

CUSTODY, PRIMARY JURISDICTION, AND CONCURRENT SENTENCES IN SEPARATE JURISDICTIONS

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TERMS as used in this paper:

Primary jurisdiction-the jurisdiction holding the defendant in its physical custody on an arrest warrant or to serve a sentence, unless it has relinquished custody by bail release, dismissal, parole release, or sentence expiration. It has no power to control whether other jurisdictions grant an inmate credit toward their sentences.

Crediting jurisdiction-a jurisdiction other than the "primary" jurisdiction. It alone has the power to grant a defendant credit towards its sentence for time served in the custody of the primary jurisdiction.

Writ of habeas corpus ad prosequendum-a writ by which one sovereign, normally not the one with primary jurisdiction, temporarily borrows the defendant from the custody of another. A transfer of temporary physical custody under a writ does not transfer primary jurisdiction.

"Constructive custody"-not in a jurisdiction's physical custody, but rather subject to its detainer or other order. Constructive custody is often a statutory prerequisite to lawfully granting the defendant credit toward a sentence for time being served in another jurisdiction's physical custody.

Introduction.

Criminal defense lawyers often must argue for concurrent sentences for clients being punished on multiple charges. The multiple counts may be pending in any one of four procedural contexts, from the simple to the complex:

- (1) the same indictment;
- (2) different indictments, but same court;
- (2) different indictments and courts, but same jurisdiction;
- (4) different indictments, courts, and jurisdictions.

In the first two procedural contexts there are few procedural traps. Defense counsel collects all of the legal and equitable arguments for concurrent sentences and argues them forcefully to the prosecutor during negotiations or to the judge at sentencing. In federal court, where Guideline sentencing is more structured, the arguments usually must be molded to fit within specific sentencing guidelines, discussed below, such as U.S.S.G. § 1B1.3 (regarding "relevant conduct") or § 5G1.3 (sentencing on multiple counts).

In the third context, where the multiple counts are before different judges, chronological sequence is an important factor. Rule of thumb is that the second sentencing judge usually decides whether the sentence will run concurrently with the first one imposed. Defense counsel tries to manage the cases so the more reasonable judge sentences last.

This article deals with the fourth context-- obtaining concurrent sentences on charges in separate jurisdictions. Different jurisdictions mean not only different judges, but also:

- (1) different prison departments,
- (2) different statutes, for
 - (a) determining the appropriate sentences,
 - (b) computing how time is credited,
 - (c) granting credit for time served elsewhere.

Counsel must do more than persuade the judges that the sentences should be served concurrently. He or she must deal with the two prison departments and statutory sentencing schemes.

"Primary" and "crediting" jurisdiction.

The physical reality that a defendant can only be in the actual, physical custody of one sovereign at a time gives rise to two critical concepts, "primary" jurisdiction and "crediting" jurisdiction.

"Primary" jurisdiction is where the defendant first physically serves the sentence(s). The "primary" jurisdiction lies with the sovereign first arresting the defendant, unless it releases custody by, for example, bail release, dismissal of charges, parole release, or expiration of sentence. *United States v. Warren*, 610 F.2d 680 (9th Cir. 1980); *United States v. Smith*, 812 F.Supp. 368 (E.D.N.Y. 1993).

Primary jurisdiction may change if a defendant is released on bond. Any other sovereign thereafter arresting the defendant will assume primary jurisdiction. If the sovereign which released the defendant thereafter revokes the bond (or probation, parole, etc.) of a defendant in another jurisdiction's custody, then it can only lodge a detainer and wait (or proceed ad prosequendum). It has become what I will call the "crediting" jurisdiction. It has lost "primary" jurisdiction, until and unless the defendant is released by that other jurisdiction.

The "crediting" jurisdiction does not have actual physical custody of the defendant, but has the power to credit toward its sentences the time a defendant serves confined in the custody of another jurisdiction.

"Borrowing" a defendant under a writ of habeas corpus ad prosequendum does not change primary custody. *Hernandez v. U.S. Atty. General*, 689 F.2d 915 (10th Cir. 1982). According to such writs, the borrowing authority must return the defendant to the lending authority as soon as the prosecution is completed and primary jurisdiction is unaffected.

As examples below illustrate, counsel must keep in mind three rules of thumb to obtain concurrent sentences in different jurisdictions.

- (1) The sovereign with primary jurisdiction has no control over whether sentences will be concurrent or consecutive. It has no power over another jurisdiction's decision to grant or deny credit.
- (2) The "crediting" jurisdiction, the one not having actual physical custody, determines whether the sentences will be concurrent. This jurisdiction has the exclusive power to decide whether and to what extent it will grant credit for time a defendant serves elsewhere.
- (3) The defendant must be in a "crediting" jurisdiction's constructive custody to receive any credit. Regardless of a judge's wishes, a jurisdiction's prison system can grant credit only in accordance with its computation law, meaning the defendant usually must be in its "constructive" custody.

