State Sovereignty and Federal Sentencing: Why de facto Consecutive Sentencing by the Bureau of Prisons Should Not Survive *Bond v. United States*

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I. The Problem of Concurrent and Consecutive Sentences in Dual Jurisdiction Prosecutions

When a defendant is prosecuted in both federal and state court, the decision whether those sentences will be served concurrently or consecutively ultimately determines how much actual time the defendant will serve in prison. This exceptionally important decision must be made in the context of one of the "most confusing and least understood" areas of federal sentencing law.[1] Because the concurrent/consecutive decision is a core judicial function, the determination cannot constitutionally be delegated to the same Executive Branch that prosecutes the defendant, absent clearly expressed congressional intent.[2] Yet, without clear legislative direction, the Bureau of Prisons (BOP), an Executive Branch agency, makes precisely that decision hundreds of times each year by denying nunc pro tunc designation to state facilities, thereby creating de facto consecutive sentences.[3] In effect, the BOP assumes the authority to impose a consecutive sentence when the federal judgment is silent on concurrency, even if a subsequent state judgment calls for a concurrent sentence. The BOP essentially nullifies the state judge's determination of the appropriate punishment for a purely state crime.

As sovereign entities, the states possess independent and separate power to define and punish criminal offenses—a power that predates the formation of the Union and is "preserved to them by the Tenth Amendment."[4] In 1922, in deciding how state and federal sentences should interact, the Supreme Court in *Ponzi v. Fessenden* recognized the fundamental norm of mutual respect and comity between state and federal criminal jurisdictions.[5] This norm is embodied in the Full Faith and Credit Statute, in which the First Congress extended the Constitution's Full Faith and Credit Clause to the federal government.[6] The Full Faith and Credit Statute generally applies with the same force to criminal acts and judgments as it does to civil acts and judgments.[7] However, with the advent of the Sentencing Reform Act of 1984 (SRA),[8] the federal sentencing laws left gaps regarding the interaction between state and federal sentences that were filled by the BOP, with the sometimes reluctant approval of the courts. Under the current regime, the following scenario has become common:

- A state arrest places the defendant in the state's primary custody or jurisdiction.[9]
- The federal prosecutor then files a writ of habeas corpus ad prosequendum to pursue a federal prosecution against the same defendant.[10]
- The federal judge imposes a sentence that is silent on whether the federal sentence should run concurrently or consecutively with the yet-to-be-imposed state sentence.[11]
- After the federal prosecution is complete, the defendant returns to state court where the state judge imposes sentence and orders the state sentence to run concurrently with the federal sentence.
- Because the state time is credited against the state sentence,[12] and the federal sentence does not commence until the state sentence is satisfied,[13] the BOP executes the sentence as de facto consecutive, even though no judge ever ordered the sentence to run consecutively.

In *Setser v. United States*, while finding inherent judicial authority to run a federal sentence consecutively with a yet-to-be-imposed state sentence, the Supreme Court acknowledged that the concurrent/consecutive decision is, at its heart, a judicial function.[14] However, due to the unusual facts in *Setser*, the state comity interest was not squarely presented, so the BOP continues to create de facto consecutive sentences without authorization in either the state or federal judgment.[15] However, in 2014, the Supreme Court in *Bond v. United States* reinforced the principles of federalism set forth in *Ponzi*, making it clear that, absent an explicit expression of congressional intent, the federal government must refrain from intruding into the realm of the states' police power.[16] Accordingly, because the federal sentencing statutes do not expressly authorize the BOP or any other nonjudicial authority to make concurrent/consecutive determinations, courts should avoid the constitutional problems inherent in the de facto imposition of consecutive sentences by barring the BOP from using its designation authority to thwart state judgments.[17]

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II. Forgetting *Ponzi*: Concurrency and Comity Before *Setser*

