



1 proceedings were initiated, the United States filed a criminal complaint against Cruz-Rodriguez  
2 and his co-conspirators<sup>2</sup> and successfully petitioned for a writ of habeas corpus ad  
3 prosequendum.<sup>3</sup> Cruz-Rodriguez was transferred from state custody to the U.S. Marshals  
4 Service on October 19, 2015, and eventually indicted by a federal grand jury on the conspiracy-  
5 to-distribute charge.<sup>4</sup> He pled guilty, and I sentenced him to 33 months of custody on April 18,  
6 2017.<sup>5</sup>

7         Several weeks later, the State of Nevada charged Cruz-Rodriguez with a drug-trafficking  
8 felony offense based on the same conduct underlying his federal conviction.<sup>6</sup> He again pled  
9 guilty and was sentenced to 12 to 36 months to run concurrent to his federal sentence.<sup>7</sup> The state  
10 court also credited Cruz-Rodriguez for 657 days for the time he spent in federal pre-trial  
11 detention.<sup>8</sup>

12         In November 2017, almost seven months after I entered judgment on his federal  
13 conviction, Cruz-Rodriguez filed a “motion for a sentence nunc pro tunc.”<sup>9</sup> He argued that the  
14 Bureau of Prisons (BOP) erred by not crediting him for the 18 months he spent in federal  
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16 <sup>2</sup> ECF No. 1.

17 <sup>3</sup> ECF Nos. 7, 16–17.

18 <sup>4</sup> ECF No. 217 at 1; ECF No. 54.

19 <sup>5</sup> ECF Nos. 196–97, 200.

20 <sup>6</sup> ECF No. 217-1; ECF No. 220 at 3 (“[B]oth the state case and federal case were related to the  
21 drug trafficking organization (DTO) and attendant drugs attributed to Mr. Cruz-Rodriguez, who  
22 was a ‘drug mule’. The state case arrest and charges were for possession of heroin within the  
23 same time period as the charges in the instant federal case and within the same DTO.”); ECF No.  
24 240 (the government stating that Cruz-Rodriguez’s “state conviction is based on conduct that is  
25 *entirely* encompassed by his federal offense of conviction”).

26 <sup>7</sup> ECF No. 217-1 at 2.

27 <sup>8</sup> *Id.*; *see also* ECF No. 240 at 5.

28 <sup>9</sup> ECF No. 217.

1 custody. But Cruz-Rodriguez did not contest the general rule that a defendant held in pre-trial  
2 detention by federal authorities under a writ of habeas corpus ad prosequendum is “considered to  
3 be ‘on loan’” from the jurisdiction that originally arrested him and is therefore not entitled to  
4 time-served credit against his *federal* sentence.<sup>10</sup> Cruz-Rodriguez instead argued that the  
5 probation office’s presentence report (PSR), which stated that he was “in continuous federal  
6 custody,” misled him to believe that he was in *exclusive* federal custody.<sup>11</sup> He contended that, if  
7 he had understood that he was being held by federal authorities on a writ, he would have  
8 requested that I delay sentencing him until after he was sentenced in state court.<sup>12</sup> He then  
9 would have sought to have his federal sentence run concurrent to his state sentence, which was  
10 credited for the time he spent in pre-trial detention under the writ. He argued that, because the  
11 PSR’s inaccurate portrayal of his detention status prevented him from taking these steps, I should  
12 order the BOP to credit the time he spent detained under the writ.

13         The government countered that Cruz-Rodriguez’s motion was untimely because, under  
14 Federal Rule of Criminal Procedure 35(a), I may correct a sentence only within 14 days of  
15 rendering it.<sup>13</sup> At a motion hearing,<sup>14</sup> Cruz-Rodriguez argued that I could nonetheless grant him  
16 relief under Rule 36, which permits district courts to correct a clerical error in the judgment “at  
17 any time . . . .” But Cruz-Rodriguez sought to substantively amend his sentence—not merely fix

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19 <sup>10</sup> See *Thomas v. Brewer*, 923 F.2d 1361, 1367 (9th Cir. 1991); see also *Dugan v. Clark*, No.  
20 CV 00-9374-RC, 2001 WL 113660, at \*3 (C.D. Cal. Feb. 2, 2001) (citing *Thomas* and holding  
21 that the petitioner was “not entitled to credit against his federal sentence for time spent in federal  
custody pursuant to the writ of habeas corpus ad prosequendum”).

22 <sup>11</sup> See ECF No. 217 at 1.

23 <sup>12</sup> ECF No. 220 at 4.

<sup>13</sup> ECF No. 219 at 2.

<sup>14</sup> ECF No. 227.

1 a clerical error. And because the Ninth Circuit has held that “the fourteen day provision in  
2 Rule 35(a) is jurisdictional,”<sup>15</sup> I denied his motion on the record.

