

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PATRICK MOYE,  
Petitioner,  
v.  
H. A. RIOS, Jr.,  
Respondent.

Case No. 1:11-cv-02131-AWI-SKO-HC

FINDINGS AND RECOMMENDATIONS TO  
DENY THE PETITION FOR WRIT OF  
HABEAS CORPUS (DOC. 1) AND TO ENTER  
JUDGMENT FOR RESPONDENT

FINDINGS AND RECOMMENDATIONS TO  
DELINE TO ISSUE A CERTIFICATE OF  
APPEALABILITY

**OBJECTIONS DEADLINE:**  
**THIRTY (30) DAYS**

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is the petition, which was filed on December 27, 2011. Respondent filed an answer on May 7, 2012. Petitioner filed a traverse on June 28, 2012. On August 9, 2012, Respondent filed a supplement to the answer; Petitioner filed a supplemental traverse on October 1, 2012.

## I. Jurisdiction

Because the petition was filed after April 24, 1996, the

1 effective date of the Antiterrorism and Effective Death Penalty Act  
2 of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.  
3 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,  
4 1499 (9th Cir. 1997).

5 Petitioner contends the Federal Bureau of Prisons (BOP)  
6 improperly calculated his sentence and release date because the BOP  
7 failed to give him credit on his federal sentence for time spent in  
8 state custody serving a state sentence imposed after the federal  
9 sentence. The state court indicated an intent that the state  
10 sentence be served concurrently with the previously imposed federal  
11 sentence, but did not transfer Petitioner to primary federal  
12 jurisdiction.

13 A claim challenging the manner, location, or conditions of a  
14 sentence's execution must be brought under § 2241. Hernandez v.  
15 Campbell, 204 F.3d 861, 864 (9th Cir. 2000). A challenge to the  
16 manner in which a sentence is executed must be brought in a  
17 habeas petition pursuant to 28 U.S.C. § 2241. Tucker v. Carlson,  
18 925 F.2d 330, 331 (9th Cir. 1991) (concerning whether the parole  
19 commission had improperly failed to credit the prisoner's federal  
20 sentence with time served in state custody). Thus, this Court  
21 has jurisdiction over Petitioner's claim concerning the execution  
22 of his sentence.

23 A petitioner filing a petition for writ of habeas corpus under  
24 28 U.S.C. § 2241 must file the petition in the judicial district of  
25 the petitioner's custodian. Brown v. United States, 610 F.2d 672,  
26 677 (9th Cir. 1990). Petitioner has named as Respondent the warden  
27 of his institution of confinement, who is within this district.  
28

1       The Court concludes it has jurisdiction over the subject matter  
2 of the petition as well as jurisdiction over the person of the  
3 Respondent.

4       Respondent also concedes that Petitioner has named a  
5 proper respondent, venue is proper in this district, and Petitioner  
6 has exhausted administrative remedies. (Ans., doc. 16, 2-3.)

7       II. Factual Summary

8       The following undisputed factual summary is taken from the  
9 documentation filed by Respondent. (See pet., doc. 1, 7-8.)

10      Petitioner was arrested on January 12, 2004, by Texas state  
11 authorities for assault on a public officer that occurred in the  
12 course of an attempt to arrest Petitioner for parole violations.  
13 When arrested, it was discovered that Petitioner possessed a  
14 firearm. (Doc. 19-1 at 2, 7; doc. 16-1 at 3, 13.)

15      On February 10, 2004, Petitioner was temporarily transferred  
16 from state custody to federal custody on a writ of habeas corpus ad  
17 prosequendum to stand trial for a federal charge of being a felon in  
18 possession of a firearm. (Doc. 16-1 at 6, 10.) Petitioner later  
19 entered a plea of guilty to the federal charge. Petitioner was  
20 sentenced in the United States District Court for the Western  
21 District of Texas to a term of 71 months in prison on the federal  
22 offense. (Doc. 16-1 at 6, 11, 13-18.) The federal judgment was  
23 silent as to whether the sentence imposed should run consecutively  
24 or concurrently to any other sentence. (Id. at 13-18.) That issue  
25 was also not addressed by the court at the sentencing hearing.  
(Doc. 19-1, 2-3.)

