UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN BIANCO,	:
	:CIVIL ACTION NO. 3:03-CV-0193
Petitioner,	:
	:(JUDGE CONABOY)
v.	:
	:
JONATHAN C. MINOR,	:
Warden of FCI Allenwood,	:
	:
Respondent.	:

MEMORANDUM AND ORDER

I

Before the Court is Petitioner John Bianco's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2241, (Doc. 1), in which he alleges that the Bureau of Prisons (BOP) incorrectly calculated his federal sentence when it did not give him credit for all the time he had served on a state sentence. Petitioner is currently incarcerated at the Federal Correctional Facility at Allenwood (FCI-Allenwood) serving a sixty-month sentence imposed on September 25, 2001, upon the revocation of his federal probation. Petitioner was on probation for a 1991 arrest for drug offenses in the Southern District of New York. In 1999, he was sentenced for the 1991 offenses to a term of four years probation. In January of 2001, while still on

probation, Petitioner was arrested in California on drug related charges. Following Petitioner's California arrest, a federal detainer was lodged for violation of his federal probation. After pleading guilty to state charges, he was sentenced in California to one year imprisonment on January 31, 2001. He was brought to New York in March of 2001 to answer on the federal probation violation. On September 25, 2001, Judge Loretta Preska of the Southern District of New York revoked Petitioner's federal probation and sentenced him to sixty months imprisonment to run concurrently with his state sentence and to run "from the first day he entered federal custody." (Doc. 1 Ex. D at 31.)

Petitioner alleges that the Judge's sentence gave him credit for time served on his state sentence and, therefore, the BOP should have credited his sixty-month sentence with the time he had served from January 31, 2001, until his federal sentencing in September of 2001. (Doc. 1, §§ 4, 14.) Respondent filed a response requesting that the Court dismiss the petition because the BOP correctly calculated Petitioner's sentence. (Doc. 10.) On April 25, 2003, Petitioner filed an Unopposed Motion for Enlargement of Time, (Doc. 11), requesting that he be granted until April 24, 2003, to reply to Respondent's Response. Also on April 25, 2003, Petitioner filed a reply to Respondent's Response, (Doc. 12). We will consider Petitioner's Reply timely

filed.

The sole issue we must decide in this habeas action is whether the Bureau of Prisons (BOP) correctly calculated the amount of time Petitioner must serve on his federal sentence. The resolution of this issue turns on whether Judge Preska intended to or could give Petitioner credit for all the time he had served on the California state sentence when she sentenced him to sixty months imprisonment for violation of his federal probation and ordered the sentence to run concurrently with his state sentence.

Based on our review of the record and consideration of relevant federal law and the United States Sentencing Guidelines, we conclude that Judge Preska did not intend to and did not give Petitioner credit for time served on his state sentence from January 31, 2001, until the imposition of his federal sentence in September 2001. Therefore, for the reasons fully set forth below, we dismiss Petitioner's § 2241 petition.

II
Background

The basic facts of this case are not in dispute. The recitation of facts below is taken from Petitioner's Habeas Petition and Exhibits, (Doc. 1), and Respondent's Response and Exhibits, (Doc. 10).

On December 15, 1999, Petitioner was sentenced in the United

States District Court for the Southern District of New York on indictment number 91 Cr. 990 to four years probation for conspiracy to distribute and possession with intent to distribute marijuana in violation of 21 U.S.C. §846.[1]

On January 23, 2001, while on probation, Petitioner was arrested in Mendocino County, California, by local authorities for various drug offenses, including possession of heroin. On January 25, 2001, while Petitioner was being arraigned in state court, the Southern District of New York issued a warrant to Petitioner for violating his probation. The warrant was lodged as a detainer with the Mendocino County authorities. Therefore, the California County Court would not entertain a request for bail.

On January 31, 2001, Petitioner pled guilty to possession of a controlled substance and was sentenced by the Mendocino County Superior Court to one year imprisonment to "run concurrent with any federal sentence that [Bianco] may receive, and, specifically, it will run concurrent with the sentence in case number 91-CR-00990-004, District of New York." (Doc. 10 at 2.)

On March 8, 2001, Petitioner was taken into temporary federal custody via a writ of habeas corpus ad prosequendum to

[1] The record does not reflect how the sentencing court calculated the 1999 sentence.

answer the probation violation in the Southern District of New York. During this time, Petitioner remained in the primary custody of the State of California.

Subsequently, Petitioner admitted he had violated his probation and the Southern District of New York revoked Petitioner's probation. On September 4, 2001, Judge Loretta Preska, District Judge of the Southern District of New York, sentenced Petitioner to 108 months imprisonment.

At the September 4, 2001, hearing, Judge Preska had been advised that the offense level was 31 - the level which had been calculated in the July 1998, presentence report - and that this offense level yielded a guideline range of 108 to 135 months.[2] (Doc. 1 Ex. D at 27.) Following the September 4, 2001, hearing,

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[2] Although not directly reflected in the record, it appears that the United States Sentencing Guidelines Manual for the year 2000 was used. The sentencing transcript contains a reference to Chapter 7, Part A, paragraph number 4 being located on page 394 of the Guidelines Manual. (Doc. 1 Ex. D at 14.) This reference is consistent only with the 2000 edition of the Guidelines Manual. See U.S. Sentencing Guidelines Manual at 394 (2000). Furthermore, this would have been the proper manual to use because it was the manual in effect on the date of sentencing and there is no evidence of an ex post facto issue which would have required the use of the manual in effect at the time of the commission of the crime. See U.S. v. Rodriguez, 989 F.2d 583, 587 (2d Cir. 1993).

