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Enforcing Concurrent Sentences

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ENFORCING CONCURRENT SENTENCES

DANIEL B. YEAGER*

ABSTRACT

Who gets the last word on how much time a prisoner will serve when subject to unexpired terms imposed at different times by state and federal courts? The short answer is the executive, though the question is complicated by who has “primary jurisdiction.”

In 2015, I began representing Jose Antonio, who after pleading guilty but before being sentenced on a California robbery, pled guilty to federal drug charges, for which he was sentenced. Rather than deliver him to a federal prison, the feds returned him to state court, which pronounced an eight-year term on the robbery to run concurrently with his 9.3-year federal term on the drug offense. But there seemed nothing we could do to prevent the state and federal terms from running consecutively, the reason being that junior bureaucrats at the DOJ wanted to run them that way. As sovereigns, both the United States and California may exact from a convicted person as much or as little punishment for a crime as they like. But neither the state nor the federal court sentenced Antonio to a 17.3-year term, a sum realizable only had the terms been structured to run consecutively, which they explicitly were not. Antonio’s plight betrays a friction between sister jurisdictions and among coequal branches of governments that is an affront to anyone of the mind that in these recurring, high-stakes conflicts, deference is due the second sentencing court.

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INTRODUCTION

“Someone Must Decide”¹

This Article is the first to take on the following two questions: first, where in the mélange of legislative, executive, and judicial powers that constitutes sentencing law is the last word on how much time a prisoner will serve when subject to unexpired terms imposed at different times by state and federal courts? Embedded in that first question is the second: may a convicted person who presents himself to federal prison

1. *Setser v. United States*, 566 U.S. 231, 234, 237 (2012); *see also id.* at 251 (Breyer, J., dissenting).

authorities to serve his federal time be turned away on the ground that he has not yet completed his state time on another offense?

In 2015, I began litigating on behalf of Jose Alberto Antonio, who after doing the last stretch of eight years of state time in Lancaster, California, was transferred on January 11, 2021, to a federal prison in Los Angeles. There, he was to serve five of what was originally designed to be 9.3 years of federal time for a drug conspiracy. Together we repeatedly sought to enforce the state sentence imposed on him by a state trial court at a June 2016 re-sentencing for a March 2013 robbery. At that re-sentencing, the judge structured Antonio's federal prison term and his state prison term to run concurrently, which meant that Antonio could serve no more than the longer federal term's 9.3 years. But there seemed nothing we could do to prevent the state and federal terms from running consecutively.

The 9.3-year federal term would not commence until the eight-year state term had expired, resulting in a total of 17.3 years—although neither the state nor the federal court had structured them to so run. The reason the sentences would run consecutively rather than concurrently? The Assistant United States Attorney who had negotiated Antonio's federal plea wanted them to, a decision to which the Federal Bureau of Prisons ("BOP") by its own standards defers.²

As a recurring, even "notorious"³ basis of litigation on which both the ultimate length of countless prison terms and the division of authority between state and federal courts depend, one would think the legal academy would have meditated on this serious question of dual sovereignty. But the legal academy has not. The scant pertinent

2. See FED. BUREAU OF PRISONS PROGRAM STATEMENT 5160.05 ¶ 9b(4)(c) (2003), https://www.bop.gov/policy/progstat/5160_005.pdf [hereinafter BOPPS 5160.05].

3. See Brief of the Ninth Circuit Federal & Community Defenders as *Amici Curiae* in Support of Granting the Petition for Certiorari at 2, *Cole v. Feather*, 134 S. Ct. 462 (2013) (No. 13-6268), 2013 WL 5519388 at *2 ("In these situations, the difficulties surrounding the ordering of state and federal sentences—including the involvement of the Bureau of Prisons in carrying out the orders of sentencing judges are notorious and frequently recurring.").

literature,⁴ like the only relevant Supreme Court ruling,⁵ addresses *Antonio*'s mirror or reverse image, whereby a federal court structures a federal term to run consecutively to an *anticipated* state term. There is a smattering of lower-court rulings on point,⁶ the implications of which have somehow remained unilluminated.

*People v. Antonio*⁷ is therefore an apt occasion to burrow down into a peculiar rift in which junior bureaucrats at the Department of Justice can force concurrent sentences to run consecutively. As a tract on dual sovereignty, this chronological study of Antonio's protracted litigation identifies a profound sentencing snag that owes to an excessive though correctible deference to executive branch officials.

I. PEOPLE V. ANTONIO I

A. Plea, Conviction, Sentencing, and Re-sentencing #1

On March 13, 2013, Oceanside, California police arrested Antonio at a Vista hotel for a residential robbery he had committed the day before.⁸ In a complaint filed March 19, 2013, the People of San Diego County charged Antonio with one count of burglary, three counts of robbery, and one count of use of tear gas.⁹ Allegations that he entered an inhabited dwelling in which non-accomplices were present elevated the burglary to first degree.¹⁰ Antonio pleaded guilty in state court on

4. See, e.g., Erin E. Goffette, Note, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. U. L. REV. 1035 (2003); Rachel A. Mills, Comment, *Too Many Cooks Spoil the Sentence: Fragmentation of Authority in Federal and State Sentencing Schemes*, 41 SETON HALL L. REV. 1637 (2011).

5. See *Setser*, 566 U.S. at 231.

6. E.g., *Isreal v. Marshall*, 125 F.3d 837 (9th Cir. 1997); *Del Guzzi v. United States*, 980 F.2d 1269 (9th Cir. 1992) (per curiam); *Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937).

7. *People v. Antonio (Antonio I)*, No. D066753, 2016 WL 310104 (Cal. Ct. App. Jan. 26, 2016); *People v. Antonio (Antonio II)*, 216 Cal. Rptr. 3d 523 (Ct. App. 2017).

8. 1 Clerk's Transcript at 20, *Antonio I*, 2016 WL 310104 (No. D066753).

9. Antonio used pepper spray to dispossess his three robbery victims of items of personal property. *Id.* at 2.

10. *Id.* at 3–5, 19–20.

April 17, 2013 to one count of robbery, enhanced by his use of a weapon.¹¹

Meanwhile, a federal arrest warrant had issued on April 4, 2013, based on an indictment charging Antonio with conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The federal warrant was executed on May 14, 2013¹² under a writ of *habeas corpus ad prosequendum*.¹³ In other words, after Antonio pleaded guilty on state charges for which he had not yet been sentenced, the feds petitioned the state trial court to order the San Diego County District Attorney to deliver Antonio to federal marshals to answer to his federal charges.

A state court minutes entry noted on May 15, 2013 that Antonio was in federal custody pursuant to that writ,¹⁴ thus putting off his state sentencing that had been set for that same day.¹⁵ Although the San Diego County District Attorney obtained two writs of *habeas corpus ad prosequendum* ordering federal marshals to produce Antonio for state sentencing,¹⁶ no sentencing occurred as scheduled. Instead, Antonio remained in federal custody at the Metropolitan Correction Center in San Diego.¹⁷

The United States District Court for the Southern District of California accepted Antonio's guilty plea on the drug charge on December 30, 2013.¹⁸ The court entered judgment of sentence on March 11, 2014, and committed Antonio to the BOP for 9.3 years.¹⁹ In imposing sentence, U.S. District Judge Roger T. Benitez made no comment on the time-relation between the federal drug sentence and Antonio's imminent state robbery sentence, even though the Assistant

11. *Id.* at 40–42.

12. Criminal Docket, *United States v. Cruz et al.*, No. 3:13-cr-01128-BEN-17 (S.D. Cal. 2013), ECF No. 161.

13. *Id.* The writ was issued on May 9, 2013, *id.* at ECF No. 151, and returned on May 21, 2013, *id.* at ECF No. 185.

14. 1 Clerk's Transcript, *supra* note 8, at 59.

15. *Id.* at 58.

16. *Id.* at 27, 33. A minute order from October 22, 2013, refers to a third writ to that same end. *Id.* at 62.

17. *Id.* at 59–62.

18. Criminal Docket, *supra* note 12, at ECF No. 424.

19. *Id.* at ECF No. 528.

