IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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HAROLD LEROY FISHER, JR.,

Petitioner,

v.

CAROL HOLINKA, Warden,

Respondent.

OPINION and ORDER

07-cv-639-bbc

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner, who is presently confined at the Federal Correctional Institution in Oxford, Wisconsin, contends that the Bureau of Prisons has calculated his sentence in violation of 18 U.S.C. § 3585 and federal common law and that federal officials have violated his due process rights by refusing to credit his sentence or retrieve him from state custody. In particular, petitioner is challenging the Bureau of Prisons' refusal to credit him for time he says he spent or should have spent in federal custody between August 26, 2003 to June 19, 2006. Petitioner has been granted leave to proceed in forma pauperis and has made the $.22 initial payment of the $5 filing fee. Petitioner alleges that he has exhausted all administrative remedies and has attached the materials to his petition.

Because petitioner has alleged facts showing that he may be entitled to relief, I will issue an order to show cause why his petition should not be granted on his claim that the Bureau of Prisons violated § 3585 by failing to credit him for time he was in federal custody serving a federal sentence before his state sentence until he was properly returned to state custody.

The following allegations of fact are drawn from the petition, attachments and additional documents received pursuant to petitioner's motion to submit supporting documents (dkt. #9).

ALLEGATIONS OF FACT

Petitioner Harold LeRoy Fisher is a prisoner at the Federal Correctional Institution in Oxford, Wisconsin. Respondent Carol Holinka is the warden at the Oxford Federal Correctional Institution.

On April 26, 2001, petitioner escaped from federal prison. On April 28, 2001, he was arrested by Arizona police officers after his alleged involvement in a hit-and-run accident and assault on a state officer. At some point, state officials determined that petitioner was wanted by the United States Marshals Service on a federal warrant for escape and advised petitioner that he was being taken into custody on the federal warrant. A federal indictment was brought against petitioner for his escape from the federal prison and state charges were

brought against petitioner for criminal damage, aggravated assault and other things, all related to his arrest on April 28, 2001.

Petitioner's status in 2001 in the Bureau of Prisons was as follows: from April 26, 2001 until October 25, 2001, the bureau classified petitioner as "escape[d]"; from October 25, 2001 until December 6, 2001, petitioner was classified as being in "holdover" and "in-transit"; from December 6 until December 18, 2001, petitioner was classified as "designated, at assigned facil[ity]." (Petitioner submitted records of his federal inmate history only for the time period between April 23, 2001 and December 18, 2001).

On December 13, 2002, petitioner was sentenced in the United States District Court for the Eastern District of Arkansas to 60 months confinement for his escape from a federal prison. The sentence was "to run consecutive to the sentence [petitioner] is now serving" and petitioner was ordered "remanded" to the custody of the United States Marshal. The judgment for that case indicated that the offense of escape was concluded on April 28, 2001.

Petitioner pleaded guilty to the state charges of criminal damage and aggravated assault. On August 26, 2003, petitioner was sentenced in the Yavapai County Superior Court of Arizona to six years of confinement for his state law convictions. The state court judge acknowledged that petitioner "ha[d] spent some time in custody serving the federal sentence" and ordered the sentence "to be served concurrently with the Federal Court sentence and may be served in a federal facility." During the sentencing hearing, the judge

ordered that the sentence "may be served in a Federal penitentiary to be arranged between the Arizona Department of Corrections and the United States Marshal's Service or Federal penal system" and that petitioner was to be transported to the state Department of Corrections and "the authorities from there will have him held in Federal." The judge granted a credit of 850 days for time served prior to sentencing. (850 days is the number of days between April 28, 2001 and August 26, 2003.)

After petitioner was sentenced for the state crimes, various state officials contacted the United States Marshals Service on several occasions to request that Federal Marshals pick up petitioner and transport him to federal custody so that he may serve his state and federal sentences concurrently in a federal prison. The Federal Marshals did not act on any of these requests. Instead, they waited until the state sentence had expired on June 19, 2006, to take custody of petitioner. The Bureau of Prisons has refused to credit petitioner for the time he served in state custody.

