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Relevant statutes and other helpful materials on custody issues

1. 18 U.S.C. § 3584 – Multiple sentences of imprisonment
2. 18 U.S.C. § 3585 - Calculation of a term of imprisonment
3. 18 U.S.C. § 3621 - Imprisonment of a convicted person
4. BOP Program Statement 5880.28
5. *United States v. Evans*, 159 F.3d 908 (4th Cir. 1998)
6. A helpful blog post re: Federal-State Interaction

159 F.3d 908
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Robert Vaughn EVANS, Defendant–Appellant.

No. 97–4707.
|
Argued Sept. 25, 1998.
|
Decided Oct. 30, 1998.

Synopsis

Defendant was convicted in the United States District Court for the Northern District of West Virginia, Irene M. Keeley, J., of escape, and he appealed. The Court of Appeals, Hamilton, Circuit Judge, held that: (1) defendant's escape was from federal "custody," and (2) defendant's custody was "by virtue of" his underlying conviction.

Affirmed.

West Headnotes (8)

[1] **Escape** Evidence

Custody/confinement element of escape from federal custody can be proven by demonstrating that defendant was (1) in custody of Attorney General or her authorized representative; (2) confined in institution by direction of Attorney General; (3) in custody under or by virtue of any process issued under laws of United States by any court, judge, or magistrate; or (4) in custody of officer or employee of United States pursuant to lawful arrest. 18 U.S.C.A. § 751(a).

20 Cases that cite this headnote

[2] **Escape** Evidence

To prove prior offense element of escape from federal custody, government must demonstrate that defendant's custody or confinement was by virtue of arrest on felony crime or conviction for any offense. 18 U.S.C.A. § 751(a).

14 Cases that cite this headnote

[3] **Escape** Evidence

Escape from federal custody or confinement may be established by proof that defendant absented himself from custody without permission. 18 U.S.C.A. § 751(a).

6 Cases that cite this headnote

[4] **Escape** Nature and elements of offenses in general

Although federal prisoner had been transferred to state authorities pursuant to writ of habeas corpus ad prosequendum, writ did not effect transfer of custody, and thus, when prisoner escaped while awaiting trial on state charges, his escape was from federal "custody." 18 U.S.C.A. §§ 751(a), 3585; 28 U.S.C.A. § 2241(c).

212 Cases that cite this headnote

[5] **Escape** Nature and elements of offenses in general

Custody element of escape for federal custody does not require actual physical restraint. 18 U.S.C.A. § 751(a).

4 Cases that cite this headnote

[6] **Sentencing and Punishment** Accommodation to sentence imposed in other proceeding

Federal sentence does not begin to run when prisoner in state custody is produced for prosecution in federal court pursuant to federal writ of habeas corpus ad prosequendum; rather, state retains primary jurisdiction over prisoner, and federal custody commences only when state authorities relinquish prisoner on satisfaction of state obligation. 18 U.S.C.A. § 3585; 28 U.S.C.A. § 2241(c).

314 Cases that cite this headnote

[7] **Criminal Law** Habeas corpus for production of accused

Principles of comity require that when writ of habeas corpus ad prosequendum is satisfied, receiving sovereign return prisoner to sending sovereign.

92 Cases that cite this headnote

[8] **Escape** Nature and elements of offenses in general

Although prisoner escaped before his supervised release was revoked, his confinement was "by virtue of" his underlying conviction, as required for conviction of escape from federal custody, since term of supervised release was part of prisoner's original sentence. 18 U.S.C.A. § 751(a).

54 Cases that cite this headnote

Attorneys and Law Firms

***909 ARGUED:** Richard Wallace Shryock, Jr., Mullens & Regan, Elkins, West Virginia, for Appellant. Zelda Elizabeth Wesley, Assistant United States Attorney, Clarksburg, West Virginia, for Appellee. **ON BRIEF:** R. Mike Mullens, Mullens & Regan, Elkins, West Virginia, for Appellant. William D. Wilmoth, United States Attorney, Clarksburg, West Virginia, for Appellee.

Before HAMILTON and MICHAEL, Circuit Judges, and MOON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge HAMILTON wrote the opinion, in which Judge MICHAEL and Judge MOON joined.

OPINION

HAMILTON, Circuit Judge:

Robert Vaughn Evans appeals his conviction for escape. *See* 18 U.S.C. § 751(a). For the reasons stated below, we affirm.

I

Evans was convicted of violating 18 U.S.C. § 922(g)(1) in the United States District Court for the Northern District of Florida. He was sentenced to thirty-five months' imprisonment, followed by three years supervised release. His supervised release term began on March 19, 1994, with his supervision later transferred to the Northern District of West Virginia.

On January 17, 1995, the United States Probation Office for the Northern District of West Virginia filed a petition to revoke Evans' supervised release. Following the issuance of an arrest warrant, Evans was arrested in Iowa. On February 6, 1995, Evans was transported to the Northern District of West Virginia by the United States Marshal Service and was housed in the Central Regional Jail.

