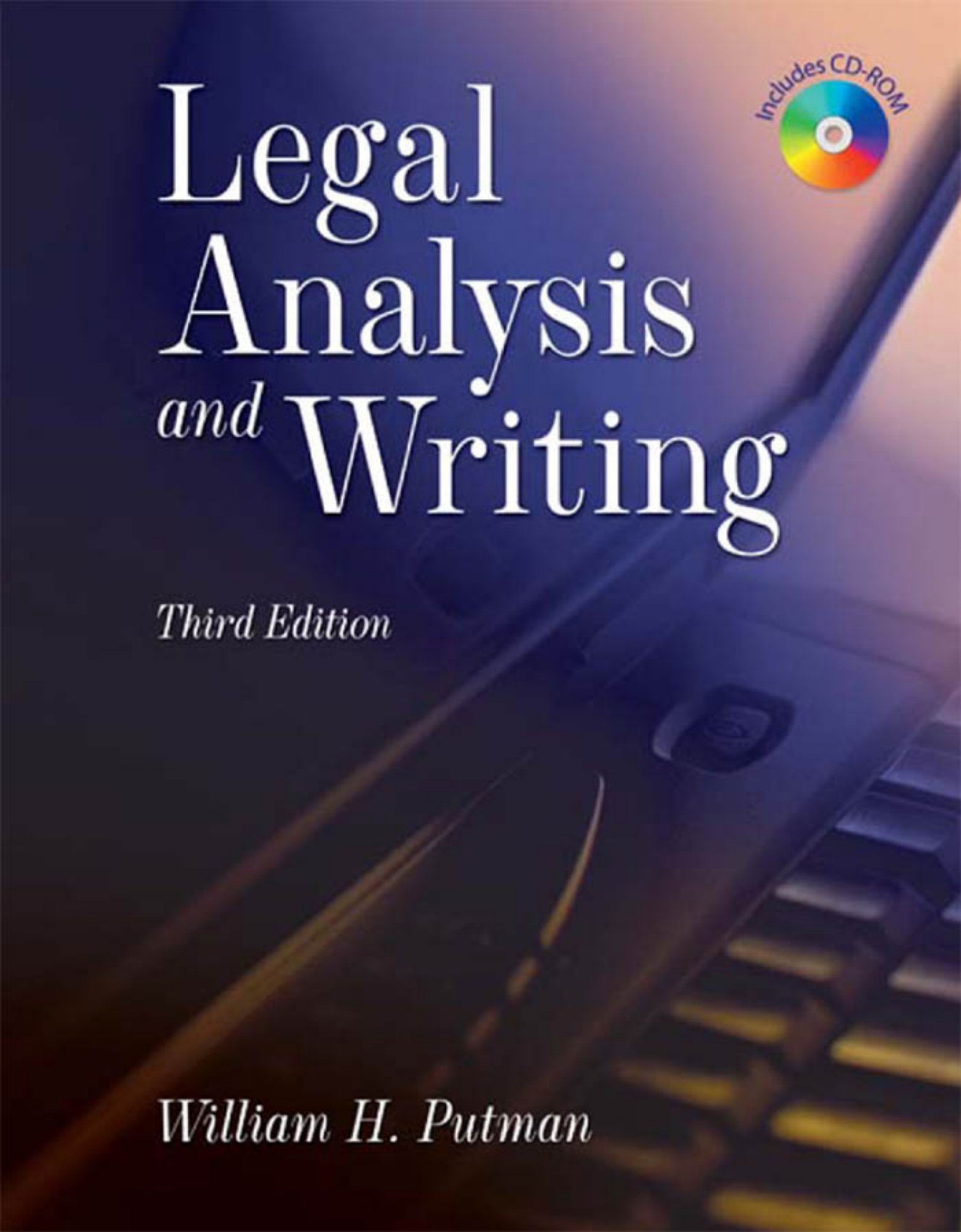

Legal Analysis and Writing

Third Edition

William H. Putman

APPENDIX B

Appellate Court Brief

INTRODUCTION

The brief of the appellee in the case of *Frank Lewis v. U.S. Attorney, U.S. Marshal and New Mexico Department of Corrections* is presented in this appendix. The brief was filed in the United States Court of Appeals for the Tenth Circuit. The legal research, legal analysis, and initial drafts of this brief were performed by Gardner Miller. Mr. Miller, listed in the 1998–1999 edition of *Who's Who in American Law*, received his Associate of Applied Science degree in Legal Assistant Studies from Albuquerque TVI, a community college. He works as a paralegal in the Criminal Division of the United States Attorney's office for the District of New Mexico.