U.S. Attorney had brought the state guilty plea to the court's attention during the federal sentencing hearing.²⁰

The long-delayed state sentencing hearing was held on March 26, 2014, about ten months after Antonio's state guilty plea. There, aware that "Antonio has been sentenced to ten [sic] years in federal custody,"²¹ state trial counsel, over the prosecutor's objection,²² asked that the eight-year state term run concurrently with the 9.3-year federal term entered on March 11, 2014.²³ After some discussion of alternative dispositions,²⁴ the agreement reached by the state court, the prosecution, and the defense was that the judgment would *not* indicate whether the state sentence would run concurrent or consecutive to the federal sentence.²⁵ Specifically, the state court's idea was "whatever the feds decide to do with it, they do with it, and . . . everybody gets the benefit of the plea agreement."²⁶ All agreed that the state sentence would be served in a federal facility.²⁷

On July 24, 2014, the state court recalled Antonio's sentence, having learned to its surprise that Antonio was still incarcerated at Ironwood State Prison in Blythe, California.²⁸ The state court's purpose in recalling the sentence was to let state trial counsel and "the federal people"²⁹ confer "to see if arrangements can be made for Mr. Antonio to be transferred from the state court system to the federal court system,

20. Transcript of Court Proceedings, *United States v. Antonio*, No. 13-CR-01128-BEN (Mar. 3, 2014), at ECF No. 950 at 9.

21. 1 Reporter's Transcript of Proceedings at 9, *Antonio I*, 2016 WL 310104 (Cal. Ct. App. Jan. 26, 2016) (No. D066753).

22. *Id.* at 9–11.

23. *Id.* at 9–12. The federal sentencing hearing was held on March 3, 2014, with judgment of sentenced filed on March 11, 2014. *See* Criminal Docket, *supra* note 12, at ECF Nos. 500, 528.

24. 1 Reporter's Transcript of Proceedings, *supra* note 21, at 1–13 (discussing consecutive terms or withdrawal of the plea).

25. *Id.* at 13–17.

26. *Id.* at 13.

27. *Id.* at 13, 16–18; 2 Reporter's Transcript on Appeal at 20–21, *Antonio I*, 2016 WL 310104 (No. D066753); 3 Reporter's Appeal Transcript at 24–25, *Antonio I*, 2016 WL 310104 (No. D066753).

28. 1 Clerk's Transcript, *supra* note 8, at 45; 2 Reporter's Transcript on Appeal, *supra* note 27, at 20–21.

29. 3 Reporter's Appeal Transcript, *supra* note 27, at 24.

which would then allow him to . . . serve his time as we had anticipated back in March of this year.”³⁰

Antonio’s state trial counsel would soon get a chance to “check with the federal people”³¹ (namely, “the prosecutor and the defense attorney”)³² on “whether or not they would take him first.”³³ At Antonio’s state re-sentencing on September 25, 2014, his state trial counsel reported that federal prosecutors intended to “pick him up on a warrant when he’s finished his state time.”³⁴ The San Diego County Deputy District Attorney had heard the same thing from the Assistant United States Attorney who had prosecuted Antonio.³⁵ Antonio’s state trial counsel went on:

I think even if this court would order it to be concurrent, it would do Mr. Antonio no good because the federal prison will simply wait until he has served the state time then go pick him up. So I think your order on that can’t be helpful to us . . . no matter what, even though I’d ask the court make it.³⁶

Because in the state trial court’s view, any attempt to structure concurrent sentences “probably won’t matter,”³⁷ the court declined “to make any comment on whether [Antonio’s sentence] should be run concurrent or consecutive with the federal system.”³⁸ Accordingly, the state trial court re-sentenced Antonio to the same eight-year term.³⁹

30. 2 Reporter’s Transcript on Appeal, *supra* note 27, at 21.

31. 3 Reporter’s Appeal Transcript, *supra* note 27, at 24.

32. 2 Reporter’s Transcript on Appeal, *supra* note 27, at 21.

33. 3 Reporter’s Appeal Transcript, *supra* note 27, at 24.

34. *Id.*

35. *Id.* at 28.

36. *Id.* at 25.

37. *Id.* at 29. The court also perceived consecutive sentencing to be unauthorized by state law. *See id.* at 28–29.

38. *Id.* at 29.

39. *Id.* at 26.

B. Direct Appeal #1

Basing his argument on California Penal Code section 669,⁴⁰ Antonio took his first direct appeal from that judgment of sentence. When section 669 was first passed in 1872, it prescribed that multiple prison terms would all run consecutively.⁴¹ This, even though “at common law the court had discretion to impose either cumulative or concurrent sentences, and that where it failed to exercise such discretion the sentences ran concurrently.”⁴² A 1927 amendment to section 669 restored trial courts’ discretion to run sentences concurrently in “exceptional cases.”⁴³ A 1931 amendment made such elections between consecutive and concurrent terms no longer exceptional but entirely discretionary.⁴⁴ Because the existence of a prior, unexpired prison term is sometimes unknown to the trial court when judgment for a second offense is entered, a 1935 amendment obligated the California Detentions Bureau to alert the trial court to any unexpired prison terms to which the defendant was subject.⁴⁵

Finally, a 1941 amendment provided that when “the court at the time of pronouncing the second . . . judgment . . . fails to determine how the terms of imprisonment shall run in relation to each other, then . . . the term of imprisonment on the second . . . judgment shall run concurrently.”⁴⁶ Put slightly differently, when a trial court fails to designate the time-relation of the sentences, then concurrency is the

40. Appellant’s Opening Brief at 16, *Antonio II*, 216 Cal. Rptr. 3d 523 (Ct. App. 2017) (No. D070590) [hereinafter Appellant’s Opening Brief II].

41. See CAL. PENAL CODE § 669 (West 2021).

42. *Ex parte Radovich*, 142 P.2d 325, 326 (Cal. Ct. App. 1943).

43. See CAL. PENAL CODE § 669 (West 2021).

44. See *id.*

45. See *id.* The California prison system was created in 1912 by the state legislature as the California State Detentions Bureau, which in 1951 was renamed the California Department of Corrections, and again in 2004 as the California Department of Corrections and Rehabilitation. See Rory K. Little, *Merit-Based Sentencing Reductions: Moving Forward on Specifics, and Some Critique of the New Model Penal Code*, 66 HASTINGS L.J. 1535, 1539 n.21 (2015).

46. CAL. PENAL CODE § 669 (West 2021). Unless, that is, the trial court directs the terms to run consecutively within 60 days from the start of the second term. *Id.*

default sentence,⁴⁷ whether the prior judgment is from a state or federal court.⁴⁸ That remains the law to this day.⁴⁹

The state court of appeal vacated Antonio's sentence, but refused to impose section 669's default provision of concurrent terms against the trial court.⁵⁰ Instead, repeatedly citing Antonio's sentencing hearing as "fraught with confusion," the court of appeal left the trial court free to run the state and federal terms as it saw fit.⁵¹

II. PEOPLE V. ANTONIO II

A. *Re-sentencing #2*

At Antonio's re-sentencing, the trial court directed that his state term run concurrently with his federal term.⁵² While delighted with the result, we anticipated difficulties in enforcing this order, knowing that federal prosecutors wanted to suspend the running of Antonio's federal term until his state term expired.⁵³ So how, exactly, could we bring about the trial court's order of concurrency? By depositing Antonio on the doorstep of a federal facility?

Certainly Antonio was not the first prisoner who suffered a state sentence structured to run concurrently with an unexpired federal term. There had to be a procedure in place for facilitating concurrency. In fact, there were two procedures: first, a state habeas corpus petition, authorized by a fifty-year-old California Supreme Court ruling; second, a state statute, passed six years after that ruling, which obligates the state warden to tender prisoners in Antonio's shoes to federal prison officials.

47. *See* *People v. Black*, 161 P.3d 1130, 1143–45 (2007).

48. *See In re Altstatt*, 38 Cal. Rptr. 616, 617 (Ct. App. 1964).

49. *See* CAL. PENAL CODE § 669 (West 2021).

50. *Antonio I*, No. D066753, 2016 WL 310104, at *1–2 (Cal. Ct. App. Jan. 26, 2016).

51. *Id.* at *2–3.

52. *Antonio II*, 216 Cal. Rptr. 3d 523, 525 (Ct. App. 2017).

53. *See supra* notes 35–36 and accompanying text.

1. *In re Stoliker*

To facilitate concurrency under section 669, the California Supreme Court decided *In re Stoliker*, which ruled that a state habeas corpus proceeding could transfer custody of a state prisoner to the foreign jurisdiction—there, the United States—which had first sentenced the prisoner.⁵⁴ *Stoliker*, a California prisoner who had been arrested for robbery, was delivered to the United States, which convicted him of federal weapons offenses.⁵⁵ He was then returned to California, where the trial court ordered that his robbery sentence “run ‘concurrently with any other offense to which he is now subject.’”⁵⁶ California’s Attorney General urged that the statutory “concurrency provisions related only to any other sentence which petitioner was then ‘serving’ and that petitioner was not ‘serving’ any other sentence at that time.”⁵⁷

The California Supreme Court, however, sided with *Stoliker*,⁵⁸ not relying explicitly on section 669(b) but rather on the sentencing judge’s decree, which “ordered the state sentences to run ‘concurrently with any other sentence to which he is now *subject*.’”⁵⁹ “It is, of course,

54. *In re Stoliker*, 315 P.2d 12, 14 (Cal. 1957). State habeas proceedings are designed for matters unsuited to direct appeal of a conviction or sentence. Direct appeal is suited only to claims that can be adjudged by a study of the trial record. An example of a claim suited only to state habeas is a claim of ineffective assistance of counsel. Because trial counsel is entitled to proffer a professional basis for her putatively incompetent trial conduct, and no such explanation will be found on the trial record (since she had not at that point been asked to justify her conduct), a new record must be established for that purpose, to which only habeas, not appellate review, is suited. That new record would take the form of trial counsel’s affidavit or testimony at an evidentiary hearing. *See, e.g.,* *People v. Witcraft*, 133 Cal. Rptr. 3d 897, 901 (Ct. App. 2011).