On July 19, 1995, a circuit judge of the Circuit Court of Harrison County, West Virginia issued a writ of habeas corpus *ad prosequendum,* to allow the State of West Virginia to proceed with grand larceny charges against Evans. The writ directed the United States Marshal Service for the Northern District of West Virginia to "deliver the body of Robert Vaughn Evans to the custody of the Sheriff of Harrison County, West Virginia." (J.A. 36). The writ also directed the Sheriff of Harrison County to return Evans to the ***910** United States Marshal Service at the conclusion of the state court proceedings. On July 23, 1995, Evans was released to Harrison County Sheriff's deputies and was transported to the Harrison County Jail.

While in the Harrison County Jail, Evans suffered a seizure and on August 24, 1995 was transported to the United Hospital Center in Clarksburg, West Virginia by state authorities. On August 27, 1995, Evans escaped from the United Hospital Center while pretending to take a shower. Evans remained a fugitive until he was apprehended by United States marshals on February 6, 1996.

While Evans remained a fugitive, he was charged with escape, *see* 18 U.S.C. § 751(a), by a federal grand jury sitting in the Northern District of West Virginia in Count One of a five-count indictment. * Following a jury trial, Evans was convicted of escape and was sentenced to a term of imprisonment of sixty months, followed by a term of supervised release of three years. Evans noted a timely appeal.

II

On appeal, Evans challenges the sufficiency of the evidence to support his § 751(a) conviction. We must sustain his conviction if there is substantial evidence to support it when the evidence and all reasonable inferences from it are viewed in the light most favorable to the government. *See Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Burgos,* 94 F.3d 849, 862–63 (4th Cir.1996) (*en banc*), *cert. denied,* 519 U.S. 1151, 117 S.Ct. 1087, 137 L.Ed.2d 221 (1997).

[1] **[2]** **[3]** Section 751(a) provides in relevant part:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both....

18 U.S.C. § 751(a). Section 751(a) requires the government to prove three elements. First, the government must satisfy § 751(a)'s custody/confinement requirement. The government can meet this burden by demonstrating that the defendant was (1) in the custody of the Attorney General or her authorized representative; (2) confined in an institution by direction of the Attorney General; (3) in custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate; or (4) in the custody of an officer or employee of the United States pursuant to a lawful arrest. Second, the government must satisfy § 751(a)'s offense requirement. To meet this burden, the government must demonstrate that the defendant's custody or confinement was by virtue of an arrest on a felony crime or a conviction for any offense. Finally, the government must prove that the defendant escaped from such custody or confinement. Although the term "escape" is not defined in § 751(a), the government meets its burden if it demonstrates that the defendant "absent[ed]" himself "from custody without permission." *United States v. Bailey,* 444 U.S. 394, 407, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980).

Evans makes two arguments attacking the sufficiency of the evidence to support his § 751(a) conviction. First, he contends that the government failed to prove that he escaped from the custody of the Attorney General or her authorized representative. Second, he contends that the government failed to prove that his custody was by virtue of an arrest for a felony crime or a conviction for any offense. We shall address each of these arguments in turn.

A

[4] Evans contends that he was not in the custody of the Attorney General or her ***911** authorized representative because at the time of his escape he was in state custody awaiting trial on state charges pursuant to a writ of habeas corpus *ad prosequendum* issued by the Circuit Court for Harrison County. According to Evans, a writ of habeas corpus *ad prosequendum* effectuates a change in custody whereby the sending jurisdiction loses escape jurisdiction and the receiving jurisdiction gains it. Therefore, Evans contends that if he was guilty at all of escape, it would be a West Virginia state charge of escape.

[5] The term "custody" is not defined in § 751. However, it is well-settled that § 751 was not intended by Congress to apply to persons who merely escaped from state custody. *See United States v. Depew,* 977 F.2d 1412, 1413 (10th Cir.1992). Rather, § 751 was intended to apply to "those escapees who were originally confined or in custody under federal law in the sense that they were held in custody of the Attorney General or in custody by an order or process issued under the laws of the United States by a competent court or official." *United States v. Howard,* 654 F.2d 522, 525 (8th Cir.1981). Further, "custody" does not require actual physical restraint. *See Depew,* 977 F.2d at 1414; *see also United States v. Keller,* 912 F.2d 1058, 1059–61 (9th Cir.1990) (escape when defendant failed to report to correctional facility to begin his sentence).

Evans concedes, as he must, that he was in federal custody while he was incarcerated at the Central Regional Jail. Consequently, Evans' argument rests on the proposition that the Attorney General relinquished custody of Evans, as the term "custody" is used in § 751(a), to state authorities when Evans was received by the state authorities from the federal authorities pursuant to the writ of habeas corpus *ad prosequendum.* This proposition we cannot accept.