To demonstrate the effect of primary jurisdiction, assume hypothetical simultaneous Texas and federal prosecutions for aggravated robbery and use of firearm during crime of violence (18 U.S.C. § 924(c)). In all three examples below, the defendant is arrested first by state authorities, and Texas starts with primary jurisdiction.

First example.

Assume that while the state case is still pending with defendant in state custody, the federal court borrows the defendant on a writ of habeas corpus ad prosequendum, convicts him, and sentences him to five years' imprisonment. Federal court returns the defendant to Texas custody. Defendant then enters into a plea bargain with Texas for a 10-year sentence to be served concurrently with the federal sentence. The state judge orders that the state sentence be served concurrent with the federal sentence.

Will the two sentences run concurrently? No, because the court with primary jurisdiction has no power to grant concurrent credit.

In the first example, Defendant will go first to TDCJ-ID and remain there until he has served his Texas sentence. The Texas court cannot order the federal government to grant him credit. He will not accrue federal credit while in TDCJ-ID, even though the federal government will lodge a detainer with TDCJ-ID, because the federal judge and the federal Bureau of Prisons, the "crediting" authorities, did not credit the Texas time. While in TDCJ-ID the defendant is never in federal "custody." For purposes of calculating federal sentence credits, "custody" is defined at 18 U.S.C. § 3585 and 3621.

Second example.

Let's change primary jurisdiction to the feds. Suppose the defendant, who was first

arrested by the state, bonds out of Texas custody and is picked up by the federal Marshal on the federal warrant, which had been lodged as a detainer. The feds now have primary jurisdiction and Texas has "crediting" jurisdiction. Subsequently, Texas borrows the defendant with a writ ad prosequendum to prosecute the aggravated assault charge. The state judge sentences the defendant to 10 years to be served concurrently with the federal sentence. Texas returns defendant to the federal marshal and lodges its detainer.

Will the sentences run concurrently? Yes, so long as Texas lodges its detainer. In the second example, after both prosecutions are completed, the defendant will go to the Federal Bureau of Prisons (BOP) to serve his 5-year sentence, and TDCJ-ID will lodge its detainer with BOP. (Counsel should check to make sure the detainer is lodged so credit is authorized by state law.) Because Texas is the "crediting" jurisdiction, the state judge's directive to credit time served in federal custody can be carried out by TDCJ-ID, so long as the detainer is lodged.

Third example.

Change one more fact, that the federal judge expressly orders, as he must under federal law, that the 5-year sentence under § 924(c) "shall run consecutively to any other sentence." Recall that the feds assumed primary jurisdiction when they executed their warrant the day defendant bonded out of state custody, Texas borrowed defendant on a writ ad prosequendum and imposed a concurrent sentence, and that the defendant will serve his time first in the federal prisons.

Will the federal sentence run consecutively as the federal judge directed? No. Again, the primary jurisdiction has no power to limit the "crediting" jurisdiction's sentencing decisions. While in BOP custody, Texas will award the defendant concurrent credit toward his state sentence, regardless of the federal judge's order and regardless of federal law in 924(c) about consecutive terms.

The chronological order in which courts impose sentences is irrelevant. The "crediting" jurisdiction has the power to grant credit for time eventually served in the primary jurisdiction's custody, even if that jurisdiction has not yet decided what that sentence will be.

When representing a client facing charges in different jurisdictions, a four-step analysis is useful.

First, determine which court has primary jurisdiction. One should not "assume" anything about primary and crediting jurisdiction, since it is useless to request a concurrent sentence in the court having "primary" jurisdiction. Counsel should examine court and/or jail booking records to determine whether the client is in federal or state custody, and whether the other (potentially "crediting") jurisdiction is proceeding on ad prosequendum or simply waiting after having lodged a detainer.

Second, consider whether it may be advantageous and feasible to switch primary and crediting jurisdiction by, for example, posting bond and transferring custody. The judge more

likely to impose a concurrent sentence should have "crediting," not primary jurisdiction.

Third, in the "crediting" jurisdiction counsel must persuade the sentencing court to order that its sentence be served concurrently with sentences imposed, or to be imposed, in the primary jurisdiction, and

Fourth, ensure that the "crediting" jurisdiction gains constructive custody over the defendant so that the concurrent sentence can be given legal effect by its prison authorities.

Concurrent sentence arguments.

Some state sentencing laws leave considerable discretion to judges, based on mitigating factors argued at sentencing. In federal court Sentencing Guideline 5G1.3, "Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment," addresses the issue of concurrent sentencing, and limits the federal court's discretion. Guideline 5G1.3 provides that if the federal sentence is based on conduct already punished in the other jurisdiction's sentence, the federal sentence should be concurrent.