No Criminal History level is noted in the sentencing transcript or elsewhere in the record. However, the Sentencing Table found in the 2000 Guidelines Manual indicates that Criminal History Category I combined with Offense Level 31 would yield a Guideline range of 108-135 months.

Petitioner's counsel pointed out that the 1998 report was in error because, having "met the requirements of the safety valve," Petitioner was entitled to a two-point reduction in his offense level. (Id.) Therefore, his offense level was incorrectly stated on the 1998 report and his proper offense level was 29 with a guideline range of 87 to 108 months.

Because of this error, Petitioner filed a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to reconsider the sentence imposed on September 4, 2001. A hearing was scheduled for September 11, 2001, which was rescheduled to September 25, 2001.

Petitioner's state sentence expired on September 23, 2001. On this date, California authorities relinquished primary custody of Petitioner to federal authorities. There is no evidence that the parties or the sentencing court were aware that the state sentence had expired when Judge Preska imposed sentence on September 25, 2001.

On September 25, 2001, the district court entertained Petitioner's Rule 35(c) motion and reduced Petitioner's sentence to sixty months imprisonment, concurrent with his California sentence. In regard to the concurrent sentence, Petitioner's counsel asked, "[D]oes that date back to the first day he entered federal custody?" Judge Preska responded, "Yes." (Doc.

1 Ex. D at 31.)

Before explaining her rationale for the sentence imposed, Judge Preska noted that she considered the United States Sentencing Guidelines Chapter Seven policy statements which had been discussed at both resentencing hearings and the revocation table included in § 7B1.4 which recommended a period of imprisonment of twelve to eighteen months.[3] Judge Preska then explained her reasons for imposing the sixty-month sentence.

> Nevertheless, as noted in the background section of part A of Chapter 7, the introduction to the chapter, "If the court finds that a defendant violated a condition of probation, the Court may . . . revoke probation and impose any other sentence that initially could have been imposed. 18 U.S.C. Section 3565."
>
> For the record, . . . I do not rely in any respect in making this determination on any disparity or discrepancy between supervised release and probation. I'm just reading the guidelines and applying them as the plain language permits.
>
> First, it was my intention at the resentencing hearing to sentence Mr. Bianco to the bottom of his guideline range. At that first resentencing proceeding, [we had] the mistaken impression that Mr. Bianco's guideline range was 108 to 135 months. . . . Mr. Bianco is entitled to an additional two-point

[3] The Chapter Seven policy statements discussed at the September 25, 2001, resentencing hearing include the following propositions put forth by Petitioner's counsel: 1) the district court judge should not consider the new crime, that was to be addressed by other prosecutors and other judges, (Doc. 1 Ex. D at 7); and 2) the concept of a violation of probation or supervised release is a breach of trust, (Id.). No policy statements regarding concurrent or consecutive sentences were discussed.

reduction in his offense level because he met the requirements of the safety valve. Accordingly, instead of the level 31 noted on page 6 of the July 17, 1998, presentence report, Mr. Bianco's offense level is 29, yielding a guideline range of 87 to 108 months. . . .

. . . .

For the record, I will elaborate on my comments at the prior proceeding to the effect that, despite the Chapter 7 revocation table recommendations, a sentence in the guideline range or at least a sentence above the revocation table recommendation is required here because of the defendant's repeated and willful flaunting of the conditions of probation, that is, because of the defendant's egregious breach of trust that this Court reposed in him. . . .

. . . .

. . . Such a complete and utter disregard of the conditions of probation requires a severe sentence, that is, a sentence above the recommended 18 to 24 months.

In addition, I note application note 4 to Section 7B1.4, which states, "Where the original sentence was the result of a downward departure . . . an upward departure [from the revocation table recommendations] may be warranted.

Here defendant's original sentence of probation was an enormous departure from the guidelines range. Because of the defendant's repeated and willful flaunting of the conditions of his probation and his acknowledged intention to return to the activities on which the underlying conviction was based, I find that an upward departure from the Section 7 recommendation is warranted.

. . .

It's the Court's intention to impose a sentence of 60 months' incarceration, to be concurrent with the California sentence.

(Doc. 1 Ex. D at 21-29.)

As noted previously, when Judge Preska was asked by defense counsel whether the sentence dated back to the first day he entered federal custody, she responded "yes." See supra p. 6.

On September 26, 2001, Judgment was entered committing Petitioner to a term of 60 months imprisonment. The Judgment further notes that "[t]his sentence shall run concurrently with the Defendant's California sentence." (Doc. 1 Ex E.)

No appeal was taken from the violation adjudication or the sentence imposed.

The BOP calculated Petitioner's anticipated release date, via good time credit, to be January 2, 2006. The BOP credited Petitioner's federal sentence with presentence credit for time spent in state custody from January 23, 2001, (when he was arrested by Mendocino County authorities) to January 30, 2001, (the day before the state sentence began). (Doc. 10 at 5.) Because of the sentencing court's direction that the federal sentence run concurrent with the state sentence, Petitioner's federal sentence was deemed to begin on September 4, 2001 - the date of the first probation revocation hearing. This was accomplished through the BOP's nunc pro tunc designation of the

state as primary custodian for service of the federal sentence.[4]

Petitioner filed the appropriate requests for administrative review. (Doc. 10 Ex. 2.) He first filed for administrative relief with the warden at FCI-Allenwood. The warden found the BOP calculations accurate. Petitioner then appealed the decision to the regional director. Petitioner also filed a Central Office Administrative Remedy Appeal following the regional director's unfavorable decision. This appeal was also denied.

III
Discussion

The issue in dispute in this habeas action is what Judge Preska intended when she indicated that Petitioner's sentence was to run concurrently with his state sentence dating back to the first day he entered federal custody.