On March 21, 2006, petitioner filed a request for an administrative remedy with the warden of the federal facility where he was incarcerated. Petitioner argued that he should receive credit for the six year he spent in custody on the state sentence. The warden denied petitioner's request, explaining that petitioner was serving a state sentence in state custody and is therefore not entitled to credit. Petitioner appealed this decision unsuccessfully at the regional and national levels. The response to petitioner's national appeal states in relevant

part:

> You were serving a 24-month federal sentence for a Supervised Release Violation when you escaped from federal custody on April 26, 2001. This act relinquished primary jurisdiction from federal authorities and your federal sentence was made inoperative. On April 28, 2001, you were arrested by the Arizona Department of Public Safety for Possession of a Stolen Vehicle, Reckless Endangerment, Fleeing the Scene of an Accident, and Aggravated Assault. At that time, as a result of your escape from federal custody and subsequent arrest, primary jurisdiction had been relinquished to Arizona authorities. You were produced in federal court pursuant to a writ and, on December 13, 2002, were sentenced in U.S. District Court for the Eastern District of Arkansas to 60 months confinement for Escape, ordered to run consecutive to your current sentence [for the Supervised Release Violation]. The state court has no authority to determine when a federal sentence will commence. After sentencing [in the federal court] you were returned to the state for disposition of their charges and your 24-month federal sentence for the Supervised Release Violation was still inoperative [and] . . . . could not resume until your release from state custody.

OPINION

Petitioner contends that he is entitled to credit against his federal sentence from the time of his arrest two days after escaping a federal prison until the expiration of his state sentence because, throughout that time, he was either in federal custody or "should have been" in federal custody. In addition, petitioner contends that his constitutional due process rights were violated when federal authorities refused to credit petitioner for time served in state custody after improperly releasing him to state custody and when they refused to receive him from state custody to serve his state and federal sentences concurrently.

A. In Custody in Violation of Due Process Clause

Petitioner's due process claims must fail. Even if federal officials had petitioner in custody and inappropriately delayed his federal sentence by transferring petitioner to state custody, his due process rights are not implicated. Dunne v. Keohane, 14 F.3d 335, 337 (7th Cir. 1994) (common law rule against delaying expiration of federal sentence "is only a rule of interpretation," not a "constitutional command"); see also Cain v. Menifee, ___F.3d___, 2008 WL 681679, *4 n.6 (5th Cir. 2008) (due process clause not implicated by common law rule prohibiting interruption of federal sentence). Likewise, due process rights are not implicated when federal officials refuse to take custody of a prisoner to allow a federal sentence to run concurrent with a state sentence. "[T]he lost possibility of serving any federal sentence concurrently with a state sentence does not violate any due process right." United States v. Smith, 5 F.3d 259, 261 (7th Cir. 1993) (citing United States v. Koller, 956 F.2d 1408, 1416 (7th Cir.1992) (prisoner has no right to serve state and federal sentences concurrently)). Thus, federal officials did not violate petitioner's due process rights by refusing to take petitioner into custody to serve his sentences concurrently.

B. In Custody in Violation of Federal Law

Petitioner contends that he is in custody in violation of federal law because he has not been given credit against his federal sentence for his imprisonment from the day of his arrest

after his escape until the expiration of his state sentence. Plaintiff's theory is that he was "in federal custody" either starting the day of his arrest or starting the day he was designated at an assigned facility by the Bureau of Prisons and was only later sent to state custody for sentencing and service of a state sentence; therefore, under 18 U.S.C. § 3585(a), petitioner's pre-escape sentence "recommenced" upon his arrest and under a common law rule prohibiting the interruption or delay in a federal prisoner's sentence, petitioner's federal sentence should not have been stopped for service of his state sentence.

1. Custody of petitioner after his escape

Under 18 U.S.C. § 3585(a), "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." Petitioner contends that he came into federal custody for the purpose of commencing his federal sentences either when he was arrested after escaping or when the Bureau of Prisons classified him as "designated" at an assigned facility one year before his sentencing on the federal escape charge.

As a starting point, as petitioner concedes, the federal government lost custody of him when he escaped. Newell v. Page, 362 F.2d 538, 539 (10th Cir. 1966) ("Appellant by his own act of escape interrupted his right to continuous service of his 1943 sentence and

cannot complain of the acts of comity between sovereigns or the imposition and service of other lawful sentences that prolonged, again through his own conduct, the interruption of service of his original sentence."). The next question is: When did the federal government regain custody of prisoner?

a. Custody of petitioner at arrest

Petitioner contends that the federal government had custody over him from the time he was arrested because he was told he was being taken into custody on a federal warrant. This is incorrect. The jurisdiction that first gains custody over a person by arrest has what is known as "primary jurisdiction." Thomas v. Brewer, 923 F.2d 1361, 1365 (9th Cir. 1991). The sovereign with "primary jurisdiction" over a person is the first in line for trial, sentencing and incarceration. Id. If a state has "primary jurisdiction," the federal government does not have jurisdiction to receive a person into custody for the purpose of serving a federal sentence even if the person is incarcerated at a federal facility. Flick v. Blevins, 887 F.2d 778, 782 (7th Cir. 1989) (under former statute governing commencement, 18 U.S.C. § 3568, a prisoner's sentence could not commence when he was in custody at federal prison because state had primary jurisdiction and federal government took prisoner out "on loan" with writ of habeas corpus ad prosequendum). In that situation, the federal government may receive the person "on loan" to prosecute the person by a writ of habeas

corpus ad prosequendum, Flick, 887 F.2d at 782, or receive primary custody of the person if the state relinquishes its custody, Williams v. Dept. of Corrections, 438 F.2d 78, 79 (9th Cir. 1971).