The Tenth Circuit Court of Appeals decided this case on the briefs submitted to the court (there was no oral argument). The decision was in favor of the appellee (United States Government).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
NO. 94-2275

FRANK LEWIS,

Petitioner–Appellant,

vs.

U.S. Attorney, U.S. Marshal and
New Mexico Department of Corrections,

Respondents–Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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January, 1995

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PRIOR OR RELATED APPEALS

The United States informs this Court, pursuant to *10th Cir. R.* 28.2(a), that there are no prior or related appeals in this case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal is a review of the District Court's denial of Appellant's Habeas Petition, and presents the following issues for review:

POINT I:

WHETHER THE DISTRICT COURT SHOULD HAVE DISMISSED APPELLANT'S HABEAS PETITION FOR LACK OF JURISDICTION?

POINT II:

WHETHER THE DISTRICT COURT ACTED PROPERLY IN DENYING APPELLANT'S HABEAS PETITION ON THE MERITS AND DISMISSING THE PETITION WITH PREJUDICE?

STATEMENT OF THE CASE

On March 15, 1993, Petitioner-Appellant Frank Lewis (herein after referred to as Lewis) filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 for a person in state custody[1] (Doc. 1). On March 25, 1993, United States Magistrate Judge William Deaton issued an Order appointing Tova Indritz, the Federal Public Defender, to represent Lewis (Doc. 4).

On May 25, 1993, Lewis filed an Amended Petition (Doc. 5) with numerous exhibits. The government filed its Answer on July 20, 1993, requesting that Lewis' Amended Petition be dismissed for lack of jurisdiction (Doc. 8).

Lewis then filed a Memorandum Brief in support of his Amended Petition on September 27, 1993 (Doc. 12). Because this Memorandum Brief restructured Lewis' habeas petition under 28 U.S.C. § 2241 and § 2255, revamped old arguments, requested new remedies and introduced new exhibits, it was, for all practical purposes, a new habeas petition.

Without being ordered to do so, the government responded to Lewis' Memorandum Brief on December 13, 1993 (Doc. 14).

On October 4, 1994, United States Magistrate Judge Lorenzo Garcia issued his proposed findings and recommended disposition of Lewis' habeas petition (Doc. 17). Lewis filed his objections to Judge Garcia's findings and recommended disposition on October 17, 1994 (Doc. 18).

On November 8, 1994, Senior United States District Judge Juan Burciaga adopted Judge Garcia's proposed findings and recommended disposition and ordered that Lewis' action

1. The following day, March 16, 1993, the New Mexico Department of Corrections transferred Lewis into Federal custody.

be dismissed with prejudice (Doc. 19). Lewis timely filed a notice of appeal of Judge Burciaga's Order on November 22, 1994 (Doc. 20).

STATEMENT OF THE FACTS

The facts underlying Lewis' habeas petition are not in dispute. They are summarized from the record as follows: On February 27, 1985, Lewis pled guilty in New Mexico State District Court for the Second Judicial District (Bernalillo County) to two crimes he committed on December 22, 1983. One was the felony offense of heroin possession and the other was the misdemeanor offense of possession of drug paraphernalia (Doc. 5, Petitioner's Exhibit 1).