55. *Stoliker*, 315 P.2d at 12.

56. *Id.* at 13. In actuality, at the time of state sentencing, the federal court had already pronounced that the federal term was “to run consecutively with any sentence imposed by any other court, for any other offense.” The high court noted that while such a phrasing “might be construed to include future convictions, the propriety of such a construction to petitioner’s prejudice would be questionable.” *Id.* A half-century later, the United States Supreme Court would authorize such a construction. *See* *Setser v. United States*, 566 U.S. 231 (2012).

57. *Stoliker*, 315 P.2d at 13.

58. *Id.*

59. *Id.* (emphasis added).

conceded,” the Court went on, “that petitioner was then ‘subject’ to the federal sentence.”⁶⁰ Accordingly, the Court ordered that state prison officials tender *Stoliker* to the United States for concurrent service of his state and federal terms.⁶¹

2. *California Penal Code § 2900(b)(2)*

Stoliker acknowledged the need for a process to enforce concurrent sentences. Given “the clumsiness of habeas corpus as a means of accomplishing what should be an administrative function,” the need for a protocol more streamlined than “the piecemeal process of individual adjudications” for enforcing concurrent sentences was manifest.⁶²

In response, the California Legislature enacted California Penal Code section 2900(b)(2), which “authorizes the Director of Corrections to accomplish administratively what the *Stoliker* rule accomplishes by a writ of habeas corpus.”⁶³ Section 2900(b)(2) provides a method for protecting prisoners like Antonio—who suffer convictions in both California and foreign jurisdictions—from the unintended consequence of consecutive sentences that had been pronounced concurrent:

In any case in which . . . a prisoner of another jurisdiction is, before completion of actual confinement in a penal or correctional institution of a jurisdiction other than the State of California, sentenced by a California court to a term of imprisonment for a violation of California law, and the judge of the California court orders that the California sentence shall run concurrently with the sentence which such person is already serving, the Director of Corrections shall designate the institution of the other jurisdiction as the place for reception of such person⁶⁴

California cases summarize section 2900(b)(2) as holding that when a state sentence is set up to run concurrently with a foreign sentence that

60. *Id.*

61. *Id.* at 14.

62. *In re Portwood*, 45 Cal. Rptr. 862, 864 (Ct. App. 1965).

63. *Id.*

64. Section 2900(b)(2) goes on to say that the Department of Corrections “may also designate the place in California for reception of such person in the event that actual confinement under the prior sentence ends before the period of actual confinement required under the California sentence.”

the prisoner is “already serving,” the prisoner is to be transferred to the foreign authorities to have the foreign prison designated as the place to serve both the foreign and California sentences together.⁶⁵

Antonio, however, had never begun to actually *serve* his federal sentence under either federal or state law. Under federal law, a prison sentence “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.”⁶⁶ Under California law, a prison sentence “commences to run only upon the actual delivery of the defendant into the custody of the Director of Corrections at the place designated by the Director of Corrections as a place for the reception of persons convicted of felonies.”⁶⁷ Recall that after Antonio’s federal sentence was pronounced, he was returned to state court, where he was sentenced and given over to the California Department of Corrections and Rehabilitation (“CDCR”).⁶⁸ In turn, the CDCR installed Antonio for the first few years of his state term at a private Oklahoma prison.⁶⁹ It is therefore at least plausible that section 2900(b)(2) has no specific application to Antonio, who was not yet “serving” a foreign term.

Because section 2900(b)(2) was meant to facilitate and not impede section 669,⁷⁰ an uninterrupted line of cases interpreting *Stoliker* has provided for prisoner transfer by the CDCR to foreign authorities. Those cases feature prisoners who, while on parole from offenses they had committed in foreign jurisdictions, committed offenses in California, which provoked those foreign authorities to revoke their

65. See, e.g., *In re Tomlin*, 50 Cal. Rptr. 805, 807 (Ct. App. 1966); *In re Riddle*, 49 Cal. Rptr. 919, 921 (Ct. App. 1966); *Portwood*, 45 Cal. Rptr. at 864.

66. 18 U.S.C. § 3585(a).

67. CAL. PENAL CODE § 669 (West 2021); see also *People v. Young*, 45 Cal. Rptr. 2d 177, 182 (Ct. App. 1995) (quoting *People v. Karaman*, 842 P.2d 100, 106 (1992)).

68. See *supra* text at pp. 4–6 and accompanying notes.

69. See Defendant’s Request for Judicial Notice at 4, *Antonio I*, 2016 WL 310104 (Cal. Ct. App. Jan. 26, 2016) (No. D066753).

70. *In re Altstatt*, 38 Cal. Rptr. 616, 617 (Ct. App. 1964) (“[Section 2900(b)(2)] facilitates and implements concurrency, and significantly fails to limit the provision of Section 669 that silence is deemed to effect that result.”); *Tomlin*, 50 Cal. Rptr. at 807 (“Section 2900 of the Penal Code was intended to facilitate and implement concurrency.”).

parole.⁷¹ As parolees, none of those defendants were actually “already serving” a sentence in the foreign jurisdiction when sentenced in California. Yet each of those defendants, like *Stoliker*, was nonetheless “subject to” the foreign sentence when sentenced in California.⁷² In each case, the reviewing court enforced the California prisoner’s right to be presented to the foreign authority.⁷³ The foreign authority would then decide whether to admit the prisoner so as to run the California sentence concurrently with the reimposed foreign term following parole revocation.⁷⁴

California courts have long preferred concurrent over consecutive sentences. As early as 1964, concurrency had “for more than 30 years” been the state’s “legislative trend.”⁷⁵ To this day, *Stoliker* has been cited only with approval,⁷⁶ including in the very court of appeal in which Antonio litigated.⁷⁷ To read section 2900(b)(2) as requiring that California prisoners be presented to the federal facility “ensures that the concurrent aspect of the sentence is made effectual and not nullified.”⁷⁸

71. See, e.g., *In re Patterson*, 411 P.2d 897, 899 (Cal. 1966); *In re Cain*, 52 Cal. Rptr. 860, 861 (Ct. App. 1966); *Tomlin*, 50 Cal. Rptr. at 807; *In re Riddle*, 49 Cal. Rptr. 919, 921 (Ct. App. 1966); *In re Portwood*, 45 Cal. Rptr. 862, 864 (Ct. App. 1965); *Altstatt*, 38 Cal. Rptr. at 617; *People v. Massey*, 16 Cal. Rptr. 402, 408 (Ct. App. 1961); *Application of McClure*, 13 Cal. Rptr. 298, 298 (Ct. App. 1961).

72. See *In re Stoliker*, 315 P.2d 12, 14 (Cal. 1957); cf. *In re Taylor*, 343 P.3d 867, 879 (Cal. 2015) (parolees remain in “constructive custody” of the Department of Corrections) (citing CAL. PENAL CODE § 3056(a) (West 2021)).

73. See *Patterson*, 411 P.2d at 900; *Cain*, 52 Cal. Rptr. at 862; *Tomlin*, 50 Cal. Rptr. at 807; *Riddle*, 49 Cal. Rptr. at 921; *Portwood*, 45 Cal. Rptr. at 864; *Altstatt*, 38 Cal. Rptr. at 618; *Massey*, 16 Cal. Rptr. at 408; *McClure*, 13 Cal. Rptr. at 299.

74. See *Tomlin*, 50 Cal. Rptr. at 67.

75. *Altstatt*, 38 Cal. Rptr. at 617; see *People v. Broughton*, 133 Cal. Rptr. 2d 161, 171 (Ct. App. 2003) (“[T]he opportunity for concurrent sentences is one of the factors supporting a ‘speedy trial’ right for convicts.”), *abrogated on other grounds by* *People v. Wagner*, 201 P.3d 1168 (Cal. 2009); see also *Stoliker*, 315 P.2d at 13 (“Interpretations resulting in concurrent sentences when imposed by the same court are favored over those which make sentences run consecutively.”); cf. *Massey*, 16 Cal. Rptr. at 408 (stating that the Attorney General’s argument for consecutive sentences “is contrary to the policy of our law”).

