Dueling Sovereigns

MAKING SENSE OF CUSTODY, PRETRIAL CREDITS, AND HOW TO HELP YOUR CLIENT WHO HAS PENDING STATE MATTERS

ANDREW SZEKELY, ASSISTANT FEDERAL PUBLIC DEFENDER, D. MD.

Why does this matter?

- Can shorten your client's total sentence considerably
- A way to help clients in very tough spots
- Lets you be the authority at a sentencing

The client who everyone wants a piece of

The 80% that I can give you today

- Primary and secondary custody
- The curious world of awarding credit for time-served
- Strategizing what is best for your client
- Avoiding the nightmare scenario
- Helpful contacts
- Questions

Primary and Secondary Custody

THE BASICS

Definitions

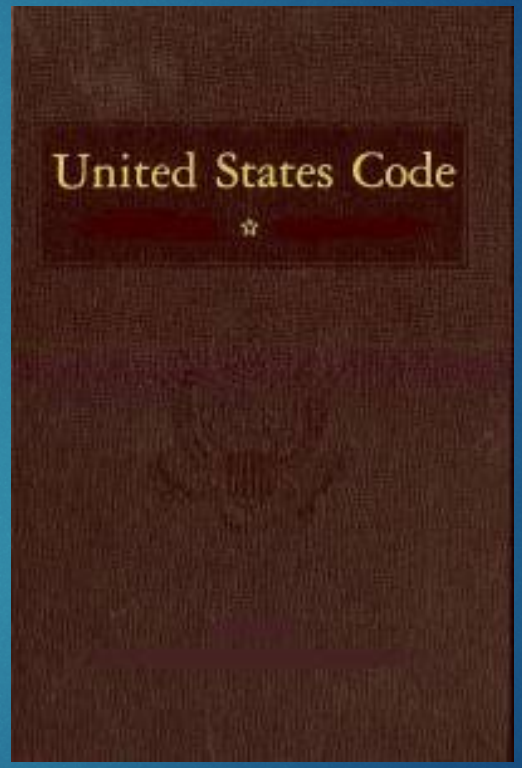
- **Primary Custodian** - the sovereign (aka government) that first arrests an individual has primary custody.
- **Secondary Custodian** – the next government in line. This is the sovereign who can run a sentence concurrent (or consecutive)*! If the federal court is second, their sentence is consecutive unless the J&C states otherwise.**

Primary Custody Doctrine

- The "primary custody" doctrine developed to provide different sovereigns with an orderly method by which to prosecute and incarcerate an individual who has violated each sovereign's laws.
- The doctrine provides that the sovereign that first arrests an individual has primary custody.
- That sovereign's claim over the individual has priority over all other sovereigns that subsequently arrest the person.
- The sovereign with primary custody is entitled to have the individual serve a sentence it imposes before a sentence imposed by any other jurisdiction, regardless of the chronological order of sentence imposition.
- Primary custody remains vested in the sovereign that first arrests the individual until it relinquishes its priority by, e.g., bail release*, dismissal of charges, parole release, or expiration of the sentence.

Authority for the Doctrine

- 18 U.S.C. § 3584 – Multiple sentences of imprisonment
- 18 U.S.C. § 3585 – Calculation of a term of imprisonment
- 18 U.S.C. § 3621 - Imprisonment of a convicted person