Petitioner argues that the "district court explicitly stated that the sentence was to run concurrently 'nunc pro tunc' with that (one year) imposed by the Mendocino County court earlier that year." (Doc. 2 at 1.) He contends that this sentence was entirely lawful under relevant statutory and case law, and that § 5G1.3 of the United States Sentencing Guidelines mandates that his sentence be imposed to run retroactively concurrently.

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[4] See 18 U.S.C. § 3621; Barden v. Keohane, 921 F.2d 476 (3d Cir. 1990).

(Id.) Therefore, in Petitioner's view, his federal sixty-month sentence should have been calculated to begin on January 31, 2001, the date on which he was sentenced to one year imprisonment on the California charges.

Respondent argues that the Court should dismiss Petitioner's habeas action for three reasons. (Doc. 10 at 1.) First, because Petitioner did not raise his U.S.S.G. § 5G1.3 claim administratively, his habeas action is barred due to his failure to properly exhaust administrative remedies. (Id.) Second, the sentencing court did not mention § 5G1.3 at the sentencing or elsewhere, and the federal district court did not issue a "nunc pro tunc" sentence under § 5G1.3. (Id.) Third, U.S.S.G. § 7B1.3(f) and Application Note 6 to U.S.S.G. § 5G1.3 barred Petitioner from receiving a fully concurrent sentence because the sixty-month sentence was imposed as the result of his violating probation. (Id. at 1-2.)

Based on the applicable statutory and case law, we conclude that the BOP correctly calculated Petitioner's sentence because the sentencing court did not intend to impose a retroactively concurrent sentence.

A. Exhaustion of Administrative Remedies

We disagree with Respondent that Petitioner has failed to exhaust his administrative remedies. Rather, we conclude that

Petitioner has fulfilled the exhaustion requirement and the case should be reviewed on its merits.

To satisfactorily exhaust administrative remedies, a petitioner must present the substance of his claim to the reviewing agency - magic words or precise language are not required. Rather, we look to see whether the reasons we require exhaustion have been met. Courts adhere to the exhaustion requirement for several reasons:

> (1) judicial review may be facilitated by allowing the appropriate agency to develop a factual record and apply its expertise, (2) judicial time may be conserved because the agency might grant the relief sought, and (3) administrative autonomy requires that an agency be given an opportunity to correct its own errors.

Bradshaw v. Carlson, 682 F.2d 1050 (3d Cir. 1981) (quoting United States ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656, 659 (3d Cir. 1973), rev'd. on other grounds, 417 U.S. 653 (1974).

Based on our review of Petitioner's submissions to the BOP, we conclude that none of the reasons for exhaustion are frustrated in this case. The BOP reviewed Petitioner's claim that his sentence had been improperly calculated. (See Doc. 10 Ex. 2.) Petitioner asserted that he was "not being given credit for time spent in federal custody [and] [i]t was the Judges [sic] intent to give me credit for that time." (Id. Inmate Request dated 2/5/02.) In his subsequent appeals, Petitioner

clearly articulated that his sentences were ordered to run concurrently and that he believed Judge Preska had intended to give him credit for time served. He also attached pertinent portions of the sentencing transcript with his appeal. (See Doc. 10 Ex. 2 Appeal Forms dated 3/1/02 and 5/6/02.)

We do not concur with Respondent's proposition that Petitioner failed to exhaust administrative remedies because he did not claim "that he was relying on U.S.S.G. § 5G1.3 as the basis of his arguments or that the sentencing court had imposed a § 5G1.3 sentence so as to make a downward departure." (Doc. 10 at 7.) Although Petitioner did not cite any statutory or case law or the United States Sentencing Guidelines to support his position in his administrative filings, it is not necessary to provide such support to fulfill the exhaustion requirement. Because Petitioner makes the same claims to this Court as he did throughout the administrative appeal process, we conclude that he has exhausted his administrative remedies.

B. Sentencing Court's Intent

We now address the merits of Petitioner's assertion that his federal sentence was to run retroactively concurrently with his state sentence and that the BOP incorrectly calculated his sentence when it failed to give him credit for the state time he had served.

We are guided by case law which tells us that "the intent of the sentencing court must guide any retrospective inquiry into the term and nature of a sentence." United States v. Taylor, 47 F.3d 508, 511 (2d Cir. 1995) (quoting United States v. Einspahr, 35 F.3d 505, 506 (10th Cir.), cert. denied, 513 U.S. 1009 (1994)). The Third Circuit Court of Appeals has held that, when the sentencing court's oral and written sentences conflict, the oral sentence prevails. Ruggiano v. Reish, 307 F.3d 121, 133 (3d Cir. 2002) (citing State v. Faulks, 201 F.3d 208, 211 (3d Cir. 2000)). In Ruggiano, the court noted that, when there is no conflict, only ambiguity in either or both, "the controlling oral sentence often consists of spontaneous remarks that are addressed primarily to the case at hand and are unlikely to be a perfect or complete statement of all surrounding law." Id. (citing Rios v. Wiley, 201 F.3d 257, 268 (3d Cir. 2000). The Ruggiano court also remarked, "In interpreting the oral statement, we have recognized that the context in which this statement is made is essential." Id. at 134. Here, we must decide what Judge Preska intended when she said that Petitioner's 60 month federal sentence "will be concurrent with the time that you were sentenced to in California," and then responded in the affirmative when asked "[d]oes that date back to the first day he entered federal custody?" (Doc. 1 Ex. D at

31.)

B1. Review of the Hearing Transcript

We disagree with Petitioner that the "district court explicitly stated that the sentence was to run concurrently 'nunc pro tunc' with that (one year) imposed by the Mendocino County court earlier that year." (Doc. 2.)