27      On July 1, 2004, after his federal sentencing, Petitioner was  
28 returned to the custody of state authorities to stand trial on the

1 state charges. (Doc. 16-1 at 7, 10; doc. 19-1 at 3.) On August 20,  
2 2004, Petitioner was sentenced in Travis County Criminal District  
3 Court to a seven-year term of state confinement for aggravated  
4 assault on a public servant. (Doc. 16-1 at 7, 20-21.) The state  
5 sentencing court ordered the state sentence to run concurrently with  
6 the prior federal sentence. Id. However, the state did not  
7 relinquish primary custody of Petitioner to allow both sentences to  
8 be served concurrently.

9 Petitioner served his state sentence and was released from  
10 state custody on January 11, 2011. Petitioner was then turned over  
11 to federal authorities to begin serving his 71-month term of  
12 imprisonment for the federal conviction of being a felon in  
13 possession of a firearm. (Doc. 16-1 at 7, 23-24.) Petitioner thus  
14 began receiving credit against his federal sentence on January 11,  
15 2011, when he was turned over to federal authorities. (Doc. 16-1 at  
16 7.)

17 Petitioner moved the federal sentencing court to amend its  
18 judgment to reflect that the federal sentence should run  
19 concurrently with his state sentence. The court denied the  
20 application to amend the judgment because it had not intended for  
21 the sentences to run concurrently at the time it imposed the  
22 sentence. (Doc. 19-1, 2-3.)

23 The BOP also evaluated Petitioner's case to determine whether  
24 he might have been eligible for the BOP to designate nunc pro tunc  
25 the state institution of confinement as a detention facility for  
26 partial service of his federal sentence. (Doc. 17, 3; doc. 18, 12.)  
27 The factors considered included the nature of Petitioner's offense  
28 (felon in possession of a firearm) and the absence of a

1 recommendation from the sentencing court as well as Petitioner's  
2 prior convictions of possession of marijuana, unauthorized use of a  
3 motor vehicle, possession of a controlled substance, assault on a  
4 police officer, failure to provide identification, and evading  
5 arrest. (Doc. 17, 3.) Based on the factors outlined in 18 U.S.C. §  
6 3621(b), it was determined that a retroactive designation was not  
7 appropriate. Id.

8 Based on the BOP's computation of his sentence, Petitioner is  
9 currently scheduled to satisfy his federal sentence, via good  
10 conduct time release, on March 7, 2016. (Doc. 16-1, 2-4.)

11       III. Computation of Sentence

12 Petitioner challenges the BOP's failure to give him credit on  
13 his federal sentence for time spent in state custody. Petitioner  
14 argues that the BOP overlooked compelling circumstances that  
15 entitled him to a nunc pro tunc designation of the state facility as  
16 the institution to serve his federal sentence. (Doc. 1, at 3, 31.)  
17 In the traverse, Petitioner alleged for the first time that he  
18 suffered a violation of due process and equal protection. (Trav.,  
19 doc. 18; supp. trav., doc. 21, 1.) However, the court exercises its  
20 discretion not to consider entirely new claims in the traverse.  
21 See, Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994),  
22 cert. den., 514 U.S. 1026 (1995); Landis v. North American Co., 299  
23 U.S. 248, 254-255 (1936); Ferdik v. Bonzelet, 963 F.2d 1258, 1260  
24 (9th Cir. 1992).

25       Multiple terms of state and federal imprisonment run  
26 consecutively absent a court order that the sentences run  
27  
28

1 concurrently. 18 U.S.C. § 3584(a).<sup>1</sup> A federal court may exercise  
2 its discretion to order a federal sentence to run either  
3 concurrently with or consecutively to an anticipated state sentence.

4 Setser v. United States, - U.S. -, 132 S.Ct. 1463, 1473 (2012).

5 Here, the federal sentencing court did not order or intend that  
6 Petitioner's federal sentence run concurrently with the state  
7 sentence. Indeed, when Petitioner requested that the federal  
8 sentencing court amend the judgment to provide for concurrent  
9 service, the sentencing court reiterated it did not intend that the  
10 sentence run concurrently. Thus, there is no basis for a suggestion  
11 that the sentencing court would find that extraordinary  
12 circumstances warranted a concurrent sentence. There is no  
13 indication that the BOP has proceeded in a manner contrary to the  
14 authority of the sentencing court.

