V(g) (“For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State.”).



conduct a criminal prosecution.<sup>33</sup> The Agreement conditions such temporary presence on the receiving sovereign commencing its trial within 120 days of receiving the prisoner, absent “good cause” for delay.<sup>34</sup> Otherwise, the indictment or complaint pending in the receiving jurisdiction must be dismissed with prejudice.<sup>35</sup>

C. *Detainers vs. Writs of Habeas Corpus Ad Prosequendum*

The temporary transfer of physical custody pursuant to article IV(a) of the Interstate Agreement on Detainers parallels the custodial and jurisdictional arrangement when a transfer is made pursuant to a writ of *habeas corpus ad prosequendum*.<sup>36</sup> Writs of *habeas corpus* have existed since the founding of our republic. The Constitution provides in Article 1, Section 9, Clause 2 that “[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Congress expressly granted federal courts the power to issue the writ in Section 14 of the Judiciary Act of 1789.<sup>37</sup> While no power to issue *ad prosequendum* writs was specifically granted, Chief Justice Mar-

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33. See *id.* art. V(d), (f).

Article V(d) provides:

The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

34. Article V(f) provides that “[d]uring the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run . . . .”

*Id.* art. V(f).

35. See *id.* art. IV(e). Article IV(e) provides:

If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner’s being returned to the original place of imprisonment . . . such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

36. See *supra* notes 11-15 and accompanying text.

37. Section 14 granted to:

all the . . . courts of the United States [the power] . . . to issue writs of *scire facias*, *habeas corpus*, (*e*) and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.

shall “following the English practice . . . noted that the writ ad prosequendum was necessary to remove a prisoner in order to prosecute him in the proper jurisdiction wherein the offense was committed. [H]e recognized . . . that the Congress had without qualification authorized the customary issuance of the writ ad prosequendum.”<sup>38</sup> This power was officially codified in 1948 in 28 U.S.C. § 2241.<sup>39</sup>

Because writs of *habeas corpus ad prosequendum* are issued for the limited purposes of testimony or trial, they have no effect on the primary jurisdiction of the sending sovereign, which, in effect, temporarily lends its prisoner to the receiving sovereign.<sup>40</sup> This arrangement is comparable to the temporary transfer of custody provision of the Interstate Agreement on Detainers, but this latter provision follows from the Agreement and is not a product of the detainer itself. Detainers and writs of *habeas corpus ad prosequendum* exist in parallel, with the separate historical roots described above. The writ is issued to compel temporary custody proximately, whereas a detainer per se simply notifies the sovereign with primary jurisdiction that its prisoner is wanted by another sovereign. Primary jurisdiction is transferred pursuant to a detainer but not until after the prisoner’s obligations to the sovereign with initial primary jurisdiction are satisfied.

As discussed, the Interstate Agreement on Detainers sought to remedy the collateral consequences of a pending detainer, which prejudice a prisoner for the duration of his incarceration. Because

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*Provided:* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

Judiciary Act of 1789 § 14, 1 Stat. 81, 81-82 (1789) (*italics in original*).

38. *Carbo v. United States*, 364 U.S. 611, 614-15 (1961) (citing *Ex Parte Bollman*, 4 Cranch 75, 95 (1807)). Note that Marshall drew a distinction between the statutory reference to “habeas corpus” as an unqualified grant of a “generic” category of writs, and the constitutional reference as referring to the prototypical purpose of investigating the reason for incarceration. Therefore, writs issued pursuant to the constitutional grant are restricted to the territory of the federal district court, whereas those issued pursuant to the statutory grant are not territorially constrained. *See id.*

Additionally, note that, much like a federal court’s habeas power pursuant to the statutory grant, a state can issue a writ of *habeas corpus ad prosequendum* to secure the presence of a federal prisoner held outside the boundaries of that state. *See Jackson v. United States*, No. 96-1726, 1997 U.S. App. LEXIS 13955, at \*6-7 (6th Cir. 1997).

39. *See* 28 U.S.C. § 2241(c)(5) (1994).

40. *See Flick v. Blevins*, 887 F.2d 778, 781 (7th Cir. 1989).

a writ of *habeas corpus ad prosequendum* affects a proximate result rather than a delayed one, it does not implicate these concerns. A writ of *habeas corpus ad prosequendum* is not a detainer, then, and this holds true for purposes of the Agreement; that is, unlike a detainer, a writ does not activate the Agreement.<sup>41</sup>

*Flick v. Blevins* illustrates the importance of this distinction. There, defendant Flick faced federal prosecution while he was serving a Pennsylvania state (i.e., primary jurisdiction) sentence, and his presence in federal court (i.e., the receiving sovereign) for purposes of trial was compelled by a writ of *habeas corpus ad prosequendum*.<sup>42</sup> Once sentenced, Flick was transported because of an “administrative error” from federal court to a Bureau of Prisons facility, where he remained for two months before being returned to state authorities.<sup>43</sup> Flick’s state sentence was credited with this two month period. He satisfied the remainder of his state obligations and then was transported back to federal prison to serve his federal time.<sup>44</sup> Article 4(e) of the Agreement prevents this sort of “shuttling” between jurisdictions and requires that a premature release as above constitute a waiver of the duration of Flick’s obligations to the Bureau of Prisons.<sup>45</sup> The Seventh Circuit explained that because Flick’s presence in federal court was secured via a writ and not a detainer, the Agreement’s “anti-shuttling” provisions were not implicated.<sup>46</sup> Accordingly, his federal sentence did not commence during his two month stay with the Bureau of Prisons, and his accidental shuffling did not violate the Agreement, which was never activated.<sup>47</sup>

As explained above, detainers and writs of *habeas corpus ad prosequendum* are distinct jurisdictional and custodial tools. However, in cases where they come into conflict, the detainer trumps the writ in light of the Agreement’s provision for transfers of temporary custody expressed in article IV(a). If a detainer is lodged by sovereign A with sovereign B (the latter of which enjoys primary jurisdiction), and afterwards, sovereign A issues a writ of *habeas corpus ad prosequendum* to compel the prisoner’s presence for testimony or trial, that writ will be construed as a written request for temporary cus-

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41. See *United States v. Mauro*, 436 U.S. 340, 361 (1978).

42. See *Flick*, 887 F.2d at 780.

43. See *id.*

44. See *id.*

45. See *id.* at 781.

46. *Id.* at 781-82.

47. See *id.* at 782.

tody pursuant to article IV(a) of the Agreement.<sup>48</sup> This is so because the Agreement already had been activated by the prior lodging of the detainer by sovereign A, and, consequently, the framework it lays out governs jurisdictional and custodial relations for that prisoner.<sup>49</sup> So, if in *Flick* the federal authorities had issued a detainer with Pennsylvania authorities against Flick prior to his federal trial, the erroneous two month federal incarceration and subsequent transfer back to state prison would have constituted a waiver of the duration of Flick's federal sentence. The Agreement would have been activated and article IV(a) would have controlled.<sup>50</sup>

*D. A Proposal for Improved Clarity and Flexibility: Executive Waiver*

Primary jurisdiction is an enduring relational hold, but it can be overcome. Release, in one form or another, terminates a sovereign's priority of jurisdiction, but temporary lending via writs of *habeas corpus ad prosequendum* or the Interstate Agreement on Detainers has no such effect. These two instruments represent compromises in jurisdictional priorities in the form of hierarchical distributions of custodial authority, allowing sovereigns with lesser priority to proceed with their business while respecting the priority of sovereigns with primary jurisdiction. It is important for lawyers and other criminal justice professionals to keep track of the custodial methods employed to secure a prisoner's appearance. As Flick's experience shows, bureaucratic mistakes can happen when the intricacies of custody and transfer are overlooked. Fortunately, Flick's state sentence was simply credited with the time he inappropriately spent in federal prison, and he was no worse off as a result of the error. Nonetheless, in situations where this kind of mistake is not realized so quickly, a prisoner may find himself incarcerated in the wrong jurisdiction for a period exceeding in length the duration of his obligations to the sovereign with primary jurisdiction over him. In such cases, the excess time may not be credited toward the prisoner's obligations to the receiving sovereign because, as a technical matter, this sovereign would not have enjoyed the necessary jurisdiction over him.<sup>51</sup>

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48. See *United States v. Mauro*, 436 U.S. 340, 362 (1978).