First, we note that Judge Preska never used the phrase "nunc pro tunc." (See Doc. 1 Ex. D.) Rather, Judge Preska said the sixty month sentence "will be concurrent with the time that you were sentenced to in California," and then responded affimatively when asked "[d]oes that date back to the first day he entered federal custody?" (Doc. 1 Ex. D at 31.) Petitioner maintains that the effect of Judge Preska's agreement with Petitioner's counsel's statement at the sentencing hearing was that his sentence "was ordered 'truly concurrent' with the state sentence (such that it began, effectively on January 31, 2001) . . . ." (Doc. 12 at 4.)

Respondent argues that technically "the first day he entered federal custody" meant September 23, 2001, when California relinquished custody. (Doc. 10 at 17.) From March 8, 2001, to September 23, 2001, Petitioner was in temporary federal custody via a writ of habeas corpus ad prosequendum to answer the probation violation in the Southern District of New York.

During this time, Petitioner remained in the primary custody of the State of California because, when a prisoner is in federal custody via a writ ad prosequndum, the state is the primary custodian "unless and until the first sovereign relinquishes jurisdiction over the prisoner." Rios v. Wiley, 201 F.3d 257, 274 (3d Cir. 2000).

Petitioner responds that this result does not make sense for two reasons. First, Petitioner asserts that Judge Preska evidenced a desire to help Petitioner by ordering a concurrent sentence because ordinarily a sentence imposed at a later time, as is the case with Petitioner's federal sentence here, would have run consecutively pursuant to 18 U.S.C. § 3584(a).

Second, Petitioner contends that the timing of the expiration of the state sentence indicates that Judge Preska intended to give him credit for the time he had served on his California sentence. (Doc. 12 at 3-4.)

Our review of the sentencing hearing transcript does not reveal the intent argued by Petitioner. Judge Preska never stated that Petitioner's sentence was to be fully retroactive with his California sentence or that he was to receive credit for all the time he had served on that sentence. (See Doc. 1 Ex. D.) The sentencing transcript does not reveal that Petitioner's counsel requested Judge Preska to "lower the

applicable term." Rather, Petitioner derives his interpretation of Judge Preska's sentence from her affirmative response to defense counsel's question whether the sentence was to "date back to the first day he entered federal custody." (Doc. 1 Ex. D at 31.)

We agree with Respondent that technically the first day Petitioner entered federal custody was September 23, 2001, the day on which he completed his state sentence. See Rios, 201 F.3d at 274.[5] It is unlikely that Judge Preska knew that custody had been transferred on September 23, 2001, both because no evidence points to such knowledge and because a concurrent sentence cannot be ordered to run with a sentence which has been completely discharged. Labielle-Soto, 163 F.3d 93, 99 (2d Cir. 1998). Therefore, we assume that when Judge Preska agreed that the sentence was to be concurrent dating "back to the first day he entered federal custody" she was not referring to September 23, 2001.

However, we are also not persuaded that Judge Preska was referring to January 31, 2001. This conclusion is based on several factors. First, Judge Preska initially did not say when the sentence was to begin, just that the sentence was to be

[5] Although Rios was superceded by statute on other grounds as recognized in United States v. Saintville, 218 F.3d 246 (3d Cir. 2000), the federal custody issue was not affected.

concurrent with Petitioner's state sentence. (Doc. 1 Ex. D at 29, 31.) Because the imposition of a concurrent sentence normally means that the sentence being imposed is to run concurrently with the undischarged portion of the previously imposed sentence, it is unlikely that the judge would deviate from the norm with no discussion. See 18 U.S.C. § 3584; Ruggiano, 129 F.3d at 133; Rios, 201 F.3d at 261, 271. In cases where the reviewing court found that the sentencing judge intended to impose a retroactively concurrent sentence, the sentencing judge had engaged in a dialog on the issue of credit for time served and had explicitly directed that the defendant was to receive credit for such time. Ruggiano, 307 F.3d at 131, 135; Rios, 201 F.3d at 260-61, 271. We recognize that a sentencing court need not cite applicable statutory or Sentencing Guidelines provisions when imposing sentence. Ruggiano, 307 F.3d at 134; see infra p. 22. However, as discussed above, here we find no expression of intent similar to that found in Ruggiano or Rios.

Furthermore, we disagree with Petitioner's assertion that Judge Preska's intent can be ascertained from the timing of the expiration of the state sentence.[6] (See Doc. 12 at 3.)

[6] The record does not reflect why Petitioner's California sentence of one year imprisonment imposed on January 31, 2001, expired on September 23, 2001.

Petitioner contends that the parties and the court believed at the time of sentencing that the California state sentence had almost expired. He argues that, in these circumstances, "the only way to truly grant counsel's request and lower the applicable term was to order a truly concurrent sentence. . . . [I]t is far more reasonable to conclude that the court intended to lower the sentence by eight or nine months . . . than to conclude that it granted counsel's request to reduce his client's total six-year sentence by a day or two, at best." (Doc. 12 at 3-4.)

Contrary to Petitioner's assertion, we have no evidence that Judge Preska knew when Petitioner's state sentence would conclude. Because Judge Preska had a probation report, (see Doc. 1 Ex. D at 4), we can assume that she knew Petitioner had been sentenced on January 31, 2001, to one year imprisonment on the California charge. Therefore, Petitioner's state sentence could have run through January 30, 2002. With up to four months potentially remaining on Petitioner's state sentence, one could argue that Judge Preska's concurrent sentence could have implicated far more than the "day or two" indicated by Petitioner. (Doc. 12 at 3-4.)