Petitioner escaped from a federal prison and was arrested by Arizona police. According to petitioner, "exhibit 1" of his motion to submit supporting documents, dkt. #9, shows that he was arrested "on a federal warrant." What exhibit 1 shows is that petitioner was arrested by Arizona police officers after a hit-and-run and aggravated assault and that later officials discovered that petitioner was *wanted* on a federal warrant. Even though petitioner was told he was being taken into federal custody, petitioner was arrested on state law violations, so the state of Arizona first gained custody over petitioner. Therefore, at the time of arrest, the state of Arizona obtained primary jurisdiction over petitioner for trial, sentencing and incarceration and the federal government did not have jurisdiction to receive petitioner into custody to commence his pre-escape sentence.

b. Custody of petitioner when classified as "designated"

Petitioner next argues that, even if he was not in federal custody at the time of arrest, he was returned to federal custody by December 6, 2001, when he was classified by the Bureau of Prisons as being "designated, at assigned facil[ity]." However, the question is not how the federal Bureau of Prisons classified petitioner, but whether the *state* of Arizona

retained its primary jurisdiction over him.

Generally, a sovereign's primary jurisdiction over an individual "is not exhausted until there has been complete compliance with the terms of, and service of any sentence imposed by, the judgment of conviction entered against the individual by the courts of that first sovereignty." In re Liberatore, 574 F.2d 78, 89 (2d Cir. 1978). However, the sovereign may relinquish primary jurisdiction. Any such relinquishment must be express, not implied. See, e.g., Williams, 438 F.2d at 79 ("waiver of jurisdiction should be found only in those cases in which the record reflects 'affirmative evidence that the waiver was intentional'") (quoting In re Patterson, 64 Cal. 2d 357, 363 (1966)); Shumate v. United States, 893 F. Supp. 137, 142-43 (N.D.N.Y. 1995) (individual acting with authority for custodial sovereign may relinquish primary jurisdiction by executing express waiver of jurisdiction); State ex rel. Graves v. Williams, 99 Wis. 2d 65, 76, 298 N.W.2d 392, 397 (Ct. App. 1980) ("The almost universal view of the state and federal courts which have addressed this issue is that no waiver of jurisdiction will be found unless waiver was 'manifestly intended' by the demanding state at the time it yielded to another sovereignty.") (citing Gottfried v. Cronin, 192 Colo. 25, 555 P.2d 969, 973 n.11 (1976)).

Although petitioner has offered no information that directly addresses whether the state of Arizona expressly relinquished primary jurisdiction over him, his allegations do not rule out the possibility that he was in federal custody serving his federal sentence before he

began his state sentence. First, the Bureau of Prisons took petitioner off his "escape" status and placed him in "holdover" "in transit" and finally "designated, at [an] assigned facil[ity]" more than one year before he was ever sentenced for his federal escape, suggesting that the bureau considered that petitioner had been returned to federal custody to serve his pre-escape sentence. This seems unlikely in light of the fact that the state had taken him into custody after the federal government lost primary jurisdiction over him as a result of his escape, but I cannot rule it out completely at this stage of the proceedings. Petitioner's allegations have some support in the court references. (At sentencing, the federal court ordered petitioner "remanded" to the custody of the United States Marshal and the state court seems to have believed that petitioner had been in custody serving his federal sentence awaiting state sentencing.) It is true that a court's belief about an offender's primary custodian is not evidence; courts do not make determinations about custody and primary jurisdiction except in the context of a case that raises such an issue. It is the executive branch of the government that is responsible for the custody of offenders. However, because it is not completely clear from petitioner's allegations that the state of Arizona never expressly relinquished its primary jurisdiction over petitioner, I will ask for a response on this question.

If the state did relinquish primary jurisdiction, petitioner's federal sentence may have been resumed in either a federal or state facility, if the Bureau of Prisons agreed. 18 U.S.C.

§ 3621(b) (allowing Bureau of Prisons to designate state facility as place of imprisonment). If so, petitioner is entitled to credit for the time he was in federal custody after the state of Arizona relinquished primary jurisdiction to the federal government.

c. If the federal government regained custody, could it be relinquished to the state?