The Supreme Court has examined in great detail the history of the writ of habeas corpus *ad prosequendum,* observing that § 14 of the first Judiciary Act, 1 Stat. 81, authorized federal courts to issue writs of habeas corpus. *See Carbo v. United States,* 364 U.S. 611, 614, 81 S.Ct. 338, 5 L.Ed.2d 329 (1961). Although § 14 of the first Judiciary Act did not expressly state that courts could issue writs of habeas corpus *ad prosequendum,* the Supreme Court, in an opinion authored by Chief Justice Marshall, *Ex Parte Bollman,* 8 U.S. (4 Cranch) 75, 2 L.Ed. 554 (1807), interpreted the words "habeas corpus" as being a generic term including the writ "necessary to remove a prisoner in order to prosecute him in the proper jurisdiction wherein the offense was committed." *Carbo,* 364 U.S. at 615, 81 S.Ct. 338. This authority is now explicit under 28 U.S.C. §§ 2241(c) & (c)(5), which provide that the "writ of habeas corpus shall not extend to a prisoner unless ... [i]t is necessary to bring him to court to testify or for trial."

Writs of habeas corpus *ad prosequendum* are court orders demanding that an inmate be produced to face criminal charges. *See Stewart v. Bailey,* 7 F.3d 384, 389 (4th Cir.1993) ("[W]rits of habeas corpus *ad prosequendum* are issued directly by a court of the jurisdiction where an indictment has been lodged against the prisoner.... [A writ of habeas corpus *ad prosequendum*] is a court order requesting the prisoner's appearance in the summoning jurisdiction."). Such writs are "immediately executed," *United States v. Mauro,* 436 U.S. 340, 360, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978), and, thus are unlike detainers which do not summon a prisoner to the requesting jurisdiction's courts. *See Stewart,* 7 F.3d at 389.

That a writ of habeas corpus *ad prosequendum* does not effect a transfer of custody for purposes of § 751(a) is confirmed by examining the term "custody" in 18 U.S.C. § 3585, the statute establishing when a federal sentence begins.

A federal sentence does not commence until the Attorney General receives the defendant into her "custody" for service of that sentence. *See* 18 U.S.C. § 3585(a) ("A sentence to a term of imprisonment commences on the date the defendant is received in custody...."); *United States v. Pungitore,* 910 F.2d 1084, 1119 (3d Cir.1990) ("a federal sentence does not begin to run until the defendant is delivered to the place where the sentence is to be served"). When a federal court imposes a sentence on a defendant who is already in state custody, the federal sentence ***912** may commence if and when the Attorney General or the Bureau of Prisons agrees to designate the state facility for service of the federal sentence. *See Barden v. Keohane,* 921 F.2d 476, 481–82 (3d Cir.1990); 18 U.S.C. § 3621(b) (vesting designation authority in the Bureau of Prisons).

[6] A federal sentence does not begin to run, however, when a prisoner in state custody is produced for prosecution in federal court pursuant to a federal writ of habeas corpus *ad prosequendum.* Rather, the state retains primary jurisdiction over the prisoner, and federal custody commences only when the state authorities relinquish the prisoner on satisfaction of the state obligation. *See Thomas v. Whalen,* 962 F.2d 358, 361 n. 3 (4th Cir.1992); *Thomas v. Brewer,* 923 F.2d 1361, 1366–67 (9th Cir.1991) (producing state prisoner under writ of habeas corpus *ad prosequendum* does not relinquish state custody).

[7] This rule derives from the fact that the federal writ of habeas corpus *ad prosequendum* merely loans the prisoner to federal authorities. *See Whalen,* 962 F.2d at 361 n. 3; *Crawford v. Jackson,* 589 F.2d 693, 695 (D.C.Cir.1978) ("When an accused is transferred pursuant to a writ of habeas corpus *ad prosequendum* he is considered to be 'on loan' to the federal authorities so that the sending state's jurisdiction over the accused continues uninterruptedly. Failure to release a prisoner does not alter that 'borrowed' status, transforming a state prisoner into a federal prisoner."). Principles of comity require that when the writ of habeas corpus *ad prosequendum* is satisfied, the receiving sovereign return the prisoner to the sending sovereign. As Chief Justice Taft explained in *Ponzi v. Fessenden,* 258 U.S. 254, 260, 42 S.Ct. 309, 66 L.Ed. 607 (1922):

> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to

> attain which it assumed control, before the other court shall attempt to take it for its purpose.

It follows that if the sending jurisdiction in the § 3585 context does not relinquish its custodial authority over the prisoner when the prisoner is sent to the receiving jurisdiction pursuant to a writ of habeas corpus *ad prosequendum,* the same rationale should apply with equal force in the § 751(a) context. In each context, the sending jurisdiction has a significant interest in retaining custodial authority over the prisoner. To hold otherwise, would frustrate comity principles dating back to the first Judiciary Act, and, in fact, would encourage sovereigns not to honor writs of habeas corpus *ad prosequendum.*

Our decision is bolstered by four further points. First, Evans concedes that all of the time he served in the Harrison County Jail and the United Hospital Center awaiting the disposition of the state charges counts toward satisfying the term of imprisonment imposed for violating the terms of his federally imposed supervised release. If Evans was in federal custody for purposes of calculating time served, it follows that the Attorney General did not relinquish custody of Evans as that term is used in § 751(a). Second, the federal government has a significant and substantial interest in keeping prisoners confined and preventing them from escaping. This federal interest is embodied in § 751(a). The federal interest at stake does not dissipate by virtue of a writ of habeas corpus *ad prosequendum* issued to federal authorities by a state court. In fact, the opposite is true. The prisoner is released to state authorities with the understanding that the prisoner will remain confined and will be returned to federal authorities once the proceedings in state court have concluded. Thus, our interpretation of § 751(a) furthers the significant and substantial federal interest embodied in § 751(a). Third, the term "custody" in § 751(a) has never been interpreted to require actual physical restraint of the prisoner. *See Depew,* 977 F.2d at 1414; *Keller,* 912 F.2d at 1059–61. In our view, there is no meaningful difference for custody purposes between a defendant who fails to report for the commencement of his prison sentence on the one hand, as in *Keller,* and on the other a defendant who escapes while he is being prosecuted in another jurisdiction pursuant to a writ of habeas corpus *ad prosequendum.* In each instance, the Attorney ***913** General's custodial rights are vested and cannot be superseded. Finally, our decision is consistent with decisions from our sister circuits that have upheld § 751(a) convictions in similar, though not identical, circumstances. *See Depew,* 977 F.2d at 1414 (§ 751(a) conviction upheld where federal prisoner attempted to escape in the presence of an undercover United States marshal while being transported by a county sheriff's deputy to state court pursuant to writ of habeas corpus *ad prosequendum*); *United States v. Stead,* 528 F.2d 257, 258–59 (8th Cir.1975) (§ 751(a) conviction upheld where federal prisoner escaped from county jail after testifying pursuant to a writ of habeas corpus *ad testificandum*). In summary, we have no doubt that Evans, at the time he escaped from the United Hospital Center, was in the custody of the Attorney General or her authorized representative as the term "custody" is used in § 751(a).

B

We now turn to Evans' contention that the government failed to meet its burden on § 751(a)'s offense requirement, which provides that a defendant's custody must be "by virtue of an arrest on a charge of felony, or conviction of any offense...." According to Evans, because he escaped before his supervised release was revoked and a sentence of imprisonment was imposed for violating the terms of his supervised release, his confinement was not "by virtue of a [ ] ... conviction of any offense...." 18 U.S.C. § 751(a). We disagree.

The phrase "by virtue of" is not defined in § 751(a). However, the dictionary, as well as common sense, defines the phrase as "[o]n the grounds or basis of; by reason of." *The American Heritage Dictionary of The English Language, New College Edition,* 1432 (1976). Thus, the merits of Evans' argument turns on whether Evans' custody for violating the terms of his supervised release was by reason of his § 922(g)(1) conviction.

[8] Evans was convicted of violating § 922(g)(1). His sentence for that offense included a period of incarceration and a period of supervised release. He was placed on supervised release following his satisfactory completion of the term of imprisonment. He was arrested for allegedly violating the terms of his supervised release. Because the conduct underlying the revocation of Evans' supervised release formed the basis of Evans' incarceration, it follows that his incarceration for violating the terms of his supervised release was by reason of his § 922(g)(1) conviction. *Cf. United States v. Pynes,* 5 F.3d 1139, 1140 (8th Cir.1993) (applying USSG § 2P1.1(a)(1), which provides for an offense level of thirteen if the "custody or confinement is by virtue

of a [ ] ... conviction of any offense," to Pynes who escaped following the revocation of his supervised release because "Pynes was on supervised release by virtue of his original felony conviction, and hence upon revocation of his supervised release was in custody for 'conviction of any offense.' "). Without the § 922(g) conviction, his sentence that included a term of supervised release, and the alleged violation of the terms of the supervised release, there was no legal basis for federal authorities to apprehend and incarcerate Evans.

Evans' claim also founders because it is premised on the proposition that his custody was not part of his original sentence for violating § 922(g)(1). However, the term of supervised release, the revocation of that term, and any additional term of imprisonment imposed for violating the terms of the supervised release are all part of the original sentence. *See United States v. Woodrup,* 86 F.3d 359, 361 (4th Cir.), *cert. denied,* 519 U.S. 944, 117 S.Ct. 332, 136 L.Ed.2d 245 (1996). This explains why the *Ex Post Facto* Clause prohibits legislative changes in the terms of supervised release following the commission of the original offense, and why the Double Jeopardy Clause does not prohibit the government from prosecuting and punishing a defendant for an offense which has formed the basis for revocation of supervised release. *See id.* at 361–63. Accordingly, we hold that Evans' custody was "by virtue of" his § 922(g)(1) conviction.

III

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED.