We also do not agree that Judge Preska's imposition of a concurrent sentence can be construed as evidence that she

desired to help the defendant to the degree suggested by Petitioner. (See Doc. 12 at 3.) Throughout the sentencing hearing, Judge Preska consistently asserted her intention to sentence Petitioner above the probation revocation table range of twelve to eighteen months found in Chapter Seven of the United States Sentencing Guidelines. (See, e.g., Doc. 1 Ex. D at 27-29.) She concluded that a sentence in the area of the guideline range for his original drug violation conviction was more appropriate because of Petitioner's "repeated and willful flaunting of the conditions of probation, that is, because of the defendant's egregious breach of the trust that this Court reposed in him." (Id. at 27.) In fact, Judge Preska originally sentenced Petitioner to 108 months at the September 4, 2001, sentencing hearing when she believed the appropriate range was 108 to 135 months. We recognize that the 60 months imposed at the September 25, 2001, hearing is below the corrected appropriate range of 87 to 108 months. However, there is no evidence that Judge Preska's decision to impose a sentence below the range of the original charge supports the proposition that she intended to further reduce Petitioner's sentence by crediting him for time served on the state sentence, particularly when the state conviction involved completely new and different conduct.

Given the unusual circumstances in this case - the original sentencing took place on September 4, 2001, and the September 25th resentencing hearing was required to correct the Guideline range error - we cannot say that the BOP miscalculated Petitioner's sentence when it determined that Judge Preska meant September 4, 2001, as the "first day he entered federal custody." Pursuant to 18 U.S.C. § 3585(a), a sentence commences when the defendant is taken into custody to begin his federal sentence. Because Petitioner was originally sentenced in federal court on September 4, 2001, the imposition of a concurrent sentence would ordinarily mean that September 4, 2001, would be the date from which the sentence would run. (Doc. 10 Ex. 1 ¶ 14); see also supra pp. 15-16. Therefore, the BOP made a reasonable determination when it determined that Judge Preska was looking back at September 4, 2001, the date on which Petitioner was originally sentenced on the federal probation revocation matter, when she referred to "the first day he entered federal custody," rather than January 31, 2001, the day he was sentenced in California on the state charge.[7]

[7] Although assigning September 4, 2001, as the "first day he entered federal custody" does not comport with the date Petitioner actually entered federal custody - September 23, 2001 - we keep in mind that the "oral sentence often consists of spontaneous statements that are addressed primarily to the case at hand and are unlikely to be a perfect or complete statement of all surrounding law." See supra p. 11.

Finally, we note that the Judgment entered on September 26, 2001, does not provide support for Petitioner's position. (See Doc. 1 Ex. E.) The Judgment states only that "this sentence shall run concurrently with the Defendant's California sentence." (Id.) It does not repeat the language of the previous day's hearing that the sentence dated "back to the first day he entered federal custody," or make any other reference to the starting date of Petitioner's sentence. As discussed previously, the mere use of the term "concurrent" does not indicate retroactivity or credit for time served.

B2. U.S.S.G. Section 5G1.3 and Other Relevant Law

Because we do not find that Judge Preska intended to impose a retroactively concurrent sentence from our review of the sentencing hearing transcript, we will now address Petitioner's argument that relevant law requires a finding that the BOP credit him with time served from January 31, 2001.

Petitioner contends that a retroactively concurrent sentence was entirely lawful pursuant to 18 U.S.C. § 3584(a) which authorizes concurrent sentences and instructs the court to consider the factors listed in 18 U.S.C. § 3553(a). Section 3553(a) directs that the sentencing court shall consider applicable guidelines and policy statements issued by the United States Sentencing Commission. (Doc. 2.) Petitioner further

maintains that § 5G1.3(b) of the United States Sentencing Guidelines is applicable to this case and cites the following:

> If . . . 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.

U.S. Sentencing Guidelines Manual § 5G1.3(b) (2000). Asserting that his California sentence was "fully taken into account in the determination of the offense level for the instant offense," Petitioner concludes that a concurrent sentence was mandated. Furthermore, Petitioner argues that Application Note 2 to § 5G1.3 and the Third Circuit decision in Ruggiano require that "concurrently" for the purpose of § 5G1.3(b) "means fully or retroactively concurrently, not simply concurrently with the remainder of the defendant's undischarged sentence." (Doc. 2 at 2 (quoting Ruggiano, 307 F.2d at 128).)

Finally, Petitioner cites Ruggiano and United states v. Dorsey, 166 F.3d 558 (3d Cir. 1999), to support his argument that a sentencing court has the power under 18 U.S.C. § 3584(a) to order a truly concurrent, or fully retroactive sentence and that, even in the absence of a specific reference to § 5G1.3, the overall record may properly reflect the district court's intention to fashion a truly concurrent sentence. (Doc. 12 at 3 (citing Ruggiano, 307 F.3d at 128; Dorsey, 166 F.3d at 562).)

Respondent does not directly refute the assertion that § 5G1.3(b) applies to this case and mandates a retroactively concurrent sentence. Rather, Respondent argues that a retroactively concurrent sentence is not appropriate under § 5G1.3(c) because the sentencing court did not engage in the "methodology *required* to determine whether there should be an 'adjustment' to Bianco's federal parole violation term to warrant a departure from the 60-month term."[8] (Doc. 10 at 14.)