76. See, e.g., *People v. Sewell*, 574 P.2d 1231, 1233 (Cal. 1978).

77. See *People v. Seaman*, 150 Cal. Rptr. 430, 431 (Ct. App. 1978).

78. *Cozine v. Crabtree*, 15 F. Supp. 2d 997, 1002 (D. Or. 1998); see also *id.* at 1005 (ruling that “California’s duty to make the defendant available to the foreign authorities is absolute.”).

Accordingly, section 2900(b)(2) obligates the CDCR to make the prisoner available to the foreign authorities to effectuate concurrency in such cases, whether the prior, foreign sentence has been pronounced only, or both pronounced and commenced.⁷⁹ The CDCR's obligation therefore is *not* "a matter of judicial or administrative discretion,"⁸⁰ nor is any "formal court order (apart from a concurrent state sentence) . . . needed to trigger that duty or to effect the transfer."⁸¹

To prevent Antonio from languishing in state prison while the feds awaited his state term's expiration before picking him up, we wanted to impress upon the trial judge the CDCR's statutory obligation to "make the prisoner available" to the feds, whether the feds *wanted* Antonio or not. To that end, at Antonio's June 2016 re-sentencing hearing, his state trial counsel presented a proposed order by which Antonio's sentence, if pronounced concurrent, would be effectuated.⁸² The proposed order, based on section 2900(b)(2), commanded the following:

Mr. Antonio is to be transferred by the Department of Corrections to the [BOP] to have a federal facility designated as the place to serve the federal and California sentences, thus fulfilling this court's duty to make the prisoner available to the foreign authorities.⁸³

After refusing to sign the proposed order, the trial court instead rephrased its vacated ruling to clarify that Antonio's state and federal terms would run concurrently:

So I am going to basically reinstate the sentence I imposed on March 26th of 2014 as it is and order that it run concurrent with the federal prison sentence, and that it may be served in a federal facility. And I don't know what else I can say on this case.⁸⁴

79. See *In re Portwood*, 45 Cal. Rptr. 862, 863 (Ct. App. 1965); *Tomlin*, 50 Cal. Rptr. at 806–07.

80. *In re Cain*, 52 Cal. Rptr. 860, 861 (Ct. App. 1966).

81. *Antonio II*, 216 Cal. Rptr. 3d 523, 526 (Ct. App. 2017); see also *In re Riddle*, 49 Cal. Rptr. 919, 921 (Ct. App. 1966).

82. See 4 Reporter's Appeal Transcript at 32, *Antonio II*, 216 Cal. Rptr. 3d 523 (No. D070590).

83. 1 Supplemental Clerk's Transcript at 5–6, *Antonio II*, 216 Cal. Rptr. 3d 523 (No. D070590). I wrote the order but did not appear at the hearing.

84. 4 Reporter's Appeal Transcript, *supra* note 82, at 42.

Repeatedly doubting its authority to get the CDCR to get the BOP to accept Antonio into a federal facility,⁸⁵ the trial court left it to trial counsel to “convince the feds to pick him up.”⁸⁶ Trial counsel reminded the trial court that it *did* have the authority to make Antonio available to the United States for concurrent service, even if the court could not script Antonio’s acceptance there.⁸⁷ But the trial court declined to do so on the ground that the “federal authorities will not pick him up until he finishes his sentence.”⁸⁸ Despite the trial court’s stated intention to run the state and federal terms concurrently, that the terms would end up running consecutively was, in the trial court’s view, “just the nature of the system.”⁸⁹

B. Direct Appeal #2

On appeal from that ruling, Antonio sought to establish criteria for what can count as making a prisoner available to the foreign jurisdiction. The court of appeal rejected Antonio’s argument that, by declining to order the CDCR to tender Antonio to the feds, the state trial judge erred by failing to make him available to the feds for concurrent service of his state and federal terms.⁹⁰

Antonio presented to the court of appeal an example of a judgment of sentence that explicitly directed the CDCR to make the prisoner available to the foreign jurisdiction.⁹¹ But rather than delineate what could count as making a prisoner available,⁹² the court of appeal relied on a legal presumption that Antonio *had* already been tendered to federal authorities.⁹³ “In the absence of evidence to the contrary,” states California Evidence Code section 664, “it is presumed that an official

85. *Id.* at 42–46.

86. *See id.* at 42.

87. *Id.* at 45.

88. *Id.*

89. *Id.*

90. *Antonio II*, 216 Cal. Rptr. 3d 523, 526 (Ct. App. 2017).

91. *See People v. Heinold*, 94 Cal. Rptr. 538, 540 (Ct. App. 1971).

92. In fact, the court of appeal dropped a footnote putting the issue off: “Although not at issue in this appeal, we note that the requirements of ‘making a defendant available’ for transfer are not set forth in statute or case law.” *Antonio II*, 216 Cal. Rptr. 3d at 526 n.2.

93. *See CAL. EVID. CODE* § 664 (West 2021).

duty has been regularly performed.”⁹⁴ Noting “no evidence submitted to rebut the presumption of performance,”⁹⁵ the court of appeal dismissed Antonio’s appeal as unripe.⁹⁶

In order to compel the CDCR to transfer him to the custody of the BOP, Antonio had first to build a record indicating that he in fact had *not* yet been transferred. And the fact that his lawyer was in court saying that Antonio was still writing him letters postmarked from a state penitentiary could not pass as an item of evidence on that question. In order to build a record as to his whereabouts, Antonio was directed by the court of appeal to exhaust his administrative remedies in prison; and if that was unsuccessful, then from there seek state habeas relief to bring about his transfer to a federal facility.⁹⁷

So that he did. On May 3, 2017, the CDCR dismissed on jurisdictional grounds Antonio’s first administrative challenge to his sentence, which he continued to insist had entitled him to be tendered to a federal facility. The basis of the dismissal was the CDCR’s perception that Antonio’s quarrel was with the courts, not with the prison.⁹⁸ Coming off that position, the CDCR issued its second-level adverse ruling on July 27, 2017, this time on the grounds that Antonio was disqualified from transfer for: (a) carrying a balance on his \$1,000 restitution order in his federal case, and (b) having been written up by state correctional officers for “Possession of a Manufactured Weapon.”⁹⁹ On November 3, 2017, the CDCR issued its third and final adverse ruling, this time denying Antonio’s transfer due only to his unpaid restitution order.¹⁰⁰

94. *Antonio II*, 216 Cal. Rptr. 3d at 527.

95. *Id.*

96. *Id.*

97. *Id.* at 525, 527.

98. Letter from C. Martella et al., Appeals Coordinator, State of California, to Antonio Jose, Inmate (May 3, 2017) (on file with author).

99. Petition for Writ of Habeas Corpus at Ex. 1, *In re* Jose Antonio, No. S253384 (Cal. Oct. 11, 2018) (Nos. D066753, D070590, D074781).

100. *Id.*

C. State Habeas Petition #1

Antonio's administrative remedies exhausted, he filed a habeas petition in the San Diego Superior Court on January 5, 2018 to demand that his concurrent sentences be enforced.¹⁰¹ On January 31, 2018, the superior court asked the prosecution for an informal response that would address why Antonio had yet to be transferred.¹⁰² On March 16, 2018, before the prosecution's informal response was filed, the CDCR amended its third adverse ruling of November 3, 2017. The amended version both conceded Antonio's right to transfer and acknowledged exhaustion of his administrative remedies.¹⁰³ On March 28, 2018, the prosecution filed its informal response, which characterized Antonio's by-then-uncontested right to be tendered to the BOP as rendering his habeas petition moot.¹⁰⁴

On April 4, 2018, the superior court denied Antonio's habeas petition as moot.¹⁰⁵ The superior court reasoned that the CDCR's advice that Antonio "could be returned to federal authorities for concurrent service of terms" would correct the CDCR's erroneous refusal to tender Antonio to the BOP.¹⁰⁶

D. State Habeas Petition #2

With an uncontested right to be transferred to a federal prison, Antonio justifiably wondered what he was still doing in a state prison. On May 10, 2018, CDCR staff member Jimenez acknowledged receipt of Antonio's first "request for interview, item or service."¹⁰⁷ In that request, Antonio followed up with prison officials on the status of his transfer request.¹⁰⁸ On May 24, 2018, CDCR staff member Ochoa handwrote the following on both a pertinent form and on a copy of Antonio's federal abstract of judgment: "Even though your state commitment states running concurrent to federal[,] your federal

101. *Id.* at Ex. 9.