49. See *id.*

50. See *Flick*, 887 F.2d at 781; *Mauro*, 436 U.S. at 352-53.

51. No federal statute or sentencing guideline requires that the excess in this scenario be so credited. Recall that temporary transfers of custody pursuant to the Agreement or a writ of *habeas corpus ad prosequendum* are restricted to purposes of trial, testimony, and sentencing; the custodial authority provided by each of these

The best way to avoid errors in the tracking of primary jurisdiction and temporary custody is to designate the jurisdictional status of each custodial transfer when it occurs. It is possible for the primary sovereign itself to waive its priority status to another sovereign. In *Shumate v. United States*,<sup>52</sup> defendant Shumate faced both federal and New York state criminal charges arising out of the same series of events, and plea agreements with the state and federal prosecutors were arranged in conjunction with one another. The state and federal trial judges, prosecutors, and the defendant agreed that concurrent terms of imprisonment would be imposed and served at a federal facility.<sup>53</sup> Because the defendant had been arrested by state officers and remained in primary state custody, the district attorney issued a written waiver of primary jurisdiction to the Assistant United States Attorney so that the defendant would be able to begin serving his time in federal prison.<sup>54</sup> The Bureau of Prisons, however, doubted the constitutionality of this waiver and refused to take custody of Shumate, who consequently had to remain in a New York state prison facility.<sup>55</sup> Pursuant to Shumate's subsequent habeas motion, the district court reaffirmed its approval of this written waiver and ordered the Bureau of Prisons to accept custody of the defendant.<sup>56</sup> Such a waiver of primary jurisdiction is not rooted in judicial authority, but rather exists within the discretionary authority of the executive branches of state and federal government.<sup>57</sup>

At present, few jurisdictions have had occasion to rule on the legitimacy of executive waivers of primary jurisdiction, but those

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tools does not encompass detention for purposes of incarceration. *See supra* notes 11-13, 33-36 and accompanying text.

52. 893 F. Supp. 137 (N.D.N.Y. 1995).

53. *Id.* at 139.

54. This waiver provided, in relevant part, the following:

After intensive negotiating involving all parties in the above-captioned case which is currently pending in the federal system and in the Schenectady County Court, please be advised that it is our determination that we will relinquish any priority of jurisdiction in the person of David L. Shumate to federal authorities . . . .

The purpose of this letter is also to confirm our understanding that based upon our relinquishment of priority of jurisdiction, Mr. Shumate will serve his sentence federally.

*Id.* at 139-40.

55. *Id.* at 140.

56. *Id.* at 140-41.

57. *See United States v. Warren*, 610 F.2d 680, 684-85 (9th Cir. 1980) ("[T]he sovereign with priority of jurisdiction . . . may elect under the doctrine of comity to relinquish it to another jurisdiction. This discretionary election is an executive, and not a judicial, function."); *United States v. Gonzalez*, S-1 94 Cr. 313 (CSH), 1998 U.S. Dist. LEXIS 15300, at \*8 (S.D.N.Y. Sept. 30, 1998).

that have considered them, notably the Ninth Circuit<sup>58</sup> and the Northern<sup>59</sup> and Southern<sup>60</sup> Districts of New York, have upheld them. Increased use of executive waivers would reduce prisoner tracking mistakes that, as in *Flick*, negate the jurisdictional relationships necessary to credit time served. Therefore, if a prisoner were transferred, the reviewing sovereign would easily understand its custody as being temporary in the absence of an executive waiver, and primary where one is present.

## II CREDIT AND RELIEF

In circumstances where a defendant faces contemporaneous federal and state prosecutions, or where a prisoner already incarcerated by one sovereign is tried by another, keeping track of time to be credited as served can be a complicated process. Generally, the imprisonment term of the sovereign with primary jurisdiction over the individual will be credited with any custodial detention time, regardless of any contemporaneous transfers of temporary custody to another sovereign. Dismissal of charges following pre-trial detention, the lodging of a federal detainer, and the form of the detention itself all can affect decisions about time served. This section discusses time credit decisions in the interjurisdictional context as modulated by such circumstances, and critiques the process currently available for administrative and judicial relief. It shows that the status quo, again defined by divided authority, is inefficient, inadequate, and slow, and argues for a streamlined remedy in the form of expanded federal district court power.

### A. *When and By Whom*

Federal terms of imprisonment begin when the Bureau of Prisons gains custody. "A sentence to a [federal] 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 [federal] sentence is to be served."<sup>61</sup> "A person who has been sentenced [by a federal court] to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons until the expiration of the

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58. *Warren*, 610 F.2d at 684.

59. *Shumate*, 893 F. Supp at 141-42.

60. *Gonzalez*, 1998 U.S. Dist. LEXIS 15300, at \*8-9.

61. 18 U.S.C. § 3585(a) (1994).

term imposed, or until earlier released for satisfactory behavior.”<sup>62</sup> It is the Bureau of Prisons, then, that determines when a federal sentence commences.<sup>63</sup>

When the defendant has obligations to the federal government and a state contemporaneously, however, remand to Bureau of Prisons custody by the federal sentencing court may need to be delayed pending completion of the defendant’s obligations to the state. Additionally, if the defendant’s presence in federal court for trial was compelled by a writ of *habeas corpus ad prosequendum* or a detainer (that is, a detainer followed by a written request for temporary custody pursuant to article IV(a) of the Interstate Agreement on Detainers), that time is not automatically credited toward the federal sentence. In such cases, post hoc decisions regarding credit for time served must be made and are, indeed, statutorily compelled.<sup>64</sup> What the federal statutes do not explicitly dictate, though, is who is authorized to make these decisions and at what point.

In *United States v. Wilson*, defendant Wilson was arrested by Tennessee authorities and subsequently faced both federal and state prosecutions arising out of the same series of events.<sup>65</sup> After pleading guilty to both prosecutions, Wilson appeared in federal court for sentencing and was then returned to a state facility.<sup>66</sup> He was then sentenced in state court, which granted him credit for time served for his presentence incarceration during trial.<sup>67</sup> The Bureau of Prisons took custody of Wilson shortly thereafter, and he then began serving his federal term.<sup>68</sup>

At his federal sentencing, the district court denied Wilson’s request that his federal term be credited with his presentence incarceration by state authorities.<sup>69</sup> The Supreme Court heard Wilson’s

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62. 18 U.S.C. § 3621(a) (1994).

63. See *Taylor v. Reno*, 164 F.3d 440, 445-46 (9th Cir. 1998), *cert. denied*, 527 U.S. 1027 (1999); *United States v. Pineyro*, 112 F.3d 43, 45 (2d Cir. 1997); *Thomas v. Whalen*, 962 F.2d 358, 360 (4th Cir. 1992).

64. See 18 U.S.C. § 3585(b) (1994), which states:

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.

65. 503 U.S. 329, 331 (1992).

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

appeal, not on the issue of whether such credit was deserved but whether the district court had the authority to make the decision one way or another. Interpreting 18 U.S.C. § 3585(b)'s past and present perfect tense usages,<sup>70</sup> the Court concluded that the credit-ing decision must be made after a defendant begins serving his federal sentence.<sup>71</sup> After pointing out that a federal sentence does not always commence immediately after federal sentencing, the Supreme Court explained that "[a]t sentencing, the District Court only could have speculated about the amount of time that Wilson would spend in detention prior to the commencement of his [federal] sentence; the court did not know when the state-court proceedings would end or when the federal authorities would take Wilson into custody."<sup>72</sup> "Because the offender has a right to certain jail-time credit under section 3585(b), and because the district court cannot determine the amount of the credit at sentencing, the Attorney General [through the Bureau of Prisons]<sup>73</sup> has no choice but to make the determination as an administrative matter when imprisoning the defendant."<sup>74</sup>

In accordance with this administrative approach to time credit decisions, the Bureau of Prisons has developed administrative review procedures to ensure inmates an accurate computation of their sentences, including credit for time served.<sup>75</sup> After exhausting these administrative remedies, inmates can then (and only then) seek binding judicial review of their sentence computations and decisions about credit for time served.<sup>76</sup> Any judicial ruling sought prior to such exhaustion will either be dismissed for lack of jurisdiction or will have the force of a nonbinding recommendation to the Bureau of Prisons.<sup>77</sup>

Most circuits have followed the Supreme Court's lead in *Wilson*, adhering to an exhaustion requirement even on different

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70. 18 U.S.C. § 3585(b) (1994) states that "[a] defendant shall be given credit . . . for any time *he has spent* in official detention prior to the date the sentence commences . . . that *has not been credited* against another sentence" (emphasis added).

71. *Wilson*, 503 U.S. at 333.

72. *See id.* at 334.

73. *See* 28 C.F.R. § 0.96 (2000).

74. *Wilson*, 503 U.S. at 335.

75. *See* 28 C.F.R. §§ 542.10–542.19 (2000). Note, too, that administrative review proceedings cannot begin until the prisoner is in Bureau of Prisons custody. *See infra* note 91 and accompanying text.

76. *See Wilson*, 503 U.S. at 335.