3 At a subsequent status-check hearing, Cruz-Rodriguez’s attorney stated that she had  
4 informed Cruz-Rodriguez that he could collaterally attack his federal sentence under § 2255.<sup>16</sup> I  
5 confirmed on the record that Cruz-Rodriguez understood that this avenue was available to him,  
6 and he eventually filed this pending petition. Two weeks ago, I directed the government to  
7 submit an answer, which it timely filed this week.<sup>17</sup>

### 8 Discussion

9 The government argues that the BOP correctly denied Cruz-Rodriguez time-served credit  
10 under 18 U.S.C. § 3585(b), which allows the BOP to credit an inmate for time spent in pre-trial  
11 detention only if this time “has not been credited against another sentence.” And because the  
12 state court credited Cruz-Rodriguez’s state sentence, he is not entitled to the same credit against  
13 his federal sentence. The government further contends that Cruz-Rodriguez’s counsel was not  
14 ineffective because she could not have known during his federal sentencing whether Nevada  
15 would subsequently prosecute him and thus could not have requested time-served credit against  
16 his federal sentence at that point.<sup>18</sup> And, the government continues, it would have been  
17 “reasonable” for Cruz-Rodriguez’s attorney to believe that Nevada would decline to prosecute  
18 him because the PSR noted that the state was monitoring his federal case and “especially because  
19 the offense conduct for which Cruz-Rodriguez was charged in state court was part and parcel of  
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22 <sup>15</sup> *United States v. Aguilar-Reyes*, 653 F.3d 1053, 1056 (9th Cir. 2011).

23 <sup>16</sup> ECF No. 229.

<sup>17</sup> ECF No. 240.

<sup>18</sup> *Id.* at 6–7.

1 the federal offense . . . .”<sup>19</sup> The government also represents that its prosecutor also “likely  
2 anticipated the state would drop its charges after the federal sentencing” and that Cruz-Rodriguez  
3 would have therefore received time-served credit against his federal sentence.<sup>20</sup> The government  
4 calculates that, as of the time it filed its response, Cruz-Rodriguez has been in custody for just  
5 over 37 months, which exceeds his 33-month sentence.<sup>21</sup>

6 Ultimately, I need not decide whether Cruz-Rodriguez can establish ineffective assistance  
7 of counsel because the government nonetheless asserts that the interests of justice support  
8 resentencing Cruz-Rodriguez to time served.<sup>22</sup> It highlights several “highly unusual  
9 circumstances” in support of this recommendation:

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11 (1) [the] defendant’s state conviction is based on conduct that is  
12 *entirely* encompassed by his federal offense of conviction; (2) the  
13 parties may reasonably have expected the state to dismiss its  
14 charges once the defendant was sentenced in federal court, and  
15 thus for the defendant to have all of the time he spent in custody  
16 prior to the commencement of his federal sentence credited toward  
17 that sentence; (3) the state court intended the state and federal  
18 sentences to run concurrently; and (4) the defendant has already  
19 spent more time in custody tha[n] the federal sentence  
20 imposed . . . .<sup>23</sup>

21 Given these circumstances, the government has (to the extent of its  
22 recommendation) “expressly and affirmatively” waived the provision of Cruz-  
23 Rodriguez’s plea agreement waiving his right to collaterally challenge his

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21 <sup>19</sup> *Id.* at 7.

22 <sup>20</sup> *Id.*

23 <sup>21</sup> *Id.* at 8 n.3.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.*

1 conviction.<sup>24</sup> I therefore find good cause for granting Cruz-Rodriguez's motion to  
2 vacate his sentence, resentence him to time served, and order his immediate  
3 release from prison subject, of course, to any applicable detainers.

4 **Conclusion**

5 Accordingly, IT IS HEREBY ORDERED that Cruz-Rodriguez's motion to vacate his  
6 sentence under 28 U.S.C. § 2255 [ECF No. 234] is **GRANTED**.

7 IT IS FURTHER ORDERED that Cruz-Rodriguez's sentence [ECF No. 200] is  
8 **VACATED**. I **RESENTENCE** Cruz-Rodriguez to a sentence of **time served and reimpose all**  
9 **previously ordered conditions in his amended judgment [ECF No. 200]**. The **CLERK OF**  
10 **COURT** is directed to **REENTER JUDGMENT**. The Clerk must also file this order and a  
11 separate civil judgment in the related civil cases: 2:18-cv-00281 and 2:18-cv-00413.

12 IT IS FURTHER ORDERED that the **Federal Bureau of Prisons IMMEDIATELY**  
13 **RELEASE** Cruz-Rodriguez, **SUBJECT to any DETAINERS**.

14 IT IS FURTHER ORDERED that Cruz-Rodriguez's motion for appointment of counsel  
15 [ECF No. 235] is **DENIED as MOOT**.

16 Dated: November 6, 2018

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19 U.S. District Judge Jennifer A. Dorsey  
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<sup>24</sup> *Id.*; see also ECF No. 122 at 12.