102. *Id.* at Ex. 2.

103. *Id.* at Ex. 3.

104. *Id.* at Ex. 4.

105. *Id.* at Ex. 5.

106. *Id.*

107. *Id.* at Ex. 6.

108. *Id.*

commitment does not state it[']s running concurrent to your state commitment, therefore it[']s running consecutive.”¹⁰⁹ Staff member Ochoa did not elaborate.

It seems that on behalf of the BOP, Ochoa interpreted 18 U.S.C. § 3584(a), which states that “[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.” But that provision cannot be read to support consecutive terms in Antonio’s case. The default position of 18 U.S.C. § 3584(a)—that sentences run consecutively unless explicitly stated to run concurrently—pertains to the *second* sentencing court, i.e., the court that pronounces sentence *after* the foreign jurisdiction has pronounced sentence.¹¹⁰ With no first sentence in place, there would be no “multiple terms” within which the federal default position of consecutive terms could operate.¹¹¹

Antonio’s position that his state and federal sentences cannot be read to run consecutively under 18 U.S.C. § 3584(a) is based on *Setser v. United States*,¹¹² which is what this Article’s Introduction calls “Antonio’s mirror or reverse image.” Setser was indicted, first under Texas law and thereafter under federal law, for drug offenses arising from a single traffic stop.¹¹³ Texas prosecutors also sought to revoke the probation to which Setser had been subject for a prior state drug conviction.¹¹⁴ Before judgment was entered on the state charges, Setser pleaded guilty in federal district court, where he appeared on a writ of *habeas corpus ad prosequendum*.¹¹⁵ There, Setser caught a 151-month federal drug term, which was structured to run concurrently with the

109. *Id.*

110. *United States v. Almonte-Reyes*, 814 F.3d 24, 28 (1st Cir. 2016) (“Section 3584(a) says that when a term of imprisonment has ‘already’ been imposed, . . . the sentence is presumed to be consecutive unless the court orders otherwise. *By giving such discretion to the later federal sentencing court*, ‘§3584(a) impliedly prohibits’ an earlier federal court from making that decision with respect to a future federal sentence.”) (emphasis added) (citation omitted).

111. *See infra* notes 140–42 and accompanying text.

112. 566 U.S. 231 (2012).

113. *Id.* at 233.

114. *Id.*

115. *Id.*

future state drug term and consecutively to the future state term for violating probation.¹¹⁶

Setser appealed from the federal district court's sentence to the United States Court of Appeals for the Fifth Circuit.¹¹⁷ Specifically, his claim was that the district court lacked authority to run the federal term consecutively to an *anticipated* state term.¹¹⁸ During the pendency of that appeal, the state sentenced Setser to five years on the probation violation and ten years on the new state drug charge, the terms structured to run concurrently.¹¹⁹

After the Fifth Circuit affirmed the federal district court's sentence, Setser sought relief in the United States Supreme Court.¹²⁰ Affirming the judgments below, Justice Scalia summarized for the six-to-three Court that "*someone* must answer . . . how the state and federal sentences fit together. The issue . . . is *who* will make that decision, which in turn determines *when* that decision is made."¹²¹ Insisting that "sentencing not be left to employees of the same Department of Justice that conducts the prosecution," Justice Scalia emphasized that it should be courts, not prisons, that control whether multiple terms run concurrently or consecutively.¹²² To that end, Justice Scalia found nothing wrong with letting the first sentencing court make the call.¹²³

Setser does acknowledge, however, that *functionally* at least, the concurrent-versus-consecutive determination is consigned to prisons.

116. *Id.*

117. *United States v. Setser*, 607 F.3d 128 (5th Cir. 2010), *aff'd*, 566 U.S. 231 (2012).

118. *Id.* at 130.

119. *Setser*, 566 U.S. at 233–34; *Setser*, 607 F.3d at 129–30; Douglas A. Berman, *May a Judge Order That a Federal Sentence Be Served Consecutively to a State Sentence That Has Not Yet Been Imposed?*, 39 *PREVIEW* 119 (2011).

120. *Setser*, 566 U.S. at 234. Because the Department of Justice agreed with Setser's position, the Court appointed *amicus curiae* to defend the federal district court's sentence. *See id.* at 233–34.

121. *Id.* at 234; *see also id.* at 237 ("*someone* must decide the issue") (emphasis added).

122. *Id.* at 237, 238 n.3, 242.

123. *Id.* at 239 (finding it other than "natural" to interpret federal statutes on point "as giving the Bureau of Prisons what amounts to sentencing authority").

The Court traces the source of that legal stance to 18 U.S.C. § 3621(b),¹²⁴ which states:

The [BOP] shall designate the place of the prisoner's imprisonment The [BOP] may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the [BOP], whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the [BOP] determines to be appropriate and suitable¹²⁵

Because § 3621(b) enables the BOP to “order that a prisoner serve his federal sentence in a state prison,”¹²⁶ Setser complained that the BOP can designate the state prison as the place of imprisonment for the federal sentence, “effectively making the two sentences concurrent—or decline to do so—effectively making them consecutive.”¹²⁷ This, even though “[o]n its face,” § 3621(b) “says nothing about concurrent or consecutive sentences.”¹²⁸

The consecutive terms on the federal drug and state probation offenses, Setser predicted, would end up “thwarted”¹²⁹ (or as the Fifth Circuit put it, “partially foiled”)¹³⁰ by the state. Specifically, the state would credit Setser for his 151-month federal drug term toward both his ten-year state drug term and his five-year term for violating his state probation.¹³¹ Nothing in the federal district court’s power, Setser continued, could prevent Texas from effectuating concurrency (provided that Setser began serving time in federal not state prison).¹³²

124. *Id.*

125. 18 U.S.C. § 3621(b).

126. *Setser*, 566 U.S. at 235.

127. *Id.*

128. *Id.*

129. *Id.* at 244.

130. *United States v. Setser*, 607 F.3d 128, 132 (5th Cir. 2010) (stating prisoner’s “contention that the sentence is ‘impossible’ to fulfill stems . . . from the very practical problems that arise in carrying out overlapping state and federal sentences in a dual sovereignty.” (quoting *United States v. Cibrian*, No. 09-40048, 2010 WL 1141676, at *5–6 (5th Cir. Mar. 24, 2010))).

131. *Setser*, 566 U.S. at 244.

132. *See id.* at 233–34. As fate had it, Setser began serving time in *state*, not federal, prison—a point nowhere acknowledged by either the majority or the dissent

Setser is the mirror or reverse image of *Antonio* in that *Setser* posed the possibility that the second sentencing authority (Texas) could thwart the first sentencing authority (the United States) by crediting the state prisoner with time already served in federal prison. Oppositely, *Antonio* posed the possibility that the first sentencing authority (the United States) would thwart the second sentencing authority (California) by *refusing* to credit the federal prisoner with time already served in state prison. That the sentencing authorities doing the thwarting in both cases are executive not judicial actors was, for the *Setser* Court (dissenters included), just a part of the system. The *Setser* dissenters viewed the BOP's de facto function as a sentencing authority as an unobjectionable aspect of separation of powers.¹³³ While the majority agreed that leaving the BOP with the final say on the time-relation of multiple sentences was "a problem,"¹³⁴ *Setser* nonetheless ruled that the district court's actions were reasonable, even if the consecutive terms it pronounced would turn out unenforceable.¹³⁵

For our purposes, the *Setser* majority explicitly ruled inapposite the presumption of consecutive terms under 18 U.S.C. § 3584(a), because "[h]ere the . . . defendant was not already subject to that state

in the Supreme Court. Although sentence was pronounced first in federal court, *Setser* was immediately thereafter returned by writ to state authorities for sentencing on state offenses. Service of his state terms terminated on *Setser*'s parole after just 2.5 years, his federal term commencing on his date of release from state custody, for which the BOP gave him zero credit. *See Setser*, 607 F.3d at 130.

133. Dissenting Justice Breyer, joined by Justices Kennedy and Ginsburg, elaborated:

The Court's only criticism of this system is that it is less "natural" to read the statute "as giving the Bureau of Prisons what amounts to sentencing authority." But what is unnatural about giving the Bureau that authority? The sentencing process has long involved cooperation among the three branches of Government. And until the Guidelines the BOP itself decided, within broad limits, precisely how much prison time every typical offender would serve. Even today, it still decides that question within certain limits.

Setser, 566 U.S. at 255–56 (Breyer, J., dissenting) (citing 18 U.S.C. § 3621(b)(4)(A)).

134. *Setser*, 566 U.S. at 244.

