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Silent Sentences: The Procedural Tragedy of the Bureau of Prisons' Sentence Computation Policy

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Cover Page Footnote

J.D. Candidate, 2024, University of Georgia School of Law; B.A., 2020, Emory University. I owe special thanks to Senior District Court Judge W. Louis Sands and his chambers for the opportunity to encounter the case inspiring this Note and their invaluable mentorship; John Meixner for his aid in publication; my family, Holly Jordan, Payton Scott, and other colleagues for their support and their patience when listening to my rants on the subject; as well as the staff of the Georgia Law Review for their careful review. Additional thanks to Judge Todd Markle of the Court of Appeals of Georgia, Laurie Kotz, Clare Norins, Elizabeth Chamblee Burch, Anna Howard, Patrick Connor, and all others whose mentorship has developed the skills necessary to make this Note happen.

SILENT SENTENCES: THE PROCEDURAL TRAGEDY OF THE BUREAU OF PRISONS' SENTENCE COMPUTATION POLICY

Max Abramson[*]

The Bureau of Prisons has systematically lengthened sentences—at times doubling them—for prisoners subject to federal and state sentences for the same conduct. This phenomenon does not stem from any expressed intent on the part of federal or state judges, defense attorneys, the prosecution, or a plea deal. Instead, it arises through silence at a prisoner's federal sentencing on a key issue: whether the federal sentence is consecutive to or concurrent with a yet-to-be-imposed state sentence.

For those facing both a federal sentence and a yet-to-be-imposed state sentence for the same conduct, perhaps no other aspect of sentencing has a greater impact. If a federal sentence is to run concurrently with a state sentence, the time a prisoner spends in custody is credited towards both terms of imprisonment. Conversely, if a sentence is set to run consecutively, the service of one sentence hinges on the completion of the other. Years of additional lost liberty hang in the balance. Yet if a federal judge omits a few words at sentencing about the interaction between the federal and yet-to-be-imposed state sentence, the Bureau of Prisons seizes unlimited and unreviewable discretion to make the sentences consecutive.

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The scope of this discretion is breathtaking. The Bureau of Prisons can unilaterally add to a term of imprisonment even where the state judge explicitly provides for concurrency, or when the prosecution acknowledges the sentences should run concurrently. Once the error comes to light, neither the prisoner nor the sentencing federal judge have the means to rectify it. Instead, the length of imprisonment is solely left to the administrative halls of the same agency, the Department of Justice, that conducts the prosecution. While this realization has startled and dismayed several courts that encounter the issue, the procedural mechanism for administrative imprisonment and its consequences remain largely unexplored.

This Note documents the procedural tragedy of this sentence computation mechanism and delves into its tangible repercussions for those ensnared within its Kafka-esque framework. Leveraging developments in sentencing law, this Note contends that the inclusion of five simple words to 18 U.S.C. § 3584(a) is all that stands between what can be decades of arbitrary imprisonment and freedom for many. However, in the absence of such reform, this Note concludes with a plea for awareness of the issue among stakeholders in the criminal justice system to avoid this tragic fate.

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I. INTRODUCTION

> "[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."[1]
>
> —Alexander Hamilton

In 2006, Emmit Hunt stood before a judge and pleaded for the "[c]ourt to have mercy."[2] This was his sentencing hearing, and Hunt, then forty-five years old,[3] was looking at the possibility of spending the rest of his life in prison for a non-violent drug offense.[4] After thanking him for his comment, the district court judge handed down the sentence—over fifteen years in federal prison.[5] In the preceding exchange, the district court judge sternly warned that Hunt alone had "the key" to not "spend [his] time dying in jail" once he finished serving his fifteen years behind bars.[6] Shortly thereafter, marshals escorted Hunt out of the courtroom.

Within a month, Hunt was again before a judge for sentencing, this time in state court and acting pro se.[7] Hunt's state probation had been revoked for the same criminal conduct—distribution of cocaine base—and the state judge sentenced Hunt to another term of fifteen years, set "to run concurrent with the time [he would] be serving in Federal Court."[8] If the two sentences had run

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[1] THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[2] Transcript of Sentencing Hearing at 4, United States v. Hunt, No. 1:05-cr-00054 (M.D. Ga. Sept. 15, 2006), ECF No. 48 [hereinafter Sentencing Hearing].

[3] *See id.* at 5 (noting that Hunt was "the oldest defendant [the Court] had in a long time with a drug charge at 45.").

[4] *See* Supplemental Report at 1, United States v. Hunt, No. 1:05-cr-00054 (M.D. Ga. June 24, 2022), ECF No. 54 (stating that Hunt faced a sentence of up to forty years in prison for possession of cocaine base with intent to distribute).

[5] *See* Sentencing Hearing, *supra* note 2, at 7 (sentencing Hunt to 230 months in prison); *see also* Notice of Need to Amend Criminal Judgment at 1, United States v. Hunt, No. 1:05-cr-00054 (M.D. Ga. Mar. 14, 2007), ECF No. 38 (reducing the sentence to 188 months).

[6] Sentencing Hearing, *supra* note 2, at 6.

[7] *See* Transcript of Stipulation to Violation of Probation at 1, United States v. Hunt, No. 1:05-cr-00054 (M.D. Ga. Apr. 29, 2022), ECF No. 49-1 (indicating that Hunt was representing himself before the Superior Court of Dougherty County in Georgia).

[8] *Id.* at 12.

concurrently, as the state judge had explicitly intended and ordered, Hunt would have been released after fifteen years in 2021.[9]

Lamentably, Hunt was not released in 2021.[10] Instead, at sixty years old and immediately after serving fifteen years in state prison, marshals took Hunt into custody and brought him to federal prison to serve another fifteen-year sentence.[11] His new sentence would release him not in 2021 but in 2036 at the age of seventy-five.[12] The district court judge had been silent on the concurrency of the sentence, and despite the state judge's explicit order for the sentences to run concurrently, the federal agency in charge had decided that Hunt's two sentences were consecutive.[13] Unfortunately for Emmit Hunt, contrary to the district judge's warning, the Bureau of Prisons (BOP) had secretly held his "key" to leaving prison alive all along.

This unfortunate outcome is not unique to Emmit Hunt.[14] After a first pass by the district judge at sentencing, the BOP decides the

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[9] *See* Motion for a Reduced Sentence Based on the First Step Act and 18 U.S.C. § 3582(c)(1)(B) at 7, United States v. Hunt, No. 1:05-cr-00054 (M.D. Ga. Apr. 29, 2022), ECF No. 49 [hereinafter Motion for Reduced Sentence] (noting that, had the Bureau of Prisons credited the state sentence, Hunt would have already been released).

[10] *See id.* (noting Hunt had not yet been released in 2022).

[11] *See id.* at 3 (documenting that Hunt was taken into custody by the BOP to serve a fifteen-year sentence following his state incarceration).

[12] *See* Order at 1, United States v. Hunt, No. 1:05-cr-00054 (M.D. Ga. Aug. 8, 2022), ECF No. 62 (noting Hunt being taken into custody after serving his state sentence).

[13] *See* Motion for Reduced Sentence, *supra* note 9, at 7 ("If the BOP credited him the time supposed to have been concurrent, he would be a free man today. It has not done so, making his current release date May 3, 2036."). *See id.* (noting that the district court had failed to clarify the concurrency of Hunt's sentence despite the state judge's intent for the sentence to run concurrently).

[14] *See* Todd Bussert, *The Federal Bureau of Prisons, in* 2 DEFENDING A FEDERAL CRIMINAL CASE 19-809, 19-820 (Carson P. Baucher, Matthew C. Binninger & Cassandra L. Lopez eds., 2016) ("Inmates frequently complain that they are not receiving credit due for time served or based on concurrent state sentences. . . . Counsel should thus be wary of making any assurances to clients about credit for time served."); *see also* Stephen R. Sady, *State Sovereignty and Federal Sentencing: Why de facto Consecutive Sentencing by the Bureau of Prisons Should Not Survive* Bond v. United States, 27 FED. SENT'G REP. 56, 58 (2014) ("[T]ragically for some prisoners, the BOP has continued its practice of creating de facto consecutive sentences when the federal judgment is silent on concurrency, even where the state court ordered its sentence to be served concurrently with an already-imposed federal sentence."); United States v. Delacruz, No. 16-cr-262-3, 2019 WL 5203747, at *1 (S.D.N.Y. Oct. 1, 2019) (reviewing a prisoner's consecutive sentence resulting from a district court's silence on concurrency, even with a state judge order to the contrary); Luna v. Warden, FCI-

fate of all prisoners incarcerated by the federal government via an opaque and discretionary computation mechanism—the BOP's method is unknown even to many federal judges.[15] The BOP's central role, one of the most critical for maintaining the proper functioning of the justice system, is to ensure that sentences are computed correctly so that prisoners are not kept in prison longer than the sentencing court intended. In this role, the BOP has repeatedly fallen short due to negligence and apathy in applying computation standards, and thus "thousands of prisoners, some who could be released today, languish in prison."[16] In 2016, the Office of the Inspector General estimated that, over a five-year period, 4,340 prisoners suffered from what is euphemistically called "untimely release."[17] In such circumstances, "the consequences of an untimely

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Berlin, No. 17-cv-510, 2019 WL 937480, at *1 (D.N.H. Feb. 1, 2019) (highlighting that the "BOP denied Luna's request for federal sentencing credit for the time he served in state custody").