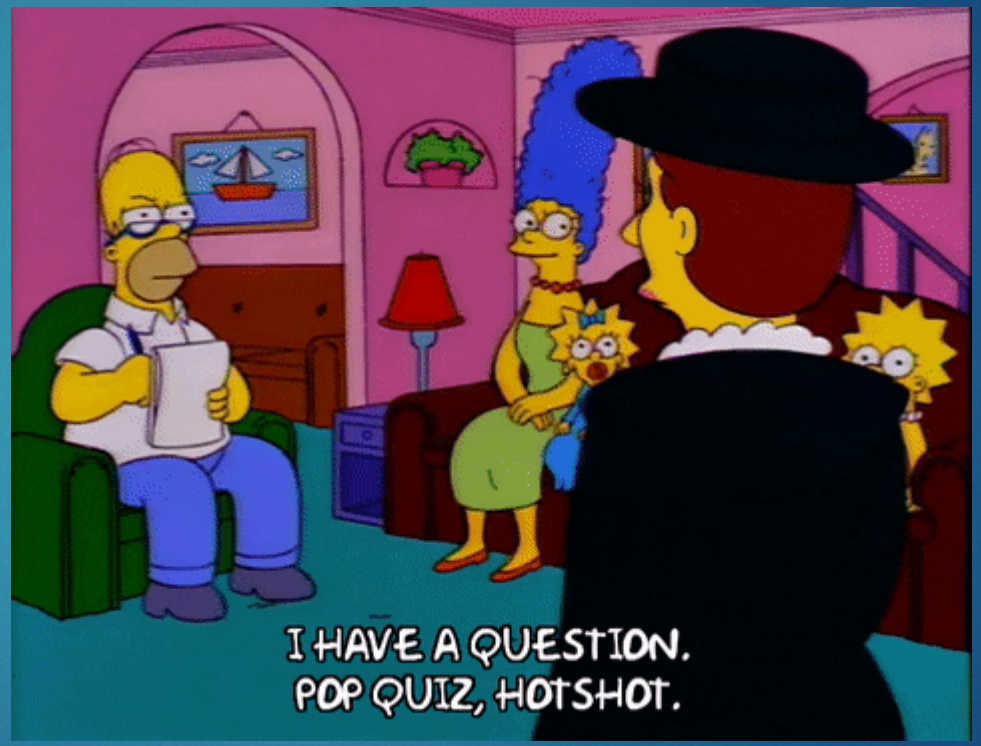
The most typical scenario that causes later problems

- Steve gets arrested during a house raid on April 1, 2020. He is charged with a state court drug case and is on probation for another drug case. In the probation case, the original sentencing judge could impose up to 10 years of suspended "backup time." He is held without bond on both cases. The state dismisses his drug case in favor of federal prosecution on August 15, 2020. On September 1, 2020, he appears for his IA in federal court.

Quiz!

Is the primary custodian in this situation:

A. The state
B. The feds



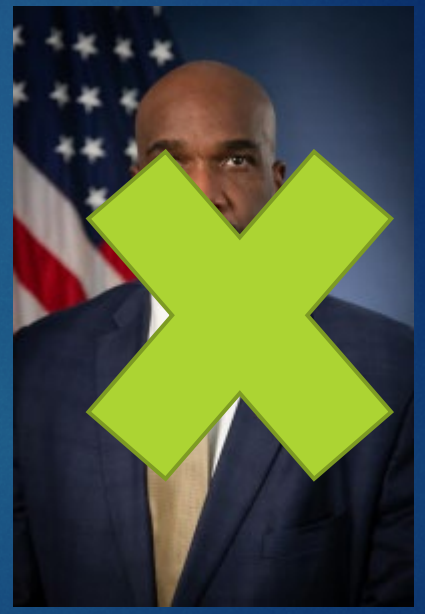
Practice Pointer: Writs

- Writs of *habeas corpus ad prosequendum* do not change custody status.
- Beware the never-ending writ.
- Clients who ask under the Interstate Agreement on Detainers to remain in federal pretrial custody to face their federal charges remain in the primary custody of the state.

Credit for time-served

QUICK STATUTORY AND BOP OVERVIEW

Who has the statutory authority to determine if your client gets credit against a federal sentence for time already served?



18 USC § 3585

(**a) Commencement of sentence.**--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.