All Citations

159 F.3d 908

Footnotes

* The remaining counts in the indictment pertain to a co-defendant who is not a party to this appeal.

Nevertheless, we have not yet held that a consumer survey is mandatory to establish likelihood of confusion in a Lanham Act case and do not so hold in this case. While consumer surveys are useful, and indeed the most direct method of demonstrating secondary meaning and likelihood of confusion, they are not essential where, as here, other evidence exists. *Accord Getty Petroleum Corp. v. Island Transp. Corp.*, 878 F.2d 650, 656 (2d Cir.1989); *c.f. Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 1583 (Fed.Cir.1988) (survey not necessary to show acquired distinctiveness under section 2(f) of the Lanham Act). Since a consumer survey was not necessary for Jacquin to prove its claim, the refusal of the district court to give the jury charge on failure to conduct a survey was not error.

VI.

We will affirm the district court's grant of a directed verdict in favor of DSI on the issue of punitive damages and its refusal to give DSI's requested instruction on consumer surveys. We will also affirm the district court's injunction to the extent that it limited protection to cordials and specialties, however, we will vacate and remand the portion of the injunction that limited protection to Pennsylvania for further proceedings in accordance with this opinion. Each side shall bear its own costs.

Kevin L. BARDEN, Appellant,

v.

Patrick KEOHANE, Warden, Appellee.

No. 89-5712.

United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6) Jan. 19, 1990.

Decided Dec. 13, 1990.

As Amended Dec. 27, 1990.

As Amended Jan. 19, 1991.

Federal prisoner filed petition for writ of habeas corpus after Bureau of Prisons failed to consider his request to designate a state prison as place of confinement. The United States District Court for the Middle District of Pennsylvania, Edwin M. Kosik, J., denied petition, and appeal was taken. The Court of Appeals, Hutchinson, Circuit Judge, held that: (1) prisoner was entitled to have Bureau of Prisons consider request for purposes of determining whether prisoner was entitled to credit against federal sentence for time spent in state custody, and (2) Bureau had discretion to order concurrency where federal sentence was imposed before state sentence and state judge clearly intended sentences to be served concurrently.

Vacated and remanded.

1. Habeas Corpus ⇐813

Jurisdiction over petition for writ of habeas corpus was determined when petition was filed, and, thus, petitioner's unauthorized transfer from a United States penitentiary in Pennsylvania to a penitentiary in Indiana did not affect the Court of Appeals' subject matter jurisdiction over the case. F.R.A.P.Rule 23(a), 28 U.S.C.A.

2. Criminal Law ⇐1218

Habeas Corpus ⇐510(2)

Prisoner was entitled to have Bureau of Prisons consider his request to designate state prison as "place of confinement" for purposes of determining whether prisoner was entitled to credit against his federal sentence for time spent in state custody; Bureau's failure even to consider claim for relief from possible mistake in failing to designate state prison as place of federal confinement carried serious potential for miscarriage of justice and warranted habeas relief. 18 U.S.C. (1982 Ed.) § 4082(b).

3. Criminal Law ⇐1218

Bureau of Prisons had authority to designate state prison as place of federal confinement for purposes of determining whether prisoner was entitled to credit

against federal sentence, even though federal sentencing court did not order concurrency, where federal sentence was imposed before state sentence and state judge clearly intended that sentences be served concurrently. 18 U.S.C.(1982 Ed.) § 4082(b).

Kevin L. Barden, Terre Haute, Ind., pro se.

Dennis C. Pfannenschmidt, U.S. Atty's. Office, Harrisburg, Pa., for appellee.

Before SLOVITER, HUTCHINSON and NYGAARD, Circuit Judges.

OPINION OF THE COURT

HUTCHINSON, Circuit Judge.

I.

[1] Kevin Barden (Barden), while a prisoner in the United States Penitentiary at Lewisburg, Pennsylvania, filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania on October 31, 1988.[1] The district court ordered the Penitentiary's Warden, Patrick Keohane (Keohane), to show cause why the writ should not be granted; but, ultimately, the district court denied Barden's petition. Barden filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e). On reconsideration, the district court refused to disturb its order denying Barden's petition. Barden filed a timely appeal, and the district court granted Barden's motion for leave to appeal *in forma pauperis*.

Barden is serving a twenty-year term of imprisonment for bank robbery. The government says Barden has almost seventeen years to go until completion of his federal sentence because his federal term could not begin until February 12, 1987, the day Barden arrived at a federal facility for service of his federal sentence. Before his arrival in federal custody, Barden had served more than ten years on state sentences that the state sentencing court intended to run concurrently with Barden's federal sentence.

