

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

CR 17-50066

Plaintiff,

DEFENDANT'S REPLY TO  
UNITED STATES' RESPONSE TO  
PETITION FOR MANDAMUS  
OR, ALTERNATIVELY,  
HABEAS CORPUS RELIEF

vs.

DWIGHT THUNDER SHIELD,

Defendant.

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Defendant/Petitioner Dwight Thunder Shield, by his attorney, Assistant Federal Public Defender Jennifer Albertson, respectfully replies as follows to the United States opposition, (Doc. 48), to the Defendant's petition, (Doc. 46), for mandamus relief pursuant to 28 U.S.C. § 1651 or, alternatively, for habeas corpus relief under 28 U.S.C. § 2241.

**BACKGROUND**

Thunder Shield seeks immediate release from custody asserting the Bureau of Prisons has and is holding him behind the expiration of his 14-month sentence imposed by this court on January 24, 2018, (Doc. 42), because the Bureau has failed to credit him with time served in federal custody after he was transferred from tribal to federal custody pursuant to the United States' application for a writ of habeas corpus ad prosequendum, (Doc. 5), granted by this court on April 25, 2018. (Doc. 6.) The Bureau of Prisons has not awarded Thunder Shield time served credit from and after his transfer into federal custody on April 25, 2018, upon this court's grant of the United States' requested writ and his sentencing on January 24, 2018.

Time is of the essence. Thunder Shield will be brief in his reply.

With good time credits, the United States submits Thunder Shield will be released on December 15, 2018 – in less than two months.

### ARGUMENT

Notwithstanding the United States' unsupported claim Thunder Shield somehow remained in tribal, rather than federal custody upon his transfer into federal custody pursuant to the writ of habeas corpus ad prosequendum issued by this court on April 25, 2018, the law is clear Thunder Shield, in fact, was transferred into federal custody upon issuance of the writ. *United States v. Hall*, 825 F.3d 373, 373 (8th Cir. 2016) (“ Before any of the state charges were resolved, Hall was transferred into federal custody pursuant to a writ of habeas corpus ad prosequendum.”).

The United States apparently believes Thunder Shield remained in tribal custody because he completed serving his tribal sentence after the writ of habeas corpus ad prosequendum was issued. A separate sovereign, the tribe was free to make its own choice to credit Thunder Shield's tribal sentence with post-writ time. This does not show Thunder Shield in the face of the writ somehow continued in tribal, not federal custody. He did not. When this court issued the United States' requested writ of habeas corpus ad prosequendum, he went into primary federal, not tribal, custody and was entitled to receive time served credit from that point forward.

Certainly, the tribe, even though Thunder Shield was taken from its custody, could have lodged a detainer for his return to tribal custody after completion of the federal proceedings. The tribe chose not to do so. Instead, the tribe evidently decided to continue to give Thunder Shield credit on his tribal sentence even though he had been taken into federal custody. This

decision in no way, however, defeats the fact Thunder Shield was transferred into federal custody on April 25, 2018, when the writ of habeas corpus ad prosequendum desired and applied for by the United States was granted.

Next, the United States seems to assert Thunder Shield was not entitled to credits because this court when sentencing him chose to impose “a sentence that was four months below the guideline range to account for time Thunder Shield spent in Tribal custody that was directly related the instant federal offense.” (Doc. 48, p. 3.) The United States is correct. But this was tribal time Thunder Shield had served before he was taken into federal custody on the United States requested writ. It did not account for post-writ time for which Thunder Shield is still entitled to credit.

Apparently, the Bureau of Prisons has denied Thunder Shield time served credit because it is upset the court reduced Thunder Shield’s sentence to account for related time he had served in tribal custody when first arrested and prior to being transferred to federal custody.

Notwithstanding the United States’ evident objection to this sentencing credit given Thunder Shield by the court, the court was entirely within the range of its sentencing discretion to do so. The United States has not shown otherwise nor has the United States shown Thunder Shield should be denied time served credit from and after issuance of the writ of habeas corpus ad prosequendum April 25, 2018.

The United States also submits Thunder Shield’s petition should be dismissed for failure to exhaust internal administrative remedies within the Bureau of Prisons potentially available to him. (Doc. 48, pp. 4-5.) However, given the short time frame, pursuing those remedies would

be fruitless and unlikely to result in any meaningful relief. Thunder Shield's counsel has twice contacted BOP officials to try to address Thunder Shield's concerns. No one from BOP has ever responded.

In *McCarthy v. Madigan*, 503 U.S. 140, 147-148 (1992) (federal prison not required to exhaust FBI administrative remedies before filing *Bivens* action in federal court), the Supreme Court concluded exhaustion of administrative remedies is not required when doing so does not allow a plaintiff to avert irreparable harm. Here, requiring Thunder Shield to exhaust any potentially available administrative remedies with the bureaucracy of the Bureau of Prisons would not allow him to obtain judicial relief prior to the time his sentence is already scheduled to expire on December 15, 2018. In this narrow circumstance, exhaustion is not required under *McCarthy*.

*McCarthy* also recognized exhaustion of possible administrative remedies is not required when it would be futile to do so or the available remedy is unlikely to result in effective relief. *Id.* *Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 1000 (8th Cir. 2006) (administrative remedy deemed futile if there is doubt about whether the agency could grant effective relief, citing *Madigan*). Given the short time remaining before Thunder Shield will be otherwise released that again is the situation presented by this case. Before any BOP administrative proceedings would run its course, Thunder Shield is likely to have served his presently calculated sentence time and be released. Even if this were not the case, each day of delay attendant to an administrative proceeding would be an unrecoverable day of sentence credit lost to Thunder Shield should his claim for immediate release ultimately be proven correct.

### **SUMMARY**

Thunder Shield was entitled to receive time served credit from and after April 25, 2018, the day he went into federal custody upon this court's grant of the United States' application for a writ of habeas corpus ad prosequendum, until his sentencing on January 22, 2018, and subsequent transfer into the custody of the Bureau of Prisons at the Tripp County Jail in Winner, South Dakota, on February 12, 2018. Thunder Shield completed his sentence and should have been released no later than June 14, 2018. (Doc. 46, p. 4.) Since the United States admits Thunder Shield received prior custody credit of 9 days from December 10 through December 18, 2016, and an additional credit of 32 days from December 20, 2017, through January 21, 2018, (Doc. 48, pp. 3-4), it appears Thunder Shield should, in fact, have been released May 4, 2018.

Nonetheless, Thunder Shield remains in federal custody with a release date of December 15, 2018 – seven and a half months beyond when Thunder Shield should have been, and was entitled to be, released from custody.

### **CONCLUSION**

Thunder Shield's petition should be granted by this court and the Bureau of Prisons ordered to immediately release Thunder Shield from custody.

Dated this 23rd day of October 2018.

Respectfully submitted,

NEIL FULTON  
Federal Public Defender  
By:

/s/ Jennifer Albertson

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