15 The BOP properly proceeded pursuant to federal law when it  
16 initially computed the time credit to be given to Petitioner. With  
17 respect to credit for time served and the commencement of terms, 18  
18 U.S.C. § 3585 provides as follows:

19 (a) Commencement of sentence.--A sentence to a term of  
imprisonment commences on the date the defendant is  
20 received in custody awaiting transportation to, or arrives  
21

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22  
23<sup>1</sup> Section 3584(a) provides as follows:  
24

25 If multiple terms of imprisonment are imposed on a defendant at the  
same time, or if a term of imprisonment is imposed on a defendant who  
26 is already subject to an undischarged term of imprisonment, the terms  
may run concurrently or consecutively, except that the terms may not  
run consecutively for an attempt and for another offense that was the  
sole objective of the attempt. Multiple terms of imprisonment imposed  
27 at the same time run concurrently unless the court orders or the  
statute mandates that the terms are to run consecutively. Multiple  
terms of imprisonment imposed at different times run consecutively  
28 unless the court orders that the terms are to run concurrently.

1       voluntarily to commence service of sentence at, the  
2       official detention facility at which the sentence  
      is to be served.

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

11 that has not been credited against another sentence.

18 U.S.C. § 3585. Section 3585 does not authorize a district court  
to compute pre-sentence credit at the time of sentencing; the  
Attorney General, acting through the BOP, has the duty to compute  
the credit allowed by § 3585(b). United States v. Wilson, 503 U.S.  
329, 337 (1992).

17 The fact that Petitioner was prosecuted and sentenced in  
18 federal court before the state court sentence was imposed does not  
19 require that the time served on the state sentence in a state  
20 institution be credited to the federal sentence. Generally, the  
21 sovereign that first arrests an individual acquires priority of  
22 jurisdiction for purposes of trial, sentencing, and incarceration.  
23 United States v. Warren, 610 F.2d 680, 684-85 (9th Cir. 1980)

24 (citing Ponzi v. Fessenden, 258 U.S. 254, 261-62 (1922)); Thomas v.  
25 Brewer, 923 F.2d 1361, 1365 (9th Cir. 1991). The sovereign with  
26 priority of jurisdiction may elect under the doctrine of comity to  
27 relinquish jurisdiction to another sovereign. United States v.  
28 Warren, 610 F.2d at 685. The production of a federal defendant for

1 prosecution by a federal writ of habeas corpus ad prosequendum from  
2 state custody does not interrupt the primary jurisdiction of the  
3 state. See Thomas v. Brewer, 923 F.2d 1361. Instead, the state  
4 retains primary jurisdiction over the prisoner, and federal  
5 jurisdiction does not commence until state authorities relinquish  
6 primary jurisdiction and custody. See Del Guzzi v. United States,  
7 980 F.2d 1269 (9th Cir. 1992).

8 Here, Texas relinquished primary custody on January 11, 2011.  
9 At that point, the Petitioner's prison term could commence pursuant  
10 to § 3585(a). Since that date, Petitioner's federal sentence has  
11 been properly computed and executed. The time Petitioner spent in  
12 custody awaiting trial on his federal charge did nothing to  
13 interrupt the primary jurisdiction of Texas, and that time was  
14 properly credited as time already served toward his state sentence.  
15 (Doc. 16-1, 20.)

16 With respect to Petitioner's challenge to the BOP's failure to  
17 grant a nunc pro tunc designation, 18 U.S.C. § 3621(b) states that  
18 the BOP "shall designate the place of the prisoner's imprisonment,"  
19 and "may designate" any correctional facility meeting minimal  
20 standards, even if it is not maintained by the federal government,  
21 that "the Bureau determines to be appropriate and suitable,"  
22 considering 1) the resources of the facility contemplated, 2) the  
23 nature and circumstances of the offense, 3) the history and  
24 characteristics of the prisoner, 4) any statement by the court that  
25 imposed the sentence a) concerning the purposes for which the  
sentence to imprisonment was determined to be warranted, or b)  
recommending a type of penal or correctional facility as  
appropriate, and 5) any pertinent policy statement issued by the

1 Sentencing Commission pursuant to section 994(a)(2) of title 28. 18  
2 U.S.C. § 3621(b). The BOP may designate a state facility as  
3 appropriate for the service of a "concurrent" federal sentence when  
4 it complies with the intent of the federal sentencing court or  
5 comports with the goals of the judicial system. Taylor v. Sawyer,  
6 284 F.3d 1143, 1149 (9th Cir. 2002). However, the BOP has broad  
7 discretion to refuse to make a nunc pro tunc designation of a state  
8 prison even if it is contrary to a state sentencing court's order.  
9 Reynolds v. Thomas, 603 F.3d 1144, 1151 (9th Cir. 2010), abrogated  
10 on other grounds by Setser, 132 S.Ct. at 1473.