135. Although *Setser* left the question open, *see id.* at 241 n.4, lower courts since have ruled that a federal court may not determine the time-relation of an anticipated *federal* sentence, *see, e.g.*, *United States v. Almonte-Reyes*, 814 F.3d 24, 28 (1st Cir. 2016).

sentence.”¹³⁶ The parties agreed with that conclusion.¹³⁷ Applied to *Antonio*, *Setser* nullified the BOP’s claim that Judge Benitez’s silence at Antonio’s federal sentencing runs the federal and state terms end-to-end.¹³⁸ The BOP should have known as much.

Undeterred by the BOP’s erroneous position that his state and federal terms were consecutive, Antonio again followed up with prison officials on his transfer status.¹³⁹ This time, Antonio asked the CDCR for documentation of the BOP’s purported refusal to accept him for transfer.¹⁴⁰ On August 9, 2018, two weeks after acknowledging receipt of Antonio’s inquiry,¹⁴¹ CDCR staff member Ochoa handwrote on the pertinent form that the BOP’s refusal “was a verbal . . . received from the BOP’s Mr. Williams,” for whom the CDCR provided a phone number.¹⁴² I called Mr. Williams on August 28, 2018 for documentation of the BOP’s decision to refuse Antonio’s transfer request. In our brief phone conversation, Mr. Williams could not recall any decision regarding Antonio. Promptly thereafter, I received an email from Mr. Williams, who explained that the matter of documenting the BOP’s refusal had been forwarded to the BOP legal staff, who were to contact me.¹⁴³ No such contact was forthcoming.

As a result, on October 12, 2018, we filed a state habeas petition in the court of appeal¹⁴⁴ demanding that Antonio’s concurrent sentence be enforced.¹⁴⁵ On October 29, 2018, the prosecution filed its informal response, again characterizing Antonio’s by-then-uncontested right to be tendered to the BOP as rendering his habeas petition moot.¹⁴⁶ On November 9, 2018, Antonio filed his reply, which presented his case as

136. *Setser*, 566 U.S. at 234–35.

137. *See id.*

138. Criminal Docket, *supra* note 12, at ECF No. 528.

139. Petition for Writ of Habeas Corpus, *supra* note 99, at Ex. 7.

140. *Id.*

141. On July 26, 2018, CDCR staff member Jimenez acknowledged receipt of Antonio’s second “request for interview, item or service.” *Id.*

142. *Id.*

143. *Id.* at Ex. 8.

144. *Id.* at Ex. 10.

145. *Id.*

146. *Id.* at Ex. 11.

unresolved by any BOP action, given that he remained in state custody.¹⁴⁷

On November 30, 2018, the court of appeal denied Antonio's habeas petition, explaining:

Antonio contends that the state prison's informal contact with the BOP is insufficient to fulfill its duty to make him "available" for transfer to federal prison. He asserts that a formal written tender to the federal prison is required, along with a formal refusal by the federal prison. Antonio, however, provides no authority to directly support these contentions. Additionally, he concedes that existing authority establishes that "state officials cannot compel their foreign counterparts to accept the transfer." By failing to establish that the prison officials failed to comply with their statutory duties and acknowledging that this court has no authority to compel action by the federal authorities, Antonio fails to establish a prima facie case for relief.¹⁴⁸

To correct these misimpressions held by the court of appeal, Antonio filed a third state habeas petition, this time in the California Supreme Court.

E. State Habeas Petition #3

1. In re Cain

Contrary to the court of appeal's position, to fulfill the statutory commitment to concurrency, the proper California officials must make a formal offer to present the prisoner to the proper foreign government officials.¹⁴⁹ The authority for this proposition is *In re Cain*,¹⁵⁰ in which a California prisoner sought transfer to serve his unexpired terms in the State of Washington, where he also faced unexpired terms, so as to run the terms concurrently by virtue of the trial court's silence under California Penal Code section 669(b).¹⁵¹

147. *Id.* at Ex. 12.

148. *Id.* at Ex. 13.

149. *In re Cain*, 52 Cal. Rptr. 860, 861 (Ct. App. 1966).

150. 52 Cal. Rptr. 860.

151. *Id.* at 769, 770 n.1.

In a letter to the Public Defender of Sacramento County who represented Cain, the Washington parole board wrote that it would refuse Cain as a prisoner.¹⁵² “We do not find this letter,” noted the California Court of Appeal in response, “to be an official refusal of the Washington authorities to accept the transfer of petitioner into its custody.”¹⁵³ Instead, “at most,” the letter was “an expression of intent of the State of Washington . . . not made to the State of California and insufficient to constitute an official rejection of a proper tender of California to transfer the custody of [Cain] to Washington.”¹⁵⁴

Under *Cain*, an oral refusal from a BOP staff member who in an email to appellate defense counsel had no recollection of any such refusal, is *not* an official refusal by the United States to accept Antonio into federal custody.¹⁵⁵ Evidence on the record shows that the CDCR alerted the BOP that Antonio sought transfer (or the designation of his state penitentiary as the place to serve both terms).¹⁵⁶ Yet nothing shows that the BOP actually denied the request. Absent proof of the requisite “official rejection of a proper tender of California,”¹⁵⁷ in what sense are Antonio’s habeas petitions mooted by the CDCR’s concession that he is entitled to seek the BOP’s cooperation in enforcing his sentence? Letters of refusal to cooperate with concurrency are signed by the Regional Designator of the BOP, not by junior staff members.¹⁵⁸ An unverifiable, purported telephone refusal communicated by a BOP staff member to a CDCR staff member can hardly qualify as official action by the United States.

152. *Id.* at 769–70.

153. *Id.* at 770.

154. *Id.*

155. *Id.*

156. Letter from Marcus Boudreaux, Designation & Sentence Computation Ctr., Fed. Bureau of Prisons, to Jose Antonio, Inmate, Salinas Valley State Prison (Oct. 30, 2018) (on file with author); Letter from California Dep’t of Corr. & Rehab., to U.S. Marshal, S. Dist. of California (Mar. 2, 2018) (on file with author).

157. *Cain*, 52 Cal. Rptr. at 861.

158. *See Cozine v. Crabtree*, 15 F. Supp. 2d 997, 1002 (D. Or. 1998).

2. 18 U.S.C. § 3585(a)

While the widely held perception is that state officials may not compel their foreign counterparts to accept the transfer,¹⁵⁹ the question is never quite live.¹⁶⁰ The protocol has long been that prisoners' requests for transfer and foreign jurisdictions' denials of those requests are made in writing, not in person.¹⁶¹ So it is unsurprising that there are no published cases where a prisoner surrendering to the foreign jurisdiction is literally turned away from the prison gates. Fifty years ago, a surrendering prisoner *was* turned away by a federal marshal in *United States ex rel. Binion v. United States Marshal for the District of Nevada*.¹⁶² There, however, because the attempted surrender was premature, the marshal had no authority to detain the prisoner.¹⁶³

Another reason for the absence of cases where federal authorities turn away surrendering prisoners is suggested by 18 U.S.C. § 3585(a). Section 3585(a) provides that a federal sentence “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.”¹⁶⁴ “Actual admission to the prison is not a prerequisite to commencement of the

159. See *In re Tomlin*, 50 Cal. Rptr. 805, 806 (Ct. App. 1966) (“The law of this state requires only that Tomlin be made available, it does not and cannot compel the Commonwealth of Virginia to take him.”).

160. See *Isreal v. Marshall*, 125 F.3d 837, 839 n.1 (9th Cir. 1997) (“We do not address whether Missouri’s refusal to accept appellant violated his rights under Missouri law or whether any such violation would pose federal constitutional problems . . .”).

161. Interpreting California law, the Ninth Circuit has required that the CDCR tender the California prisoner to the foreign jurisdiction, adding that a letter may suffice to fulfill the CDCR’s statutory duty under section 2900(b)(2). See *Isreal*, 125 F.3d at 840.

162. 292 F.2d 494, 497 (9th Cir. 1961).

163. *Id.* at 497–98. Because the Attorney General’s authority to confine Binion came from the Supreme Court’s denial of Binion’s petition for certiorari, federal marshals—who had not been told of the high court ruling—could not yet accept him as a prisoner. *Id.*

164. 18 U.S.C. § 3585(a); see also *supra* text accompanying note 65.

sentence.”¹⁶⁵ Indeed, no federal statute mentions a federal facility’s liberty to turn away a surrendering prisoner.¹⁶⁶

Accordingly, Antonio argued to the California Supreme Court that once the CDCR tenders a prisoner to the United States under California Penal Code section 2900(b)(2) for concurrent service of terms, the prisoner “arrives voluntarily” for purposes of 18 U.S.C. § 3585(a).¹⁶⁷ This reading of what it means to arrive at a federal facility would recognize both actual and constructive arrivals, thus avoiding what a California appellate court termed a half-century ago “the undesirability of achieving concurrency of sentence by the physical shipment of prisoners back and forth across state lines.”¹⁶⁸ Under such a reading of 18 U.S.C. § 3585(a), Antonio’s voluntary appearance to serve his federal term stripped the BOP of the discretion to turn him away, though his person remained in California.