As a result of these convictions, on May 17, 1985, State District Judge Burt Cosgrove sentenced Lewis to the custody of the New Mexico Department of Corrections for a term of 6½ years. The court also ordered Lewis to turn himself in to authorities at 9:00 a.m. on May 21, 1985 to begin serving his sentence. On June 4, 1985, about two weeks after Lewis started serving his sentence, a federal grand jury indicted him on four counts of heroin trafficking. The first two counts charged Lewis with possession with intent to distribute heroin and distribution of heroin on or about August 18, 1983. The other two counts charged that Lewis committed the same offenses on or about August 25, 1983 (Doc. 5, Petitioner's Exhibit 2).

On April 29, 1986, as a consequence of the federal indictment, United States District Judge Juan Burciaga issued a Writ of Habeas Corpus Ad Prosequendum commanding the Warden of the New Mexico State Penitentiary to deliver Lewis into federal custody so that he could be prosecuted on the federal drug charges (Doc. 5, Petitioner's Exhibit 5).

On May 23, 1986, pursuant to a plea agreement, Lewis pled guilty to Count IV of the Indictment (heroin distribution). In return, the government agreed to dismiss the other

three counts against him and not seek a sentence enhancement under 21 U.S.C. § 851, based on his prior state drug conviction. The agreement also stated there was *no* agreement that "a specific sentence is the appropriate disposition of this case" (Doc. 5, Petitioner's Exhibit 3).

Judge Burciaga accepted Lewis' guilty plea and, on July 18, 1986, sentenced Lewis to eight years imprisonment to be followed by a special parole term of three years. After imposing the sentence, the court dismissed the remaining counts against Lewis. The Judgment was entered on the docket on July 28, 1986 (Doc. 5, Petitioner's Exhibit 4).

Lewis was returned to the state's custody on July 23, 1986 (Doc. 12, Petitioner's Exhibit 16 at 3).

Five months later, on December 22, 1986, Lewis escaped from the New Mexico State Penitentiary and also kidnapped someone. The record does not show when he was apprehended. However, on January 12, 1988, Lewis was convicted in state district court (Thirteenth Judicial District, Valencia County) for the felony offenses of Escape from the penitentiary and Kidnapping. On April 11, 1988, the state district court sentenced Lewis to the custody of the New Mexico Corrections Department for 19 years for these convictions. The court then suspended eight years of the sentence and ordered the remaining eleven years to be served in the state penitentiary, "consecutive to any other state or federal time that he is now serving or served." (Doc. 5, Petitioner's Exhibit 6). According to an affidavit from Lewis' attorney at this sentencing, State District Court Judge Mayo T. Boucher actually wanted the new eleven-year sentence to be concurrent with Lewis' existing state and federal sentences (Doc. 5, Petitioner's Exhibit 9).

Consequently, the state district court for Valencia County issued a series of Amended Judgments regarding Lewis' latest state sentence. The first, filed August 27, 1990, ordered the sentence to run concurrently with the eight-year federal sentence, but consecutively to the original state sentence of 6½ years (Doc. 5, Petitioner's Exhibit 7). The second, filed October 31, 1990, made Lewis' latest sentence run concurrently with both his original state sentence and his federal sentence (Doc 5, Petitioner's Exhibit 8). The Third Amended Judgment, filed September 10, 1992, retained the basic nineteen-year sentence, but suspended half of it (9-1/2 years) instead of the eight years that had been previously suspended. It again ordered the state sentence to be served concurrently with the federal sentence, this time specifying the underlying case number, and ordered Lewis to be remanded to the custody of the U.S. Marshal's Office for transfer to a federal prison to serve his federal sentence (Doc. 5, Petitioner's Exhibit 10). A year earlier, New Mexico prison officials had given Lewis written notification that the U.S. Marshal's Office, on the advice of the U.S. Attorney's Office, would not take him into federal custody until he had been paroled or discharged from the state (Doc. 5, Petitioner's Exhibit 12). The Fourth (and final) Amended Judgment was filed on January 7, 1993. It again specified that Lewis' state sentence for escape and kidnapping run concurrently with his federal sentence to be served and ordered Lewis' immediate transfer to federal custody (Doc. 5, Petitioner's Exhibit 11).