Prior to *Setser*, BOP concurrency decisions regularly undermined the determinations of state criminal courts, primarily because federal courts paid little attention to the principles of comity set forth in *Ponzi*. The Supreme Court in *Ponzi* provided two clear rules that should steer the balance between state and federal authority in criminal sentencing to this day. First, the *Ponzi* Court emphasized that the states and the federal government are distinct sovereigns, each having independent criminal justice systems that are equal and require mutual respect. In other words, federalism requires that each sovereign be allowed to impose as much, or as little, punishment as that sovereign sees fit for a violation of its own laws. Second, the *Ponzi* Court analogized the treatment of defendants to commercial liens, meaning that the jurisdiction with priority satisfies its interest first, then the secondary interest kicks in. In effect, once the first jurisdiction acts, the second is free to act independently and fully based on the previous final disposition. In recognizing that "the people for whose benefit [the dual sovereignties] are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws,"[18] the *Ponzi* Court drew from the deeply rooted founding principle that "every government ought to possess the means of executing its own provision by its own authority."[19]

In 1987, the SRA created a statutory superstructure that provides little guidance regarding the imposition of concurrent and consecutive sentences, which has resulted in defendants serving additional time not ordered by either the state or federal sentencing courts. The BOP interpretations of the SRA limit the availability of federal credit for time served in state institutions in several ways. For one, the BOP interprets 18 U.S.C. § 3584(a) to require that sentences imposed at different times run consecutively, even though the statute only refers to undischarged extant sentences.[20] As a result, the BOP runs sentences consecutively when the federal judgment is silent, even when the state judge orders its later state sentence to run concurrently. Additionally, the BOP disallows credit for time that is credited against "another sentence," even where the state judgment expressly states that the sentences should run at the same time.[21] Therefore, if the defendant remains in the state's primary jurisdiction, the BOP, in most cases, will not give the prisoner federal credit for state time, deeming it to be credited to "another sentence," since federal sentences are not considered to have commenced until the prisoner arrives at the federal detention facility.[22] As a consequence of the BOP's statutory interpretations, the availability of fully concurrent sentences depends on when sentencing in each jurisdiction takes place. As recognized in *United States v. Wilson*, a sentencing regime that turns on the order of sentencing operates in an "arbitrary" manner, and there is no legitimate reason why Congress would intend such a result.[23]

Two stopgap measures have been developed to address the BOP's problematic interpretations. First, the Sentencing Commission promulgated commentary calling for downward adjustment or departure to compensate for pretrial time not credited by the BOP under § 3585(b).[24] Second, the BOP has interpreted the designation authority under § 3621(b) to allow nunc pro tunc designation to the state facility, which can potentially achieve a concurrent sentence but, if denied, creates a de facto consecutive sentence.[25]

Where the concurrent/consecutive issues are not addressed by the federal judgment, the BOP's makeshift solution using nunc pro tunc designations to state institutions produces profound statutory and constitutional problems. In determining whether to grant nunc pro tunc designation, the BOP contacts the federal sentencing judge ex parte and asks for a statement of intent,[26] even though the statute on sentencing finality should foreclose a postsentencing procedure to determine the sentence's length.[27] Not only does the statute preclude effective amendment of the judgment based on ex parte contact, but more importantly, the government's informal communications with the sentencing judge violate the defendant's right to counsel. The Supreme Court has found that postsentencing actions that affect the length of time in custody, even where the requested judicial recommendation is nonbinding on the Executive Branch, constitute a "critical stage" for purposes of the Sixth Amendment.[28] However, in the process currently used by the BOP, the prisoner has no opportunity to challenge factual errors in the BOP's presentation or in the judge's recollection, and is potentially forced to proceed pro se when challenging the adverse decision. Regardless of how the judge responds to the BOP's inquiry, the BOP considers the judicial recommendation to be nonbinding.[29] Instead, the BOP bases its discretionary decision whether to designate the state facility on its own assessment of "the intent of the federal sentencing court" or "the goals of the criminal justice system."[30] By conducting its own evaluation of the "goals of the criminal justice system," the BOP invades the province of the judiciary, because Congress expressly requires "the court" to consider the objectives of criminal sentencing under 18 U.S.C. § 3553(a) when deciding whether a sentence should run concurrently or consecutively.[31]