(**b) Credit for prior custody**.--A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

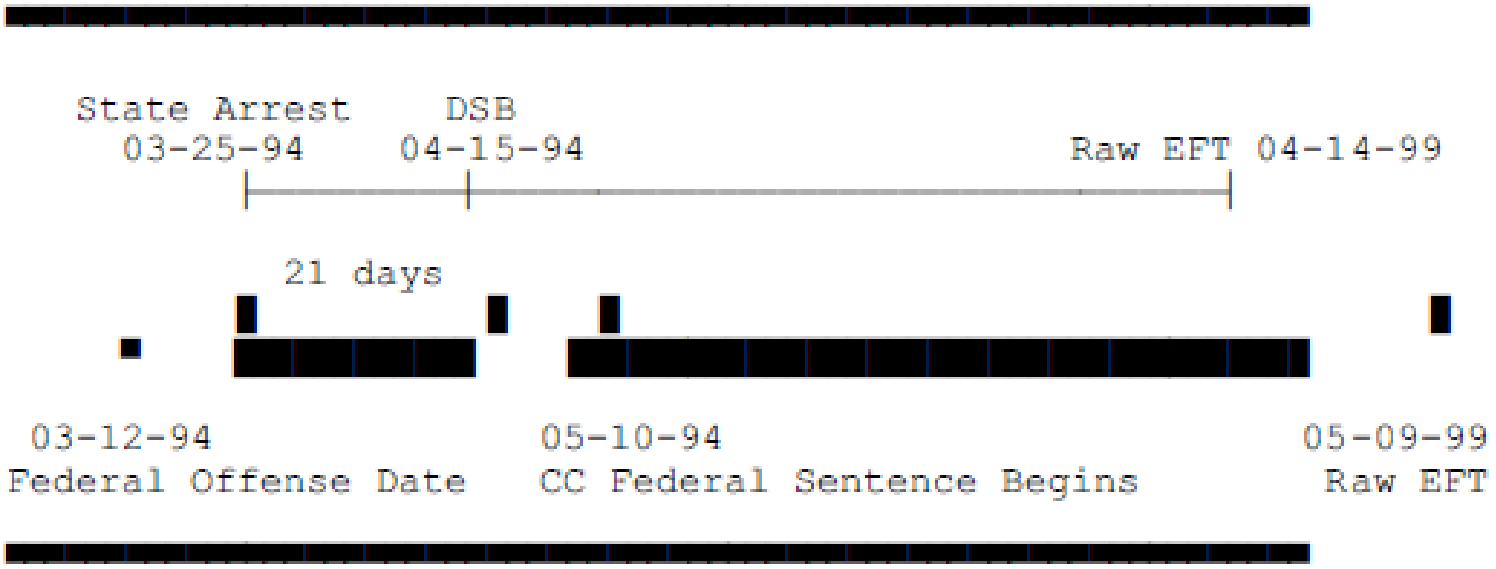
that has not been credited against another sentence.

Too bad to not share

Example No. 5

Date of Federal Offense = 03-12-1994
Date Arrested by State = **03-25-1994**
Date State Sentence Begins = **04-15-1994**
Date Concurrent Federal Sentence Begins = 05-10-1994

Time to award off the federal sentence is from **03-25-1994 through 04-14-1994** which equals **21** days.



Program Statement 5880.28

- In no case can a federal sentence of imprisonment commence earlier than the date on which it is imposed – p. 1-13
- Should the Judgment and Commitment order make a recommendation that a period of time credit be awarded to the sentence that is not authorized, the recommendation may be treated as surplusage and the credit will not be allowed. No letter need be written to the court that the time was not awarded. If the court, however, orders that a period of time be awarded that is not authorized, a letter must be sent to the appropriate U.S. Attorney requesting assistance in resolving the problem … . – p. 1-27

In other words …

- A federal judge normally cannot "back date" the start of a federal sentence.
  - The sentence starts on the date of sentencing, at the earliest;
  - It is up to the BOP sentence computation staff to determine what, if any, credits prior to that date are applied against the sentence; and
  - Language as to credit for time-served in a Judgment and Commitment Order (J&C) are ignored by the BOP.*
- You don't normally get "double credit" for time already served.
  - But your state might allow it!

Now what?

STRATEGIZING WHAT IS BEST FOR YOUR CLIENT

Overlapping Sentences Have Consequences

- Detainers affect placement
  - State or federal system
  - Can have an especially outsized impact on federal designation
- Detainers affect sentence length
  - Can disqualify someone from RRC placement in BOP
  - Can disqualify someone from state parole or other early release
- Detainers affect programming
  - State detainer can bar people from some programs or move them to the bottom of the list for others
  - Can keep people out of more favorable work assignments

Ask yourself what do you want to do here?