11 There is no subject matter jurisdiction in this Court to review  
12 individualized, discretionary determinations made by the BOP  
13 pursuant to 18 U.S.C. § 3621; however, judicial review remains  
14 available for allegations that BOP action is contrary to established  
15 federal law, violates the Constitution, or exceeds statutory  
16 authority. Reeb v. Thomas, 636 F.3d 1224, 1228-29 (9th Cir. 2011).  
17 This Court thus lacks the jurisdiction to review the discretionary  
18 determination of the BOP in Petitioner's case. Reeb, 636 F.3d at  
19 1228-29; see Baskerville v. Babcock, no. 2:11-cv-0843-JFM(HC), 2012  
20 WL 2562350, at \*6-\*7 (E.D.Cal. June 29, 2012) (unpublished); Butler  
21 v. Sanders, no. CV-11-8625-JHN(JEM), 2012 WL 893742, at \*4-\*5  
22 (C.D.Cal. Jan. 23, 2012) (unpublished).  
23

24 This Court retains jurisdiction to determine whether non-  
25 individualized BOP action is contrary to its statutory authority.  
26 Close v. Thomas, 653 F.3d 970, 973-74 (9th Cir. 2011), cert. den.,  
27  
28

1 132 S.Ct. 1606 (2012). The record submitted by the parties reflects  
2 that the BOP articulated the correct legal standards, considered the  
3 appropriate criteria, and came to a determination regarding  
4 retroactive designation in a manner that was consistent with the  
5 statutory requirements and with the stated intention of the federal  
6 sentencing court.  
7

8 This case is distinguishable from Cozine v. Crabtree, 15  
9 F.Supp.2d 997, 1011 (D.Ore. 1998), cited by Petitioner, because  
10 there both the state court and the petitioner had attempted to  
11 effectuate a transfer to federal custody for service of the state  
12 sentence, and the federal authorities had refused.

13 In summary, Petitioner has not shown that the BOP's computation  
14 of Petitioner's credit or consideration of Petitioner's request for  
15 a nunc pro tunc designation order was contrary to established  
16 federal law, violated the Constitution, or exceeded statutory  
17 authority. Accordingly, it will be recommended that the petition  
18 for writ of habeas corpus be denied.

19 IV. Certificate of Appealability

20 Unless a circuit justice or judge issues a certificate of  
21 appealability, an appeal may not be taken to the Court of Appeals  
22 from the final order in a habeas proceeding in which the detention  
23 complained of arises out of process issued by a state court. 28  
24 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336  
25 (2003). A district court must issue or deny a certificate of  
26 appealability when it enters a final order adverse to the applicant.  
27 Rule 11(a) of the Rules Governing Section 2254 Cases.  
28

1       A certificate of appealability may issue only if the applicant  
2 makes a substantial showing of the denial of a constitutional right.  
3 § 2253(c)(2). Under this standard, a petitioner must show that  
4 reasonable jurists could debate whether the petition should have  
5 been resolved in a different manner or that the issues presented  
6 were adequate to deserve encouragement to proceed further. Miller-  
7 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.  
8 473, 484 (2000)). A certificate should issue if the Petitioner  
9 shows that jurists of reason would find it debatable whether: (1)  
10 the petition states a valid claim of the denial of a constitutional  
11 right, and (2) the district court was correct in any procedural  
12 ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

13       In determining this issue, a court conducts an overview of the  
14 claims in the habeas petition, generally assesses their merits, and  
15 determines whether the resolution was debatable among jurists of  
16 reason or wrong. Id. An applicant must show more than an absence  
17 of frivolity or the existence of mere good faith; however, the  
18 applicant need not show that the appeal will succeed. Miller-El v.  
19 Cockrell, 537 U.S. at 338.

20       Here, in an abundance of caution, the Court will consider  
21 whether a certificate of appealability should issue. It does not  
22 appear that reasonable jurists could debate whether the petition  
23 should have been resolved in a different manner. Petitioner has not  
24 made a substantial showing of the denial of any right protected by  
25 federal law. Accordingly, it will be recommended that the Court  
26 decline to issue a certificate of appealability.

27       V. Recommendations

28       In accordance with the foregoing analysis, it is RECOMMENDED

that:

- 1) The petition for writ of habeas corpus be DENIED;
- 2) Judgment be ENTERED for Respondent; and
- 3) The Court DECLINE to issue a certificate of appealability.

These findings and recommendations are submitted to the United States District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections shall be served and filed within fourteen (14) days (plus three (3) days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C). The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal.

Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **March 27, 2015**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE