UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. DWIGHT THUNDER SHIELD, Defendant/Petitioner.	CR NO. 17-50066 United States of America's Response and Brief in Opposition to Thunder Shield's Petition for Mandamus Relief or, Alternatively, Habeas Corpus Relief Pursuant to 28 U.S.C. § 2241

Respondent, United States of America, by and through its counsel of record, United States Attorney Ronald A. Parsons, Jr., and Assistant United States Attorney Delia M. Druley, respectfully submits this Response and Brief in Opposition to Thunder Shield's Petition for Mandamus Relief, or Alternatively, Habeas Corpus Relief Pursuant to 28 U.S.C. § 2241. This response is supported by the Declaration of Jan Stopps with attached exhibits and the Declaration of Shannon Boldt with attached exhibits.

INTRODUCTION

Thunder Shield contends he is owed credit for the time he spent in federal custody as result of a federal writ of habeas corpus ad prosequendum before he was sentenced for the instant offense. Because the additional time for which Thunder Shield seeks credit was spent in service of a tribal sentence, 18 U.S.C.

§ 3585(b)'s prohibition on double counting bars Thunder Shield from relief.[1] Alternatively, Thunder Shield's petition should be denied because he failed to exhaust administrative remedies as is required of prisoners before they pursue relief under 28 U.S.C. § 2241.

FACTUAL AND PROCEDURAL BACKGROUND

I. Sentence Computation

Thunder Shield is serving a 14-month term of imprisonment imposed by this Court for Assault on a Federal Officer in violation of 18 U.S.C. § 111(a). Thunder Shield has a projected release date of December 15, 2018, via a good conduct time release. *See* Declaration of Jan Stopps at ¶ 4; Stopps Exhibit A.

On December 10, 2016, Thunder Shield was arrested in Case No. CRI-16-1143K by the Oglala Sioux Tribe Department of Public Safety for Violence to a Policeman or Judge, Assault in the Second Degree, Child Endangerment in the First Degree (3 counts), Obstructing Justice, Disorderly Conduct, and Sale and Possession of Alcoholic Beverages. *See id.* at ¶ 5; Stopps Exhibit B. On December

[1] Because inmates may challenge the calculation of their sentences through a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, *see Matheny v.* Morrison, 207 F.3d 709 (8th Cir. 2002), the government respectfully asserts that Thunder Shield's petition should be considered under that statute, rather than as a petition for a writ of mandamus under the All Writs Act. *See Baranski v. United States*, 880 F.3d 951, 954 (8th Cir. 2018) (explaining that while "the All Writs Act is a residual source of authority . . . [w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling" while concluding that a coram nobis petitioner whose motion for § 2255 relief was denied while he was in custody is not required to obtain authorization of a three-judge panel of the Court of Appeals to seek coram nobis relief) (quoting *Carlisle v. United States*, 517 U.S. 416, 429 (1996)). *See also Otey v. Hopkins*, 5 F.3d 1125, 1130 (8th Cir. 1993) (stating that a writ of habeas corpus is a means to provide relief for a prisoner who is challenging the fact or duration of confinement and seeks immediate or speedier release).

16, 2016, the Oglala Sioux Tribal Court sentenced Thunder Shield to a 12-month term of imprisonment in that case. *Id.* at ¶ 6; Stopps Exhibit C.

On April 18, 2017, this Court issued a Redacted Indictment charging Thunder Shield with Assault on a Federal Officer, which occurred on or about December 10, 2016. *Id.* at ¶ 7; Stopps Exhibit D.

On April 25, 2017, Thunder Shield was temporarily removed from the physical custody of the Oglala Sioux Tribe by the United States Marshals Service (USMS) on a federal writ of habeas corpus ad prosequendum. *Id.* at ¶ 8; Stopps Exhibit E at 9. On December 19, 2017, while still on writ, Thunder Shield completed service of his Tribal sentence. *Id.* at ¶ 9; Stopps Exhibit F.

On January 22, 2018, this Court sentenced Thunder Shield to a 14-month term of imprisonment for Assault on a Federal Officer in Case No. 5:15CR50066-1. Id. at ¶ 10; Stopps Exhibit G. According to the Statement of Reasons, this Court imposed a sentence that was four months below the guideline range to account for time Thunder Shield spent in Tribal custody that was directly related to the instant federal offense. *Id.* at ¶ 11; Stopps Exhibit H.