[15] *See* Robert M. Simels, *Do Lawyers Adequately Address Their Client's Prison Existence?*, N.Y.L.J. (Sept. 29, 2022, 4:00 PM), https://www.law.com/newyorklawjournal/2022/09/29/do-lawyers-adequately-address-their-clients-prison-existence [https://perma.cc/8PZ8-4BPM] ("[M]ost judges and lawyers (particularly defense lawyers) are not familiar with Bureau of Prisons (BOP) considerations and practices that could negatively impact defendants throughout their incarceration. Indeed, that lack of knowledge may cause federal judges to impose sentences far more onerous than they intend without sufficient pushback from the defendants' lawyers."); *see also* United States v. Wilson, 503 U.S. 329, 335–36 (1992) (holding that the Attorney General has the sole authority to determine sentence computation through the BOP); *see generally Sentence Computations*, BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/sentence_computations.jsp [https://perma.cc/8FXV-2V9P] (describing the process and mechanisms for BOP sentence computation).

[16] Walter Pavlo, *First Appearance by Bureau of Prisons Director Falls Shorts on Facts*, FORBES (Oct. 1, 2022, 11:30 AM), https://www.forbes.com/sites/walterpavlo/2022/10/01/first-appearance-by-bureau-of-prisons-director-falls-shorts-on-facts/?sh=6ccc256e7a9b [https://perma.cc/ULC8-QYTH]; *see also* Walter Pavlo, *Bureau of Prisons Holding Inmates for Longer Than Law Allows,* FORBES (July 6, 2022, 12:58 PM), https://www.forbes.com/sites/walterpavlo/2022/07/06/bureau-of-prisons-holding-inmates-for-longer-than-law-allows/?sh=2772f27f36e6 [https://perma.cc/769P-ECVN] ("[T]here are reports from around the country that the BOP is not providing accurate information to prisoners . . . and some are staying in prison longer than necessary.").

[17] OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS' UNTIMELY RELEASE OF INMATES 5 (2016), https://oig.justice.gov/reports/2016/e1603.pdf [https://perma.cc/H89F-A6SN] [hereinafter REVIEW OF UNTIMELY RELEASE].

release can be extraordinarily serious" and "deprive inmates of their liberty."[18]

One of the most common causes of a significantly lengthened sentence computation involves a simple oversight on the part of the district court during the sentencing hearing. These errors occur when the sentencing court fails to put on the record whether a yet-to-be-imposed state sentence is to run concurrently or consecutively to the instant federal sentence.[19] Where the district court is silent regarding an anticipated but not-yet-imposed state sentence, the BOP presumes the sentences run consecutively, regardless of the explicit intent and order of the state judge in the later sentencing.[20] Indeed, "[i]t is well settled that the state court's intent is not binding, so the state court's action raises the defendant's expectations but does not resolve the issue" and holds no power whatsoever to determine the concurrency of the sentence it hands down.[21] This presumption of consecutive sentences seems strange,

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[18] *Id.* at ii; *see also* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences,* 4 WAKE FOREST J.L. & POL'Y 151, 174 (2014) ("[G]iven that the economic costs of long-term incarceration can be hundreds of thousands of taxpayer dollars, the 'stakes' for society . . . are also quite significant.").

[19] *See* REVIEW OF UNTIMELY RELEASE, *supra* note 17, at iii ("We concluded that the most common sentence computation errors resulted from . . . incorrect determinations of primary jurisdiction between federal and state custody[] and errors relating to concurrent versus consecutive sentences . . . ."); *see also* Reynolds v. Thomas, 603 F.3d 1144, 1155 (9th Cir. 2010) (Fletcher, J., concurring) ("[T]here are no statistics showing how often a federal sentencing judge desires to impose a sentence that will run concurrently with a yet-to-be-imposed sentence but is unable to achieve that result . . . . [I]t is obvious that under the law . . . there is a problem in effectuating the sentencing intention of a federal judge . . . .").

[20] *See* Jamie Markham, *Federal-State Sentence Interaction: Concurrent and Consecutive Sentences*, UNIV. OF N.C.: N.C. CRIM. L. (Apr. 25, 2019, 10:24 PM), https://nccriminallaw.sog.unc.edu/federal-state-sentence-interaction-concurrent-and-consecutive-sentences/ [https://perma.cc/2HBR-6YWK] ("[A]bsent specific instruction from the federal judge, BOP's default analysis under 18 U.S.C. § 3584(a) will be that sentences imposed at different times run consecutively."); *see also* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PS 5880.28, SENTENCE COMPUTATION MANUAL 1-32A (1997) (noting that "[i]f the federal sentence is silent" the sentence is considered consecutive and time served is not credited towards the federal sentence "until the U.S. Marshals' [sic] Service or the Bureau of Prisons gains exclusive custody of the prisoner"); Fults v. Sanders, 442 F.3d 1088, 1090 (8th Cir. 2006) (stating that "[t]here is no question that § 3621(b) provides the BOP with broad discretion to choose the location of an inmate's imprisonment" and thus the BOP has broad discretion in deciding when an inmate is considered to enter exclusive custody).

[21] Fegans v. United States, 506 F.3d 1101, 1104 (8th Cir. 2007); *see also* Elwell v. Fisher, 716 F.3d 477, 482 (8th Cir. 2013) ("The non-binding nature of the state court's intentions are,

given that the current version of United States Sentencing Guidelines § 5G1.3 provides that, for the same relevant conduct, "the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment."[22] But, as these guideline statements are no longer binding, the BOP is at liberty to presume the opposite and compute the sentence as consecutive.[23] While the simplest solution would be for the BOP to simply contact the federal sentencing court for clarification regarding intent, it is under no statutory or constitutional obligation to do so, and BOP policy is to assume such a sentence is consecutive.[24] Indeed, while "one might reasonably expect the BOP to exercise its discretion to weigh heavily what the state judge *did say*," its internal policy assumes the opposite.[25]

Thus, the BOP, with near impunity, can take federal judges' silence as an opportunity to double a sentence, adding what can be decades. The BOP has the power to do this despite no clear intent to do so from the federal judge and an explicit order to the contrary from the state judge.[26] This is perhaps the greatest possible injustice

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understandably, frustrating to criminal defendants . . . ."); Jake v. Herschberger, 173 F.3d 1059, 1066 (7th Cir. 1999) (holding that state judges cannot decide concurrency); Bloomgren v. Belaski, 948 F.2d 688, 691 (10th Cir. 1991) (discussing the same).

[22] U.S. SENT'G GUIDELINES MANUAL § 5G1.3(c) (U.S. SENT'G COMM'N 2018).

[23] *See* United States v. Lynn, 912 F.3d 212, 217 (4th Cir. 2019) (finding that, notwithstanding § 5G1.3(c), "because the Guidelines are advisory, a district court is not obligated to impose a concurrent sentence" and "recognizing an exception . . . that . . . 'a district court may have inadequate information and may forbear'" from making any determination at all (quoting Setser v. United States, 566 U.S. 231, 242 (2012))).

[24] *See* 18 U.S.C. § 3584(a) [hereinafter § 3584] ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."); *see also* Wahid v. Williams, No. 19-3851, 2020 WL 5412791, at *2 (6th Cir. Aug. 13, 2020) ("[Plaintiff] asserts that the record does not show that the BOP contacted the sentencing court about his request for a retroactive concurrent designation . . . . Neither § 3621(b) nor the applicable program statement requires the BOP to contact the sentencing court."); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PS 5880.28, SENTENCE COMPUTATION MANUAL 1-32A (1997) ("On occasion, a federal court will order the federal sentence to run . . . consecutively to a not yet imposed term of imprisonment . . . . If the federal sentence is silent . . . then the federal sentence shall not be placed into operation until the U.S. Marshals' [sic] Service or the Bureau of Prisons gains exclusive custody of the prisoner.").

[25] Mangum v. Hallembaek, 824 F.3d 98, 103 (4th Cir. 2016).

[26] *See* Del Guzzi v. United States, 980 F.2d 1269, 1272–73 (9th Cir. 1992) (Norris, J., concurring) ("State sentencing judges and defense attorneys in state proceedings should be put on notice. [Federal prison officials] remain free to turn those concurrent sentences into

in sentencing, as "the consecutive v. concurrent question may have greater practical consequences than any other aspect of the sentence."[27]

As a method of finding relief, prisoners have the right to request a retroactive *nunc pro tunc*[28] designation of their state prison as the place to serve their federal sentence from the BOP, thus using this administrative mechanism to effectively make the federal sentence concurrent with the state sentence.[29] This is the primary method to prevent doubling a prisoner's sentence, but it is not absolute.[30] As explained in Section II.D, internal BOP policy and the lack of meaningful review thereof puts such relief out of the hands of prisoners. Compounding the issue, Section III.A demonstrates that prisoners have no access to judicial review of the BOP's *nunc pro tunc* designation decisions. Considering this deeply flawed procedure, Section III.B argues for a five-word amendment to § 3584 to provide prisoners a method of relief that will end unlawful and immoral BOP administrative imprisonment.