Petitioner is entitled to credit under § 3585 only for time he was in custody of the federal government serving his sentence. Thus, even if the state of Arizona relinquished custody to the federal government at some time, petitioner is entitled to credit only until the federal government relinquished its custody of petitioner and returned him to state custody. Petitioner contends that he should receive sentence credit for any time served after the federal government took him back to serve his federal sentences, regardless whether he was returned to state custody, because the federal government is prohibited from meting out its punishment in "installments." There does exist a common law rule against "installment punishment" that prohibits federal officials from delaying the expiration of a sentence either by delaying commencement or by releasing a prisoner and then reimprisoning him. Dunne v. Keohane, 14 F.3d 335, 336 (7th Cir. 1994). In Dunne, the court explained that "the government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the expiation of his debt to society and his reintegration into the free community." However, application of the rule is dubious when the delay occurs in the context of delays

in transferring a prisoner from one sovereign to another, as opposed to delays of "release into the free community." Id. at 337. Even if the rule does apply to that situation, it does not apply when the delay does not result in "postponing the date at which the prisoner's last sentence would expire." Id. at 337.

Petitioner contends that the rule applies to him because he would have gotten out earlier if he had never stopped serving his federal sentence. According to petitioner, his federal sentence for escape was consecutive only to the present federal sentence and not to the later concurrent state sentence; therefore, if he had never stopped serving his federal sentence, he would have started serving his state sentence concurrently with his federal sentence. Petitioner's assessment is wrong. Under 18 U.S.C. § 3584(a), a federal sentence is automatically consecutive to later state law sentences imposed. Romandine v. United States, 206 F.3d 731, 737-38 (7th Cir. 2000) (under § 3584, "[a] judge cannot make his sentence concurrent to nonexistent sentences that some other tribunal may or may not impose; thus the sentence is automatically consecutive."). Thus, even if petitioner had served his state sentence in federal prison, the consecutive federal sentence for escape could have been delayed until after his state sentence had expired. Dunne, 14 F.3d at 337 (Bureau of Prisons could have deemed service of all federal sentences to begin after expiration of later state sentence even though state judge had ordered sentence to run concurrently with federal sentence). Therefore, petitioner is not entitled to time under the common law rule against

"installment punishment," and may receive credit only for any time he spent serving his federal sentence until he was properly returned to state custody, if he ever was in federal custody before his state sentence began.

d. If the federal government did not have custody, should it have?

Petitioner's final argument is that, even if he was not properly in federal custody after he was sentenced in state court, he "should have been" because the state ordered concurrent sentences and service in federal prison. Such an argument is without merit. First, it is not at all clear that a state court can relinquish state jurisdiction on its own. Rather, it appears that only an executive branch may relinquish the primary jurisdiction of a state. United States v. Warren, 610 F.2d 680, 685 (9th Cir. 1980); Strand v. Schmittroth, 251 F.2d 590, 609 (9th Cir. 1957) (relinquishing primary jurisdiction "is essentially political and executive in character" and ordinarily done by law enforcement officers after consultation with like officials of other sovereign). Second, even if the state could relinquish primary jurisdiction, petitioner concedes that federal authorities refused to take him back from state custody. The federal government's decision not to retrieve petitioner is a decision within its discretion and not one about which petitioner may complain. Jake v. Herschberger, 173 F.3d 1059, 1065 (7th Cir. 1999) (federal government has no obligation to receive state prisoner upon request or credit prisoner for time served in state prison on state sentence ordered to run

concurrently with federal sentence); Jeter v. Keohane, 739 F.2d 257, 258 (7th Cir. 1984) (any dispute over whether an individual should be in custody of either state or federal government is between two sovereigns and "[a]n individual who has violated the laws of two or more sovereigns may not complain of the order in which he is to serve the various sentences").

Although petitioner cannot receive credit for any time he believes he "should have" been in federal custody but was not, petitioner has alleged facts showing he may be entitled to credit for time that was in federal custody serving his federal sentence. Therefore, respondent will be ordered to show cause why a writ of habeas corpus should not be issued on petitioner's claim that some time after his arrest, he was returned to federal custody to serve his pre-escape sentence, and continued to serve his federal sentence until the federal government relinquished its custody over him to the state of Arizona. If respondent can show that petitioner was only "on loan" from state custody on a writ of habeas corpus ad prosequendum, as opposed to being in custody on the basis of an express relinquishment of primary jurisdiction by the state of Arizona, petitioner will not be entitled to any credit.

ORDER

IT IS ORDERED that

1. Respondent Carol Holinka is to file a response to this petition not later than 20

days from the date of service of the petition, showing cause, if any, why this writ should not issue on petitioner Harold LeRoy Fisher Jr.'s claim that he should receive sentence credit for time he was in federal custody serving a federal sentence before his state sentence until he was properly returned to state custody.

2. Petitioner may have 20 days from the service of the response to file a traverse to the allegations of the response submitted by respondent.

Entered this 24th day of March, 2008.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge