UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

MATTHEW DEHART,

Petitioner,

v.

J.C. STREEVAL.

Respondent

Case No. 18-CV-0074 (HRW)

REPLY TO RESPONSE FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Respondents' late-filed brief misinterprets the applicable case law, and miscasts the facts of this case. Foremost, their Response (Dkt. 10) and the attached statement of Stephen P. Smith ("Smith Declaration," Dkt. 10-1) omit the fact that Mr. DeHart's sentence was correctly calculated after his initial intake on March 22, 2016. (*Cf*. Smith Declaration at p. 5 (making no mention of sentence calculation and foreign jail credit until August 2017).) Instead, they bury the BoP's original sentence calculation on page 116 of their attached exhibit. (*See id*. at pp. 116-19.) Next, Respondents misconstrue the nature of Mr. DeHart's detention time in Canada and the reasons for his detention across the border. Finally, Respondents urge deference to their calculation well beyond what is supported by either the applicable law or core constitutional implications.

I. Mr. DeHart is Entitled to Pretrial Custody Credit under § 3585(b), because he was Held in Canadian Criminal Detention Facilities as a Result of Criminal Charges in the United States

The fulcrums on which pretrial detention credit turns concern the nature of the detention itself and the reason for that detention, not, as Respondents urge, solely the administrating agency of the pretrial detention. The cases determining this question look to whether the detention facility was a criminal or immigration facility, whether criminal charges were an underlying reason for pretrial detention, and whether the agency administering that facility has immigration or criminal detention authority.

As discussed in Mr. DeHart's initial petition, Mr. DeHart was held in a Canadian criminal detention facility, based on the pending criminal charges against him in the United States, in high-security criminal facilities administered by Canada's equivalent of the Bureau of Prisons. *See* Exhibit A – Declaration of Paul DeHart. His parents, who made similar applications for asylum, were never detained, and it is uncontested that the criminal charges pending in the United States were the reason for Mr. DeHart's detention in Canada. *See id*.

Respondent cites several cases to support its contrary argument, but none are relevant to the facts here. In *Aguila v. Stone*, there was no pending prosecution in either Mexico or the United States. *See Aguila v. Stone*, No. CV 317-008, 2017 WL 2197123, at *3 (S.D. Ga. May 18, 2017), report and recommendation adopted, No. CV 317-008, 2017 WL 2589968 (S.D. Ga. June 14, 2017). In *Aslanyan v. Johnson*, the defendant's "prosecution for healthcare fraud had nothing to do with his immigration status," unlike here, where the prosecution was the basis for Mr. DeHart's Canadian detention. *Aslanyan v. Johnson*, No. EDCV1502383GHKDFM, 2016 WL 6156078, at *3 (C.D. Cal. Sept. 9, 2016), *report and recommendation adopted,* No. EDCV1502383GHKDFM, 2016 WL 6156079 (C.D. Cal. Oct. 21, 2016). *Solorzanos-Cisneros* deals with a credit request related to 25-day civil detention in an ICE-administered facility for deportation review. *See Solorzano-Cisneros v. Zych*, No. 7:12-CV-00537, 2013 WL 1821614, at *1 (W.D. Va. Apr. 30, 2013). *Plummer* is again about ICE civil detention for deportation review. *See Plummer v. Longley*, No. CIV.A. 10-171 ERIE, 2011 WL 1204008, at *1 (W.D. Pa. Mar. 28, 2011). Respondents other cases reflect similar facts – a defendant detained by ICE or INS, in a U.S. immigration detention facility, for a civil deportation proceeding unrelated to either pending criminal charges or any criminal conviction in the United States or elsewhere. (*See* Respondent's Response to Petition, Dkt. 10, at pp. 8-9).

None of Respondent's cases match the situation here, where Mr. DeHart was detained in foreign criminal facilities, administered by the foreign country's equivalent of the BoP, as a result of criminal charges pending against him in the United States. This was not the civil detention to which the above

cases speak. Rather, this is squarely within the Supreme Court's definition of "official detention" under 18 USC § 3585(b). *See Reno v. Koray*, 515 U.S. 50, 58–59, 115 S. Ct. 2021, 2026, 132 L. Ed. 2d 46 (1995) ("credit for time spent in 'official detention' under § 3585(b) is available only to those defendants who were detained in a 'penal or correctional facility,' § 3621(b), and who were subject to BOP's control.")