Respondent also argues that the sentence imposed cannot be retroactively concurrent for the following reasons: 1) there was no mention of U.S.S.G. § 5G1.3 at the sentencing or elsewhere,

[8] Although Respondent cites the text of § 5G1.3 as amended in November, 1995, (Doc. 10 at 10 n.7), Respondent's argument refers to pre-amendment § 5G1.3(c) text, commentary, application notes and relevant case law, particularly United States v. Holifield, 53 F.3d 11 (3d Cir. 1995). (See, e.g., Doc. 10 at 10-16.) This is problematic because the amendments to the Guidelines effective November 1, 1995, substantially rewrote § 5G1.3(c). See United States v. Brannan, 74 F.3d 448, 450 n.2 (3d Cir. 1996). The amendments did not affect the Brannan court's analysis both because it applied the pre-1995 Guidelines and the court's holding that a sentencing court was "free to adjust a defendant's sentence so as to account for time served on an unrelated state conviction" pursuant to U.S.S.G. § 5G1.3(c) was unaffected by the 1995 amendments. Id. However, the Third Circuit's decision in United States v. Saintville, 218 F.3d 246, 249 (3d Cir. 2000), confirms that the methodology which Respondent argues is required when a court adjusts a sentence under § 5G1.3(c), is no longer required under the 1995 amendments. Therefore, we conclude that Respondent's reliance on Holifield and Brannan is misplaced, and we will not engage in a more detailed analysis of Respondent's 5G1.3(c) argument.

(Doc. 10 at 1, 14); 2) a district court cannot order a sentence to commence earlier than the date it is imposed, (Doc. 10 at 8 (citing United States v. Labielle-Soto, 163 F.3d 93, 98 (2d Cir. 1998)); and 3) a concurrent sentence is barred under U.S.S.G. § 7B1.3(f) and Application Note 6 to § 5G1.3, (Doc. 10 at 16).

As a preliminary matter, we consider the relevance of Second Circuit law in determining the intent of the sentencing judge. In Ruggiano, the Third Circuit Court of Appeals considered whether to apply the law of the Eleventh Circuit, the circuit in which the sentencing court was located, in deciding whether the sentencing court intended to give credit for time served on the defendant's state sentence. Ruggiano, 307 F.3d at 135. The court acknowledged that consideration of circuit precedent and assuming the sentencing court was following that precedent would be relevant to determining the sentencing court's true intent in imposing sentence. Id. Because the Ruggiano court found the sentencing court's intention to be clear, and the law of the Eleventh Circuit to be inconclusive on the issue of whether a sentencing court may adjust for time served on a pre-existing state sentence under § 5G1.3(c), the court found that application of Third Circuit law was appropriate. Ruggiano, 307 F.3d at 136-37. However, the court distinguished Eleventh Circuit law with the situation in the Second Circuit Court of

Appeals, where the law is clear that adjustments for pre-existing sentences are not permitted under § 5G1.3(c). Id. at 136 (citing United States v. Fermin, 252 F.3d 102 (2d Cir. 2001).

Here, we have concluded that the sentencing court's intent is not clear. Therefore, we will follow the guidance of the Ruggiano court: to the extent that Second Circuit law is clear and differs from Third Circuit law on an issue relevant to determining the sentencing court's intent, we will assume that the sentencing court was following Second Circuit precedent.

Before addressing Petitioner's § 5G1.3 argument, we note that we cannot dispose of this matter based solely on the propositions Respondent has put forth. (See supra p. 22-23.) First, we disagree with Respondent's argument that Judge Preska could not have intended her sentence to be retroactively concurrent because she did not mention U.S.S.G. § 5G1.3. (Doc. 10 at 1, 14.) We cannot determine Judge Preska's intent from the fact that she did not refer to U.S.S.G. § 5G1.3 because it is not necessary for a sentencing court to explicitly state its reliance on § 5G1.3 in order for a reviewing court to find that the sentencing court intended to impose a retroactively concurrent sentence. Ruggiano, 307 F.3d at 134 (citing Rios, 201 F.3d at 268).

Second, we also disagree with Respondent's assertion that Judge Preska's intent can be decided based on the cited Second Circuit case law relating to the commencement of sentence. (Doc. 10 at 8.) Although Respondent is correct that the Second Circuit Court of Appeals in Labielle-Soto determined that the district court could not order a sentence to commence earlier than the date it was imposed, the factual situation at issue was that the sentencing court had known that the defendant's state sentence had expired and granted him credit on the expired sentence. See Labielle-Soto, 163 F.3d at 96-98. The case at bar can be distinguished because Judge Preska was apparently not aware of the expiration of Petitioner's state sentence. This distinction is significant insofar as we are looking at Judge Preska's intent, not the factual correctness of her sentence. Furthermore, the Second Circuit noted that, although the reasons set forth for a downward departure in Labielle-Soto were rejected, Labielle-Soto "suggested that a sentencing court could grant a downward departure to address time already served on a preexisting state sentence." Fermin, 252 F.3d at 110 (citing Labielle-Soto, 163 F.3d at 101). Importantly, Labielle-Soto considered the retroactivity issue pursuant to § 5G1.3(c). Here, Petitioner claims that his interpretation is mandated by § 5G1.3(b).

Third, we do not concur with Respondent's suggestion that we can determine Judge Preska's intent from the fact that Chapter Seven of the United States Sentencing Guidelines prohibits a concurrent sentence in the case of a probation revocation. (Doc. 10 at 16.) While a concurrent sentence is barred under U.S.S.G. § 7B1.3(f), this prohibition is not dispositive. This is so because, in both the Second and Third Circuits, the policy statements set out in Chapter Seven are not binding on the courts but are merely advisory. United States v. Brady, 88 F.3d 225, 229 n.2 (3d Cir. 1996); United States v. Pelensky, 129 F.3d 63, 69 (2d Cir. 1997); United States v. Anderson, 15 F.3d 278, 284 (2d Cir. 1994).

Finally, the cited portion of Application Note 6 to § 5G1.3 by its literal terms does not apply to the instant case. Respondent cites the following:

> Revocations. If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation . . . .

U.S. Sentencing Guidelines Manual § 5G1.3 Application Note 6 (emphasis added by Respondent). The cited text addresses the situation for sentencing on an offense which follows the revocation of probation. Here, Petitioner was being sentenced

for the violation of probation. Therefore, the proposition for which Respondent cites Application Note 6 does not apply to the case at bar. However, the Note's reference to § 7B1.3 is applicable and will be discussed infra at 28-30.