The Bureau of Prisons prepared a sentence computation for Thunder Shield based on a 14-month term of imprisonment in Case No. 5:15CR50066-1. *Id.* at ¶ 16; Stopps Exhibit A. His sentence commenced on January 22, 2018, the day of imposition. *Id.* at ¶ 17. Thunder Shield received prior custody credit from December 10, 2016, the date of his arrest by Oglala Sioux Tribe Department of Public Safety, through December 18, 2016, the date before his Tribal sentence was imposed, and from December 20, 2017, the day after Tribal sentence was

completed, through January 21, 2018, the day before his federal sentence was imposed, on his federal sentence. *Id.* at ¶ 18. Based on this calculation, Thunder Shield has a projected release date of December 15, 2018, via a good conduct time release. *Id.* at ¶ 20; Stopps Exhibit A.

II. Exhaustion of Administrative Remedies

The Bureau of Prisons has established an administrative remedy procedure whereby inmates can seek formal review of any complaint regarding any aspect of their imprisonment. *See* 28 C.F.R. § 542, Subpart B. In accordance with the Bureau's Administrative Remedy Program, an inmate shall first attempt informal resolution of his complaint by presenting the issue informally to staff, and staff must attempt to resolve the issue. *See* 28 C.F.R. § 542.13(a). If the complaint cannot be resolved informally, the inmate may submit a formal written Administrative Remedy Request to the Warden, on a designated form, within twenty days of the event that triggered the inmate's complaint. 28 C.F.R. § 542.14(a). If the inmate's formal request is denied, the inmate may submit an appeal to the appropriate Regional Director of the BOP within twenty calendar days of the date of the Warden signed the response. 28 C.F.R. § 542.15(a). A negative decision from the Regional Director may in turn be appealed to the General Counsel's Office (in the Central Office) within thirty calendar days of the date the Regional Director signed the response. *Id.* No administrative remedy appeal is considered to have been fully exhausted until considered by the Bureau of Prisons' Central Office. 28 C.F.R. §§ 542.14-542.15.

As of October 16, 2018, Thunder Shield has attempted to file one administrative remedy during his incarceration with the Bureau of Prisons. *See* Declaration of Shannon Boldt at ¶ 12; Boldt Exhibit B. On or about April 19, 2018, Thunder Shield filed Administrative Remedy 937702-F1 at the institutional level, alleging his projected release date was wrong. *Id.* at ¶ 13; Boldt Exhibit B. However, Thunder Shield withdrew Administrative Remedy 937702-F1. *Id.*

Since the withdrawal of Administrative Remedy 937702-F1, Thunder Shield has not refiled Administrative Remedy Series 937702 at any level. *Id.* at ¶ 14; Boldt Exhibit B.

STANDARD OF REVIEW

Prisoners may challenge the execution of their sentences through a petition under § 2241. "A petitioner may attack the execution of his sentence through § 2241 in the district where he is incarcerated; a challenge to the validity of the sentence itself must be brought under § 2255 in the district of the sentencing court." *Bell v. United States*, 48 F.3d 1042, 1043 (8th Cir. 1995). Actions regarding the denial of sentence credits for good time or pretrial detention are cognizable under § 2241. *Id.* at 1043-44; *see also Reno v. Koray*, 515 U.S. 50, 52-53 (1995). As the petitioner, Thunder Shield has the burden of establishing that he is entitled to habeas corpus relief. *See Wiggins v. Lockhart*, 825 F.2d 1237, 1238 (8th Cir. 1987) ("In order to warrant relief, or, as an initial matter, even an evidentiary hearing, a habeas corpus petitioner must allege sufficient facts to establish a constitutional claim. Mere conclusory allegations

will not suffice."), *cert. denied*, 484 U.S. 1074 (1988); *see also Whitaker v. Fisher*, Civ. 10-3595, 2011 WL 1542066, at *4 (D. Minn. Mar. 28, 2011) ("In § 2241 habeas corpus cases, '[t]he burden of proof of showing deprivation of rights leading to unlawful detention is on the petitioner.' ") (quoting *Espinoza v. Sabol,* 558 F.3d 83, 89 (1st Cir. 2009)). The Eighth Circuit Court of Appeals reviews this Court's decision on a § 2241 petition de novo. *United States v. Lurie*, 207 F.3d 1075, 1076 (8th Cir. 2000).