77. *See United States v. Pineyro*, 112 F.3d 43, 45 (2d Cir. 1997); *United States v. Brann*, 990 F.2d 98, 103-04 (3d Cir. 1993).



facts.<sup>78</sup> The Third Circuit, however, has embraced a narrow reading of *Wilson* and reserved for itself the authority to make crediting decisions in controversies concerning federal orders of concurrent service. In *United States v. Dorsey*, defendant Dorsey was arrested by New Jersey state authorities for firearms possession, and a federal detainer was lodged against him shortly thereafter.<sup>79</sup> Dorsey pleaded guilty to both prosecutions and was sentenced first in state court and then in federal court.<sup>80</sup> Dorsey's presentencing detention in state custody was credited toward his state sentence, but his request that this time be similarly credited toward his federal sentence was denied because the federal district court ruled that the Bureau of Prisons, and not the court, had authority to make such decisions in the first instance.<sup>81</sup> The district court did order that Dorsey's federal sentence run concurrently with his state sentence.<sup>82</sup> The Third Circuit distinguished this factual scenario from the one in *Wilson*, citing the fact that *Wilson* did not involve federal and state prosecutions for related events, nor did it involve a federal

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78. See, e.g., *United States v. McGee*, 60 F.3d 1266, 1272 (7th Cir. 1995) (finding that when a defendant seeks federal credit for time spent in primary state custody with federal detainer pending, "it is the Attorney General, and not the sentencing court, that computes the credit due under § 3585(b) . . . . Accordingly, we hold that this court lacks jurisdiction to review any computation of credit at this time") (citations omitted); *United States v. Jenkins*, 38 F.3d 1143, 1144 (10th Cir. 1994) (finding that when a defendant appealed district court's refusal to grant credit for time spent in home detention, credit awards must only be made by the Attorney General, through the Bureau of Prisons, after sentencing: "As a result, Defendant must bring his request for sentence credit to the Bureau of Prisons in the first instance and thereafter seek judicial review of the Bureau's determination. We therefore vacate the district court's [order regarding time credit.]" (citations omitted); *United States v. Moore*, 978 F.2d 1029, 1031 (8th Cir. 1992) (denying defendants credit for time spent in primary state custody facing charges, later dismissed, arising out of the same incident for which they were convicted in federal court and stating that "the appropriate credit for time spent in official detention is to be determined by the United States Attorney General after the criminal defendant has begun to serve his sentence rather than by a federal sentencing court at the time of sentencing").

79. 166 F.3d 558, 559 (3d Cir. 1999).

80. See *id.*

81. See *id.*

82. U.S. SENTENCING GUIDELINES MANUAL, 18 U.S.S.G. App. § 5G1.3(b) (2001) states that when "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." Here, both prosecutions arose out of the same firearms activity, which requires that the federal sentence (i.e., the "instant offense") run concurrently with the previously imposed state sentence (i.e., the "undischarged term of imprisonment").

court order of concurrency.<sup>83</sup> The Third Circuit then structured the dispute as a balance between the Bureau of Prisons's statutory authority to make crediting decisions under 18 U.S.C. § 3585(b) and the district court's statutory authority to impose concurrent sentences under 18 U.S.C. §§ 3584(a), 3584(b), 3553(a), and application note 2 to U.S.S.G. § 5G1.3(b).<sup>84</sup> It explained that

the real issue is whether the sentencing court's authority must extend beyond the mere imposition of a concurrent sentence to the authority to impose a truly concurrent one, that is, a sentence that is not frustrated by the happenstance of when a defendant is sentenced in state and federal court. We believe a sentencing court has that authority.<sup>85</sup>

In *Rios v. Wiley*, the Third Circuit reaffirmed its reading of the statutory authority of district courts to make crediting adjustments for time served when imposing a concurrent sentence. There, the district court imposed a ninety month sentence and ordered defendant Rios to receive credit for the twenty months spent in temporary federal custody pursuant to a writ of *habeas corpus ad prosequendum* issued to New York state, where Rios was serving an unrelated prison term.<sup>86</sup> The Bureau of Prisons disagreed with this order, however, because that twenty-two month period had already been credited toward Rios's unrelated state sentence.<sup>87</sup>

The Bureau's determination was overturned by the Third Circuit. As the Third Circuit explained:

[W]e understand the sentencing court to have exercised its discretion to impose a federal sentence under section 5G1.3(c) which took into consideration the 22 months that Rios had spent in federal custody as of the date of the federal sentencing

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83. *See Dorsey*, 166 F.3d at 561.

84. *See id.* at 561-62. ("Under 18 U.S.C. § 3584(a), a district court has the authority to impose a concurrent sentence, but section 3584(b) requires the court to consider the factors listed in 18 U.S.C. § 3553(a). In turn, the latter section requires the court to consider 'any applicable guidelines or policy statements issued by the sentencing Commission,' . . . [and a]pplication note 2 is commentary to subsection (b) of guidelines section 5G1.3"). Application Note 2 to U.S. SENTENCING GUIDELINES MANUAL, 18 U.S.S.G. App. § 5G1.3, cmt. 2 (2001), states:

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.

85. *Dorsey*, 166 F.3d at 562.

86. *See Rios v. Wiley*, 201 F.3d 257, 262 (3d Cir. 2000).

87. *See id.* at 263.

proceeding . . . so that the actual sentence imposed was 90 months, less 22 months, or 68 months total. . . . [W]e hold that the [Bureau of Prisons] was required to effectuate the sentence imposed.<sup>88</sup>

The Third Circuit here seemed to bootstrap the trial court's crediting power in concurrency cases with the clear authority of a district court to impose a federal sentence. While the sentencing court explicitly ordered that Rios "receive credit for time served,"<sup>89</sup> the Third Circuit was not so direct. Rather than explicitly refer to the sentencing order as having "credited" Rios's federal sentence with this twenty-two month period, the Third Circuit nebulously described the district court's arithmetic as an "exercise [of] its discretion." Nonetheless, the effect of *Rios* is to affirm the authority of a district court, pursuant to its power to impose concurrent sentences, to adjust a federal sentence to account for time served when sentence is imposed.

Thus, time credit decisions are generally to be made by the Bureau of Prisons after a defendant's federal sentence has commenced because the prisoner already will have completed the detention time sought to be credited and the decision to credit can be determinate rather than anticipatory. The Third Circuit has provided for an exception in its case law allowing district courts to make time credit decisions in instances where they intend to impose concurrent sentences. It has done so, despite the potential for indeterminacy, pursuant to a district court's statutory authority to impose sentences and order them to run concurrently.

#### *B. A Proposal for Streamlined Relief: Direct Judicial Review*

The allocation of authority envisioned by the *Wilson* decision is inadequate. There are two kinds of administrative relief available from the Bureau of Prisons, direct credit for time served and *nunc pro tunc* facility designation. Both of these options are explained in Section III.B.<sup>90</sup> What matters presently is that this review process cannot begin until after the defendant is in Bureau of Prisons custody.<sup>91</sup> This method of review is "too little too late" in situations

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88. *Id.* at 266.

89. *Id.* at 261.

90. See *infra* notes 161-68 and accompanying text.

91. See *supra* notes 71-77 and accompanying text. 28 C.F.R. § 542.10 (2000) (emphasis added), explains:

The Administrative Remedy Program is a process through which inmates may seek formal review of an issue which relates to any aspect of their confinement . . . . This Program applies to all inmates confined in institutions oper-

where orders of concurrent service are thwarted by mistakes about primary jurisdiction,<sup>92</sup> leaving a defendant to serve his state sentence first and then his federal sentence. Here, because the defendant cannot pursue administrative relief until he is in Bureau of Prisons custody, he cannot even petition the Bureau to recognize the time spent in state custody until after that state term has been served and the federal term has begun. Even if relief is granted by the Bureau, the problem with this approach is that if the administrative review process takes longer than the amount of time by which a defendant's federal sentence exceeds his state term (i.e., the amount of time he would have had to spend in federal prison had concurrency been effectuated in the first place), or if the federal term is shorter than the state term, then the defendant is forced to serve more time in prison than any court intended. The exhaustion requirement makes binding judicial review inadequate for the same reason. By requiring exhaustion of administrative remedies offered by the Bureau of Prisons, belated judicial review imports the same kind of inadequacy.

The judicial review process for sentence corrections itself is also inefficient insofar as it preserves division of authority between the district court and the Bureau of Prisons in its exhaustion requirement. A prisoner is presently free to file habeas motions in federal court to request relief in the form of time credit or facility designation. The catch is that if he does so prior to exhausting his administrative review options within the Bureau of Prisons, the judicial response to such a petition will be dismissal for lack of jurisdiction, or it will carry the weight of a mere nonbinding recommendation.<sup>93</sup> Rather than expend judicial resources on proceedings with such attenuated efficacy, an alternative should be established. The district court's jurisdiction should be expanded, allowing it to rectify the situation directly when problems involving concurrency orders are involved. That is, the requirement of administrative exhaustion must be eliminated.