Barden says the federal authorities made a mistake in failing to designate the state prison as the place of confinement for his federal sentence. This designation, he argues, is a necessary prerequisite to carrying out the intention of the state sentencing court that his state sentence be served concurrently with his federal sentence. Barden claims that the federal authorities can and should correct their mistake by a *nunc pro tunc* exercise of their power to designate the place of confinement, and that he has a right to have an administrative determination of this issue because he would be eligible for an earlier release if the state prison were designated *nunc pro tunc*[2] as a place for him to serve his federal sentence.[3] The federal government in-

1. On June 12, 1990, while this appeal from the district court's denial of Barden's petition was pending, without making application for a leave to transfer pursuant to Federal Rule of Appellate Procedure 23(a), Barden was transferred to the United States Penitentiary at Terre Haute, Indiana. Barden himself later notified the Clerk of this Court of that transfer. The Clerk, treating it as a simple change of address, did not notify the panel until the opinion was filed. Like the Sixth Circuit, we do not believe Barden's unauthorized transfer can affect our subject matter jurisdiction over this case. *See Cohen v. United States,* 593 F.2d 766, 767 n. 2 (6th Cir.1979). Other circuits have held that jurisdiction over a petition for a writ of habeas corpus is determined when the petition was filed. *Ross v. Mebane,* 536 F.2d 1199 (7th Cir.1976) (per curiam); *Harris v. Ciccone,* 417 F.2d 479 (8th Cir.1969) (Blackmun, J.), *cert. denied,* 397 U.S. 1078, 90 S.Ct. 1528, 25 L.Ed.2d 813 (1970). We find those decisions persuasive. Accordingly, in the absence of an application for transfer pursuant to Rule 23(a), jurisdiction is retained and Keohane remains the respondent.

2. The Latin phrase *nunc pro tunc* describes a doctrine that permits acts to be done after the time they should have been done with a retroactive effect—a Latin term meaning literally, "now for then." An act *nunc pro tunc* is an "entry made now of something actually previously done to have effect of former date, [previously] omitted through inadvertence or mistake." *Black's Law Dictionary* at 964 (5th ed. 1979).

3. We understand Barden to argue that he will be eligible for parole earlier if a *nunc pro tunc* designation is made. In a memorandum attached to his opening brief, Barden also refers to the version of the parole statute applicable to his offense. 18 U.S.C.A. § 4082(b) (West 1985), *repealed by* Comprehensive Crime Control Act of 1984, ch. 58, § 218(a), 98 Stat. 2027.

sists that all that matters is the date Barden was turned over from state to federal custody and that the intention of the state court that Barden's state sentence run concurrently with his federal sentence is immaterial.

[2] We agree with Barden that the federal government has the statutory authority to make the *nunc pro tunc* designation Barden desires. On this record, Barden is entitled to a writ of habeas corpus to compel the Bureau to consider his case. We do not pass upon Barden's contention that he is entitled to a favorable exercise of the broad discretion the Federal Bureau of Prisons (Bureau) has in acting on his request. Instead, we hold only that the federal authorities have an obligation, on the peculiar facts before us, to look at Barden's case and exercise the discretion the applicable statute grants the Bureau to decide whether the state prison in which he served his sentence should be designated as a place of federal confinement *nunc pro tunc.*[4] The answer to that question will depend on the Bureau's practice in making such designations, as well as its assessment of Barden's conduct in custody, the nature of his crime and all the other factors that govern penal authorities' consideration of a prisoner's request for relief from the strict enforcement of his sentence.

We will therefore remand this matter to the district court with directions that it in turn remand the matter to the Bureau so that the Bureau can promptly review Barden's claim and thereafter act to grant or deny it in accordance with the broad discretion the Bureau is given by the applicable statute. *See* 18 U.S.C.A. § 4082(b) (West 1985). Any further court review of the Bureau's action will be limited to abuse of discretion.

II.

On April 28, 1975, Barden was arrested by Pennsylvania authorities and charged with robbery, rape and kidnapping. While awaiting trial on the state charges, Barden was given over to the custody of federal authorities on October 21, 1975, under a writ of habeas corpus *ad prosequendum.* He was sentenced to a prison term of twenty years on a bank robbery conviction by the United States District Court for the Western District of Pennsylvania and then returned to state custody.

The Court of Common Pleas of Beaver County, Pennsylvania, sentenced Barden to a term of eleven-to-thirty years on the state charges on November 12, 1975, and ordered that the state sentence run concurrently with the federal sentence. Barden then began to serve his state sentence in the State Correctional Institution at Rockview, Pennsylvania, where a federal detainer was lodged against him. On April 6, 1976, an additional state sentence of one-to-five years, consecutive to the previous state sentence of eleven to thirty years, was imposed on Barden on other charges. Barden was paroled from state custody on December 15, 1986, and turned over to federal authorities under the detainer. He entered the Lewisburg Penitentiary on February 12, 1987, and began serving his twenty-year federal sentence for bank robbery.

Beginning May 7, 1987, Barden, attempting to gain credit for the time he served in state prison by having the State Correctional Institution at Rockview designated a federal facility *nunc pro tunc,* sought administrative relief from the Bureau. When these efforts failed, he sought judicial relief in the district court.

III.

The district court had jurisdiction over Barden's habeas corpus petition pursuant to 28 U.S.C.A. § 2241 (West 1971). Barden's petition is actionable under § 2241 because he is in custody and he attacks the term of that custody. *See Preiser v. Rodriguez,* 411 U.S. 475, 487, 93 S.Ct. 1827, 1835, 36 L.Ed.2d 439 (1973); *Braden v.*

4. We recognize that neither the federal courts nor the Bureau are bound in any way by the state court's direction that the state and federal sentences run concurrently. *See* U.S. Const. art. VI, cl. 2.

30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 488–89, 93 S.Ct. 1123, 1126, 35 L.Ed.2d 443 (1973); *Peyton v. Rowe*, 391 U.S. 54, 66–67, 88 S.Ct. 1549, 1555–56, 20 L.Ed.2d 426 (1968); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 806–10 (D.C.Cir. 1988) (in banc) (habeas action under § 2241 proper and exclusive remedy to compel consideration of federal prisoner's claim that prison authorities failed to properly aggregate consecutive sentences in determining parole eligibility).[5] These cases necessarily imply that issues which affect a prisoner's term are fundamental issues of liberty that fall within our jurisdiction under 28 U.S.C.A. § 2241 (West 1971). We do not think this is affected by the fact that Barden remains dependent on the discretion of the Bureau.[6] He has, without success, exhausted the means he has available to get the Bureau even to consider his plight. Therefore, judicial action is necessary if he is to have any chance of gaining credit against his federal sentence for the twelve years of his life he spent in state prison, credit he could get if the Bureau decides to designate the state prison as a place of federal confinement.

The Bureau's failure even to consider Barden's claim for relief from possible mistake or inadvertence in failing to designate the state prison as a place of federal confinement carries a serious potential for a miscarriage of justice. Accordingly, the Bureau's error is fundamental and can be corrected through habeas. *See Murray v. Carrier*, 477 U.S. 478, 495, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) (habeas available to avoid potentially serious miscarriage of justice).

We have appellate jurisdiction over Barden's appeal pursuant to 28 U.S.C.A. § 1291 (West Supp.1990), and exercise plenary review over the district court's conclusion of law that Barden could not be afforded any relief, the conclusion upon which the district court based its denial of Barden's petition for a writ of habeas corpus. *See Henderson v. Carlson*, 812 F.2d 874, 879–80 (3d Cir.), *cert. denied*, 484 U.S. 837, 108 S.Ct. 120, 98 L.Ed.2d 79 (1987).

IV.

On the merits, the question before us is a limited one, namely, whether the district court erred in denying Barden's petition for a writ of habeas corpus because the Bureau, in reviewing Barden's application, mistakenly failed to recognize its power to have a state facility designated *nunc pro tunc* as a place of federal confinement where Barden could gain credit against his federal sentence for the time he served there.

Keohane argues that the district court's ruling should be affirmed because a federal court is without the power to make such a *nunc pro tunc* designation. The power to make a *nunc pro tunc* designation, he notes, is vested solely in the Bureau. Combining the rule that a federal prisoner's sentence does not begin until he is received into federal custody with the rule that concurrency is not presumed in the absence of an agreement between federal and state authorities, Keohane says that Barden is properly in federal custody and must remain there to serve out his twenty-year sentence, unless the Bureau acts. The government's argument that the Bureau has sole power to act collides with the Bureau's failure to recognize any such power in Barden's case, and so these two rules are not dispositive of this case.

In his opening brief, Barden appears to raise a "quasi-equal protection" argument.

5. Eleven judges participated in the decision in *Chatman-Bey*. Judge Starr's opinion for the court commanded nine votes. *Chatman-Bey*, 864 F.2d at 805. Judge Robinson filed a concurring opinion joined by one other judge. The concurring judges did not dispute the availability of habeas but thought mandamus was also an available remedy to compel action by prison officials. *Id.* at 815–22 (Robinson, J., concurring).

In light of our decision that Barden is entitled to a writ of habeas corpus, we need not decide whether mandamus would be available if habeas were not.

6. We recognize Barden does not directly pose a legal issue subject to full plenary review by the judiciary, like the issue of how to properly aggregate sentences in *Chatman-Bey*. Rather, Barden is dependent on the Bureau's discretionary power, and, even if the Bureau is ordered to take a look at his situation, he has no assurance of success.

He focuses this argument upon the district court's failure to alter its order denying Barden's habeas petition in response to his Rule 59(e) motion. In the motion for reconsideration, Barden attempted to place evidence before the district court showing that Keohane refused to return to Barden documents that Barden claims would demonstrate that the Bureau granted another prisoner the exact relief Barden seeks under identical circumstances. There is no merit to Barden's equal protection argument.[7]

In his reply brief, Barden renews the argument that the Bureau did not make a "fair" decision in comparison with the action it took on the other prisoner's case, but this time he frames it in terms of due process. Considering the state court's expressed intent that Barden's state sentence should run concurrently with his federal one, Barden claims that his case is peculiarly appropriate for *nunc pro tunc* designation under the Bureau policy. Barden also says that he is entitled to administrative consideration under the statute that affords the Bureau broad discretion to designate and redesignate a federal prisoner's place of confinement. If so, it is unnecessary to treat Barden's claim in terms of substantive due process.