The fact that a federal executive agency effectively decides whether a state sentence should run consecutively has inspired a chorus of concern within the federal court system. In 1992, in *Del Guzzi v. United States*, Ninth Circuit Judge Norris, concurring, warned practitioners that the BOP rules create a sentencing trap that can potentially result in years of additional imprisonment that "neither the federal nor the state sentencing court anticipated."[32] In 2005, the Second Circuit, later joined by the Fifth and Eighth Circuits, called for congressional action to address the separation of powers issue that arose "when the same branch of government that prosecutes federal prisoners determines concurrency in lieu of the judge."[33] In 2010, Judge Fletcher of the Ninth Circuit joined the other courts requesting congressional action, describing the BOP's

nunc pro tunc procedure as creating separation of powers issues, and finding the BOP's assertion that it is not required to abide by the preference of the federal sentencing judge particularly troubling.[34] Unfortunately, none of the courts that raised such concerns construed the vague sentencing statutes to avoid constitutional problems, instead finding that the state judgment regarding concurrency was not binding on the BOP. Then along came *Setser*.

III. *Setser* Answers Only Half the Question

In *Setser*, the Court confronted the question of whether a district court has the authority to order a federal sentence to run consecutively to a yet-to-be-imposed state sentence, resolving a split in the circuits, but failing to provide much-needed clarity to the concurrent/consecutive problem.[35] Based on the question presented, *Setser* looked as if it might lead to a return to *Ponzi*'s principles of comity regarding state sentences. Unfortunately, the case did not turn out to be an ideal vehicle for review. On the surface, Mr. Setser's circumstances appeared to present the familiar series of events involving a state arrest, followed by a federal sentence, then followed by a state sentence. The wrinkle in *Setser* was that the federal judge ordered a consecutive sentence, followed by two state sentences, one of which the state judge ordered to run consecutively to the federal sentence, the other concurrently. Ultimately, both the defendant and the government took the position that the federal judge had no authority to impose a sentence consecutive or concurrent to a yet-to-be-imposed sentence, arguing that only the BOP had the authority to make that call. Nobody argued the *Ponzi* comity position that, because the statute did not authorize the federal court to address unimposed state sentences, the state judge's determination of the concurrent/consecutive question should prevail.[36]

Even though the *Ponzi* comity argument was not presented, Justice Scalia's majority opinion provides the building blocks for a return to the principles of federalism embraced in *Ponzi*.[37] At its core, *Setser* established that a federal judge possesses the inherent authority to order a federal sentence to run concurrently with a yet-to-be-imposed sentence. Although the decision did not provide the clarity needed to change BOP practices when the federal judgment is silent, the opinion is peppered with language indicating that the concurrent/consecutive decision is a purely judicial function, and that the BOP, as an arm of the executive, has no business making that decision:

- "Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings."[38]
- "Congress contemplated that only district courts [as opposed to the BOP] would have the authority to make the concurrent-vs.-consecutive decision."[39]
- "§ 3621(b) . . . is a conferral of authority on the Bureau of Prisons, but does not confer authority to choose between concurrent and consecutive sentences."[40]
- "When § 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."[41]
- "It is much more natural for a judge to apply the § 3553(a) factors in making all concurrent-vs.-consecutive decisions, than it is for some such decisions to be made by a judge . . . and others by the Bureau of Prisons."[42]
- "[S]entencing [should] not be left to employees of the same Department of Justice that conducts the prosecution."[43]
- "Yet-to-be-imposed sentences are not within the system . . . and we are simply left with the question whether judges or the Bureau of Prisons is responsible for them. For the reasons we have given, we think it is judges."[44]

Not only does the *Setser* opinion recognize that the concurrent/consecutive decision is the province of the judiciary, the Court also treated the relationship between federal and state sentences as guided by principles of mutual respect and comity. The Court recognized that "it is always more respectful of the State's sovereignty for the district court to make [the concurrent/consecutive] decision up front rather than for the [BOP] to make the decision after the state court has acted," and emphasized the importance of a state court having "all of the information before it when it acts."[45] The Court also used language mirroring *Ponzi*, stating that a federal court's "forbearance"—the same root word used in *Ponzi*—on deciding concurrency questions left the matter to the state.[46] Yet, tragically 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.