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ated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons' responsibility, and to former inmates for issues that arose during their confinement, *but does not apply to inmates confined in other non-federal facilities.*

92. Section III.A *infra* explains how these situations arise. For now, the focus is on the adequacy of the remedial process, and it suffices to understand that legal rules can align such that state court orders of concurrent service are ignored by the Bureau of Prisons on certain facts.

93. *See supra* notes 75-77, *see infra* 170-76 and accompanying text. *But see infra* note 177 and accompanying text.

One possibility is to establish an explicit exception in such cases to the general requirement of administrative exhaustion for habeas jurisdiction. Another involves Federal Rule of Criminal Procedure 35(c). Rule 35(c) allows the district court to revisit a sentencing order to correct “arithmetical, technical, or other clear error.” But to preserve the division of authority between the Bureau of Prisons and the court, Rule 35(c) limits the window of such direct review to seven days after the imposition of sentence.<sup>94</sup> The nature of concurrency order mistakes, involving multiple sentencing hearings in multiple courts, multiple prison terms, and multiple transfers of custody, makes this miniscule timeframe virtually meaningless, and subsequent petitions, which take the form of habeas motions, may be barred or rendered meaningless by the administrative exhaustion regulation.<sup>95</sup> Rule 35(c), then, could be reworked to provide a more reasonable window for concurrency challenges. Either way, the goal is to avoid the delay associated with administrative exhaustion, which cannot even begin until the petitioner has served his state sentence and begun his federal term, by expanding the federal court’s authority to act.

This method of prompt redress, in whatever form, would be more effective than those currently available and should entail no additional expenditure of judicial resources. In fact, the suggested remedies would be more economical than the status quo because they eliminate the need to proceed through three levels of review: (1) judicial recommendation, (2) administrative review by the Bureau of Prisons and, finally, (3) binding judicial review of the administrative determination.<sup>96</sup> As a practical matter, these three review proceedings would be replaced with a single, binding, corrective motion.<sup>97</sup>

In *Wilson*, the Supreme Court explained that time credit decisions and facility designation decisions must be made in the first instance by the Bureau of Prisons because the language of § 3585(b) suggests a congressional intent for determinate, post hoc evaluations of time served.<sup>98</sup> To the extent that the *Wilson* Court’s determinacy concerns remain, congressional intent is not foiled by

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94. FED. R. CRIM. P. 35(c), which provides in relevant part: “The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.”

95. See *supra* notes 75-77 and accompanying text.

96. See *supra* notes 76-77 and accompanying text.

97. The authority behind the presently proposed judicial relief is rooted in Constitutional and congressional habeas power. See U.S. CONST. art. 1, § 9, cl. 2; 28 U.S.C. §§ 2241, 2255 (1992).

98. See *supra* notes 70-74 and accompanying text.

these proposals because by the time a single corrective motion is filed, the defendant facing a concurrency order problem already will have been sentenced in both courts. Accordingly, the federal court would be able to make a post hoc review and evaluation of defendant's total time served presentencing (whether federal or state), and both his federal and state prison terms will have been set. Its decision would be just as determinate as that administratively made in the first instance by the Bureau of Prisons.

Additionally, a single corrective motion is consistent with the Third Circuit's approach to time credit decisions in cases where federal sentences are ordered to run concurrently with a state term. In *Dorsey* and in *Rios*, the Third Circuit held that a district court's statutory authority to impose concurrent sentences per 18 U.S.C. §§ 3584(a), 3584(b), 3553(a) and application note 2 to U.S.S.G. § 5G1.3(b) authorizes it to make time credit decisions at sentencing, despite some potential indeterminacy in total time served.<sup>99</sup> The Third Circuit rationalizes its interpretation by arguing that to deny district courts the power to credit time served in the first instance is to disrupt their ability to issue orders of concurrent service.<sup>100</sup> Since federal courts, for reasons of indeterminacy, cannot order a federal sentence concurrent to an anticipated state sentence,<sup>101</sup> however, the necessary corollary to the Third Circuit's understanding is to allow district courts to revisit their sentencing orders after the state sentence has been imposed to decide the issue of concurrency and resolve any related challenges. And again, unlike the time credit decisions authorized by the Third Circuit, these belated assessments would be as determinate as those that are currently made by the Bureau of Prisons in the first instance.

### C. What Can Be Credited

Crediting decisions are complicated in the interjurisdictional context by the division of custodial authority within the jurisdictional priorities system triggered when multiple sovereigns lay claim to the same person at the same time. Within the limits of this system, each sovereign is free to proceed with its prosecutorial or custodial business simultaneously. Simultaneous detention can lead to understandable clashes when each sovereign makes crediting decisions, however, because dual credit is generally prohibited. After clarifying what sort of detention can be recognized as time served,

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99. See *supra* notes 81-89 and accompanying text.

100. See *id.*

101. See *supra* notes 136-39 and accompanying text.

the present discussion examines these clashes and derives a generally applicable operational rule.

According to 18 U.S.C. § 3585(b), a federal defendant is entitled to time credit from the Bureau of Prisons for “any time he has spent in official detention prior to the date the sentence commences . . . that has not been credited against another sentence.”<sup>102</sup> This means a defendant arrested on day one by federal agents and detained pretrial, convicted, and sentenced, and remanded for incarceration on day fifty will receive credit toward his sentence for fifty days time served. Central to the decision to award federal credit for time served are the conditions of the defendant’s prior detention.

In *Reno v. Koray*, the Supreme Court explained that “the phrase ‘official detention’ in § 3585(b) refers to a court order detaining a defendant and committing him to the custody of the Attorney General for confinement.”<sup>103</sup> There, defendant Koray was arrested on federal money laundering charges, pleaded guilty, and was released on bail.<sup>104</sup> His release order confined him to a community treatment center, where he remained for 150 days before commencing his sentence.<sup>105</sup> The Bureau of Prisons denied Koray credit for this period, and Koray challenged this decision in court as a violation of his rights under § 3585(b).<sup>106</sup>

Relying on the language of the Bail Reform Act of 1984, which authorizes a court to deny bail and issue a “detention order” remanding the defendant to the custody of the Attorney General (through the Bureau of Prisons), the Supreme Court deduced the meaning of the term “detention:” “[A] defendant suffers ‘detention’ only when committed to the custody of the Attorney General; a defendant admitted to bail on restrictive conditions, as respondent was, is ‘released.’”<sup>107</sup> Accordingly, the Supreme Court held

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102. 18 U.S.C. § 3585 (b) (1994). Additionally, note that the time spent in prior official detention must have been the “result of the offense for which the [present] sentence was imposed[, or] . . . of any other charge for which the defendant was arrested after the commission of the offense for which the [present] sentence was imposed.” *Id.*

103. *Reno v. Koray*, 515 U.S. 50, 56 (1995).

104. *Id.* at 52.

105. *Id.* at 53.

106. *Id.*

107. *Id.* at 57. Note also that the Bail Reform Act authorizes the denial of bail and issuance of a detention order only if the court “finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (1994).

that presentence detention at a community treatment center does not constitute “detention” and cannot be credited toward a prisoner’s federal sentence.<sup>108</sup> Similarly, circuit courts have held that pretrial confinement by a prisoner to his parent’s house while released on bail cannot be credited toward a subsequently imposed federal sentence.<sup>109</sup> The same holds true for bonded confinement at the defendant’s own home, both presentence<sup>110</sup> and post-conviction while awaiting appeal.<sup>111</sup> Even bonded release under conditions of home confinement and electronic monitoring is not considered “detention” for purposes of time crediting.<sup>112</sup>

The *Koray* Court’s understanding of sentencing credit, in which official detention is tied to physical custody, is complicated in the interjurisdictional context, where divisions of custodial authority and jurisdiction overlap. A prisoner in primary state custody, either for trial or incarceration, who is loaned via a writ of *habeas corpus ad prosequendum* or the Interstate Agreement on Detainers into the temporary custody of the federal government for trial is, in a technical sense, “officially detained” by both sovereigns.<sup>113</sup> This juxtaposition is at odds with § 3585(b)’s condition that credit be awarded only for time served “that has not been credited against another sentence.”<sup>114</sup>

While on supervised release from prison following a previous federal conviction, William McGee was arrested on Illinois state charges of retail theft. As this behavior constituted a violation of his supervised release, federal authorities lodged a federal detainer against him.<sup>115</sup> McGee was convicted in state court and received credit for the ninety days he was detained by state authorities pend-

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108. *Koray*, 505 U.S. at 65.