The crux of determining whether § 3585(b) awards credit is whether criminal charges resulted in official detention, in a penal or correctional facility, administered by a correctional agency. *Id*. at 63 ("the identity of the custodian has both legal and practical significance.") Mr. DeHart was detained in correctional facilities, administered by a Canadian correctional agency, as a result of the criminal charges pending in the United States, and is fully entitled to credit for this period of pretrial detention.

II. Mr. DeHart Relied on Reasonable Assurances that this Time Would be Credited

Respondents further provide no compelling argument against Mr. DeHart's right to relief for his reliance on assurances of a time-credit by the prosecution during plea negotiation and by the Tennessee court at sentencing. The crux of their argument is that Mr. DeHart's plea agreement does not specifically promise the 439 days would be credited. However, a plea agreement is not the only source of false promises that a defendant may rely on in plea discussions. *See Brady v. U.S.*, 397 U.S. 742, 755 (1970) (citations omitted); . Here, the prosecutors and defense counsel were agreed in their expectation that the time would be credited. The sentencing judge in the Middle District of Tennessee also expected it would be counted (*See* M.D. Tenn. Sentencing Transcript, Dkt. 1-1 at p. 16). The BoP indeed counted this time as expected in their March 22, 2016 sentence calculation. (*See* Sentence Monitoring Computation Data, Dkt. 1-2).

Because of these assurances, Mr. DeHart accepted a plea agreement and did not appeal the sentence as given by the sentencing court or as calculated by the BoP. Only in August 2017, acting in retaliation for Mr. DeHart's request to speak with his attorneys, did the BoP seek to remove this previously credited time.

III. The Double Jeopardy Clause's Prohibition on Multiple Punishments Entitles Mr. DeHart to the Already Awarded Pretrial Custody Credit

Respondents have no compelling answer to Mr. DeHart's double jeopardy argument. Their response neglects the fact that a sentencing calculation was made when Mr. DeHart began serving his sentence, which awarded Mr. DeHart the 439 days in pretrial custody in Canada. It was not until August 2017, through no action of his own, that Mr. DeHart's custody credit was removed. He relied on BoP's initial sentencing calculation when he began serving his sentence, and continued to rely on it through the period in which his deadline to appeal that calculation expired. Only after that, through no action or request by Mr. DeHart, was the credit removed by a retaliatory recalculation.

Respondents cite to an unreported case from the Northern District of Ohio about a prisoner's challenge seeking to count previously credited state custody against a federal sentence to support the notion that the BoP is due "[d]eference [to] the[ir] interpretation and implementation of § 3585." *Childress v. Coakley*, 4:14-CV-690, 2015 WL 4986768 at *11 (N.D. Oh. Aug. 19, 2015). This deference does not outweigh the Double Jeopardy clause's prohibition on multiple punishment under the facts here. Mr. DeHart had a valid expectation of finality in the sentence he would serve, he began to serve that sentence, and did nothing to disrupt that expectation of finality. *Compare United States v. Ayers,* 759 F. Supp. 2d 945, 952 (S.D. Ohio 2010) (collecting cases where a defendant's actions disrupted their 5th Amendment expectation of finality). The 5th Amendment protection against adding to an individual's sentence after the expectation of finality has attached "[is] rooted in the common law practices that gave rise to America's earliest legal traditions" and its protections "have become deeply ingrained in our system of jurisprudence." *Id*. BoP's deference exists within limits, and Mr. DeHart did nothing to disrupt his own expectation of finality in BoP's sentence calculation. The BoP's retaliatory removal of 439 days of pre-trial detention cannot stand.

CONCLUSION

Mr. DeHart is entitled to the full credit for his 439 days detained before trial in Canada. Each day was served in a criminal correctional facility, administered and controlled by Canada's equivalent of the Bureau of Prisons, and that detention was a result of the charges pending against him in the United States. Moreover, all parties including the sentencing judge expected and relied on that credit being applied to Mr. DeHart's sentence calculation. In fact, BoP themselves applied this credit to Mr. DeHart's sentence, up until he requested to speak to his attorneys. BoP retaliated by recalculating Mr. DeHart's sentence in a manner that misapplies 18 U.S.C. § 3585(b), violates Mr. DeHart's reliance on the representations made by the prosecution and the sentencing court, and violates Mr. DeHart's 5th Amendment right to an expectation of finality in his sentence. This court should grant Mr. DeHart's petition for a writ of *habeas corpus* to remedy these harms.

Dated: October 17, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document has been electronically filed using the Eastern District of Kentucky's CM/ECF system, and a copy has been electronically served on all e-filing parties. Mr. DeHart will be served by first class mail at FCI Ashland.

Dated: October 17, 2018

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