Turning now to the merits of Petitioner's § 5G1.3 claim, we conclude that his argument that a retroactively concurrent sentence was required pursuant to U.S.S.G. § 5G1.3(b) is without merit. Section 5G1.3 of the Guidelines addresses the Imposition of a Sentence on Defendant Subject to an Undischarged Term of Imprisonment:

> 1. If the instant offense was committed while the defendant was serving a term of imprisonment . . . or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
> 2. If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offenses 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.
> 3. (Policy Statement) In any other case, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense

U.S. Sentencing Guidelines Manual § 5G1.3 (2000).

Here, subsection (a) is not at issue. Petitioner relies on subsection (b) because he maintains that his "California term was fully taken into account in the determination of the offense

level for the instant offense." (Doc. 2 at 1.) Further, he asserts that Application Note 2 requires a concurrent sentence under 5G1.3(b) to be retroactively concurrent. Application Note 2 directs that, when a sentence is imposed under 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.

U.S. Sentencing Guidelines Manual § 5G1.3 Application Note 2 (2000).

We do not dispute that a sentence should be imposed to run retroactively concurrent with the pre-existing sentence if the conduct which resulted in the pre-existing sentence has been fully taken into account in determination of the offense level for the instant offense. However, in this case, the California conduct was not fully taken into account in determining the offense level.

First, we question whether § 5G1.3(b) applies to probation revocation situations at all. Section 5G1.3(b) refers to the offense taken into account for the purpose of establishing the offense level for the instant offense. Insofar as the U.S.S.G. Revocation Table found in § 7B1.4 does not consider an offense level and looks instead at the "Grade of Violation" and

"Criminal History Category," a revocation situation does not fit within the technical terms employed in § 5G1.3(b).

Even if we were to apply 5G1.3(b), the offense level noted in the sentencing transcript did not take Petitioner's California offense into account. After noting that she had considered the Revocation Table recommendation as found in U.S.S.G. § 7B1.4(a), Judge Preska concentrated on the Guideline range for Petitioner's 1991 offense - citing a Guideline offense level of 29 - when she calculated an appropriate sentence to impose upon the revocation of probation. (See Doc. 1 Ex. D at 27.) Clearly, the offense level established before the California offense did not take the California offense "fully into account." Therefore, Petitioner's case would not come under § 5G1.3(b).

Further bases upon which we make this determination are the Third Circuit Court of Appeals interpretation of "fully taken into account" and principles of statutory construction. The Third Circuit Court of Appeals has stated that "[s]ection 5G1.3(b) appears to be aimed at the situation in which, unless the sentences were concurrent, the defendant would be serving two sentences for essentially the identical offense." United States v. Swan, 275 F.3d 272, 277 (3d Cir. 2002). Under the Sentencing Guidelines, an offense which gives rise to a

violation of probation charge is not identical to the violation charge itself. This is evident from U.S.S.G. § 7B1.3 which deals with the Revocation of Probation or Supervised Release.

> Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.

U.S. Sentencing Guidelines Manual § 7B1.3(f) (2000). This section indicates that the term of imprisonment for the offense conduct which formed the basis for the probation violation is considered separately from the sentence for the probation violation itself. Therefore, despite Petitioner's unsupported assertion to the contrary, his California offense cannot be considered "fully taken into account" for the purposes of § 5G1.3(b). To conclude otherwise would put § 5G1.3(b) in direct conflict with § 7B1.3(f). If the Guidelines intended the conduct which gave rise to the undischarged term of imprisonment to be "fully taken into account" in the case of an imposition of sentence for a probation violation for the purposes of § 5G1.3(b), then a concurrently retroactive sentence would be mandated. In contrast, § 7B1.3(f) calls for consecutive terms in the same factual situation. Principles of statutory

construction require us to try to avoid such an interpretation.[9] See 2A Sutherland Statutory Construction § 46:05 (Norman J. Singer ed., 6th ed. 2000) (all parts of a statute to be read as harmonious); United States v. Milan, 304 F.3d 273, 293 (3d Cir. 2002) (noting that the rules of statutory construction apply when interpreting the Guidelines).

Furthermore, the principles of statutory construction require that, where there is inescapable conflict between general and specific provisions, the specific will prevail. See 2A Sutherland Statutory Construction § 46:05 (Norman J. Singer ed., 6th ed. 2000). 18 U.S.C. § 3553(a)(4)(B) specifically directs courts to "consider . . . in the case of a violation of probation . . . , the applicable guidelines or policy statements issued by the sentencing commission." Chapter Seven of the Guidelines directly addresses the probation revocation situation. Therefore, we conclude that § 5G1.3(b) either does not address a probation revocation situation at all, or does not contemplate that the charge which gave rise to the probation violation is "fully taken into account" when a sentence is imposed upon the revocation of probation. Our conclusion is

[9] Although Chapter Seven provisions are considered policy statements rather than guidelines, they should be read as internally consistent with other provisions and are instructive as to the meaning of phrases or provisions found elsewhere in the Guidelines. See supra p. 24-25.

bolstered by the fact that Application Note 6 to § 5G1.3 refers to § 7B1.3 for consideration of a case where a penalty of imprisonment is imposed for violation of probation. As this is precisely the situation in the case at bar, we reject Petitioner's argument that § 5G1.3(b) is controlling in determining Judge Preska's intent.

This conclusion does not mean that Judge Preska's imposition of a concurrent sentence was not allowed by the Guidelines. A sentencing court may order a sentence imposed upon the revocation of probation to run concurrently with a preexisting sentence because the Chapter Seven policy statements are merely advisory. See supra pp. 24-25.