109. See, e.g., *United States v. Becak*, 954 F.2d 386, 387–88 (6th Cir. 1992) (“We hold that sentence credit shall be granted under section 3585 for ‘official detention’ under conditions equivalent to physical incarceration”).

110. See, e.g., *United States v. Zackular*, 945 F.2d 423, 424 (1st Cir. 1991) (“‘custody’ . . . requir[es] incarceration as a precondition to credit”).

111. See, e.g., *United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991) (“Conditions of release are not custody”).

112. See, e.g., *United States v. Edwards*, 960 F.2d 278, 283 (2d Cir. 1992) (“although such terms of release on bail oftentimes may be rather restrictive,” pretrial confinement and electronic monitoring do not merit sentencing credit).

113. The dissent in *Koray* recognizes this extension of the Supreme Court’s logic. See *Koray*, 505 U.S. at 66–67 (Stevens, J., dissenting). The majority, however, explicitly refused to speak on detention and credit in this context because the facts before the Court did not require it. See *id.* at 63 n.5.

114. 18 U.S.C. § 3585(b) (1994).

115. See *United States v. McGee*, 60 F.3d 1266, 1272 (3d Cir. 1993).



ing sentencing.<sup>116</sup> After his obligations to the state were completed and the federal government obtained primary jurisdiction over him, McGee requested federal credit for this same ninety-day period.<sup>117</sup> During said period, the federal detainer was lodged against him and signaled the federal government's secondary claim of jurisdiction.<sup>118</sup> The Seventh Circuit rejected McGee's petition, however, arguing in part that § 3585(b) foreclosed this request when the time he served was credited toward another sentence.<sup>119</sup> This same result emerges in situations where temporary federal custody is secured via a writ of habeas corpus ad prosequendum.<sup>120</sup>

In *United States v. Payton*,<sup>121</sup> however, a slight variation emerged. There, defendant Payton was arrested on Connecticut state charges that were later dismissed, resulting in his transfer to primary federal custody.<sup>122</sup> Payton was convicted in federal court for possession of a firearm, and sentenced to 180 months in prison.<sup>123</sup> Since Payton previously had spent nine months in primary (and physical) state custody and ten months in primary (and physical) federal custody, the plain language of § 3585(b) allowed him to receive credit from the Bureau of Prisons for this latter period.<sup>124</sup> The Payton court also explained that "§3585(b) permits the Attorney General to award credit for time spent in state detention pending trial on subsequently dismissed state charges that arose out of the same incident for which the prisoner was convicted in federal court."<sup>125</sup>

Whether a period of detention can be credited toward a defendant's federal sentence depends not only on the nature of the detention but also on how a state with a contemporaneous jurisdictional claim treats that period. As to the nature of the detention, federal common law all but requires physical custody in a facility controlled or designated by the Attorney General. When

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116. See *id.*

117. See *id.*

118. See *id.* at 1267-68.

119. See *id.* at 1272. The reasoning reflected in the accompanying text was expressed in dictum; McGee's request officially was dismissed on grounds of ripeness.

120. See, e.g., *Bailes v. Booker*, No. 97-1144, 1997 U.S. App. LEXIS 28335 (10th Cir. Oct. 10, 1997); *Miller v. Clark*, No. 91-6456, 1992 U.S. App. LEXIS 27037 (6th Cir. Oct. 14, 1992).

121. 159 F.3d 49 (2d Cir. 1998).

122. See *id.* at 53.

123. See *id.* at 55.

124. See *id.* at 62; see also *supra* note 103 and accompanying text.

125. See *Payton*, 159 F.3d at 63, citing *United States v. Moore*, 978 F.2d 1029, 1031 (8th Cir. 1992).

multiple sovereigns and, accordingly, multiple priorities of jurisdiction, are involved, however, physical incarceration is insufficient because custodial authority is divided among them. Here, it is generally necessary for the detention period in question not already to have been credited toward the defendant's obligations to a state with a contemporaneous jurisdictional claim. It should be noted that while this principle reflects the norm, it is not inviolate. For example, in *United States v. Dorsey*, defendant Dorsey was arrested by New Jersey state authorities on firearms charges on April 11, 1997 and was sentenced in state court on August 22, 1997.<sup>126</sup> He received credit toward his state sentence for the 134 days he spent in pretrial detention in primary state custody.<sup>127</sup> Dorsey later was convicted in federal court on charges arising out of the same firearms activities, and the Bureau of Prisons granted him credit for the same period of presentence detention in primary state custody.<sup>128</sup> Cases of double crediting are clearly the exception, however, and as a defendant is not likely to seek review of such a credit award by the Bureau of Prisons in his favor, the sparse case law surrounding them is not particularly helpful in explaining their presence.<sup>129</sup>

#### D. In Sum

Building on the foundation forged in Section I concerning the interjurisdictional transactions regarding custody and jurisdiction, the present discussion has traced the divided authority of the two principle actors in federal sentencing: the district court and the Federal Bureau of Prisons. Each entity's respective discretion has been traced to present a more holistic understanding of the operation of federal sentencing, both intrinsically and in the interjurisdictional context. Essentially, we have seen that, for the most part, time credit decisions are made by the Bureau of Prisons upon commencement of a federal sentence, though the Third Circuit has carved out an exception allowing federal courts to make these decisions in order to effectuate concurrent sentences. Building on the Third Circuit's doctrinal approach, the present section has argued that the administrative relief offered by the Bureau of Prisons is inadequate and delayed when concurrency is at issue, and that the judicial relief presently available imports these same shortcomings in its exhaustion requirement. The three-step judicial review pro-

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126. 166 F.3d 558, 559 (3d Cir. 1999).

127. See *id.*

128. See *id.* This issue was not the subject of Dorsey's appeal, and the court of appeals did not discuss its circumstance other than merely to report its occurrence.

129. See, e.g., *id.*

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cess—judicial recommendation, administrative review, binding judicial order—has also been shown to be inefficient in accommodating the division of authority between the Bureau of Prisons and the district court. A concentration of district court power would allow it to redress concurrency order complications in a direct, efficient, and determinate fashion. I also have shown that physical incarceration is generally a prerequisite for time credit and that, even though primary and temporary custody can exist simultaneously, dual credit generally is not permitted. Now, I turn to a structural loophole in the interjurisdictional sentencing process whereby administrative rigidity by the Bureau of Prisons and the overall fragmentation of power subordinate the orders of state sentencing courts when certain facts are present.

### III

#### CONCURRENCY TRAP AND APPLIED RELIEF

As has already been discussed, state prisoners on loan to federal authorities for purposes of trial and sentencing occasionally have been erroneously delivered into the physical custody of the Bureau of Prisons due to a jurisdictional tracking mistake.<sup>130</sup> Now, the discussion centers on a different type of custodial dilemma, mentioned in Section II.B but not fully unpacked, in which sentencing orders by state judges are undermined by federal penal authorities with contemporaneous jurisdictional claims. These situations not only extend a prisoner's detention time through bureaucratic error, a fundamentally unfair consequence, but also disrespect the sovereignty of the state whose court's order is ignored. The difficulty lies in the fragmentation of authority over detention and incarceration and is especially problematic because it results from a structural loophole in federal sentencing. After explaining how specific facts can align legal rules to produce this dilemma, a simple solution is proposed to plug this loophole through an expansion, not of power, but of focus and consideration. The discussion then uses the fact pattern that has been developed as a backdrop in addressing remedial options generally available to prisoners facing custody, credit, and concurrency conflicts.

##### A. The Concurrency Trap Dilemma and Its Solution

The following illustrates just how strikingly fragmented and compartmentalized the interjurisdictional sentencing process has become. The federal system charges the Bureau of Prisons, as an

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130. See *supra* notes 43-51 and accompanying text.

agent of the Attorney General, with determining when a person's federal sentence begins.<sup>131</sup> Once sentenced by a federal court, a defendant is remanded to the custody of the Bureau of Prisons to begin service of that sentence.<sup>132</sup> However, the Bureau will not commence the federal sentence of a defendant with outstanding obligations to another jurisdiction in the absence of bail, parole, dismissal of the charges, or completion of the prior sentence,<sup>133</sup> for otherwise, the Attorney General's jurisdictional claim over the defendant is not "primary" but "secondary."<sup>134</sup> Therefore, if the defendant's presence in federal court for sentencing was secured via a writ of *habeas corpus ad prosequendum* or the Interstate Agreement on Detainers (i.e., if the federal system did not have primary jurisdiction over the defendant during sentencing), the defendant must be returned to the lending jurisdiction to complete his adjudicatory and/or penal detention obligations. Only then will the Bureau of Prisons assume physical custody and primary jurisdiction over him and commence his federal sentence.