ARGUMENT

I. Because the Bureau of Prisons' sentence calculation is correct, Thunder Shield's petition should be denied.

The Attorney General has sole responsibility for computing federal sentences, *United States v. Wilson,* 503 U.S. 329, 335 (1992), and the Attorney General has delegated this authority to the Bureau of Prisons, 28 C.F.R. § 0.96. A federal sentence "commences on the date the defendant is received in custody." 18 U.S.C. § 3585(a). The Bureau of Prisons has interpreted this statute to mean that if the defendant "is serving no other federal sentence at the time the sentence is imposed, and is in exclusive federal custody . . . the sentence commences on the date of imposition." *See* Stopps Declaration at ¶ 12; Stopps Exhibit I. Therefore, the Bureau of Prisons has determined that "[i]n no case can a federal sentence of imprisonment commence earlier than the date on which it is imposed." *See id.* at ¶ 13; Stopps Exhibit I.

In certain circumstances, the defendant is entitled to prior custody credit for time spent in official detention:

> A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> > (1) as a result of the offense for which the sentence was imposed; or
> > (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> That has not been credited against another sentence.

18 U.S.C. § 3585(b). Interpreting this statute, the Bureau of Prisons has determined that a defendant will receive credit against his federal sentence "for time spent in official detention as a direct result of the federal offense for which the federal sentence was imposed and not as a result of a writ from another jurisdiction, provided it has not been credited against another sentence." Stopps Declaration at ¶ 14; Stopps Exhibit I. Further, "[T]ime spent in custody under a writ of habeas corpus from non-federal custody will not in and of itself be considered for the purpose of crediting presentence time. The primary reason for the 'writ' custody is not the federal charge. The federal court merely 'borrows' the prisoner under the provisions of the writ for secondary custody." *Id.* at ¶ 15; Stopps Exhibit I. Thus, BOP policy clarifies that a defendant cannot count his detention time against two sentences. *See Wilson*, 503 U.S. at 337.

The Bureau of Prisons has correctly calculated Thunder Shield's federal sentence. First, under § 3585(a), his 14-month term of imprisonment commenced the day of imposition on January 22, 2018. *See* Stopps Decl. at ¶ 17; Stopps Exhibit A. Because in no case can a federal sentence of imprisonment commence earlier than the date on which it is imposed, this prevents the Bureau

of Prisons from commencing Thunder Shield's federal sentence before this date. Second, consistent with § 3585(b), Thunder Shield has received all applicable prior custody credit to which he is entitled. The Bureau of Prisons has awarded Thunder Shield prior custody credit under § 3585(b) for December 10, 2016, the date of his arrest by Oglala Sioux Tribe Department of Public Safety, through December 18, 2016, the date before his Tribal sentence was imposed, and from December 20, 2017, the day after Tribal sentence was completed, through January 21, 2018, the day before his federal sentence was imposed, to Thunder Shield's federal computation. The Oglala Sioux Tribal Court did not apply this prior custody credit towards his tribal sentence, *see* Stopps Decl. at ¶ 18, and therefore, it could be applied under § 3585(b).

Thunder Shield argues he is entitled to prior custody credit beginning April 25, 2017, through December 19, 2017. This is time Thunder Shield spent in federal custody as result of a federal writ of habeas corpus ad prosequendum. But under the doctrine of primary jurisdiction, the Oglala Sioux Tribe did not relinquish its jurisdiction over Thunder Shield.

"Under the doctrine of primary jurisdiction, service of a federal sentence generally commences when the United States takes primary jurisdiction and a prisoner is presented to serve his federal sentence, not when the United States merely takes physical custody of a prisoner who is subject to another sovereign's primary jurisdiction." *Elwell v. Fisher*, 716 F.3d 477, 481 (8th Cir. 2013). "As between the state and federal sovereigns, primary 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). "Primary jurisdiction continues until the first sovereign relinquishes its priority in some way," such as release on bail, dismissal of charges, parole, or expiration of a sentence. *Id.* "If, while under the primary jurisdiction of one sovereign, a defendant is transferred to the other jurisdiction to face a charge, primary jurisdiction is not lost, but rather the defendant is considered to be 'on loan' to the other sovereign." *Id.* at 896-97. A writ of habeas corpus ad prosequendum is a means to obtain physical custody of a defendant so that he can be prosecuted in the proper jurisdiction, which results in the defendant being on loan from the tribal or state authorities to the federal authorities. *United States v. Hayes*, 535 F.3d 907, 910 (8th Cir. 2008).