Regrettably for Antonio, courts instead hold that an inmate can only show up to a facility to commence federal service after the BOP has explicitly designated an “official detention facility at which the sentence is to be served.”¹⁶⁹ No such designation occurred here. Rather, U.S. Marshals returned Antonio to state court.

For better or worse, it is the law that the BOP ultimately controls whether concurrent terms actually run concurrently. Still, a small number of rulings have run concurrent terms from the date that the foreign jurisdiction (there, the United States) *should* have admitted, but refused to admit, an inmate.¹⁷⁰ Unfortunately, those favorable rulings have no specific application here; in those cases, the United States, not a state, had “primary jurisdiction”:¹⁷¹

165. *Cozine v. Crabtree*, 15 F. Supp. 2d 997, 1009 (D. Or. 1998).

166. *See id.*

167. *Petition for Writ of Habeas Corpus*, *supra* note 99, at 16–17.

168. *In re Portwood*, 45 Cal. Rptr. 862, 864 (Ct. App. 1965).

169. *See, e.g., United States v. Smith*, 812 F. Supp. 368, 370–71 (E.D.N.Y. 1993).

170. *See, e.g., Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984) (holding that when an inmate is improperly released from prison, or federal officials neglect to take custody of the inmate following his release from state prison, the inmate is entitled to full credit against his sentence so long as he was not responsible for the wrongful release).

171. *See, e.g., Crabtree*, 15 F. Supp. 2d at 117–18; *see also Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937).

The primary custody or primary jurisdiction doctrine relates to the determination of priority and service of sentence between state and federal sovereigns. Custody is usually determined on a first-exercised basis, and can be relinquished by granting bail, dismissing charges, and paroling the defendant. Custody can also expire at the end of a sentence.¹⁷²

For a reviewing court to run an inmate's federal term before acceptance into a federal facility, the inmate must face a federal term and be released from state custody, not merely loaned by the state to the feds by way of a writ.¹⁷³ Otherwise, only when the United States is the first to arrest the suspect does it have primary jurisdiction over the inmate. When the United States does have primary jurisdiction, the inmate can then demand that the feds accept him into their facility; refusal by the United States of such a demand will render the term as having commenced on the date the inmate should have been accepted.¹⁷⁴ By their actual release from primary custody (e.g., enlargement on bail, dismissal of charges, expired sentence, parole), the inmate "belongs" to the secondary jurisdiction, which then becomes responsible to commence the term that its court system had pronounced against the inmate.¹⁷⁵

Having been arrested first by Oceanside police on March 13, 2013 for a Vista robbery,¹⁷⁶ primary jurisdiction over Antonio vested in the People of San Diego County. By operation of a federal arrest warrant executed on May 14, 2013 under a writ of *habeas corpus ad prosequendum*,¹⁷⁷ Antonio was loaned to the United States, which had secondary jurisdiction over him. Regrettably, being shipped by writ while in uninterrupted custody from California (which had primary jurisdiction) to the United States (which had secondary jurisdiction) meant that Judge Benitez could sentence Antonio to 110 months in federal prison. Then, the federal court could hand Antonio back to the

172. Guy v. Shartle, No. CIV. 14-2771 RBK, 2015 WL 113116, at *4 (D.N.J. Jan. 8, 2015) (citations omitted).

173. *Id.* at *4–9. Courts are split on whether bail terminates primary jurisdiction. See Taylor v. Reno, 164 F.3d 440, 444–45 (9th Cir. 1998).

174. See, e.g., Kiendra v. Hadden, 763 F.2d 69 (2d Cir. 1985).

175. See, e.g., Del Guzzi v. United States, 980 F.2d 1269 (9th Cir. 1992).

176. See 1 Clerk's Transcript, *supra* note 8, at 2–5, 19–20.

177. See Criminal Docket, *supra* note 12, at ECF No. 161.

State and let the BOP decide whether to give Antonio credit against his federal term for time spent in state prison.¹⁷⁸

In a twenty-minute hearing that resembled an improvised lecture on the social costs of drug use, Judge Benitez had only this to say of Antonio's imprisonment: "So I'll remand him to the custody of the [BOP] for a period of 110 months. I'll place him on supervised release for a period of ten years."¹⁷⁹ After the judge recited the conditions of supervised release, he adjourned the meeting.¹⁸⁰ Nothing in the record indicates that Antonio's remand to serve his 110 months would be put off by the BOP for eight years (or whatever portion of the eight years of state time that Antonio would serve).

That the ultimate length of sentence remains the prerogative of the executive branch, not courts and legislatures, was a tolerable "problem" for the *Setser* majority.¹⁸¹ For some courts, however, it approaches the intolerable: "[B]y manipulating the order or the location in which the sentences are served, *i.e.*, whether the inmate initially commences service of his concurrent sentences in a state or federal prison, low-level prison officials can effectively override the decisions of the state and federal sentencing courts"¹⁸² The problem may owe to prosecutors purposely misleading sentencing judges. To this point, the Ninth Circuit's Judge William A. Norris is worth quoting at length:

An examination of the sentencing hearing reinforces the conclusion that the parties thought Del Guzzi's state and federal sentences would run concurrently. Indeed, the sentencing hearing reflects the fact that had the sentencing judge not held this understanding, he might well have sentenced Del Guzzi to a shorter sentence. The prosecutor used the fact that Del Guzzi's sentences would be served

178. For a case with a similar factual background and legal disposition, see *Thomas v. Brewer*, 923 F.2d 1361 (9th Cir 1991).

179. Transcript of Court Proceedings, *supra* note 20, at ECF No. 950 at 13.

180. *Id.* at 16.

181. See *Setser v. United States*, 566 U.S. 231, 244 (2012). The dissenters alike. See *id.* at 255–56 (Breyer, J., dissenting).

182. *Cozine v. Crabtree*, 15 F. Supp. 2d 997, 1002 (D. Or. 1998); see also *Thomas v. Whalen*, 962 F.2d 358, 364 (4th Cir. 1992) (Hall, J., concurring) ("If the state sentence was made concurrent to the previously imposed federal sentence, either expressly or by operation of state law, then a low-level administrative decision about where to first incarcerate Thomas should not be permitted to override the state court's decision.").

concurrently as a basis for arguing that the judge should impose the statutory maximum. According to the prosecutor, Del Guzzi “got a decent sentence in this case; that is, he was allowed to serve his time at the same time as his federal time and in a federal facility, which is considered quite an advantage.” The judge, apparently persuaded by the prosecutor’s argument, sentenced Del Guzzi to seven years, the statutory maximum. He indicated that the sentence would run concurrent with the federal sentence and recommended that Del Guzzi be transported to federal prison as soon as possible.¹⁸³

The gist of Judge Norris’s concern was that the state sentencing judge went to the top of the range (seven years) only because the term was to be concurrent to a five-year federal term. Seeing the game played by the BOP to convert Del Guzzi’s concurrent terms to consecutive terms, Judge Norris closed with this advice to the rest of the players in the game:

While Del Guzzi will get no relief from this court, I hope his case will serve as a lesson to those who are in a position to guard against future cases of this sort. State sentencing judges and defense attorneys in state proceedings should be put on notice. Federal prison officials are under no obligation to, and may refuse to, follow the recommendation of state sentencing judges that a prisoner be transported to a federal facility. Moreover, concurrent sentences imposed by state judges are nothing more than recommendations to federal officials. Those officials remain free to turn those concurrent sentences into consecutive sentences by refusing to accept the state prisoner until the completion of the state sentence and refusing to credit the time the prisoner spent in state custody. *I hope that defense attorneys and state judges will from this point forward structure their plea agreements and sentencing orders in a manner which avoids the unintended and unjust result reached today.*¹⁸⁴

For Judge Norris, state sentencing judges face a non-trivial likelihood that concurrent terms will be thwarted by the foreign jurisdiction. To compensate, state judges should give low-end-of-the-range prison terms or even probation to prevent the inmate from serving more than the length of the longer term. Alternatively, prosecutors and defenders

183. *Del Guzzi v. United States*, 980 F.2d 1269, 1271–72 (9th Cir. 1992) (Norris, J., concurring) (per curiam).