In the context of concurrent versus consecutive state and federal sentences, however, the Bureau of Prisons attends only to the federal sentencing order for instruction, and if that order is silent on the issue of order of service, the Bureau infers consecutive service.<sup>135</sup> Unfortunately, courts of appeals discourage federal sentencing courts from imposing sentences to run concurrently with state sentences that have yet to be imposed.<sup>136</sup> As one district court explained, "[t]o make a meaningful determination in the absence of another sentence . . . would require attributes this Court lacks, including clairvoyance as to the ultimate outcome of the state charges."<sup>137</sup> In this vein, 18 U.S.C. § 3584(a) allows a sentence to be

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131. See *supra* notes 61-63, 70-74 and accompanying text.

132. See *supra* note 62 and accompanying text.

133. See *supra* note 9 and accompanying text.

134. See *supra* notes 1, 4, 8 and accompanying text.

135. 18 U.S.C. § 3584(a) (1994). See *United States v. Pineyro*, 112 F.3d 43, 45 (2d Cir. 1997).

136. See, e.g., *Taylor v. Reno*, 164 F.3d 440, 447 (9th Cir. 1998), *cert. denied*, 527 U.S. 1027 (1999); *McCarthy v. Doe*, 146 F.3d 118, 122 (2d Cir. 1998). As opposed to concurrent service, federal courts do have the authority to order a sentence to run consecutively with a state sentence that has yet to be imposed. See *United States v. Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995); *United States v. Ballard*, 6 F.3d 1502, 1506-10 (11th Cir. 1993); *United States v. Brown*, 920 F.2d 1212, 1215-17 (5th Cir. 1991). But see *United States v. Quintero*, 157 F.3d 1038, 1040-41 (6th Cir. 1998) (18 U.S.C. § 3584(a) does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991).

137. *Delima v. United States*, 41 F. Supp.2d 359, 361 (E.D.N.Y. 1999).

deemed concurrent with another when the defendant is “already subject to an undischarged term of imprisonment.” The same section makes no mention of anticipated terms, and states as a default rule that “[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.”<sup>138</sup> Thus, when an individual faces both state and federal charges, it is up to the final sentencing judge to decide whether the latter sentence should “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.”<sup>139</sup>

If a defendant is in primary state custody when the sentences are imposed, a problem arises if the state sentence is to run concurrently with the federal sentence and the federal sentence is silent on the issue of concurrency. Essentially, in such situations, the state court’s order of concurrency is ignored and the Bureau of Prisons infers consecutive service from the federal sentencing order’s silence.<sup>140</sup> Because the prisoner is in primary state custody, only his state term is credited with any incarceration he serves, despite the state court order of concurrency, since the Bureau will not commence his federal sentence until such state incarceration obligations are completed.<sup>141</sup> When the defendant is sentenced in federal court before state court, the common law rule requires the federal order to be silent on the issue of concurrency of service.<sup>142</sup> This leaves only the state judge, the second sentencing judge, to decide on concurrent versus consecutive service. But again, the Bureau of Prisons only looks to the federal order and does not attend to the state judge’s assessment and order.<sup>143</sup> So, in these situations,<sup>144</sup> the Bureau of Prisons effectuates consecutive sentences regardless of any state court order to the contrary.

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138. 18 U.S.C. § 3584(a) (1994). See also U.S.S.G. § 5G1.3, U.S. SENTENCING GUIDELINES MANUAL (2001) (incorporating this default rule).

139. U.S.S.G. § 5G1.3(c), U.S. SENTENCING GUIDELINES MANUAL (2001); see also Pineyro, 112 F.3d at 44.

140. See *supra* notes 135, 138 and accompanying text.

141. See *supra* notes 133-34 and accompanying text.

142. See *supra* notes 136-38 and accompanying text.

143. See *supra* notes 136, 139, 140 and accompanying text.

144. Again, this discussion concerns situations where the defendant is in primary state custody. When he is in primary federal custody, the concurrency dilemma discussed in the main text does not arise because the Bureau of Prisons in those cases will commence the federal sentence immediately after it is imposed. As the federal system, of course, will honor a detainer or writ of habeas corpus ad prosequendum for purposes of state trial and sentencing, the federal sentence simply proceeds in spite of a contemporaneous state adjudication. Therefore, a state

A federal court, which gives an earlier sentence than a state court for the same defendant, is prevented from anticipating a state court sentence.<sup>145</sup> Even after the state sentence is imposed, however, and despite an order by the state judge that the sentence it orders is to run concurrently with the federal sentence, the federal court essentially is prevented by the Federal Rules of Criminal Procedure from revisiting its own order to add a concurrency instruction reflecting the state court's wishes.<sup>146</sup> In effect, the state court, the federal court, and the defendant are all trapped by this fragmentation of authority and, in particular, by the Bureau of Prisons's inattention to the state sentencing order in the first place.

An illustration is in order. The facts of *Taylor v. Reno*<sup>147</sup> are as follows: Miguel Taylor was arrested in June of 1992 on federal drug charges. Federal authorities released Taylor on his own recognizance, thereby relinquishing primary jurisdiction over him. On October 27, 1992 Taylor pleaded guilty in federal court and again was released pending sentencing. He then was arrested on December 14, 1992 by Oregon state authorities, charged with murder, and detained pretrial. By arresting Taylor and detaining him for trial, Oregon obtained primary jurisdiction over him. Next, Taylor's presence in federal court was secured via a writ of *habeas corpus ad prosequendum* on May 10, 1993 for sentencing, and he received three concurrent, seventy-month terms for his federal drug arrest and subsequent guilty plea. Taylor then was returned to the lending jurisdiction, the state of Oregon, which retained primary jurisdiction over him. Then, while remaining in the primary jurisdiction of Oregon, Taylor was acquitted of murder but convicted of the lesser included offense of manslaughter; this conviction was reversed on appeal, after which Taylor was retried and convicted of manslaughter again. While still in primary state custody, Taylor was sentenced to 115 months imprisonment ordered to be served concurrently with Taylor's federal term. Despite this concurrency order, however, the Bureau of Prisons refused to take cus-

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court order of concurrency in this situation would be effectuated, even though the Bureau of Prisons again acts in spite of the state order, because, here, the federal system already has primary jurisdiction and already will have commenced the federal sentence. In the situation detailed in the main text, the prisoner is in primary state custody. Therefore, the federal system will not commence his federal term, meaning that, regardless of the state order, the sentences cannot but be served consecutively.

145. See *supra* notes 136-38 and accompanying text.

146. See *supra* note 94; see also *United States v. Pineyro*, 112 F.3d 43, 45 (2d Cir. 1997).

147. 164 F.3d 440, 443-44 (9th Cir. 1998), *cert. denied*, 527 U.S. 1027 (1999).

tody of Taylor in light of Oregon's primary jurisdiction over him and his continued obligations to that sovereign. He sought federal habeas relief while in state prison, but his petition was denied,<sup>148</sup> which left Taylor to serve his concurrent state and federal sentences consecutively.

The source of this concurrency trap dilemma lies in the diffusion of power among the federal court, the Bureau of Prisons, and the state system. Within this fragmented framework, the Bureau of Prisons discharges its responsibilities as the federal agency charged with incarcerating federal prisoners, responsibilities that include determining commencement of service. In so doing, however, the Bureau attends specifically to the district court's discretionary authority as expressed in the federal sentencing order when deciding whether to effectuate a prisoner's sentences (should more than one exist) concurrently or consecutively.<sup>149</sup> The federal court is prevented from ordering a federal sentence to run concurrently with a state term yet to be imposed. This stems from the indeterminacy inherent in predicting the outcome of the state trial and estimating the sentence that would be imposed should a guilty verdict result there.<sup>150</sup> No such practical circumstance, however, calls for the Bureau of Prisons to infer consecutive service from a federal sentencing order silent on that issue when there exists an explicit state court order on the matter, as § 3584(a) has been interpreted to require. It is this inference that ultimately results in the ignoring by the Bureau of state court orders of concurrent service.

Section 3584 itself makes no reference to orders or sentences by state courts, nor does U.S.S.G. § 5G1.3 (the United States Sentencing Guidelines' incorporation of this statute).<sup>151</sup> This federal statute and rule instruct the federal Bureau of Prisons on the execution of federal terms of incarceration. It follows that the requirement in 18 U.S.C. § 3584(a) of consecutive service in the face of a silent federal sentencing order was not intended to apply when there also exists a subsequent nonfederal sentence with a

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148. *See generally supra* notes 75-77 and accompanying text (habeas relief sought before administrative review by the Bureau of Prisons will either be dismissed for lack of jurisdiction or carry the weight of a mere nonbinding recommendation).

