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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

MICHAEL LEE TOLLE,  
Petitioner,  
vs.  
WARDEN CRAIG APKER,  
Respondent.

No. CIV 10-444-TUC-CKJ (DTF)

**ORDER**

On June 7, 2011, Magistrate Judge D. Thomas Ferraro issued a Report and Recommendation (Doc. 21) in which he recommends that the Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2241 by Petitioner Michael Lee Tolle (“Tolle”) be dismissed. The magistrate judge advised the parties that written objections to the Report and Recommendation were to be filed within fourteen days of service of a copy of the Report and Recommendation pursuant to Fed.R.Civ.P. 72(b)(2). Tolle has filed an objection. Respondent has not filed a response.

*Report and Recommendation*

This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). Further, under 28 U.S.C. § 636(b)(1), if a party makes a timely objection to a magistrate judge's recommendation, then this Court is required to “make a de novo determination of those portions of the [report and recommendation] to which objection is made.” See also *Schmidt v. Johnstone*, 263

1 F.Supp.2d 1219, 1226 (D.Ariz. 2003) (reading the Ninth Circuit's decision in *Reyna-Tapia*  
2 as adopting the view that district courts are not required to review “any issue that is not the  
3 subject of an objection”); *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir.2003)  
4 (disregarding the standard of review employed by the district court when reviewing a report  
5 and recommendation to which no objections were made).

6 Tolle agree with the facts as set forth in the background section of the Report and  
7 Recommendation (“R&R”). The Court adopts that portion of the R & R. Further, the Court  
8 adopts those portions of the R & R to which there is no objection.

9  
10 *Case Number 06-03-31718 Date of Completion of Sentence*

11 Tolle asserts the magistrate judge incorrectly concluded that, as stated in the Prior  
12 Custody Memorandum , his sentence in Multnomah County Case Number 06-03-31718  
13 ended on October 10, 2007. Rather, Tolle asserts that his sentence was complete on June 15,  
14 2007. However, the Court agrees with the magistrate judge that a presentence admission to  
15 federal custody on June 15, 2007, does not establish when the sentence was complete.  
16 Rather, as stated by the magistrate judge:

17 Tolle calculates his state sentences differently than is revealed in the BOP  
18 documentation. For example, he counts the time from August 24, 2006 to January 5,  
19 2007, towards his sentence in case number 060331718, and concludes that this  
20 sentence was complete around June 15, 2007. (Doc. 15 at 3.) This is inaccurate  
21 because, as Tolle acknowledges, from August 24 to December 21, 2006, he was  
22 serving his 120-day sentence for violating parole. (Doc. 10, Exs. 1, 2; Doc. 15 at 2.)  
23 He then began serving his 13-month sentence in case number 060331718, which  
24 appears to have terminated on October 10, 2007. (Doc. 10, Ex. 2.) Although  
25 Respondent did not provide any state documentation regarding this date, accounting  
26 for a good time credit reduction, it is logical. Additionally, it comports with Tolle’s  
27 calculation when you properly account for the time he spent serving his parole  
28 violation. (See Doc. 15 at 3.) Therefore, the Court finds it reasonable to rely upon the  
BOP document stating that the sentence in case number 060331718 was completed  
on October 10, 2007.

R & R, pp. 3-4. The Court agrees with the magistrate judge that Tolle is not entitled to  
additional pre-sentence credit on this basis.

1 *Consecutive Sentence with Case Number 06-1443*

2 Tolle asserts that, because the sentencing judge was silent as to the relationship  
3 between the federal sentence and the sentence in the state case (Case Number 06-1443), the  
4 sentences should be calculated as concurrent. However, this Court agrees with the magistrate  
5 judge that when “a federal sentencing judge is silent regarding a previously imposed but  
6 undischarged term of imprisonment, the sentences are presumed to run consecutively.” R  
7 & R, p. 3, *citing* 18 U.S.C. § 3584(a), *United States v. Wills*, 881 F.2d 823, 826 & n.2 (9th  
8 Cir. 1989); *see also e.g., Coleman v. Sanders*, CV 08-6447-GW (AGR), 2009 WL 5220730  
9 (C.D.Cal. 2009). Tolle is not entitled to relief on this basis.

10 Tolle also argues that, even if his federal sentence was to be served consecutively with  
11 Case Number 06-1443, that sentence itself ran concurrently with Case Number 06-03-31718.  
12 Indeed, the summary prepared by the Designation and Sentence Computation Center  
13 (“DSCC”) states, “Sentenced to 13 mos. on 01-05-2007 in #06-03-31718, sentence complete  
14 on 10-10-2007. Sentenced to 13 mos. concurrent with #06-03-31718 on 01-12-2007 in #06-  
15 1443, sentence complete on 08-23-2008. TOT USMS on 08-21-2008.” Doc. 10-2, p. 5 of  
16 25. However, this conflicts with the documents submitted by Tolle. The Sentence on  
17 Additional Counts form from Circuit Court, County of Clackamas, clearly states that the  
18 sentence in 06-1443 was to be served consecutively to any sentence Tolle was serving. *See*  
19 Doc. 15, p. 9 of 12. The Court can only conclude, therefore, that the DSCC is simply  
20 incorrect.

21 Although the magistrate judge ordered Respondent to address the federal judge’s  
22 silence on 06-1443, Respondent failed to do so. *See* R & R, p. 3, n. 3. The magistrate judge  
23 concluded that Tolle began serving his second state sentence of 13 months on October 10,  
24 2007. As stated by the magistrate judge, referring to 06-1443:

25 According to Tolle’s calculations (which appear accurate), with good time credit, his  
26 actual time of service was 316 days. (Doc. 15 at 3.) Beginning to count on October  
27 11, 2007, a term of 316 days expired on August 21, 2008. BOP is using that as the  
28 date Tolle commenced serving his federal sentence. (Doc. 10, Ex. 6 at 2.) In light of  
these calculations, Tolle has not demonstrated that BOP has failed to credit any time

1 served on his federal sentence.  
2 R & R, p. 4. In light of Tolle having been sentenced to consecutive state sentences, the court  
3 agrees with the magistrate judge's conclusion.

4 Accordingly, IT IS ORDERED:

- 5 1. The Report and Recommendation (Doc. 21) is ADOPTED.  
6 2. The Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2241  
7 is DISMISSED.  
8 3. The Clerk of the Court shall enter judgment and shall then close its file in this  
9 matter.

10 DATED this 27th day of September, 2011.

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Cindy K. Jorgenson  
United States District Judge