184. *Id.* at 1272–73 (emphasis added).

of the primary and secondary jurisdictions could enter agreements as to joint dispositions, which could then be ratified by both judges and enforced by prison officials.¹⁸⁵ In any case, the idea would be to check the authority of prison officials, who as Justice Scalia reminds us, are not sentencing authorities, though they certainly function like them.¹⁸⁶

On June 12, 2019, the California Supreme Court denied Antonio's habeas petition without opinion.¹⁸⁷

III. PARTIAL RELIEF AT LAST: 18 U.S.C. § 3621(b)

In Antonio's opening briefs filed in the court of appeal,¹⁸⁸ his proposed order at his 2016 re-sentencing,¹⁸⁹ and his petitions on state habeas corpus,¹⁹⁰ we asked that the BOP designate his state penitentiary as the place to run both the state and federal terms, should Antonio's request for transfer to a federal facility be denied. Recall from *Setser* that the authority for such a demand is 18 U.S.C. § 3621(b), which empowers the BOP to designate any prison it wants for federal prisoners, including a state prison where an inmate may be doing state time.¹⁹¹

Due to the constant flow of demands on the part of state prisoners looking to enforce their concurrent sentences, the BOP published a protocol for adjudicating those demands: BOP Program Statement 5160.05.¹⁹² BOP Program Statement 5160.05 states that "under ordinary circumstances, such as overcrowding in a state institution," the BOP will *not* "accept transfer of the inmate into Federal custody for

185. At the September 2014 recall of Antonio's sentence, the Deputy D.A. acknowledged: "There are cases where we do work with the feds and do some sort of global disposition if we can, but this was never anticipated to be that kind of case." 3 Reporter's Appeal Transcript, *supra* note 27, at 27–28.

186. See *Setser*, 566 U.S. at 237–38, 238 n.3; see also *id.* at 242.

187. *In re Jose Antonio*, No. S253384 (Cal. June 12, 2019) (en banc).

188. See Appellant's Opening Brief at 30, *Antonio I*, 2016 WL 310104 (Cal. Ct. App. Jan. 26, 2016) (No. D066753); Appellant's Opening Brief II, *supra* note 40, at 24, 26.

189. See 1 Supplemental Clerk's Transcript, *supra* note 83, at 5, 6 n.1.

190. Petition for Writ of Habeas Corpus, *supra* note 99, at 17–18, Ex. 9.

191. See 18 U.S.C. § 3621(b); *Setser*, 566 U.S. at 235.

192. See BOPPS 5160.05, *supra* note 2.

concurrent service.”¹⁹³ The BOP instead prefers, unless “the federal sentencing court . . . has any objections,” to designate “the state institution . . . as the place to serve the federal sentence concurrently with the state sentence”¹⁹⁴ This agency practice of designating—even retroactively¹⁹⁵—the state facility for service of the federal sentence is intended to prevent states with overcrowded prisons from dumping prisoners into the federal system.¹⁹⁶

The BOP considers several factors to evaluate a state prisoner for acceptance in a federal facility to enforce a state judgment of concurrency.¹⁹⁷ These factors include a prisoner’s disciplinary history, institutional adjustment, recommendations of the U.S. Attorney or state and federal wardens, the intent of the federal sentencing court, and any other relevant information.¹⁹⁸ No doubt the tone of the BOP policy reinforces that “concurrent sentences imposed by state judges are nothing more than recommendations to federal officials.”¹⁹⁹

On November 2, 2018, the BOP alerted the federal district court by letter that Antonio sought to enforce his concurrent sentence.²⁰⁰ It was the BOP’s position that Judge Benitez could do whatever he wanted.²⁰¹ That is, the BOP advised Judge Benitez that he was free to run the state and federal terms as he pleased, even though the state court had already run them concurrently.²⁰² The BOP letter stated:

The [BOP] strives to administer sentences in accordance with federal statutes, [BOP] policy, and the intent of the sentencing court. Should

193. *Id.* at ¶ 9b(5)(b).

194. *Id.*; *see also* 18 U.S.C. § 3621(b).

195. BOPPS 5160.05, *supra* note 2, at ¶¶ 9b(4), 10b.

196. *Id.* at ¶¶ 9b(4), 10b. In the case that such an event occurs, the cost of incarceration is borne by the state. *See* Henry J. Sadowski, *Federal Sentence Computation Applied to the Interaction of Federal and State Sentences*, 38-APR CHAMPION 38, 42 (2014).

197. BOPPS 5160.05, *supra* note 2, at ¶ 8a.

198. *Id.*

199. *See* *Del Guzzi v. United States* 980 F.2d 1269, 1272 (9th Cir. 1992) (Norris, J., concurring) (per curiam).

200. Letter from Chief John O’Brien, Designation & Sentence Computation Ctr., Fed. Bureau of Prisons, to Hon. Roger T. Benitez, U.S. Dist. Ct. J. for the So. Dist. of California (Nov. 2, 2018) (on file with author).

201. *Id.*

202. *Id.*

the Court indicate the sentence is to run concurrently with the state term, the [BOP] will commence the sentence in the above judgment on the date of imposition, which will result in the satisfaction of Mr. Antonio's federal sentence on or about July 14, 2021. Should the Court indicate the sentence is to run consecutively to the state term, Mr. Antonio's federal sentence will not commence until he completes his state sentence and is released to the federal detainer.

Please advise us at your earliest convenience, as to the Court's position on a retroactive designation in this case.²⁰³

A status hearing on Antonio's case was finally held on May 6, 2019. There, Antonio was represented by federal trial counsel, who had not heard a word from or about Antonio in the six years since Antonio had entered his plea in the federal drug case. At the close of the hearing, Judge Benitez declined to restructure Antonio's federal term as either concurrent or consecutive to his state term. Instead, Judge Benitez ran 3.2 years of the uncommenced 9.3-year federal term concurrent with the almost-expired state term and the remaining 6.1 years of the federal term consecutive to the state term.²⁰⁴

These "partially concurrent" terms would be authorized had Judge Benitez imposed them when he sentenced Antonio on his federal plea in March 2014.²⁰⁵ It makes no legal sense, however, to suggest the following: after saying *nothing* about the anticipated state term at the time of sentencing on the federal plea in March 2014, Judge Benitez could re-enter the scene in May 2019 at the BOP's invitation and run the terms partially concurrently after the state court had structured them in June 2016 to run concurrently. But there we have it. A thirty-eight-month reduction for Antonio is better than nothing, even if arrived at after years of official indirection, evasion, and resistance.

203. *Id.*

204. Criminal Docket, *supra* note 12, at ECF No. 958.

205. Where an undischarged term is based on conduct that is not relevant conduct to the federal offense, the federal sentence "may be imposed to run concurrently, partially concurrently, or consecutively" to the undischarged term "to achieve a reasonable punishment for the instant offense." U.S. SENT'G GUIDELINES MANUAL § 5G1.3(D) (U.S. SENT'G COMM'N 2018); *see* United States v. Bilus, No. 1:12CR42/AW/GRJ, 2020 WL 1522781, at *11–12 (N.D. Fla. Jan. 23, 2020).

CONCLUSION

This Article began by posing two questions. First, who gets the last word on how much time a prisoner will serve when subject to unexpired terms imposed at different times by state and federal courts? Second, may a convicted person who presents himself to federal prison authorities to serve his federal time be turned away on the ground that he has not yet completed his state time on another offense? The short answers to both the first question—the BOP—and the second question—it depends on who has primary jurisdiction—should by now be clear.

What remains unclear is whether this division of sentencing authority is at all optimal. As sovereigns, both the United States and the State of California may exact from a convicted person as much or as little punishment for a crime as they like.²⁰⁶ The United States has an interest in seeing to it that Antonio serve his 9.3-year federal term; no California judicial, legislative, or executive authority can prevent that. But neither the state nor the federal court sentenced Antonio to a 17.3-year term—a sum realizable only if the terms were structured to run consecutively, which they explicitly were not.

That Antonio is now, by the grace of the BOP and the federal sentencing court, only to do thirteen years with good time credits, is a victory of sorts. But conditioning a favorable outcome on the discretion of BOP employees points to a structural defect in our separation of powers that we should be able to do more than just point to. The state trial judge aptly summarized the issue when he told Antonio at the close of his second re-sentencing, “In theory, you win.”²⁰⁷ Ultimately, the hollowness of Antonio’s concurrent sentences betrays a friction between sister jurisdictions and among coequal branches of governments that is an affront to anyone of the mind that, in these recurring, high-stakes conflicts, deference is due the second sentencing court. These are serious matters.

206. *See, e.g.,* Heath v. Alabama, 474 U.S. 82, 88–93 (1985); *cf.* 28 U.S.C. § 1738 (requiring federal courts to give full faith and credit to state laws, court proceedings, and judgments).

207. 4 Reporter’s Appeal Transcript, *supra* note 82, at 46.