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consecutive sentences by . . . refusing to credit the time the prisoner spent in state custody. I hope . . . state judges will . . . sentenc[e] . . . in a manner which avoids the unintended and unjust result reached today.").

[27] United States v. Mzembe, 979 F.3d 1169, 1173 (7th Cir. 2020).

[28] The term *nunc pro tunc*, or "now for then," refers to a ruling which retroactively corrects an earlier ruling to be as if the new ruling were the original ruling entered. For a more in-depth explanation of the origins and effect of *nunc pro tunc* orders, see United States v. Gillepsie, 666 F. Supp. 1137, 1139–40 (N.D. Ill. 1987).

[29] *See* Barden v. Keohane, 921 F.2d 476, 483–84 (3d Cir. 1990) (providing the right for prisoners to challenge BOP computation and request a *nunc pro tunc* designation from the BOP); *see also* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PS 5160.05, DESIGNATION OF STATE INSTITUTION FOR SERVICE OF FEDERAL SENTENCE 5 (2003) [hereinafter PS 5160.05] (adopting *Barden*'s finding as national policy to permit administrative *nunc pro tunc* prisoner challenges). For the guiding factors the BOP should consider in conducting a *nunc pro tunc* review for designation of the place of imprisonment, see 18 U.S.C. § 3621(b)(1)–(4).

[30] *See* Markham, *supra* note 20 ("If that [concurrent] designation isn't made initially, the defendant has *some* prospect of petitioning BOP to do it later, *nunc pro tunc* to the date on which the federal sentence was imposed." (emphasis added)).

II. BACKGROUND

A. THE RISE, FALL, AND RESURRECTION OF JUDICIAL DISCRETION

The administration of justice in the United States "consists of a series of discretionary decisions," a feature of the justice system so pervasive that the "point is now a truism among experts on criminal justice."[31] Sentencing discretion is of special significance as, for much of American history, judges had nearly unlimited sentencing discretion without any appellate review of their sentencing decisions.[32] Sentencing discretion dates back to the English common law, which granted power over the concurrency vs. consecutive decision entirely to the judge, rather than the jury.[33] Yet, over time, this judicial discretion in sentencing became a wellspring of great dissatisfaction and prompted calls for reform.[34] Some historians have gone so far as to say that "[t]he history of criminal justice reform is largely the history of attempting to control decision-making discretion."[35]

In line with these trends, both caselaw and structural constraints developed to significantly limit the scope of judicial discretion

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[31] SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990, at v (Nancy Lane ed., 1993).

[32] *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–26 (1993) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion . . . . For over two hundred years, there was virtually no appellate review of the trial judge's exercise of sentencing discretion.").

[33] *See* Oregon v. Ice, 555 U.S. 160, 168 (2009) ("The historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently. Rather, the choice rested exclusively with the judge."); *see also* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 9:22 (2022 update) ("Firmly rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges."); The Queen v. Cutbush [1867] 2 L.R.Q.B. 379 at 382 (Eng.) (finding sentencing discretion in the concurrency vs. consecutive decision goes "as far back as living judicial memory can go . . . to make the sentence of imprisonment . . . commence at the expiration of the sentence first awarded").

[34] *See* WALKER, *supra* note 31, at 141–43 (outlining the history and early successes of the sentencing reform movement).

[35] Jeffery T. Ulmer & Michael T. Light, *The Stability of Case Processing and Sentencing Post*-Booker, 14 J. GENDER, RACE & JUST. 143, 143 (2010).

within the last century.[36] These restraints came to a head with the introduction of federal sentencing guidelines in 1986.[37] The guidelines mandated certain sentences, granting both defendants and the government the right to appeal sentences in violation of the sentencing guidelines and essentially doing away with judicial sentencing discretion outside of a set limit.[38] However, a line of cases, culminating with *United States v. Booker*, loosened the chains of the sentencing guidelines on judicial discretion in sentencing.[39] These cases established a more expansive vision of federal sentencing discretion by limiting the sentencing guidelines to a merely advisory role.[40]

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[36] *See* Eric G. Barber, *Judicial Discretion, Sentencing Guidelines, and Lessons from Medieval England, 1066-1215*, 27 W. NEW ENG. L. REV. 1, 6–7 (2005) ("A variety of structural mechanisms limit the discretion of federal trial court judges: the long-term trend to codify laws, the jury, appellate review, and jurisdiction." (footnote omitted)).

[37] Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States v. Fanfan, 56 MERCER L. REV. 1131, 1133 (2005) ("For almost a century, until the federal sentencing guidelines went into effect in 1986, federal judges wielded broad discretion under an indeterminate sentencing system . . . ." (footnote omitted)); *see generally* U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2018) (the guidelines that were first introduced in 1986).

[38] *See* Cakmis, *supra* note 37, at 1133 ("The discretion of federal judges was sharply curtailed because they were required to impose a sentence mandated by the federal sentencing guidelines, which were mandatory and binding. . . . The government as well as defendants were given rights to appeal sentences that were imposed in violation of the federal sentencing guidelines.").

[39] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (finding that a mandatory application of the sentencing guidelines violates the Sixth Amendment, making sentencing guidelines merely advisory); *see also* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 441 (2010) ("[T]o phrase the point in terms of judicial discretion, the pre-*Booker* Guidelines severely constrained judicial sentencing discretion, while the *Booker* remedial opinion markedly relaxed controls on that discretion.").

[40] *See* Cakmis, *supra* note 37, at 1134–54 (chronicling the timeline of Supreme Court constitutional review of the sentencing guidelines and concluding cases such as Booker substantially expanded sentencing discretion). However, this is not to say that all Supreme Court decisions regarding the sentencing guidelines strictly expanded judicial discretion. Notably, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), rejected the power of judicial discretion to make findings of legal elements for sentence enhancement, instead requiring that juries make these findings. Regardless, the Supreme Court described *Apprendi*'s holding as an exception to the historical role of sentencing discretion. *Id.* at 496.

B. *SETSER*'S PROMISE

In general, the BOP has extremely broad discretion over the service of sentences and the crediting of time served, including the authority to determine how a sentence shall be computed in the interaction between state and federal sentences. The Attorney General has delegated to the Director of the BOP the power to determine the place of imprisonment, including the power to grant *nunc pro tunc* designation at a state facility.[41] This delegation of authority provides the BOP the sole authority to determine credit for time served and strips such determinations from the purview of the federal courts.[42]

However, the Supreme Court limited the BOP's discretion substantially in the early 2010s. Building on the foundation of *Booker*, the Supreme Court went on to clarify the possibility of concurrent versus consecutive sentences with a pending state sentence.[43] Resolving a circuit split in 2012, the Supreme Court reinforced federal sentencing discretion in *Setser v. United States* by deciding that 18 U.S.C. § 3584 permitted federal judges to impose sentences concurrently or consecutively to state sentencing that is pending for the same criminal conduct.[44] Finding it necessary that

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[41] *See* 28 C.F.R. § 0.96(c) (2023) (granting the Director of the BOP the authority to "[d]esignat[e] places of imprisonment or confinement where the sentences of prisoners shall be served and [to order] transfers from one institution to another."); *see also* Henry J. Sadowski, *Federal Sentence Computation Applied to the Interaction of Federal and State Sentences*, CHAMPION, Apr. 2014, at 38, 38 (explaining the history of delegation of authority to compute sentences to the Director of the BOP and other statutory grounds).

[42] *See* United States v. Wilson, 503 U.S. 329, 333–34 (1992) (determining that only the Attorney General—through the BOP—may award credit for time served, while district courts cannot); *see also* United States v. Walker, 917 F.3d 989, 993–94 (7th Cir. 2019) ("[W]e have repeatedly recognized that 'it is the Attorney General,' acting through the BOP, 'and not the sentencing court, that computes the credit due under § 3585(b).' This is consistent with the approach in every other circuit." (quoting United States v. McGee, 60 F.3d 1266, 1272 (7th Cir. 1995))).

[43] *See* Setser v. United States, 566 U.S. 231, 239–41 (2012) (evaluating the interaction between federal and state authority when a federal judge sentences a prisoner before a then-pending state sentence).

[44] *See generally id.* at 231–45 (finding that, due to the longstanding common law tradition, federalism concerns, and lack of clear intent to the contrary, federal judges retain the authority to decide the concurrency issue for a prisoner subject to a yet-to-be-imposed state prison term).