Finally, we consider whether § 5G1.3(c) may be applicable in the situation presented here. When a case does not come under subsections (a) or (b), subsection (c) allows for the imposition of a sentence to run concurrently, partially concurrently, or consecutively to the prior undischarged term. U.S. Sentencing Guidelines Manual § 5G1.3(c) (2000). For reasons similar to those stated above, we have reservations about whether § 5G1.3(c) applies to probation revocation situations. To the extent that subsection (c) allows concurrent sentences, it conflicts with the Chapter Seven provisions which directly address the imposition of sentence upon probation revocation and

requires a consecutive sentence. However, we will proceed with our analysis because we have no direct authority which precludes the application of § 5G1.3 to probation revocation cases. Insofar as the Chapter Seven policy statements are merely advisory, a sentencing court might look to the guidelines and policy statements found in § 5G1.3 when fashioning a sentence.

Here we apply Second Circuit law because Second and Third Circuit precedent conflict on the issue of whether a sentencing court has the authority to order a retroactively concurrent sentence under § 5G1.3(c). The Third Circuit has held that under § 5G1.3(c) district courts are free to adjust a defendant's sentence so as to account for time served on an unrelated state conviction. Ruggiano, 307 F.3d at 129; United States v. Brannan, 74 F.3d 448 (3d Cir. 1996). In Ruggiano, the court noted that the Second Circuit has ruled to the contrary and has interpreted 5G1.3(c) to prohibit crediting. Ruggiano, 307 F.3d at 129 (citing United States v. Fermin, 252 F.3d 102 (2d Cir. 2001). The Fermin court held that "[s]ubsection (c) does not provide the same 'credit' that is available under subsection (b) for time already served, but permits the sentencing court to exercise discretion in fashioning the new sentence to account for the time remaining on the preexisting sentence." Fermin, 252 F.3d at 109.

Because the sentencing court is in the Second Circuit and the Fermin decision was handed down over three months before Judge Preska imposed sentence on September 25, 2001, we conclude that Fermin is instructive in determining the sentencing court's intent. Judge Preska likely would have followed Second Circuit precedent regarding her authority to give credit for time served. If she found Petitioner's situation distinguishable from Fermin, Judge Preska likely would have engaged in some discussion of the issue before imposing sentence.

We recognize that Judge Preska did not follow the advisory policy statement in § 7B1.3(f) concerning the imposition of a consecutive sentence upon the revocation of probation. Also, we acknowledge that 5G1.3(c) allows concurrent sentences. However, we do not find support in § 5G1.3(c) for Petitioner's interpretation of Judge Preska's intent.

IV

The facts of this case are confused and troubling - at least from the standpoint of comprehension by the Defendant/Prisoner.

The sentencing judge tried, at some length, to explain the reasoning for the sentence - but legal authority and statutory and Sentencing Guideline provisions make it difficult, at sentencing, to "cover all bases" to make it perfectly clear how a pronounced sentence is to be interpreted or calculated.

For instance, provisions of Section Seven of the United States Sentencing Guidelines are not, in fact, guidelines and are only advisory, and need not be followed if a sentencing court finds that result would be inappropriate. Still we have a viable argument in this case whether a sentencing judge under such circumstances can turn to or rely on or apply Section Five of the Guidelines in a revocation hearing, as opposed to an initial sentencing hearing.[10]

It is unfortunate that the word concurrent was used so often - and perhaps it was used inappropriately or inadvertently. But, one can see how a defendant, at least in retrospect, might misconstrue or misunderstand the use of the word to believe that he will be credited with every day served regardless of when or where the sentence was announced.

We are somewhat handicapped here because we do not have the original presentence report; we have no real knowledge of the first federal sentence (which was apparently sixty months); we have no knowledge of why that sentence was reversed on appeal; and we have no real knowledge of why the Defendant was eventually placed on probation in 1999. But, while this would be informative, it would not change the outcome here nor would it change our decision that the Bureau of Prisons properly

[10] Indeed, the hearing at issue is a Rule 35 hearing.

calculated the Petitioner's time to be served.

The sentencing theory that applied in this case, and which the sentencing judge obviously followed, is that a revocation sentence or sanction should be mainly aimed at the Defendant's breach of trust - rather than the new crime committed. In this case, as the sentencing judge pointed out, and the record reflects, the Petitioner had seriously violated the trust placed in him - not only by a new criminal offense - but through many other violations of his probation - such as travel violations and continued association with the "drug business."

V
Conclusion

Based on the foregoing, there is no evidence from which we can conclude that Judge Preska intended Petitioner's sentence to be retroactively concurrent with his preexisting state sentence. Therefore, the BOP correctly calculated Petitioner's sentence when it did not give him credit for time served on his state sentence.

Accordingly, we dismiss Petitioner's request for habeas corpus relief. An appropriate Order follows.

_____
RICHARD P. CONABOY
United States District Court

DATED: _____

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN BIANCO,	:
	:CIVIL ACTION NO. 3:03-CV-0193
Petitioner,	:
	:(JUDGE CONABOY)
v.	:
	:
JONATHAN C. MINOR,	:
Warden of FCI Allenwood,	:
	:
Respondent.	:

ORDER

AND NOW, this _____ day of June, 2003, for the reasons set forth in the accompanying Memorandum, it is hereby ordered that:

1. Petitioner's 28 U.S.C. § 2241 Petition for Writ of Habeas Corpus, (Doc. 1), is DISMISSED;

2. Petitioner's Unopposed Motion for Enlargement of Time, (Doc. 11), is GRANTED;

3. The Clerk of Court is directed to close this case.

_____
RICHARD P. CONABOY
United States District Judge