For example, if a defendant has an undischarged 10-year robbery sentence, a federal sentence under 18 U.S.C. § 922(g)(1) (felon in possession of firearm) will be calculated under Guideline 2K2.1(c). If the firearm was used in a robbery, the sentence will be based on the robbery guideline. Since the federal sentence is based on the robbery conduct, Guideline 5G1.3 requires that defendant's federal sentence be concurrent.

Guideline 1B1.3, Relevant Conduct, is another guideline which frequently punishes conduct also punished in state courts. If the state case is still pending, counsel may be able to persuade the prosecutor to dismiss the state charges in lieu of federal punishment for the state conduct. (see copy of letter to Asst. D.A., Attachment 1). State probation revocation sentences can also be run concurrently. In Texas, this can be done even though the probationer remains in custody of another jurisdiction and never attends a revocation hearing. (see "Consent to Revoke Probation Without a Hearing," Attachment 2).

Obtaining constructive custody.

Texas obtains constructive custody by lodging a detainer where the defendant is held. *Fernandez v. State*, 775 S.W. 2d 787, 789 (Tex. App.—San Antonio 1989, no pet.) (to receive credit for time served in another jurisdiction under CCP art. 42.03, § 2(a), inmate must establish that detainer for that charge was lodged with the other jurisdiction).

Constructive custody for federal credit while in state custody.

The federal government always complicates matters. First, a federal court can impose a sentence to be served concurrently with a state sentence only with the cooperation of the Bureau of Prisons. BOP calculates credits for federal sentences. 18 U.S.C. § 3585. More importantly, BOP designates the place of confinement for every federal sentence, and a federal sentence

cannot formally begin until the inmate arrives at the designated facility. *Id.* at § 3621(b). The sentencing judge only recommends a place of confinement. BOP obtains constructive custody by designating the state facility as the place of confinement for the federal sentence under 18 U.S.C. § 3585(a).

Designation to a state prison is BOP's way of granting federal credit for time served on a state sentence. *Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990); *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 2009 (1991). But BOP will normally designate a state prison system only if the federal sentence expressly includes two items. It should clearly read that the federal sentence is to be served concurrently with the sentence imposed in X jurisdiction on Y date in Z cause. Technically, this "order" is not binding on BOP. see discussion of §§ 3585, 3621 (b), above. Second, it should recommend that BOP designate that state prison system in X state as the place of confinement for the federal sentence. Recall that the federal judge does not have the power to actually designate a facility. BOP has that exclusive power. § 3621(b). The judge's express "order" that the federal sentence run concurrently with the state sentence, however, explains the sentencing judge's intent and reasoning to BOP. BOP almost always acts in accordance with the sentence.

Changing primary jurisdiction.

Frequently a defendant can gain tactical advantage by changing primary jurisdiction. Two common scenarios may make such a change desirable to the defense. First, all else being equal, defense counsel wants primary jurisdiction to be in the court least inclined to impose concurrent sentences. Remember, the primary jurisdiction court does not determine whether the sentences will be concurrent, although its judge may certainly influence the other.

Second, the defendant may prefer to serve his sentence in the physical custody of the jurisdiction not originally exercising primary jurisdiction. Typically, federal prison conditions and programs are better. However, before changing primary jurisdiction for the benefit of the defendant's comfort, consider the judges' likely sentencing views.

Defense counsel may try to move primary jurisdiction by bond out of custody of the court likely to be most lenient, and to the detainer lodged by the new primary jurisdiction. A bond reduction may be more obtainable if the prosecutor knows a detainer is lodged and the defendant will simply be rebooked on the other jurisdiction's detainer. Note: this is an inconvenience to prosecutors and the bonding courts, because it usually means that case must be wrapped up by using a writ of habeas corpus ad prosequendum, or worse, later invoking the Interstate Agreement on Detainers Act to bring the client back to court. Offer to help the prosecutor prepare the writ. If the client is out on bond on both cases, primary jurisdiction will lie in the court where the client first surrenders bond to serve time. If one of your client's cases is federal, care should be taken not to finalize a state case until after the federal sentence has been imposed. Imposition of the state sentence first may increase the defendant's federal guideline sentence, unless the state sentence is for the same "relevant conduct" as the federal sentence. As noted above, the chronological order in which sentences are imposed has no affect on a "crediting" jurisdiction's authority to grant credit for time served in another sovereign's custody. There is no

bar to a court's ordering that a sentence run concurrently with a not-yet-existing sentence in another jurisdiction. Judge's may be uncomfortable doing this, but it is only inappropriate when the not-yet-existing sentence is in the same jurisdiction.