"sentencing not be left to employees of the same Department of Justice that conducts the prosecution," the majority decided that the determination of concurrent versus consecutive should lie with the first decisionmaker, the federal judge, rather than in the administrative halls of the BOP.[45]

In *Setser*, the Supreme Court relied heavily on § 3584, which is still in force today with no changes to its language since the 2012 decision.[46] The Court in *Setser* noted that "[w]hen § 3584(a) specifically addresses decisions about concurrent and consecutive sentences, and makes no mention of the Bureau's role in the process, the implication is that no such role exists."[47] However, the Court qualified that assertion with the idea that there is a role "where the Bureau of Prisons comes in . . . to determine how long the District Court's sentence authorizes it to continue [a defendant's] confinement."[48] Regarding potential remedies, the Supreme Court left defendants with administrative requests for *nunc pro tunc* relief and writs of habeas corpus.[49] The Court's goal was to prevent unpredictable administrative sentencing, specifically due to concerns about whether state courts would be unable to appropriately determine a sentence that could then be made concurrent or consecutive after the fact.[50] Even before *Setser*, the BOP had adopted the Court's eventual finding that federal judges could make the concurrency decision for a yet-to-be-imposed sentence years earlier.[51] The major distinction from the BOP's

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[45] *Id.* at 242–43.

[46] *Compare* 18 U.S.C. § 3584 (2023), *with* 18 U.S.C. § 3584 (2012) (showing no change to the statute).

[47] *Setser*, 566 U.S. at 239.

[48] *Id.* at 244.

[49] *See id.* ("[The defendant] may raise his claim through the Bureau's Administrative Remedy Program. And if that does not work, he may seek a writ of habeas corpus." (citation omitted)).

[50] *Id.* at 241 ("[I]t is always more respectful of the State's sovereignty for the district court to make its decision up front rather than for the Bureau of Prisons to make the decision *after* the state court has acted. That way, the state court has all of the information before it when it acts. The Government's position does not promote the States' interest—just the interests of the Bureau of Prisons.").

[51] FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PS 5880.28, SENTENCE COMPUTATION MANUAL 1-32A (1997) ("On occasion, a federal court will order the federal sentence to run concurrently with or consecutively to a not yet imposed term of imprisonment. Case law

preexisting understanding was that the Supreme Court attempted to strip the BOP of the power to make that determination on its own. However, the Court made a major omission, the impact of which is discussed below, by not addressing the limits of the BOP's discretionary authority to make such determinations when a federal court remains silent.

C. A FAILURE OF RESTRAINT

Instead of reversing the trend away from federal sentencing discretion and adhering more faithfully to the principles of federalism, the *Setser* decision has led to the opposite effect in the case of a silent sentence on concurrency.[52] A silent court gives the BOP almost unlimited discretion in determining the issue of concurrent versus consecutive sentencing where the district court was unclear in its determination on the record.[53] While a federal court holds statutory authority to determine whether a sentence is consecutive in the first instance, the BOP can exercise sole discretion over that determination if the court is silent on the issue at sentencing.[54] The BOP's internal computation and appeals mechanisms post-*Setser* created a procedural oversight which is systematically extending the sentences of prisoners who have received a federal sentence preceding their state sentence without any corresponding intent from parties involved in the original

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supports a court's discretion to enter such an order and the federal sentence shall be enforced in the manner prescribed by the court.").

[52] Sady, *supra* note 14, at 59 (finding that principles of federalism post-*Setser* require that statutes "be interpreted to bar BOP action that, in the face of a silent federal judgment, executes a sentence in a manner inconsistent with the state judgment that the state sentence should run concurrently with the federal sentence").

[53] *See supra* notes 20–21 and accompanying text.

[54] Dotson v. Kizziah, 966 F.3d 443, 446 (6th Cir. 2020) ("To be sure, § 3621(b) 'does not confer authority to [the BOP to] choose between concurrent and consecutive sentences,' nor does it 'giv[e] the [BOP] what amounts to sentencing authority.' But at the same time, the Supreme Court has explained, 'someone must decide the issue.' And when the federal court is silent, that 'someone' ultimately is the BOP." (alteration in original) (quoting *Setser*, 566 U.S. at 237–39)).

proceedings.[55] This outcome is incongruous with the rationale of *Setser* and reproduces the precise problem *Setser* sought to resolve.[56]

Furthermore, the resulting BOP *de facto* sentencing violates other Supreme Court precedents rejecting federal overreach into state powers of determining concurrency.[57] Restriction of a state's powers to define the service of a criminal sentence is perhaps the greatest crime against federalism.[58] Various courts have recognized this inapposite result, at times even pleading for congressional intervention.[59] When reviewing such cases, courts are often "sympathetic to [a d]efendant's plight"[60] for the "unintended and unjust result"[61] that leaves decades of liberty "to little more than random chance."[62] Unfortunately, courts can do very little. The question then becomes whether there is anything prisoners can do to challenge the denial of *nunc pro tunc* relief in a federally silent sentence. In *Setser,* the Supreme Court provided *nunc pro tunc*

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[55] Sady, *supra* note 14, at 60 (finding that preventing the BOP's power to incarcerate after federal silence would "avoid the human and administrative costs inherent in the imposition of significantly longer sentences than anticipated by either sentencing court" and that "[b]y failing to do so, the courts fail to protect prisoners against over-incarceration resulting from the violation of their fundamental constitutional rights").

[56] *See id.* (arguing that if the courts followed the Supreme Court's holding in *Setser* and other cases, the courts would "restore the constitutional balance between state and federal criminal jurisdictions").

[57] *See* Oregon v. Ice, 555 U.S. 160, 171 (2009) ("To hem in States by holding that they may not equally choose to make concurrent sentences the rule, and consecutive sentences the exception, would make scant sense.").

[58] *See id.* at 170–71 ("Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status . . . . This Court should not diminish that role absent impelling reason to do so.").

[59] Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 73–74 (2d Cir. 2005) ("[The Defendant] applied to the BOP for [a *nunc pro tunc*] designation and it was denied . . . . However, because incompatible federal rulings . . . raise fundamental questions concerning federalism and the separation of powers, and because these issues may warrant congressional attention, we direct the Clerk of Court to forward a copy of this opinion to the Chairs and the Ranking Members of the House and Senate Judiciary Committees.").

[60] United States v. Tallie, No. 3:11-CR-8, 2013 WL 12214392, at *2 (M.D. Ala. May 23, 2013).

[61] Del Guzzi v. United States, 980 F.2d 1269, 1273 (9th Cir. 1992) (per curiam).

[62] Cozine v. Crabtree, 15 F. Supp. 2d 997, 1004 (D. Or. 1998).

requests and habeas petitions as a method of relief for prisoners. However, neither supply the relief the Court intended.[63]

D. THE KAFKA-ESQUE *NUNC PRO TUNC* REQUEST SYSTEM AND THE FAILURE OF DISTRICT COURT OVERSIGHT.

Under *Barden*, prisoners have the right to request *nunc pro tunc* relief from the BOP's sentencing determinations, which can designate their state imprisonment for service of a federal sentence retroactively.[64] This result comes via the BOP's Administrative Remedy Program, permitting "an inmate to seek formal review of an issue relating to any aspect of his/her own confinement."[65] The BOP must consider these requests; however, "there is no obligation . . . for the Bureau to grant the request."[66] In so doing, the BOP must take into account various factors, including the resources of the facility, the nature and circumstances of the offense, the history and characteristics of the prisoner, the sentencing court's intent, and Sentencing Commission guidelines.[67] If the BOP grants the prisoner's request, the service of their state sentence is considered credited toward their federal sentence retroactively.[68] In effect, their sentence is made as though it was concurrent from the start.[69]

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[63] *See* Setser v. United States, 566 U.S. 231, 244 (providing administrative *nunc pro tunc* requests and habeas petitions as available relief for failure to credit time on a state sentence towards service of a federal sentence); *see also* discussion *infra* sections II.D & III.A.

[64] *See supra* note 29 and accompanying text.

[65] 28 C.F.R. § 542.10 (2023).

[66] *See* PS 5160.05, *supra* note 29, § 9(b)(4)(a).

[67] *See* 18 U.S.C. § 3621(b)(1)–(5) (listing factors the BOP must consider when determining the place of imprisonment).

[68] *See* Sadowski, *supra* note 41, at 41 ("[A] federal sentencing court has inherent authority to order a federal sentence be served either concurrently with or consecutive to a state sentence yet to be imposed. To allow the federal sentence to commence, the BOP designates the state correctional institution (the primary custodian) for service of the federal sentence. . . . [T]his designation may be made *nunc pro tunc* no earlier than the date of federal sentencing.").

[69] *See* Mangum v. Hallembaek, 910 F.3d 770, 773 (4th Cir. 2018) ("The BOP's refusal to grant *nunc pro tunc* relief, along with its sentencing computation, 'effectively determined that the previously imposed federal sentence would be served consecutively to the later imposed state sentence,' even though 'the clearly expressed intent of the state sentencing court [was] that its sentence be served concurrently with the federal sentence.'" (quoting Mangum v. Hallembaek, 824 F.3d 98, 101 (4th Cir. 2016))).

In some cases, this can lead to the prisoner's immediate release.[70] Prisoners must comply with this step and exhaust the Administrative Remedy Program options for *nunc pro tunc* relief before seeking habeas review.[71]

Here, it would seem, is where the nightmare ends, as the BOP's Program Statement (PS) 5160.05 requires that, "if a designation for concurrent service may be appropriate," the BOP "will send a letter to the sentencing court . . . inquiring whether the court has any objections."[72] Further, PS 5160.05 § 9(b)(3) indicates clear internal guidance permitting a district court to provide a *nunc pro tunc* order designating a state facility for the service of a federal sentence retroactively.[73] Therein, it provides that the sentencing court may "order concurrent service of the federal sentence at some time after its imposition" which "may occur when primary jurisdiction resided with the state and the court believed mistakenly that the inmate was in federal custody for service of the federal sentence."[74] Thus, the BOP has seemingly provided a mechanism for relief via this internal guidance.

However, the use of PS 5160.05 is not as straightforward as it appears. PS 5160.05 § 9(b)(4)(c) provides an illusory guarantee to prisoners that the BOP will reach out to the sentencing court to clarify silent sentences upon their request.[75] This is so because PS 5160.05 § 9(b)(4)(e) provides that "[n]o letter need be written if it is

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[70] *See* Federal Bureau of Prisons Frequently Asked Questions, Bureau of Prisons (2017), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2017/BOP_FAQ.pdf [https://perma.cc/NT95-5WHD] ("If . . . the Bureau determines a nunc pro tunc designation to the state facility where the inmate was incarcerated is appropriate, the inmate's sentence will be calculated as commencing concurrently on the date of its imposition or on a later date that will not cause to the inmate to be a late release."); *see also, e.g.*, Jefferson v. Berkebile, 688 F. Supp. 2d 474 (S.D. W. Va. 2010) (granting a *prisoner's nunc pro tunc* request for designation of state custody for service of a federal sentence and directing the BOP to "release Petitioner from custody forthwith" (emphasis added)).

[71] *See* Rodriguez v. Lamer, 60 F.3d 745, 747 (11th Cir. 1995) ("[A]n inmate must typically exhaust his or her administrative remedies with the BOP before seeking judicial relief.").

[72] *See* PS 5160.05, *supra* note 29, § 9(b)(4)(c).

[73] *See id.* § 9(b)(3) ("The court may, from time to time, order concurrent service of the federal sentence at *some time after its imposition*. This may occur when primary jurisdiction resided with the state and the court *believed mistakenly that the inmate was in federal custody for service of the federal sentence* on the date of imposition." (emphasis added)).

[74] *Id.*

[75] *See supra* note 68 and accompanying text.

determined that a concurrent designation is not appropriate."[76] As the statutory guidance provides that silence means a sentence is consecutive, a concurrent sentence is, in practice, deemed impossible and no letter is ever written.[77] Further, a program statement, standing alone, is not sufficient as an avenue for relief. Program Statements are entitled to limited deference and provide guidance only insofar as they may persuade.[78] The program statement clearly indicates that the BOP interprets the authority of the court to include the power to make such an order binding on the BOP.[79] Yet, despite this assurance, the program statement binds neither the courts nor the BOP and receives limited deference.[80] Indeed, courts provide strong, almost universal, deference to the BOP's administrative review determinations of *nunc pro tunc* relief where a federal court is initially silent.[81] Even errors in determining the support of a sentencing court for a *nunc pro tunc* request are not sufficient to overturn a BOP determination so long as the other

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[76] *See* PS 5160.05, *supra* note 29, § 9(b)(4)(e).

[77] *See* 18 U.S.C. § 3584(a) ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."); *see also* Wahid v. Merlak, No. 1:17CV01900, 2019 WL 3893242, at *6 (N.D. Ohio Apr. 15, 2019) ("[T]he record . . . may lack details as to whether the BOP contacted [the] Judge . . . regarding [the Defendant's] request for retroactive designation. However, the BOP was not required to do so, and therefore, there was no error . . . . Indeed, pursuant to BOP Program Statement 5160.05 . . . . [t]his informing-gathering process *may* include a letter to the sentencing court . . . .").

[78] *See* Fristoe v. Thompson, 144 F.3d 627, 631 (10th Cir. 1998) ("Where the agency's interpretation of the statute is made informally, however, such as by a 'program statement,' the interpretation is not entitled to *Chevron* deference, but will instead be considered only to the extent that it is well-reasoned and has 'power to persuade.'" (quoting S. Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 834 (10th Cir. 1997))).

[79] *See supra* note 69 and accompanying text.

[80] *See* Barden v. Keohane, 921 F.2d 476, 483 (3d Cir. 1991) ("[I]t is the statute and not the Program Statement that gives the Bureau the power to correct any mistake it may have made . . . . While the statute wisely requires the Bureau to solicit the views of the sentencing judge whenever possible, his decision is not controlling under the statute . . . .").

[81] *See id.* (noting that review of *nunc pro tunc* designations is limited to abuse of the BOP's "wide discretion to designate the place of confinement for purposes of serving federal sentences of imprisonment"); *see also* Fegans v. United States, 506 F.3d 1101, 1105 (8th Cir. 2007) (finding that "the BOP finding must be upheld" where there are no facts on the record as to the district court's intent).

relevant statutory factors are considered.[82] In this context, there is very little chance of a federal court finding, other than in perhaps the most extreme cases, that the BOP has exceeded its authority or acted in a way not permitted by law.

The question remains whether BOP noncompliance with the Program Statement overcomes these presumptions and provides a mechanism for relief. When a prisoner challenges the duration of their sentence or computation methods via appellate review, the proper challenge is brought as a habeas petition, pursuant to 28 U.S.C. § 2241, for "custody in violation of the Constitution or laws or treaties of the United States."[83] The usual form of a habeas challenge to the denial of a *nunc pro tunc* petition reviews the BOP's determination for compliance with the law under an abuse of discretion standard.[84]

Whether the BOP's failure to follow review procedures outlined in PS 5160.05 constitutes an abuse of discretion is "a difficult question, one which has not been squarely addressed in . . . any . . . Circuit."[85] Notably, dicta in multiple circuits suggests that failure to adhere to PS 5160.05 in conducting a *nunc pro tunc* review may constitute an abuse of discretion under some circumstances.[86]

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[82] *See* Davis v. Johns, No. 5:10-HC-2021, 2011 WL 4443200, at *3 (E.D.N.C. Sept. 23, 2011) ("[T]he BOP fully considered all the required factors. Although the BOP may have erred in finding that the sentencing court did not support [the Defendant's] application . . . any such error is insufficient to overturn the BOP's ultimate decision to deny [the Defendant's] application.").

[83] 28 U.S.C. § 2241(c)(3); *see* Adams v. United States, 372 F.3d 132, 135 (2d Cir. 2004) ("Section 2241 by contrast is the proper means to challenge the *execution* of a sentence. In a § 2241 petition a prisoner may seek relief from such things as . . . computation of his sentence . . . . "); United States v. Jalili, 925 F.2d 889, 893–94 (6th Cir. 1991) (noting a habeas petition under § 2241 is the proper method to challenge sentence computation and place of imprisonment); Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000) (per curiam) ("Generally, motions to contest the legality of a sentence must be filed under § 2255 . . . while petitions that challenge the manner, location, or conditions of a sentence's execution must be brought pursuant to § 2241 . . . .").

[84] *See Barden*, 921 F.2d at 478 (finding the standard of review for BOP denial of *nunc pro tunc* relief is abuse of discretion); *see also Fegans*, 506 F.3d at 1105 (reviewing denial of *nunc pro tunc* relief on an abuse of discretion standard); Taylor v. Lariva, 638 F. App'x 539, 541 (7th Cir. 2016) (same); McCarthy v. Doe, 146 F.3d 118, 123 n.4 (2d Cir. 1998) (same).

[85] Mitchell v. Lara, No. 11 Civ. 1540, 2011 WL 5075117, at *5 (S.D.N.Y. Oct. 25, 2011).

[86] *See* Dunn v. Sanders, 247 F. App'x 853, 854 (8th Cir. 2007) (per curiam) (finding that the BOP's failure to follow the guidelines set in PS 5160.05 required remand to the district court to order the BOP to reconsider the prisoner's request); *cf.* Goodman v. Grondolsky, 427 F.

Nevertheless, a habeas petition cannot lie solely for failure to follow a program statement. Agency rules published after notice-and-comment are reviewable for abuse of discretion under the Administrative Procedures Act.[87] However, a program statement, as internal guidance, does not constitute statutory authority and thus is not a "law" for the purposes of a habeas petition.[88] Without that jurisdictional basis for a habeas petition, there cannot be any meaningful judicial review springing from noncompliance.

Thus, PS 5160.05 binds neither the courts nor the BOP, is subject to extremely limited review, and provides no grounds for a habeas petition. The program statement does not independently permit a court to enter such an order but merely defines how the BOP should take such an order into account. In other words, while 18 U.S.C. § 3582 limits the authority of federal courts to modify imposed sentences, "the policy statement does not conflict with these limitations and does not expand a court's power to enter orders

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App'x 81, 83 (3d Cir. 2011) (per curiam) (affirming BOP denial of a prisoner *nunc pro tunc* request as prison officials complied with PS 5160.05); Reynolds v. Thomas, 603 F.3d 1144, 1150–51 (9th Cir. 2010) (finding that "Program Statement [5160.05] . . . sets forth the procedure the BOP *must* follow in determining whether to designate a state prison for (in effect) concurrent service of a federal sentence" and affirming BOP review conducted in accordance with these procedures (emphasis added)).

[87] *See* 5 U.S.C. § 706 (providing for judicial review of agency decisions). *But see* 18 U.S.C. § 3625 (noting that the APA standards "do not apply to the making of any determination, decision, or order" under certain provisions, including § 3621); Cook v. Wiley, 208 F.3d 1314, 1319 (11th Cir. 2000) (finding that, in § 2241 habeas proceedings, § 3625 precludes judicial review of the BOP's adjudicative decisions, but not rule-making which goes through formal notice-and-comment procedures).

[88] *See* Reeb v. Thomas, 636 F.3d 1224, 1227–28 (9th Cir. 2011) ("A habeas claim cannot be sustained based solely upon the BOP's purported violation of its own program statement because noncompliance with a BOP program statement is not a violation of federal law. Program statements are 'internal agency guidelines [that] may be altered by the [BOP] at will' and that are not 'subject to the rigors of the Administrative Procedure Act, including public notice and comment.'" (quoting Jacks v. Crabtree, 114 F.3d 983, 985 n.1 (9th Cir. 1997))); *see also* Reno v. Koray, 515 U.S. 50, 61 (1995) ("It is true that the Bureau's interpretation appears only in a 'Program Statemen[t]'—an internal agency guideline—rather than in 'published regulations . . . .' But BOP's internal agency guideline, which is akin to an 'interpretive rule' that 'do[es] not require notice and comment,' is still entitled to some deference since it is a 'permissible construction of the statute' . . . ." (citations omitted)); Christensen v. Harris County, 529 U.S. 576, 587 (2000) (finding internal rules not requiring notice and comment to be enforceable only as to their 'power to persuade'); Henrikson v. Guzik, 249 F.3d 395, 398 (5th Cir. 2001) (applying *Christensen* to BOP program statements).

affecting a sentence after its imposition. It merely defines what the BOP can do if such an order is entered."[89] Where a court is silent and no other statutory ground exists, such an order cannot be entered in the first place.[90] Further, as PS 5160.05 is a non-statutory authority, the only required grounds for BOP sentence computation in a habeas appeal are those under 18 U.S.C. § 3621(b)—the factors to be considered in evaluating *nunc pro tunc* requests.[91] While § 3621(b)(4) indicates the BOP must take into account "any statement by the court that imposed the sentence," this is plainly inapplicable where there is no statement on the sentence concurrency question.[92] The BOP remains free to apply the other requirements as it sees fit, unrestrained internally from a consideration outside of these grounds upon habeas review.

While habeas relief does also provide a remedy when such action violates the Constitution, the crushing weight of precedent is against such a challenge. Circuits are unanimous in their finding that the BOP's disregard of state court intent is not violative of the Constitution under principles of federalism or the Full Faith and Credit Clause.[93] Further, the above analysis forecloses any claim based on the Due Process Clause. There is no statutory requirement creating an entitlement which a prisoner could base a claim upon, and discretionary regulations do not provide sufficient ground upon

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[89] Taylor v. Sawyer, 284 F.3d 1143, 1148 n.5 (9th Cir. 2002).

[90] *See* 18 U.S.C. § 3582(c) (outlining the limited circumstances in which a sentence can be modified after imposition).

[91] *See* Hunnicutt v. Hawk, 229 F.3d 997, 1000 (10th Cir. 2000) (noting that the Court's jurisdictional limitations mean it "may only review whether the BOP exceeded its statutory authority").

[92] 18 U.S.C. § 3621(b)(4).

[93] *See, e.g.*, Hunter v. Tamez, 622 F.3d 427, 430 (5th Cir. 2010) ("[The Defendant] argues that the principles of federalism and comity . . . require the BOP to give effect to the state sentencing court's direction that his term of imprisonment on his state conviction run concurrently . . . . This argument is foreclosed by our circuit's precedent."); *Taylor*, 284 F.3d at 1151–53 (finding that the principles of dual sovereignty and comity and federalism did not support the defendant's position, nor did the Full Faith and Credit Clause provide grounds for the defendant's claim that BOP denial of *nunc pro tunc* relief violated the Constitution); Jake v. Herschberger, 173 F.3d 1059, 1065–66 (7th Cir. 1999) (finding no constitutional violation in BOP refusal to honor the state sentencing court's intent for concurrent state and federal sentences). *But cf.* Sady, *supra* note 14, at 56 (arguing that permitting the BOP to infer from § 3584 the authority to make a concurrency determination violates separation of powers principles).

which to have an entitlement to a liberty interest.[94] Additionally, while the Supreme Court appears to have taken a more aggressive stance against agency overreach in recent cases, existing precedent strongly supports the BOP's discretion to make such wide-ranging categorical determinations.[95] While there may be room for creative lawyering in attempting to make out a constitutional claim, no grounds seem readily apparent. Regardless, an attempt to overturn a longstanding BOP policy permitted by statute is a longshot at best.

III. ANALYSIS

A. THE (NEAR) TOTAL UNAVAILABILITY OF RELIEF.

Surveying potential avenues for judicial relief from silent sentences and BOP *nunc pro tunc* review paints an undoubtedly bleak picture. Having demonstrated the inaccessibility of habeas relief, one can find no meaningful path for a prisoner subject to an arbitrarily doubled sentence to request a sentence modification. Multiple courts of appeals have found that federal district courts, and even the original sentencing judge, have no authority to consider a prisoner's request for *nunc pro tunc* designation.[96] The

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[94] *See* Olim v. Wakinekona, 461 U.S. 238, 248–50 (1983) (finding that no liberty interest could exist where a regulation provided unrestricted discretion to prison officials to decide); Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 463–65 (1989) (finding the same).

[95] *Compare* West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (rejecting the EPA's discretion to make rules regarding carbon emissions without explicit congressional authorization), *with* McCarthy v. Doe, 146 F.3d 118, 120–23 (2d Cir. 1998) (upholding the BOP's authority to make *nunc pro tunc* determinations based on program statements), *and* Lopez v. Davis, 531 U.S. 230, 243–44 (2001) (upholding a categorical BOP interpretation and rulemaking regarding sentencing as a permissible exercise of the Attorney General's delegated power).

[96] *See* United States v. Johnson, 766 F. App'x 648, 650–51 (10th Cir. 2019) (finding that district courts have no jurisdiction to modify sentencing to be concurrent *nunc pro tunc*); Earls v. Fed. Bureau of Prisons, No. 22-2023, 2022 WL 4355306, at *1 (7th Cir. Sept. 20, 2022) ("Federal judges lose jurisdiction in criminal cases shortly after imposing sentence (unless a retroactive statute of Sentencing Guideline applies) and cannot modify or amplify their judgments by answering letters from the Bureau of Prisons years after the judgments have become final."); United States v. Tetty-Mensah, 665 F. App'x 687, 690 (10th Cir. 2016) (finding no jurisdiction to revise a sentence to be concurrent via *nunc pro tunc* designation). Some circuits who have yet to address the issue of federal silence directly nevertheless have

courts denying jurisdiction for review of BOP *nunc pro tunc* determinations have relied on § 3582(c) as the sole ground upon which jurisdiction for sentence modification exists for such review.[97] While federal courts are only constrained by statute and the Constitution in evaluating information in sentence modification, § 3582 limits the basis for sentence modification to the three mechanisms in § 3582(c) unless otherwise permitted by statute.[98] Unfortunately, none of those three grounds provided in § 3582(c) applies to post-sentencing concurrency determinations after service of a state sentence. [99]

Two grounds are plainly inapplicable to the circumstances described herein. Beginning with § 3582(c)(1)(B), modification is permitted "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure."[100] Unfortunately, there appears to be no other statute addressing this situation, and Rule 35 has a time limit of 14 days after

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caselaw at least suggesting that, once the state sentence has been served, a federal judge cannot order a sentence to be served *nunc pro tunc*. *See, e.g.*, United States v. Labeille-Soto, 163 F.3d 93, 98–99 (2d Cir. 1998) (noting in dicta that a federal judge cannot, at sentencing, designate his sentence to run *nunc pro tunc* with a discharged term of imprisonment); United States v. Kirklin, 701 F.3d 177, 179 (5th Cir. 2012) (including dicta suggesting a district judge could not designate *nunc pro tunc* an already discharged term of imprisonment).

[97] *See, e.g.*, *Johnson*, 766 F. App'x at 650 ("[Section] 3582(c) provided the only conceivable basis for modification of [the Defendant's] sentence."); *Tetty-Mensah*, 665 F. App'x at 690–91 (finding § 3582(c) to be the sole jurisdictional ground for a *nunc pro tunc* sentence computation order).

[98] *See* Concepcion v. United States, 142 S. Ct. 2389, 2396 (2022) ("It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained."); United States v. Pembrook, 609 F.3d 381, 383 (6th Cir. 2010) (noting that "[a] district court may modify a defendant's sentence only as authorized by statute" and reviewing for abuse of discretion if a sentence modification meets the grounds in § 3582(c)).

[99] *See Johnson*, 766 F. App'x at 650 ("[Section 3582(c)] allows modification: (1) upon motion by the Bureau of Prisons, (2) upon a change in the sentencing guidelines, or (3) upon statutory authorization (like that provided in 28 U.S.C. § 2241 and § 2255). None of these apply. The Bureau of Prisons has not filed a motion, and the applicable sentencing guidelines have not changed." (citations omitted)); *see also Tetty-Mensah*, 665 F. App'x at 690–91 (finding no jurisdiction for a *nunc pro tunc* order under § 3582(c)).

[100] 18 U.S.C. § 3582(c)(1)(B).

sentencing.[101] Further, § 3582(c)(2) provides relief where the sentencing range "has subsequently been lowered by the Sentencing Commission," which is plainly inapplicable to a *nunc pro tunc* request.[102]

There does appear to be limited ground for a request for sentence modification via § 3582(c)(1)(A), although its application is highly uncertain at present. This subsection provides statutory authorization for compassionate release "upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights."[103] In sole relevant part, the court may consider compassionate release for "extraordinary and compelling reasons."[104] The passage of the First Step Act in 2018 permitted prisoners to bring compassionate release challenges themselves, subject to the guidance of the Sentencing Guidelines.[105] However, the sole guidance provided in the relevant guideline assumed the previous version of the statute.[106] By early 2023, most circuits had decided that, due to the outdated language, district courts had wide discretion to determine the meaning of the terms "extraordinary and compelling" in the context of compassionate release.[107]

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[101] *See* FED. R. CRIM. P. 35(a) ("Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.").

[102] 18 U.S.C. § 3582(c)(2).

[103] *Id.* § 3582(c)(1)(A).

[104] *Id.* § 3582(c)(1)(A)(i).

[105] *See* First Step Act of 2018, § 603(b)(1), 18 U.S.C. § 3582(c)(1)(A) (providing for a motion for compassionate release "of the defendant" in addition to a motion by the BOP).

[106] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2021) (stating that only the director of the BOP could determine what constituted an "extraordinary and compelling" reason for compassionate release and file a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)); *see also* United States v. Booker, 976 F.3d 228, 234–36 (2d Cir. 2020) ("Turning to the text of Guideline § 1B1.13, it is manifest that its language is clearly outdated and cannot be fully applicable. . . . We could, therefore, read the Guideline as in effect abolished.").

[107] *See* United States v. Jones, 980 F.3d 1098, 1109 (6th Cir. 2020) ("We now join the majority of district courts and the Second Circuit in holding that . . . district courts have full discretion . . . to determine whether an 'extraordinary and compelling' reason justifies compassionate release when an imprisoned person files a § 3582(c)(1)(A) motion."); United States v. Brooker, 976 F.3d 228, 234 (2d Cir. 2020) (finding that "the First Step Act free[s] district courts to exercise their discretion in determining what are extraordinary circumstances"); *cf.* United States v. Giron, 15 F.4th 1343, 1346–47 (11th Cir. 2021) (finding

Responding to these developments, the United States Sentencing Commission expanded the compassionate release mechanism, formally adding four new categories to compassionate release by a 4-3 vote in April 2023.[108] Of particular relevance, the Sentencing Commission noted that one of the purposes of § 3582(c)(1)(A) is to "provide a narrow avenue for judicial relief from unusually long sentences."[109] These changes, at least in stated purpose, aimed to ensure that judges retained discretion to ensure that sentences were not overly harsh in light of the "extraordinary and compelling" reasons why a prisoner should be released.[110] Here again, the light of potential relief shines through.

However, yet again, § 3584 darkens the jailhouse door. It is impossible to know with certainty the future judicial interpretations of a regulation not yet in effect or whose most serious legal challenges will likely mature years from now. However, unlike in the pre-amendment world, where at least most circuits had determined that judges retained unlimited discretion to determine the meaning of "extraordinary and compelling," its bounds are now clearly demarcated. This definition means that, in all circuits, a prisoner's compassionate release must fall within the realm of one of these newly defined "extraordinary and compelling" reasons.[111]

Of these new definitions, only two provisions of the amended § 1B1.13 are relevant—the "Unusually Long Sentence" and the "Other Reasons" provisions.[112] The former, the "Unusually Long

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that "extraordinary and compelling" reasons for compassionate release were constrained to the reasons provided in the Sentencing Guidelines § 1B1.13).

[108] *See* Sarah N. Lynch & Nate Raymond, *U.S. Panel Votes to Expand Compassionate Release for Prisoners*, REUTERS (Apr. 6, 2023, 9:21 AM), https://www.reuters.com/world/us/us-panel-consider-expanding-compassionate-release-prisoners-2023-04-05/ [https://perma.cc/3NW7-6W84] (noting the 4-3 vote expanding compassionate release mechanisms).

[109] Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28258 (May 3, 2023).

[110] *See id.* (stating that "the Commission continues to believe . . . that judges are 'in a unique position to determine whether the circumstances warrant a reduction'" (quoting U.S. SENT'G GUIDELINES MANUAL § 1B1.13 n.4 (U.S. SENT'G COMM'N 2018))).

[111] *See id.* at 28256 (noting the amendment proposed by the Sentencing Commission provides a "list of specified and compelling reasons that can warrant sentence reductions").

[112] *See id.* at 28257 (listing the amended reasons for release under § 1B1.13). Other reasons not relevant to the current analysis include the Defendant's (1) medical circumstances, (2)

Sentence" definition, is the easiest to dispense with. It includes a key qualification that "a change in the law . . . may be considered in determining whether the defendant presents an extraordinary and compelling reason."[113] Again, we go in circles. Emmit Hunt's sentence fully comported with the law, unintended and horrific as that may be.[114] There has been no change in the meantime that could provide relief. At best, this provision may function as a method for prisoners to gain relief if, as suggested below, Congress amends § 3584.[115] Until then, this provision is nothing but false hope that those with sentences like Hunt's "unusually long sentence" can see the light of day.

Of more consequence are the so-called "Other Reasons" for relief. This provision is designed to be a catch-all provision that could encompass "any other circumstance or combination of circumstances that, considered by themselves or together . . . are similar in gravity" to those other reasons for compassionate release.[116] This requirement is relatively loose, and the application notes indicate that the Commission rejected a requirement that this reason be "similar in nature and consequence" in favor of ensuring they "need be similar only in gravity."[117] At first glance, this presents immense promise. Surely this unintended form of sentencing would constitute an extremely weighty concern.

However, before determining whether the "Other Reasons" definition could potentially encompass silent sentences, one must determine what the application of the "Other Reasons" provision looks like in practice. As noted earlier, there is no definitive answer at this point, but we can make an educated guess. The vague phrasing of any other reason "similar in gravity" provides enough

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age, (3) family circumstances, and (4) suffering sexual or physical abuse while imprisoned. *Id.*

[113] *Id.* at 28255.

[114] *See* 18 U.S.C. § 3584(a) (explaining that multiple terms of imprisonment imposed at the same time or different times run concurrently unless the court orders that the terms are to run consecutively); *see also* Wahid v. Merlak, No. 1:17CV01900, 2019 WL 3893242, at *6 (N.D. Ohio Apr. 15, 2019) (noting that the BOP was not required to contact the sentencing judge to determine whether the defendant's sentences were to tun consecutively or concurrently, and therefore, there was no error pursuant to BOP Program Statement).

[115] *See infra* section III.B.

[116] Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 28258 (May 3, 2023).

[117] *Id.*

wiggle room for judges to, at least plausibly, find that prisoners like Emmit Hunt qualify for compassionate release or sentence reduction.[118] In a sense, this is the first meaningful reform that could help victims of silent sentences.

Unfortunately, the most realistic outcome is that courts will not invoke this provision to remedy silent sentences. Again, the most stunningly Kafka-esque feature of silent sentences is that they are not only permitted but also *legally mandated*.[119] One would be hard-pressed to find a judge who would deem a legally mandated sentence computation policy, after the rejection of a *nunc pro tunc* request within the full authority of the BOP, to be "similar in gravity" to, for example, sexual assault by a correctional officer or a terminal illness.[120] Further adding to the dreary outlook, the broad discretion and deference which courts grant the BOP are likely to effectively defang this method for relief.[121] Ultimately, the "Other Reasons" provision, while "likely to produce substantial litigation," is nothing but fool's gold for victims of silent sentences.[122]

Further, other mechanisms would also be barred under these circumstances. There is no means by which a federal judge may make a sentence concurrent to a discharged state term of imprisonment even if the modification were permissible.[123] Not even

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[118] *Id.* at 28255.

[119] *See* 18 U.S.C. § 3854 ("Multiple terms of imprisonment imposed at different times run consecutively *unless the court orders that the terms are to run concurrently*" (emphasis added)).

[120] *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 28254–55 (listing the possible grounds for compassionate release).

[121] Johnny Thach, Note, *Not Far Enough: The Rising Elderly Prison Population and Criminal Justice and Prison Reform Following the First Step Act of 2018*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 631, 688 (2020) ("[T]he First Step Act . . . grants exclusive authority and sole discretion to the . . . BOP to decide all release determinations, particularly in compassionate and early release and home confinement. . . . [T]his interpretation has insulated judicial review in compassionate and early release determinations . . . .")

[122] Letter from Amy Fettig, Exec. Dir., Sent'g Project & Liz Komar, Sent'g Reform Couns., Sent'g Project, to Judge Carlton W. Reeves, Chairman, U.S. Sent'g Comm'n (Mar. 14, 2023), https://www.sentencingproject.org/advocacy-letter/comment-to-the-u-s-sentencing-commission-regarding-proposed-amendments-to-the-guidelines-governing-compassionate-release/ [https://perma.cc/CD7Y-NMHG].

[123] *See* United States v. Lucas, 745 F.3d 626, 631 (2d Cir. 2014) ("[N]either U.S.S.G. § 5G1.3 nor 18 U.S.C. § 3584 authorizes a district court to run a term of imprisonment concurrently with a discharged term of imprisonment . . . ."); United States v. Ramirez, 252 F.3d 516, 519 (1st Cir. 2001) ("The issue here involves the giving of credit when the defendant has already

informal methods seem able to achieve the same result: federal judges are prohibited from engaging in ex parte communications with the BOP to clarify their intent.[124] Even if the sentencing judge were to communicate with the BOP, the "BOP may not simply defer to the expressed views of the federal sentencing court; rather, BOP must exercise its own independent judgment."[125] Further, an ex parte communication with the BOP which constitutes "a district judge's response to an administrative inquiry is not a judicial order."[126] As PS 5160.05 by its terms only applies when an "order" is entered, such a communication would have no binding effect on the BOP under its internal, albeit still discretionary, policies.[127]

B. A CALL FOR AMENDING § 3584

Section 3584(a) was originally introduced "as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation."[128] Congress recognized the need for such a rule despite "hop[ing] that the courts will attempt to avoid the need for such a rule by specifying whether a sentence is to be served concurrently or consecutively."[129] Section 3584 may prevent some litigation,[130] but at the cost of creating a systematic overincarceration of

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completed his state sentence for the related conduct. . . . [E]ven if we extended the principle of § 5G1.3 to this case, [the Defendant] would not be entitled to credit because his state sentence was not undischarged (rather, it was discharged) . . . .").

[124] *See* Earls v. Fed. Bureau of Prisons, No. 22-2023, 2022 WL 4355306, at *1 (7th Cir. Sept. 20, 2022) ("Federal judges lose jurisdiction in criminal cases shortly after imposing sentence (unless a retroactive statute of Sentencing Guideline applies) and cannot modify or amplify their judgments by answering letters from the Bureau of Prisons years after the judgments have become final."); Mangum v. Hallembaek, 910 F.3d 770, 779 (4th Cir. 2018) ("Any suggestion that the BOP may 'follow up' with the court . . . conflicts with our opinion and mandate.").

[125] Trowell v. Beeler, 135 F. App'x 590, 596 (4th Cir. 2005).

[126] *Earls*, 2022 WL 4355306, at *1.

[127] *See* PS 5160.05, *supra* note 66, § 9(3) (providing that courts may "*order* concurrent service of the federal sentence at some time after its imposition" (emphasis added)).

[128] S. REP. NO. 98-225, at 127 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3310.

[129] *Id.*

[130] *See* United States v. Martin, 371 F. App'x 602, 606 (6th Cir. 2010) ("[W]hen the possibility of a sentence running concurrently was simply never raised . . . § 3584(a) provides a convenient 'rule of construction' that would avoid unnecessary litigation.").

prisoners beyond the intent of any person involved in the proceeding. Surely Congress had anticipated that other procedural mechanisms would function as a safety valve in preventing abuse, but as noted above, those mechanisms have repeatedly failed prisoners facing administratively doubled sentences.[131]

Considering these procedural and deferential barriers, Congress can resolve the issues with silent sentences using a simple amendment to § 3584, the statute at the heart of the *Setser* decision. As noted earlier, § 3584 provides the basis for the concurrency presumption, mandating that "unless the court orders that the terms are to run concurrently" multiple terms of imprisonment imposed at separate times are assumed to be consecutive.[132] In the abstract, there are good reasons for the presumption, indeed, ones that strike at the heart of the criminal justice system. Providing release far earlier than the sentencing court intended violates the goals of the justice system just as much as providing release far later than the sentencing court intended. Therefore, this Note proposes a middle ground between the potential elimination of the presumption altogether versus the BOP's current unchecked discretion.

The amendment is as follows: in cases of a silent federal sentence, the BOP should look at the intent of the state judge to determine the concurrency of a sentence. However, where both the state and federal courts are silent on the concurrency question, the presumption should stay intact, and the sentences remain consecutive. The presumption would also still apply when federal courts deliberately note they are staying silent on the issue, changing deliberate silence from a de facto consecutive sentence to a real delegation of that authority to the state judge. Such an amendment would put an end to sentencing by silence within the hidden machinations of the BOP computation system and stay true to *Setser*'s command that "sentencing not be left to employees of the same Department of Justice that conducts the prosecution."[133]

The revised wording of § 3584 would then read as: "Multiple terms of imprisonment imposed at different times run consecutively unless *either the state or federal* court orders that the terms are to

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[131] *See* discussion *supra* sections II.D & III.A.

[132] 18 U.S.C. § 3584(a).

[133] Setser v. United States, 566 U.S. 231, 242 (2012).

run concurrently." No further changes are necessary, as *Setser* and other caselaw on the primary jurisdiction doctrine would remain intact and provide the first sentencing judge the opportunity to determine concurrency.[134] Should the BOP fail to credit the intent of the state judge in cases of federal silence, it would then violate a statutory mandate and thus provide grounds for habeas relief under § 2241. This amendment maintains the policy goals and federalism aims of *Setser*[135] by permitting the first judge to make the decision on concurrency, and in the absence of a decision, the second judge can then make an informed decision that will be binding. Thus, where at least one court expresses the intent for a sentence to run concurrently, it would. Prisoners, on the other hand, would no longer face an arbitrary administrative doubling of their sentences that is immune from meaningful judicial review.

IV. CONCLUSION

The story of Emmit Hunt's time in federal custody ended as arbitrarily as it began. In bringing a First Step Act sentence modification motion, the BOP finally reached out and provided the judge an opportunity to clarify his intent.[136] In its final order on the First Step Act Motion, the court noted it had remained silent when the sentence was imposed and during a previous reduction in sentence, but now specified that "[i]t is the Court's intent that Hunt be released from custody."[137] Despite the BOP's lack of any obligation to do so, it released Hunt fourteen years earlier than if the district court were never given the opportunity to be heard, albeit with a year of his life lost to bureaucratic indifference.[138] Others will not be so lucky, and their petitions litter the halls of the BOP while they languish in prison.

The greatest liberty interest available is that of freedom from imprisonment, especially that which is arbitrary and completely

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[134] *See* discussion *supra* sections II.B & II.C.

[135] *See* discussion *supra* section II.B.

[136] *See* Order at 1, United States v. Hunt, No. 1:05-cr-00054 (M.D. Ga. Aug. 8, 2022), ECF No. 62 (noting the Court "recently communicated with the BOP . . . the Court's intent").

[137] *Id.*

[138] *See id.* (noting that Hunt is to be released in August 2022, nearly one year after the BOP took Hunt into custody).

insulated from the democratic and procedural protections in our criminal justice system.[139] Decades of life should not turn on the coin flip of whether the BOP will use statutory or internal policy loopholes to double sentences without any judge, jury, prosecutor, defense attorney, or plea agreement deciding it should happen. "Imposition of a consecutive sentence is strong medicine,"[140] and courts should not be shackled in their ability to conduct habeas review of silent consecutive sentencing. As it currently stands, decades of imprisonment turn on a federal judge's memory in adding a few words during the sentencing hearing, and the same federal judge may make no changes once the error comes to light. This Note's proposal for the addition of five small words, "either the state or federal," to § 3584(a) can prevent this tragedy and free those imprisoned by silence and apathy.

Until then, this Note should serve as the warning cry for state judges, prosecutors, and defense attorneys to undertake an extremely careful review of the federal sentencing transcript. If nothing indicates whether a sentence is concurrent or consecutive, state actors must know a federal sentence will almost certainly be tacked on to any state sentence and act accordingly. The stakes could not be greater, and, as for Emmit Hunt, state judiciaries must remain acutely aware that they, and not the defendant, hold "the key" to avoid the prisoner "dying in jail."[141]

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[139] *See* Wolff v. McDonnell, 418 U.S. 539, 594 (1974) (Douglas, J., dissenting in part, concurring in the result in part) ("Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration . . . .").

[140] Salley v. United States, 786 F.2d 546, 548 (2d Cir. 1986) (Newman, C.J., concurring).

[141] Sentencing Hearing, *supra* note 2, at 6.