After *Setser*, courts have upheld the BOP's continued assumption of sentencing authority without addressing *Setser*'s comity and construction requirements. For example, in *Elwell v. Fisher*, the Eighth Circuit held that the BOP "correctly interpreted the district court's silence as requiring consecutive sentences pursuant to § 3584(a)."[47] But *Elwell* is irreconcilable with the plain language of *Setser*. Prior to *Setser*, the BOP interpreted the third sentence of § 3584(a), which presumes consecutive sentences from silence, to apply to unimposed sentences, asserting federal supremacy to trump a state concurrent sentence. After *Setser*, that assertion is untenable: *Setser* recognized that the treatment of yet-to-be imposed sentences fell within inherent judicial discretion because § 3584(a) did not encompass all sentencing authority. Based on the statutory language, the Court found that § 3584(a) addresses only multiple terms of imprisonment imposed "when a defendant . . . is already subject to an undischarged term of imprisonment."[48]

IV. *Bond* to the Rescue

So how does a case about the reach of the treaty power solve the concurrent/consecutive statutory mess? In *Bond*, the government charged a wife, who smeared nonlethal chemicals on places her husband's girlfriend was likely to touch, with violating a statute implementing an international chemical weapons convention.[49] Chief Justice Roberts' majority opinion decided the question based on a rule of statutory construction that, in the context of police authority to maintain law and order, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers."[50] According to *Bond*, when legislation affects the federal balance, as where state crimes would become federalized, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[51] In the case of concurrent/consecutive determinations, nothing in § 3584(a) even suggests—never mind clearly states—that the federal government has the slightest interest in how much time a state defendant serves as punishment for a state crime.

As a matter of statutory construction, *Bond* requires a "clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." This basic premise is irreconcilable with BOP executive action that thwarts a state concurrent sentence because, "[i]n our federal system, the National Government possesses only limited powers; the States and the people retain the remainder."[52] Although the federal punishment is grounded in proper federal jurisdiction, the Supremacy Clause is inapplicable to state criminal judgments.[53] No enumerated power grants the federal government the authority to say how much, or how little, a state should punish a defendant for the violation of the state statute.

V. The Solution

In light of *Setser* and *Bond*, the courts should take a fresh look at the sentencing statutes to finally put an end to de facto consecutive sentencing by the BOP. The Judiciary must do the heavy lifting because, despite judicial expressions about the need for a legislative solution, Congress is unlikely to address the issue any time soon, and the federal courts are responsible for enforcing constitutional limits on Executive Branch action. After *Setser*, the federal sentencing statutes should be construed to recognize that the concurrent/consecutive determination is solely a judicial function. After *Bond*, the sentencing statutes should be construed to respect state police power in the absence of a clear congressional statement asserting federal supremacy. To respect the statutory and constitutional requirements of comity, federalism, and separation of powers, three separate statutes have sufficient flexibility to 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.

Section 3584 requires that a silent federal judgment result in deference to the subsequent state judgment of concurrency. The federal statute on concurrent and consecutive sentences authorizes only the federal sentencing judge to make discretionary concurrent/consecutive determinations. Whereas *Setser* recognized an inherent judicial authority that exists beyond the statutory language, the statute is silent regarding Executive Branch power, which includes no inherent authority to make sentencing decisions. Therefore, the statute should be construed to bar Executive Branch action that thwarts a subsequent state judgment of concurrency. Under *Bond*, because sentencing determinations are part of the states' police power, and de facto consecutive sentencing by the federal executive interferes with a state's sovereign authority to determine appropriate punishment for its crimes, the courts should hold that the BOP lacks authority to decide for itself whether a state sentence will be consecutive or concurrent because Congress made no clear statement evincing an intent to alter the balance of federal and state authority. Under *Setser*, the statute so construed would avoid the separation of powers and comity issues where the same branch of government that prosecutes also decides the actual period of incarceration, contrary to the judgment of the state court. Further, § 3584 recognizes only a "court" or a "statute" as sources for the concurrent/consecutive determination. "When § 3584(a) specifically addresses decisions about concurrent and consecutive decisions, and makes no mention of the Bureau's role in the process, the implication is that no such role exists."[54]

Section 3585(b) does not include a cross-referenced state judgment of concurrency as "another sentence.". The statute on pretrial credit requires that the BOP "shall" provide credit as long as the pretrial time in custody has not been credited against "another sentence." Where the state judgment explicitly references the federal sentence, and where the federal judgment is silent, the plain meaning of the word "another" should foreclose interpretation that treats it as an unrelated sentence.[55] The term is at least amenable to such an interpretation to avoid the equal protection concerns produced when the timing of sentencing determines the ultimate duration of incarceration. This interpretation also gives due respect to the principles of federalism and comity addressed in *Setser* and *Bond*, which are also expressed in the Full Faith and Credit Statute. Accordingly, time served in a state facility, where the face of the state judgment references the federal sentence, has not been credited against "another sentence" when the two sentences are explicitly ordered to run concurrently by the state court.

Section 3621(e)'s implicit creation of nunc pro tunc designation authority requires respect for the state judgment of concurrency where the federal judgment is silent. The courts created the BOP's nunc pro tunc

designation power without any express statutory authorization. Therefore, the same judicial power to create the nunc pro tunc designations through statutory interpretations should be subject to judicial interpretation that avoids the serious constitutional issues surrounding failure to give full faith and credit to the state court judgment.

VI. Conclusion

By following the Supreme Court's lead in *Bond*, *Setser*, and *Ponzi* through statutory interpretation, the courts would restore the constitutional balance between state and federal criminal jurisdictions, maintain the separation of powers, and avoid the human and administrative costs inherent in the imposition of significantly longer sentences than anticipated by either sentencing court. By failing to do so, the courts fail to protect prisoners against over-incarceration resulting from the violation of their fundamental constitutional rights.

Notes

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1 Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant Is Under State Primary Jurisdiction* at 1 (Nov. 18, 2009), http://paw.fd.org/pdf/bop-interaction-fed-state-sentences.pdf. Mr. Sadowski was formerly the Northeast Regional Counsel for the Bureau of Prisons. The interaction of federal and state sentences can involve the same, related, or unrelated conduct because the Double Jeopardy Clause does not apply to separate sovereigns. United States v. Lanza, 260 U.S. 377, 382 (1922).

2 The concurrent/consecutive decision "concerns a matter of discretion traditionally committed to the Judiciary," and therefore, should not "be left to employees of the same Department of Justice that conducts the prosecution." Setser v. United States, 132 S. Ct. 1463, 1468, 1472 (2012) (citing Oregon v. Ice, 555 U.S. 160, 168–69 (2009)).

3 "Nunc pro tunc" refers to the retroactive designation to the state facility after the commencement of the federal sentence that permits time in state custody to count against the federal sentence. In fiscal year 2011, the BOP failed to grant relief in 386 out of 488 prisoner requests for concurrency. U.S. Gov't Accountability Office, Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison 29 (2012).

4 Heath v. Alabama, 474 U.S. 82, 89–90 (1985) (citations omitted).

5 Ponzi v. United States, 258 U.S. 254, 259 (1922). The petitioner in that case was the same Charles Ponzi for whom Ponzi schemes are named.

6 U.S. Const. art. IV, § 1. The Full Faith and Credit Statute passed by the First Congress is the precursor to the modern Full Faith and Credit Act, which provides that judgments "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (2014) (enacted June 25, 1948).