- What judge is more likely to impose a concurrent sentence?
- Where is it best for your client to serve a sentence?
- Will a state matter be dismissed or otherwise favorably resolved if your client never appears on it?

Practice Pointer: Concurrent time

- Know your judges
  - State and federal
- Try to work out a global agreement to concurrent time
  - Happens more often than you might think
- Timing of proceeding matters
- Consider attending the state matter
- Arrange custody to help the client have the best shot at concurrent sentences

Before you fight, make sure it matters!

Practice Pointer: Custody Swaps

- Arranging to have the primary custodian surrender custody for a strategic reason
- This makes everyone nervous!
- It takes two motions:
  - Consent motion to release to a detainer
    - Make sure you confirm the detainer with USMS before filing!
  - Motion to revoke release order once you confirm your client is in state custody.
- Can do them the other way around too, if that makes sense.

Practice Pointer: Judgment Order

- The Judgment and Commitment should be as clear as possible
  - Avoid ambiguity that might be read against your client
  - Can help with a *Barden* review*
- Come to the sentencing with your preferred language typed on a piece of paper to hand to the courtroom deputy
- Double check it when you see it come across CM/ECF

Wording the J&C

- Good: 60 Months to begin immediately and to be served concurrent to any other sentences currently being served or to be imposed.
- Better: 60 Months to begin immediately and to run concurrent with the sentence to be imposed in [state case number and court].
- Even Better: 60 Months to begin immediately and to run concurrent with the sentence to be imposed in [state case number and court]. The Court designates [state facility] for service of sentence.

Best approach is belt and suspenders

Real life judgment that does it all

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 30 months as to Count 1 of the Indictment, to run concurrently with the violation of probation sentence imposed in the Circuit Court of Maryland, Prince Georges County, Docket No.: CT170041A in the custody of the Maryland Commissioner of Corrections in the Maryland State Facility he designates with credit for time served from 11/20/2018 to 07/25/2019 pursuant to 18 U.S.C. 3585(b)(2) and BOP Policy Statement 5880.28 because time spent in federal detention occurred after the commission of the offense, before the state sentence was imposed and has not been credited towards any other sentence.

Practice Pointer: U.S.S.G. § 5G1.3

- Provides guidance on how judges should approach cases where there is a state sentence or pending state case.
- Advisory only, but helpful for judges who tend to follow the guidelines.
- Has three specific scenarios and the catch-all

§5G1.3 - IMPOSITION OF A SENTENCE ON A DEFENDANT SUBJECT TO AN UNDISCHARGED TERM OF IMPRISONMENT OR ANTICIPATED STATE TERM OF IMPRISONMENT

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, 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.

Another common scenario

Steve is on probation and "backing up" 10 years. He is arrested in a federal sting and detained in federal custody. The federal judge sentences Steve to 5 years in prison but generously makes it concurrent with the violation of probation he will inevitably receive from the state judge. Days later, you arrange for Steve to be transported to state court on a writ and Steve receives 5 years in state prison for his VOP. The judgment in the state case is silent as to whether it is consecutive or concurrent. Steve is transported to FCI Morgantown to serve his sentence. Steve calls complaining about a state detainer for violation of probation sentence. What do you say?

What do you tell Steve?

A. Don't worry, the federal judge made his sentence concurrent to the state.
B. Don't worry, the silence of the state judge means that sentence is concurrent.
C. Uh, oh. I need to call your state attorney and see what happened.

The Nightmare Scenario

HOW TO, MAYBE, FIX IT

The Scenario:

EVERYONE THINKS CLIENT IS GOING TO GET CONCURRENT TIME, BUT CLIENT ENDS UP WITH CONSECUTIVE TIME.

How to fix it

- Never hurts to ask for a revised J&C
- State court remedies
  - Sentence modification
  - Other collateral attacks
- IAC

Helpful contacts

- The AUSA on your case (really!)
- BOP Regional Counsel Office
- Commitment office or similar at your state corrections department
- Local state public defender office
- Training Division Hotline – 800-788-9908
- Be creative! Lots of people can help!

Questions?