As a result of his federal sentence, a federal detainer had been lodged against Lewis while he was incarcerated at the New Mexico State Penitentiary. However, despite the state

court judgment ordering his transfer to federal custody, the United States Marshal's Office refused to take him into custody until he had been released from all his state sentences (Doc. 12, Petitioner's Exhibit 17 at 2).

Upon being paroled from his final state sentence, Lewis was transferred to federal custody on March 16, 1993 and began serving his federal sentence (Doc. 12, Petitioner's Exhibit 15 at 2). On April 30, 1993, Lewis arrived at his present place of incarceration, the Federal Correctional Institution (FCI) at Florence, Colorado (Doc. 12, Petitioner's Exhibit 16 at 3).

After his arrival at FCI Florence, Lewis sought to receive credit against his sentence through a Request for Administrative Remedy. His request was denied, as was his appeal of that denial (Doc. 12, Petitioner's Exhibits 14 and 15). Lewis then pursued the habeas petition which was denied by the federal district court.

POINT I

LEWIS' HABEAS PETITION SHOULD HAVE BEEN DISMISSED BY THE DISTRICT COURT FOR LACK OF JURISDICTION.

STANDARD OF REVIEW: Jurisdictional issues are reviewed *de novo. United States v. 51 Pieces of Real Property,* 17 F.3d 1306, 1309 (10th Cir. 1994).

It is well settled that jurisdictional issues are important enough that they may be raised at any time during the proceedings. *McGrath v. Kristensen,* 340 U.S. 162, 167 (1950); *United States v. Siviglia,* 686 F.2d 832, 835 (10th Cir. 1981), *cert. denied* 461 U.S. 918 (1983); *Bledsoe v. Wirtz,* 384 F.2d 767, 769 (10th Cir. 1967).

28 U.S.C. § 2242 provides that a habeas petition shall state "the name of the person who has custody over him" (i.e., the petitioner). Likewise, 28 U.S.C. § 2243 states: "The writ, or order to show cause shall be directed to the person having custody of the person detained." As the Supreme Court noted: "The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 494-5 (1973). The *Braden* Court then quoted from *In the Matter of Jackson,* 15 Mich. 417, 439-440 (1867), characterizing the quotation as a "classic statement":

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined but his jailer. The officer or person who serves it does not unbar the prison doors and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.

410 U.S. at 495.

When the habeas petitioner is incarcerated, the only appropriate respondent to his habeas petition is the warden of the facility where he is incarcerated. *Guerra v. Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986) ("Until they are paroled . . . the proper respondents are the wardens of the federal facilities at which the prisoners are confined.") *Guerra* was expressly reaffirmed in *Chatman-Bey v. Thornburgh,* 864 F.2d 804, 810-11 (D.C. Cir. 1988) ("[T]he proper defendant in federal habeas cases is the warden.") *See also Joyner v. Henman*, 755 F.Supp. 982, 984 (D.Kan. 1991). (Proper respondent for petitioner's habeas action is the warden at USP Leavenworth because he is the petitioner's present custodian.) The "custodian," for habeas corpus purposes, is the person having day-to-day control of the prisoner and is the only one who can produce "the body" of the habeas petitioner. *Guerra, supra* at 416.

The record clearly shows that Lewis was delivered to FCI Florence on April 30, 1993 (Doc. 12, Petitioner's Exhibit 16 at 3). On May 25, 1993, Lewis (through his appointed counsel) filed his Amended Petition (Doc. 5). In this Amended Petition, Lewis acknowledged that "he is currently in the custody of the Bureau of Prisons at Florence, Colorado" (Doc. 10 5 at 4). Yet, the respondent to his Amended Petition was not his present custodian, the warden of FCI Florence. Instead, Lewis named as respondents: the United States Attorney (for the District of New Mexico), the United States Marshal (for the same District) and the New Mexico Department of Corrections.

A similar situation occurred in *Billiteri v. United States Board of Parole,* 541 F.2d 938 (2d Cir. 1976). There, instead of naming as respondent the Warden of USP Lewisburg,

Pennsylvania where he was confined, the petitioner named the parole board which had denied his release. In dismissing his petition, the *Billiteri* Court declared:

> It would have imposed no great hardship on Billiteri to have brought his action against the Warden in the Middle District of Pennsylvania, as he should have done. As he did not, the present case must be dismissed for lack of jurisdiction over an application for a writ of habeas corpus . . . .

541 F.2d at 948-49.

Recently, the Ninth Circuit in *Stanley v. California Supreme Court*, 21 F.3d 359 (9th Cir. 1994), addressed the same situation as here where there were two habeas petitions with multiple respondents, but none of them were the petitioner's custodian:

> A petitioner for habeas corpus relief must name the state officer having custody of him or her as the respondent to the petition . . . . Failure to name the petitioner's custodian as a respondent deprives federal courts of personal jurisdiction (Citations omitted) . . . . Neither of Stanley's two petitions named his custodian as a respondent and *therefore* the district lacked jurisdiction (Emphasis added).

21 F.3d at 360.

In its initial Answer to Lewis' Amended Petition, the government sought to have the petition dismissed for lack of jurisdiction (Doc. 8). The district court never ruled on this request, but impliedly rejected it by addressing the merits of Lewis' Amended Petition as presented in his Memorandum Brief.

For the reasons stated herein, this Court, as a matter of law, should remand the case with instructions to dismiss for lack of jurisdiction.

POINT II

IN DECIDING ON THE MERITS OF LEWIS' HABEAS PETITION THE DISTRICT COURT ACTED PROPERLY IN DENYING THE PETITION AND DISMISSING IT WITH PREJUDICE.

STANDARD OF REVIEW: This Court reviews *de novo* a district court's decision to deny habeas relief. *Sinclair v. Herman,*986 F.2d 407, 408 (10th Cir.), *cert. denied,* _____ U.S. _____, 114 S.Ct. 129 (1993).

As an introductory note, it is recognized that, should this court indeed remand the case with instructions to dismiss for lack of jurisdiction, Lewis may be tempted to file another habeas petition under 28 U.S.C. § 2241 in perhaps a different forum. In that event, an opinion from this Court which also discusses the merits of Lewis' contentions would prove very useful.

The thrust of Lewis' habeas petition was that he was entitled to receive credit against his federal sentence because the U.S. Marshal's Service, on advice from the United States Attorney, ignored the custody transfer orders issued by a New Mexico district court. In his Memorandum Brief (Doc. 12), Lewis introduced a second stratagem under 28 U.S.C. § 2255 for obtaining the credit he sought. It was to request that Judge Burciaga (who had imposed his federal sentence) recommend *nunc pro tunc* that New Mexico State Correctional Facilities be designated as the location for serving his federal sentence. In his Order Adopting the Magistrate's Findings and Dismissing Action with Prejudice, Judge Burciaga expressly declined to make such a recommendation (Doc. 19). Because the decision was clearly within Judge Burciaga's discretion, this avenue for obtaining the desired credit is permanently blocked.

As previously stated, Lewis' main complaint centers around the conduct of the United States Marshals. By ignor-

ing the repeated custody transfer orders of a state district judge, they ensured that Lewis would not start serving his federal sentence until he had been paroled from his second state sentence. This also defied the state district court's orders that Lewis' second state sentence be served concurrently with his imposed but unserved federal sentence.

A somewhat similar situation existed in *Del Guzzi v. United States*, 980 F.2d 1269 (9th Cir. 1992). The federal marshals in that case also created a consecutive sentence by refusing to accept custody of the defendant until he had completed his state sentence. In *Del Guzzi*, however, the expectation of concurrent sentences was shared by all parties concerned *before* the state sentence was imposed and may have even contributed to its length (the statutory maximum). Nonetheless, the court upheld the marshal's actions, stating it had "no authority to violate the statutory mandate that federal authorities need only accept prisoners upon completion of their state sentence and need not credit prisoners with time spent in state custody." *Del Guzzi,* 980 F.2d at 1271.

In his proposed findings and recommended disposition, Magistrate Judge Garcia found the following guidance from Judge Norris' concurring opinion in *Del Guzzi* to be "highly instructive" (Doc. 17 at 9).

> While Del Guzzi will get no relief from this court, I hope his case will serve as a lesson to those who are in a position to guard against future cases of this sort. State sentencing judges and defense attorneys in state proceedings should be put on notice. Federal prison officials are under no obligation to, and may well refuse to, follow the recommendation of state sentencing judges that a prisoner be transported to a federal facility. Moreover, concurrent sentences imposed by state judges are nothing more than recommendations to federal officials. Those officials remain free to turn those concurrent sentences into consecutive sentences by

> refusing to accept the state prisoner until completion of the state sentence and refusing to credit the time the prisoner spent is state custody.

980 F.2d at 1272-73.

To counter this harsh reality, Lewis contends that a prisoner should not be made to suffer because ministerial officers, such as federal marshals, failed to execute a court order. Among the cases Lewis relies upon to support this contention are: *Kiendra v. Hadden,* 763 F.2d 69 (2d Cir. 1985); *United States v. Croft,* 450 F.2d 1094 (6th Cir. 1971) and *Smith v. Swope,* 91 F.2d 260 (9th Cir. 1937). As Magistrate Judge Garcia noted, these cases are easily distinguishable because they involved federal marshals failing to execute orders issued by federal courts, not state courts (Doc. 17 at 7-9).

Lewis also attempts to find support in Tenth Circuit case law. He cites *Bloomgren v. Belaski*, 948 F.2d 688, 690 (10th Cir. 1991) for the proposition that a "federal prisoner is entitled to credit for time spent in state prison on an unrelated charge 'if the continued state confinement was exclusively the product of such action by federal law enforcement officials as to justify treating the state jail as the practical equivalent of the federal one.'" (Appellant's Brief-in-Chief at 9, 20).

What Lewis fails to mention is that this exception was being applied to the pretrial state time served by Bloomgren on bailable offenses; Bloomgren had been denied bail in accordance with a federal arrest warrant that had been lodged against him after his arrest by state officials. *Bloomgren*, 948 F.2d at 689-90. In contrast, all of Lewis' state prison time was the direct result of his convictions and sentences imposed by state district courts.

In fact, *Bloomgren* supports the government's case. Bloomgren had committed his bailable state offenses while on a federal appeal bond from an earlier federal conviction. That conviction became final while Bloomgren was serving a state sentence from yet another set of offenses. Although the state sentencing judge had ordered Bloomgren's state sentence to be concurrent with his unserved federal sentence, the federal marshals refused to take him into custody until he had been paroled from his state sentence. *Bloomgren,* 948 F.2d at 290-91. The *Bloomgren* court held:

> Bloomgren thus served his federal sentence after his state sentence, rather than serving them concurrently as anticipated by the state court. Nonetheless, Bloomgren is not entitled to credit on his federal sentence from time spent incarcerated on state charges. The federal government has no duty to take on in Bloomgren's situation into custody. See *Smith v. United States Parole Comm'n,* 875 F.2d 1361, 1364 (9th Cir. 1989).

948 F.2d at 691.

If the federal government did have such a duty, then merely by ordering concurrent sentences and custody transfers, state courts could require the federal government to assume the costs of incarcerating any state prisoner facing a previously imposed federal sentence.

In imposing Lewis' federal sentence, by not recommending that New Mexico corrections facilities be designated as Lewis' place of federal confinement, Judge Burciaga made it clear that he intended for Lewis' federal sentence to be consecutive to his first state sentence.[2]

The *Bloomgren* Court declared:

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2. In his Memorandum Brief, Lewis acknowledged that Judge Burciaga intended that Lewis serve his federal sentence after his existing state sentence (Doc. 12 at 19).

> The determination by federal authorities that Bloomgren's federal sentence would run consecutively to his state sentence is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently obtained state conviction.

948 F.2d at 691.

Also, in *Salley v. United States,* 786 F.2d 546, 548 (2d Cir. 1986), another federal circuit court observed: "There is no reason why the (United States) district court's sentence, which was prior in time, must give way to that of the State court" (Citations omitted).

Another case in which United States Marshals ignored a state judge's order for concurrent sentences was *Lionel v. Day*, 430 F.Supp. 384 (W.D. Okla. 1976). In *Lionel,* as here, consecutive sentences resulted and federal prison officials refused to grant the petitioner credit for time spent in state custody. In upholding their decision, the *Lionel* court declared: "Obviously no comment or order by a state judge can control the service of a federal sentence" 430 F.Supp. at 386.

As established by these cases, the comment by United States Marshal John Sanchez that "state court judges cannot dictate when a federal sentence begins" is a correct statement of the law (Affidavit of Cathleen M. Catanach, Doc. 12, Petitioner's Exhibit 17 at 2). The portions of the Amended Judgments which directed Lewis to be transferred into federal custody (and thus begin serving his federal sentence) were invalid; therefore, the marshals were free to ignore such orders.

A crucial part of Lewis' claim is the theory that, once Lewis was paroled from his first state sentence on December 9, 1989, the state lost its jurisdiction over Lewis

and Lewis was now subject to federal jurisdiction by virtue of his federal arrest and conviction that occurred "before the Valencia County case even arose" (Appellant's Brief-in-Chief at 10).

The government's position is based on the fact that Lewis' first state sentence was clearly still in force on April 11, 1988 when his second state sentence was imposed. Therefore, Lewis' second state sentence merely extended the time the State had jurisdiction over Lewis. This also was the conclusion reached by Magistrate Judge Garcia (Doc. 17 at 6).

The authority for this proposition lies in another Tenth Circuit case, *McIntosh v. Looney*, 249 F.2d 62 (10th Cir. 1957), *cert. denied* 355 U.S. 935 (1958), which the appellant has relied upon for support.[3] McIntosh was serving a six-month sentence in a Missouri county jail when, pursuant to a Writ of Habeas Corpus Ad Prosequendum, he was sentenced in federal district court for violation of the federal kidnapping statute. He received a five-year sentence, to begin upon completion of his misdemeanor sentence. He was returned to the county jail and, while still serving his six-month sentence, he assaulted a jailer there. McIntosh's misdemeanor sentence was still in force when he was indicted in state court for the assault, pled guilty, and received a five-year sentence. It also was to begin when he completed his misdemeanor sentence. When McIntosh finally completed his six-month sentence, he was taken from the county jail to the Missouri penitentiary to serve his second state sentence. Only after

3. *McIntosh* agreed with the "ministerial officer malfeasance" exception propounded by *Smith*, calling it the "academic premise" for the claims in its case. *McIntosh*, 249 F.2d at 64. However, the Court then described why the marshal's actions in its case were proper *(Id.)*.

his second state sentence was completed on October 11, 1956 was McIntosh transferred into federal custody to begin serving his federal sentence. *McIntosh*, 249 F.2d at 63.

Like Lewis, McIntosh claimed the State had lost its jurisdiction over him upon completion of his first state sentence and that the federal marshals had a duty to take into custody at that time to begin serving his federal sentence. *Id.* at 64. In rejecting his claim, the *McIntosh* Court declared:

> The State of Missouri . . . had continuous jurisdiction and custody of appellant until October 11, 1956, at which time state jurisdiction and the right to custody were terminated . . . Appellant's incarceration was continuous and under a single and proper authority, that of the State of Missouri *(Id.)*.

The Court then compared its case to *Harrell v. Shuttleworth*, 200 F.2d 490 (5th Cir. 1952). There, while serving a state sentence, a federal court sentenced the prisoner to a federal sentence to begin upon completion of his state sentence. Before completion of the state sentence, the prisoner received an additional state sentence for an offense committed at the state prison. The *Harrell* Court held that federal sentence did not begin to run upon completion of the first state sentence. The comparison which the *McIntosh* Court made was as follows:

> In *Harrell,* the state sentences overlapped. In the instant case they were consecutive. The effect was the same—*continuous jurisdiction* and custody under a single sovereign authority (Emphasis added).