7 *See* Allen v. McCurry, 449 U.S. 90, 95–96 (1980) (in the context of federal consideration of a state criminal determination of a motion to suppress, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.").

8 The Sentencing Reform Act of 1984, 98 Stat. 1987, 18 U.S.C. §§ 3551 to 3586 (1984).

9 "[P]rimary jurisdiction over a person is generally determined by which one first obtains custody of, or arrests, the person." United States v. Cole, 416 F.3d 894, 897 (8th Cir. 2005) (citations omitted).

10 "If, while under the primary jurisdiction of one sovereign, a defendant is transferred to the other jurisdiction to face a charge [commonly based on a writ of habeas corpus ad prosequendum], primary jurisdiction is not lost but rather the defendant is considered to be 'on loan' to the other sovereign." *Id.* at 896–97.

11 Before the Supreme Court's recent decision in *Setser*, over half of the Circuits held that district courts lacked authority to order the federal sentence to run consecutively to or concurrently with the yet-to-be-imposed sentence. Even now the federal court can still "forbear" from making that decision. *Setser*, 132 S. Ct. at 1472 n.6.

12 18 U.S.C. § 3585(b) (barring pre-trial credit for time that has been credited against "another sentence").

13 18 U.S.C. § 3585(a) (the federal sentence does not commence until the defendant is received or arrives at "the official detention facility at which the sentence is to be served").

14 *Setser*, 132 S. Ct. at 1463.

15 *See* Elwell v. Fisher, 716 F.3d 477, 484 (8th Cir. 2013) (interpreting *Setser* to limit the BOP's discretionary authority over sentences that were yet-to-be-imposed but not its discretion to make a determination on concurrency when the federal judgment is silent on the issue).

16 Bond v. United States, 134 S. Ct. 2077, 2088–89 (2014).

17 See *Clark v. Martinez*, 543 U.S. 371, 384–85 (2005) ("[S]tatutes should be construed to contain substantive dispositions that do not raise constitutional difficulty . . . when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction [with the] canon function[ing] as a means of choosing between them.") (emphasis omitted).

18 *Ponzi*, 258 U.S. at 259.

19 Alexander Hamilton, *Federalist No. 80*, The Federalist Papers, http://thomas.loc.gov/home/histdox/fed_80.html.

20 "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 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 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 unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a).

21 18 U.S.C. § 3585(b).

22 18 U.S.C. § 3585(a).

23 United States v. Wilson, 503 U.S. 329, 334 (1992) ("We can imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing."); *see also* Jonah R. v. Carmona, 446 F.3d 1000, 1008 (9th Cir. 2000) (because "arbitrary discrimination" in denial of credit "might well trigger equal protection concerns," statutes must be interpreted so as to "avoid such constitutional difficulties whenever possible").

24 U.S.S.G. §§ 5G1.3 and 5K2.23. The stopgap nature of these provisions is demonstrated by the BOP's position that good time credits for the adjusted time in custody must be achieved

through variances granted by the federal sentencing judge. Brief of Respondent, Lopez v. Terrell, 654 F.3d 176 (2d Cir. 2011) (No.10-2079), 2011 WL 680803, *8; Brief of Respondent, Schleining v. Thomas, 642 F.3d 1242 (9th Cir. 2011) (No. 10-35792), 2011 WL 991513, *30.

25 *See* Barden v. Keohane, 921 F.2d 476, 478 (3rd Cir. 1990) (holding that the BOP has the authority to decide whether the state prison in which defendant served his initial term "should be designated as a place of federal confinement nunc pro tunc").

26 Federal Bureau of Prisons, U.S. Dept. of Justice, Program Statement 5160.05, at 6 (2003), http://www.bop.gov/policy/progstat/5160_005.pdf.