The Oglala Sioux Tribal Court never relinquished primary custody via bond or dismissal of their charges while Petitioner was in the temporary custody of the USMS. Petitioner's Oglala Sioux Tribal sentence continued to run while he was on the federal writ. Thus, Petitioner is not entitled to this time period as it is time he spent in custody as result of a federal writ of habeas corpus ad prosequendum and in services of his Oglala Sioux Tribal sentence, and this time was credited towards his tribal sentence. *See United States v. Wilson*, 503 U.S. 329, 337 (1992); *Baker v. Tippy*, No. 99-2841, 2000 WL 1128285, *1 (8th Cir. 2000) (unpublished opinion); *see also U.S. v. Kramer,* 12 F.3d 130, 132 (8th Cir. 1993) (citing *McIntyre v. United States*, 508 F.2d 403, 404 (8th Cir. 1975)); Stopps Decl., ¶ 19. Consequently, 18 U.S.C. § 3585(b)'s prohibition on double counting bars Thunder Shield from receiving credit towards his federal sentence for this

time. Thus, Thunder Shield's projected release date of December 15, 2018, via a good conduct time release is correct and the Petition should be dismissed.

II. Alternatively, Thunder Shield's petition should be denied for failing to exhaust administrative remedies.

A § 2241 petitioner must exhaust administrative remedies within the prison before filing in district court. *United States v. Thompson*, 297 Fed. App'x 561, 562 (8th Cir. 2008); *see also United States v. Chappel,* 208 F.3d 1069, 1069 (8th Cir. 2009) (per curiam). However, the requirement for exhaustion of administrative remedies is judicially created and is not jurisdictional. *See Lueth v. Beach*, 498 F.3d 795, 797 n.3 (8th Cir. 2007). Because exhaustion is not jurisdictional, courts may create exceptions to the exhaustion requirement. *Frango v. Gonzales*, 437 F.3d 726, 728-29 (8th Cir. 2006). Habeas petitioners can be excused from exhausting administrative remedies if they can show that proceeding through the administrative remedy process would be futile and serve no useful purpose. *See Elwood v. Jeter*, 386 F.3d 842, 844 n.1 (8th Cir. 2004).

Thunder Shield's failure to exhaust administrative remedies regarding his sentence computation should not be excused. The Bureau of Prisons' regulations make clear the administrative remedy process is available to challenge "any aspect" of the inmate's confinement. 28 C.F.R. § 542.10(a). While Thunder Shield did avail himself of the administrative remedy process at the institutional level, he withdrew that request. *See* Boldt Decl. at ¶ 13; Boldt Exhibit B at 2. He could have reinstated or appealed his request, but he has failed to do so. *Id.* at ¶ 14. Because Thunder Shield has not properly filed an appeal with the Regional or

Central Offices, he has failed to exhaust his administrative remedies. Thunder Shield has made no arguments asserting that his failure to exhaust administrative remedies should be excused. Thus, Thunder Shield's petition should be dismissed on this basis.

CONCLUSION

The Bureau of Prisons correctly calculated Thunder Shield's federal sentence. The time Thunder Shield spent in federal custody as result of a federal writ of habeas corpus ad prosequendum was applied against his tribal sentence, because the Oglala Sioux Tribe never relinquished primary jurisdiction over Thunder Shield. Thus, 18 U.S.C. § 3585(b) bars Thunder Shield from receiving credit for that same time against his federal sentence. Consequently, he is not entitled to the relief he seeks.

Alternatively, prisoners who pursue relief under 28 U.S.C. § 2241 are required to first exhaust administrative remedies within the prison before pursing an action in district court. Because Thunder Shield failed to do so, his petition is subject to dismissal.

WHEREFORE, Plaintiff/Respondent United States of America respectfully requests that this Court deny Thunder Shield's Petition for Mandamus Relief, or Alternatively, Habeas Corpus Relief Pursuant to 28 U.S.C. § 2241 and issue a judgment in favor of the United States of America.

Dated this 19th day of October, 2018.

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