149. *See supra* note 135.

150. *See supra* notes 136-38 and accompanying text.

151. These texts use terms like "the court," "multiple terms," and "the undischarged term" without distinguishing between the federal or state systems. Case law has interpreted their reach as extending to situations where a defendant faces both federal and state prison terms. *See, e.g., Pineyro*, 112 F.3d at 45.

nonfederal concurrency order.<sup>152</sup> The statute should be reinterpreted to provide for this broader consideration, thus bridging the dispersed pockets of sentencing authority the Bureau of Prisons and the state court enjoy. Comity demands as much to eliminate this structural inattention to state court discretion and authority. Fundamental fairness to defendants punished contemporaneously by a state and the federal government demands the same, as bureaucratic imprisonment is an offensive notion.

The fact is, § 3584(a) is not understood as proposed above. Until it is, defense lawyers should take care to anticipate concurrency trap situations and utilize a simple technique that presently is available to avoid them. A defendant in primary state custody undergoing generally contemporaneous federal and state trials, with his presence in federal court secured via a writ of *habeas corpus ad prosequendum* or the Interstate Agreement on Detainers, only faces the above concurrency trap if the state judge orders a concurrent term *after* the federal sentence is imposed. Therefore, this dilemma easily can be avoided by scheduling the defendant's state sentencing hearing before the federal sentencing hearing. This way, it is the federal judge who will be responsible for evaluating the totality of the defendant's situation and deciding on concurrent or consecutive service,<sup>153</sup> and any such order she issues will be recognized by and binding upon the Bureau of Prisons.<sup>154</sup>

In *Taylor*, defendant Taylor recognized after the fact the virtue of this scheduling tactic and asserted an ineffective assistance of counsel claim against his federal defense attorney for failing to do so.<sup>155</sup> In rejecting this claim, the Ninth Circuit explained that "Federal Rule of Criminal Procedure 32(a)(1) requires that a federal sentence 'be imposed without unnecessary delay.'"<sup>156</sup> This concern for timeliness may disincline federal judges from postponing sen-

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152. Again, these discussions of concurrent and consecutive service orders refer to the state vis-à-vis the federal system and visa versa. The discussion is not concerned with the service of multiple intrasystem terms of imprisonment.

153. See *supra* notes 136-39 and accompanying text.

154. See *supra* note 135. Again, note that concurrency traps only arise when the defendant is in primary state custody. Therefore, the routine preference among both defendants and state authorities for prisoners to serve time in federal rather than state prison remains unaffected when the federal government has primary custody, in which case the order of the sentencing hearings makes no difference to the issue of concurrency.

155. *Taylor v. Reno*, 164 F.3d 440, 447 (9th Cir. 1998), *cert. denied*, 527 U.S. 1027 (1999).

156. See *id.* Since *Taylor*, Rule 32 of the Federal Rules of Criminal Procedure has been amended such that the content attributed in the main text above to rule 32(a)(1) now appears in rule 32(a). See FED. R. CRIM. P. 32(a).



tencing hearings pending the outcome of a wholly separate state judicial proceeding, and defense lawyers should be ready to convince the federal judge that the fundamental unfairness of a concurrency trap is more important.

### *B. Generally Applicable Remedies*

Various interjurisdictional conflicts have been addressed in the course of this discussion. For example, Section I reviewed jurisdictional tracking mistakes in which a receiving sovereign with only temporary custody mistakenly commences its term of incarceration rather than sending the prisoner back to the lending sovereign. Section I.C specifically addressed the constraints triggered when a sovereign mistakenly files both a detainer and then a writ of *habeas corpus ad prosequendum*. Section II.C reviewed complications surrounding credit for time served pretrial when a prisoner is detained simultaneously by one sovereign with primary jurisdiction and another with temporary custody. And, of course, Section III.A explained the concurrency trap dilemma. Numerous variations on these conflicts have been addressed as well. To better understand the relief options available to prisoners facing such custody, credit, and concurrency complications, and to highlight additional remedies to the concurrency trap dilemma in particular, the remainder of this section applies, explains, and evaluates existing methods of redress using the concurrency trap scenario already developed as a factual backdrop.

A preemptive option, discussed in Section I.D, for avoiding jurisdictional complications like the concurrency trap is to convince an executive of the state, such as the prosecuting authority, to waive primary jurisdiction to the federal prosecutor. Recall that in *Warren*, *Shumate*, and *Gonzalez*, the courts upheld the exercise of executive discretion as an effective method of transferring primary custody and rejected the Bureau of Prison's position that primary jurisdiction can only be relinquished through parole, bail, dismissal of charges, or satisfaction of incarceration obligations.<sup>157</sup> This practice is largely unutilized and may be met with some resistance; however, the case law that does exist on the subject upholds it as a viable method of transferring primary custody.<sup>158</sup> Furthermore, this option is preferable to the common practice among state jurisdictions, made aware of pending federal claims by a federal de-

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157. See *supra* notes 53-57 and accompanying text.

158. See, e.g., *id.*

tainer, of issuing bail in the amount of one dollar<sup>159</sup> to dissolve that state's primary jurisdictional hold and allow the federal government to establish its own.<sup>160</sup> This latter option involves a degree of uncertainty regarding the anticipated actions of the federal government once the state prisoner is released, whereas the waiver option recommended above entails a direct and clear transfer of custody from the state to the federal government. Also, while executive waiver only requires the state prosecutor and defense lawyer to agree, nominal bail requires agreement and participation by the state judge as well. Having to convince fewer people makes consensus more likely and streamlines the actual process. Nonetheless, nominal bail will dissolve the concurrency trap dilemma much like executive waiver does.

Two administrative remedies also are available to prisoners facing the concurrency trap dilemma. First, in *Wilson*, the Supreme Court interpreted § 3585(b) as vesting with the Bureau of Prisons the statutory authority to make time credit decisions regarding the service of a defendant's federal sentence.<sup>161</sup> Pursuant to this authority, it may be possible for a defendant trapped in the above situation to ask that his federal sentence be credited with the time he spent in state prison prior to commencing his federal sentence.<sup>162</sup> The defendant would have to request this credit via administrative review within the Bureau of Prisons once his federal sentence commenced.<sup>163</sup> Again, while the present focus is on process, it should be noted that the chances are low that such a request for time credit will succeed, given § 3585(b)'s facial prohibition on dual credit. Nonetheless, at least normatively, the presence of a state

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159. Interview with Inga Parsons, Assistant Professor of Law at New York University School of Law, in New York, N.Y. (May 9, 2000). Ms. Parsons spent five years as an associate federal defender with the Federal Defender's Office in Brooklyn, N.Y.; interview with Henry Mazurek, associate at Kramer, Levin, Naftalis & Frankel in New York, N.Y. (March 13, 2001). Mr. Mazurek spent four years as an associate federal defender with the Federal Defender's Office in San Diego, CA. Both Ms. Parsons and Mr. Mazurek are cited herein for their explanation of the process of using nominal bail to terminate primary jurisdiction and made no remarks about its utility as compared to executive waiver.

160. A sovereign waives primary jurisdiction when it releases a prisoner, and bail is a form of release. See *supra* notes 7, 8, 107-14 and accompanying text.

161. See *supra* notes 70-74 and accompanying text.

162. See generally *United States v. Wilson*, 503 U.S. 329, 337 (1992) (statutory revision of text of § 3585(b) suggests broadening of range of service that can be credited by Bureau).

163. See *supra* notes 74 and 91. Of course, the Bureau of Prisons can make this determination on its own initiative at that time as well.

court order of concurrent service warrants an exception where dual credit is explicitly intended.

Another solution available via administrative review is a *nunc pro tunc* (i.e., retroactive) designation by the Bureau of the state prison facility as the location for service of a defendant's federal sentence. Section 3585(a) provides that 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."<sup>164</sup> Section 3621(a), in turn, provides that "[a] person who has been sentenced to a term of imprisonment . . . shall be committed to the custody of the Bureau of Prisons"<sup>165</sup> which, in turn, "shall designate the place of the prisoner's imprisonment . . . ."<sup>166</sup> "The Bureau may designate any available penal or correctional facility . . . whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable. . . ."<sup>167</sup> Combining these statutory grants of authority, it is possible for the Bureau to designate a prison not "maintained by the Federal Government" (i.e., a state facility) as the "official detention facility," and defendant's "sentence . . . [will have] commence[d] on the date the defendant [was] received in custody awaiting transportation to, or arrive[d] voluntarily" at that location. The fact that the time served there also would have been attributed toward the defendant's state sentence is irrelevant because, unlike time credit decisions where dual credit is facially prohibited by § 3585(b), none of the statutes authorizing *nunc pro tunc* designation of a facility impose any such restriction.<sup>168</sup>

As discussed in Section II.B, however, even if service is recognized, the potential problem with both of these administrative approaches is that they are slow.<sup>169</sup> They cannot commence until the prisoner is in Bureau of Prisons custody. If the Bureau's review process takes longer than the amount of time by which a prisoner's federal sentence exceeds his state term (i.e., the amount of time he

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164. 18 U.S.C. § 3585(a) (1994).

165. 18 U.S.C. § 3621(a) (1994).

166. 18 U.S.C. § 3621(b) (1994).

167. *Id.*

168. *See supra* notes 164-67. *See, e.g.,* Shumate v. United States, 893 F. Supp. 137, 140-41 (N.D.N.Y. 1995) (Bureau designates New York state prison, where petitioner was serving a state term when filed habeas petition, as place of service for his federal sentence).

169. *See supra* notes 91-92 and accompanying text.

would have had to spend in federal prison had concurrency been effectuated in the first place), or if his federal sentence actually is shorter than his state sentence, then the defendant is forced to serve more time in prison than any court intended.

Judicial review of both crediting decisions and facility designations by the Bureau of Prisons is available, but only after the Bureau's administrative review options have been exhausted.<sup>170</sup> In *United States v. Pinyero*, defendant Pinyero was arrested by federal authorities for selling a silencer, released on bail, and then arrested by Massachusetts police for armed robbery.<sup>171</sup> He appeared in federal court pursuant to a writ of *habeas corpus ad prosequendum* where he pleaded guilty and was sentenced to fifteen months imprisonment.<sup>172</sup> He then returned to the lending sovereign, where he was convicted of armed robbery and sentenced to seven to ten years imprisonment.<sup>173</sup> While serving state time in a state facility (i.e., without exhausting his administrative review options offered by the Bureau of Prisons), Pinyero filed a habeas motion asking the federal court to order the Bureau of Prisons to designate the state facility as the place of his federal service.<sup>174</sup> The district court believed it lacked the authority to make this decision in the first instance and simply recommended against such a designation to the Bureau.<sup>175</sup> Pinyero then appealed this unfavorable recommendation, and the Second Circuit explained that requests for judicial review of both time credit and facility designation decisions can only result in nonbinding recommendations in the first instance.<sup>176</sup>

Nonetheless, such requests made before exhaustion of the Bureau's administrative options are worthwhile as the Bureau is directed by statute to consider judicial input when making its first instance decision.<sup>177</sup> Additionally, these requests for recommendations arguably carry particular weight despite their "nonbinding" status in that they signal the likely outcome of subsequent judicial review of the administrative decision by the Bureau. That is, the post-exhaustion, binding judicial authority bolsters the influence of

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170. See *supra* notes 76-77 and accompanying text.

171. 112 F.3d 43, 44 (2d Cir. 1997).

172. See *id.*

173. See *id.*

174. See *id.* at 44-45.

175. See *id.*

176. See *id.* at 45.

177. 18 U.S.C. § 3621(b)(4) (1994). Note that the statute's language seems directed specifically at instances of facility designation, but the *Pineyro* court of appeals seems to apply this understanding to time credit decisions also in its joint analysis. See *Pineyro*, 112 F.3d at 45.

the district court's pre-exhaustion, nonbinding recommendations. Defense lawyers should be sure to highlight these arguments as courts may be inclined to dismiss such petitions as unripe rather than issuing a nonbinding recommendation out of deference to the Bureau's authority over such matters in the first instance.<sup>178</sup>

The expansion of federal court authority proposed in Section II.B would streamline this ex post review process, replacing this three-prong—nonbinding judicial review, administrative exhaustion, binding judicial review—framework with a single, direct, and prompt corrective motion.<sup>179</sup> A prisoner in Taylor's situation could resolve his concurrency trap while still in state prison and thus avoid the risk that the existing review process will outlast his leftover penal obligations in federal prison and needlessly extend his incarceration. He would ask the federal court to amend its original sentencing order to provide for concurrent service paralleling the state court's order, the difference being that the Bureau of Prisons must attend to the federal order.<sup>180</sup>

### C. *In Sum*

When a defendant faces contemporaneous state and federal trials, the federal court cannot sentence him to a term to run concurrently with a state sentence that has yet to be imposed. It is therefore up to the state judge to evaluate the totality of the situation and rule on the issue of concurrency when a defendant is sentenced in federal court first. If that defendant is in primary state custody when this ruling is made, the state court's opinion is of no practical effect. The Bureau of Prisons neither will accept custody of the defendant, after which the state authorities could credit his state term with time served in federal prison, nor will it commence his federal sentence by recognizing the time he serves in state prison. As one former federal defender in the Eastern District of New York explains,

most federal practitioners will confront such a [concurrency trap] situation a number of times during the course of their work. It certainly happens enough to be an area of concern. Personally I have had to craft sentences to avoid the situation at least five times during the course of my five year stint as a

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178. Interview with Henry Mazurek, *supra* note 159.

179. See *supra* Section II.B.

180. See *supra* note 135 and accompanying text. Note that the federal court could not initially order concurrent service because, at that time, no state sentence had been imposed. See *supra* notes 136-39 and accompanying text.

federal defender. The issue has come up as an institutional concern with the federal defender's office.<sup>181</sup>

The defendant's best option in this concurrency trap situation is to avoid it altogether by securing a waiver of primary jurisdiction by the state to the federal government or by scheduling his federal sentencing hearing after his state sentencing. If avoidance fails, the defendant can seek administrative relief from within the Bureau of Prisons. Should that prove unsuccessful, he can then turn to the district court for habeas relief, but if he does so without first exhausting his administrative review options, his habeas petition will either be dismissed for lack of jurisdiction or result in a mere non-binding recommendation to the Bureau. In spite of these options, the loophole responsible for this concurrency trap dilemma must be closed because of the potential insufficiencies inherent in the presently available methods of avoidance (anticipatory scheduling and executive waiver) and because of the potential unfairness represented by the belated ex post relief options (administrative credit and judicial review). It can be plugged by reinterpreting § 3584(a) to require the Bureau of Prisons to attend to concurrency orders from state courts or by eliminating the requirement of administrative exhaustion as per Section II.B to allow federal judges to revisit and amend federal sentences with orders of concurrency.

## CONCLUSION

Consistent with the goals of the Sentencing Reform Act of 1984,<sup>182</sup> federal sentencing cabins discretion and decentralizes authority. By establishing a process from which deviation is difficult, its designers sought to homogenize sentencing across the country. Federal sentencing practice today divides discretionary authority primarily between the district court and the Federal Bureau of Prisons to achieve the desired clarity, consistency, and determinacy. With determinacy, however, comes inflexibility and entrenchment. Unfairness results because no tribunal possesses the necessary concentration of power to overcome this mechanistic rigidity and accommodate scenarios unanticipated by the system. The present discussion has explored this sort of unfairness in one category of cases, situations where the federal government and a state assert

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181. Interview with Inga Parsons, *supra* note 159; interview with Henry Mazurek, *supra* note 159 (concurrency trap situations arise "pretty frequently," especially because so many federal prosecutions are based on drug offenses, and a single drug transaction can violate both state and federal laws).

182. See generally U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (1998).

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contemporaneous claims over the same individual. Within this context, the concurrency trap dilemma presented in Section III.A is perhaps the most egregious example of systemic entrenchment insofar as it bureaucratically extends incarceration beyond that intended by the legislatures and sentencing courts; a prisoner is forced to serve concurrent sentences consecutively because one actor will not recognize the actions of another.

This discussion has been guided by three overall goals. First, it sought to convey a functional understanding of the intricacies of the jurisdictional priorities system triggered when multiple sovereigns, one being the federal government, claim jurisdiction over the same person at the same time, including the relief available when things go awry. Highlighting the concurrency trap and available relief was a particular concern given its acute consequences and loophole status. Second, the discussion understands the common source of incongruity in the interjurisdictional context as a fragmentation of discretionary authority that prevents the system from accommodating unforeseen scenarios, and has attempted to convince the reader of the same. Third, the discussion attempts to tailor recommendations for improved custody, credit, and concurrency relief to this core problem by recognizing a common plan to mitigate the effects of this systemic rigidity: counter the dispersal of authority that causes it. The improvements proposed do so either by concentrating authority in a single tribunal, as with executive waiver and direct judicial review, or by integrating it through an expansion of focus, as in the Bureau of Prisons attending to state concurrency orders. Either way, flexibility is reintroduced and the system is improved greatly.

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