27 See 18 U.S.C. § 3582(b) & (c). The Supreme Court has described the processes for modification of a sentence listed in § 3582 as "narrow exception[s] to the rule of finality." Dillon v. United States, 560 U.S. 817, 827 (2010).

28 Mempa v. Rhay, 389 U.S. 128, 127, 133–34 (1967) (holding that a post-conviction proceeding where the sentencing judge makes a nonbinding recommendation to the parole board affecting the period of confinement was a critical stage implicating the Sixth Amendment right to counsel).

29 Program Statement 5160.05, *supra* note 26, at 5–6.

30 *Id.* at 4.

31 18 U.S.C. § 3584(b) ("The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a)."). Under § 3553(a)(2), the goals of federal sentencing are whether the sentence "reflect[s] the seriousness of the offense," "promote[s] respect for the law," "provide[s] just punishment for the offense," and adequately protects the public while providing for deterrence and rehabilitation.

32 Del Guzzi v. United States, 980 F.2d 1269, 1271 (9th Cir. 1992) (Norris, J., concurring); *see also* Thomas v. Whalen, 962 F.2d 358, 364 (4th Cir. 1992) (Hall, J., concurring) ("The fundamental issue is, of course, what was the total sentence imposed on [the defendant]. If the state sentence was made concurrent to the previously imposed federal sentence, either expressly or by operation of state law, then a low-level administrative decision about where to first incarcerate [the defendant] should not be permitted to override the state court's decision.")

33 Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 76 (2d. Cir. 2005); *accord* Hunter v. Tamez, 622 F.3d 427, 431 (5th Cir. 2010); Fegans v. United States, 506 F.3d 1101, 1104 (8th Cir. 2007).

34 Reynolds v. Thomas, 603 F.3d 1144, 1160-61 (9th Cir. 2010) (Fletcher, J., concurring), *cert. dismissed*, 132 S. Ct. 1854 (2012).

35 *Setser*, 132 S. Ct. at 1467–68.

36 For the sake of adversarial presentation, the Court appointed an amicus curiae attorney to argue that the federal judge, and not the BOP, had the authority to make the determination.

37 "In our American system of dual sovereignty, each sovereign—whether the Federal Government or a State—is responsible for 'the administration of [its own] criminal justice syste[m].'" *Setser*, 132 S. Ct. at 1471 (quoting Oregon v. Ice, 555 U.S. 160, 170 (2009)).

38 *Setser*, 132 S. Ct. at 1468.

39 *Id.* at 1469.

40 *Id.* at 1470.

41 *Id.*

42 *Id.* at 1471.

43 *Id.* at 1472.

44 *Id.* at 1472 n.5.

45 *Id.* at 1471.

46 *Compare Setser*, 132 S. Ct. at 1472 n.6 (the district court may "forbear" from exercising the power to make the concurrent/consecutive decision regarding an anticipated sentence), *with Ponzi*, 258 U.S. at 260–61 (noting the "forbearance" of courts with co-ordinate jurisdictions that avoids interference with the principle of comity).

47 *Elwell*, 716 F.3d at 484.

48 *Setser*, 132 S. Ct. at 1467 ("[§ 3584(a)] addresses *only* 'multiple terms of imprisonment . . . imposed . . . at the same time' and 'a term of imprisonment . . . imposed on a defendant who is already subject to an undischarged term of imprisonment.'") (emphasis added).

49 *Bond*, 134 S. Ct. at 2083.

50 *Id.* at 2089 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)) (internal quotation marks omitted).

51 *Id.* (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

52 *Id.* at 2086.

53 *See* Strand v. Schmittroth, 251 F.2d 590, 605 (9th Cir. 1957) (recognizing that there is no federal supremacy over state criminal proceedings because the state and federal governments are dual sovereigns exercising jurisdiction over shared territory).

54 *Setser*, 132 S. Ct. at 1470.

55 The common meaning of "another" is "different or distinct from the one first named or considered." Webster's Third New International Dictionary 89 (1993). In the context of cross-referenced judgments, the cases are running at the same time and are not different or distinct.