249 F.2d at 64.

In recognition of the State of New Mexico's jurisdiction over Lewis and Judge Burciaga's intent that Lewis' federal sentence be consecutive, a federal detainer was lodged

against Lewis at the New Mexico State Penitentiary. It was not linked to a specific conviction or sentence and it could be executed only after New Mexico had released Lewis from all his state sentences, thereby relinquishing its jurisdiction over him. This occurred on March 16, 1993 and Lewis was transferred into federal custody on that date.

In his Appeal Brief, Lewis acknowledges that 18 U.S.C. § 3568 (since repealed)[4] governed the calculation of federal sentences imposed for crimes committed prior to November 1, 1987 (Appellant's Brief-in-Chief at 12).

This statute clearly stated "The sentence of imprisonment . . . shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence."

Although Lewis decries applying § 3568 "mechanistically," there is no other way to apply it. Federal courts have uniformly interpreted the plain language of § 3568 as precluding the calculation of the time served on a federal sentence from any date other than the one on which the prisoner was delivered into federal custody. See, for example, *Thomas v. Whalen*, 962 F.2d 358, 363 (4th Cir. 1992); *Meagher v. Clark*, 943 F.2d 1277, 1282 (11th Cir. 1991); *Thomas v. Brewer*, 923 F.2d 1361, 1367 (9th Cir. 1991); *Scott v. United States*, 434 F.2d 11, 21 (5th Cir. 1970).

Title 18 U.S.C. § 3568 also stated that, in order to receive credit against a federal sentence for state time served, the offense underlying the state sentence must be "in connection with the offense or acts for which (the fed-

4. 18 U.S.C. § 3568 (1982) (repealed effective November 1, 1987 by P.L. 98-473, Title II §§ 212(a)(2), 98 Stat. 1987, 2031 (1984), *reenacted in part*, 18 U.S.C. § 3585 (1988).

eral) sentence was imposed." Lewis' federal sentence was for drug trafficking while his second state sentence (for which he seeks credit against his federal sentence) was for escape and kidnapping. Thus, the statute itself precludes the credit Lewis seeks. See *Bloomgren, supra* at 690, citing to *Goode v. McCune,* 543 F.2d 751, 753 (10th Cir. 1976) (no credit for time spent in state custody where state time was attributable to state charges only).

In effect, Lewis' pleadings are an attempt to obtain double credit for much of the time he was incarcerated by the State of New Mexico. In *Bruss v. Harris*, 479 F.2d 392, 394 (10th Cir. 1973), the court addressed a similar claim:

> We attach no significance to the fact that the state sentence ran concurrently with the previously imposed federal sentence. Petitioner owed a debt to two sovereigns, and each had a right to exact its debt independently of the other. The petitioner's claim is that after having received credit from one sovereign he is entitled to double credit.

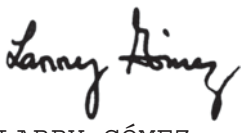
Lastly, Lewis decries the perceived unfairness and unjustness of his plight resulting from federal marshals' actions. Lewis was convicted of five distinct crimes for which he was sentenced to a total of more than 33 years imprisonment. Even if he serves every day of his federal sentence, his total time of incarceration (even counting the time he was a fugitive) will be less than 16 years.

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

For the reasons stated above, Lewis' habeas petition was properly denied. Oral argument is not necessary in this case and the matter should be submitted on the briefs of the parties.

Respectfully submitted,

JOHN J. KELLY
United States Attorney



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CERTIFICATE OF SERVICE

HEREBY CERTIFY that the Brief of Appellee was served upon Defendant-Appellant, Frank Lewis, by mailing two true and correct copies to his Attorney of record, Tova Indritz, at her address of record, Post Office Box 449, Albuquerque, New Mexico, 87102, this 27th day of January, 1995.

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