As can be seen, the problem with this case is the common one of correctly framing the issue. Unfortunately, neither the *pro se* claimant nor the Keohane have provided much help in this task. Like ships that pass unseeing in the night, the parties sail past each other's contentions. Their briefs show no disagreement on any particular point except the result. Keohane is correct in his assertion that the federal sentence, as it now stands, cannot be made to run concurrently with the state sentence. *Gomori v. Arnold,* 533 F.2d 871, 875 (3d Cir.), *cert. denied,* 429 U.S. 851, 97 S.Ct. 140, 50 L.Ed.2d 125 (1976). Because Barden's federal sentence did not begin until he was received into federal custody, *see* 18 U.S.C.A. § 3568 (West 1985),[8] Keohane correctly asserts that Barden's federal sentence did not begin until February of 1987. What Keohane does not recognize is that Barden's state incarceration can be credited against his federal sentence if the Bureau, *nunc pro tunc* designates Rockview as the facility where Barden served a portion of his federal sentence.

Seeking *nunc pro tunc* action, Barden seizes upon the language in a Bureau of Prisons Program Statement,[9] issued on July 7, 1989, concerning the designation of a state institution as the place for the service of a federal sentence to argue that the Bureau's refusal to designate the Rockview facility *nunc pro tunc* as a place for service of his federal sentence violates the Bureau's duty to treat all prisoners fairly.[10]

7. Before remanding to the Bureau, however, the district court should investigate Barden's claim that Keohane has withheld documents that Barden asserts are his. Barden claims that he needs these documents to present his case. If the district court agrees with Barden, it should direct Keohane to turn over to him any documents relevant to his request that the Bureau should favorably consider his application for *nunc pro tunc* designation of the state prison as a place of federal confinement on his federal sentence.

8. This section was repealed in 1986 but was in force in 1975, the date of the imposition of Barden's federal sentence, and therefore is applicable to Barden. Section 3568 read, in part:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.

18 U.S.C.A. § 3568 (West 1985), *repealed by* Comprehensive Crime Control Act of 1984, ch. 58, § 212(a)(2), 98 Stat.1987, *replaced without substantial change by* 18 U.S.C.A. § 3585 *reprinted in* 98 Stat. 2001.

9. "Occasionally, the [federal sentencing] court may recommend concurrent designation when an inmate is received in federal custody long after sentencing." United States Dep't of Justice, Federal Bureau of Prisons, Program Statement 5160.2, at 6 (July 7, 1989) [hereinafter Program Statement]. However, the Program Statement states:

> ... [T]he final authority to designate concurrent service rests with the Bureau of Prisons.

Id.

10. We do not understand why both the Bureau and the United States Attorney fail even to rec-

See 28 C.F.R. 541.12 (1989) (prisoners are to be treated fairly and impartially by all Bureau personnel). The recent Bureau Program Statement appended to Barden's reply brief further demonstrates the Bureau's own recognition of its ability to make *nunc pro tunc* determinations recognizing state penal facilities as places of federal custody. Barden points out that this statement was issued during the time period between the district court's order denying his habeas petition and the district court's reconsideration of that order, thus making it fully applicable to his case at the time of reconsideration. *Cf. Hill v. Equitable Trust Co.*, 851 F.2d 691, 695 (3d Cir.1988) (citing *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 486 n. 16, 101 S.Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784 (1981), and *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801)) (usually appellate courts decide cases on the law before them even if it differs from that which existed when the trial court made its decision), *cert. denied*, 488 U.S. 1008, 109 S.Ct. 791, 102 L.Ed.2d 782 (1989).

While Barden's reliance on the Program Statement to create a due process interest, á la *Hewitt v. Helms*, 459 U.S. 460, 469–72 & n. 6, 103 S.Ct. 864, 870–71 & n. 6, 74 L.Ed.2d 675 (1983), may be misplaced, we nevertheless believe he is correct in his view that under the applicable statute and the circumstances of this case, he is entitled to have the Bureau consider his claim and decide it by exercising the statutory discretion it failed to recognize is available to it. *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 619–23 (D.C.Cir.1987) (agency refusal to issue field worker sanitation standard as required by statute is abuse of discretion through inaction). The Bureau must at least consider his case in accord with the broad statutory authority it has to make such *nunc pro tunc* designations, authority it openly recognizes in general but denies with respect to Barden's case.

As the following analysis shows, that authority antedates the Bureau's recent Program Statement. It therefore becomes unnecessary to consider Barden's retroactivity argument.

Section 4082(b), which was replaced by 18 U.S.C.A. § 3621(b) (West 1985), gave the Attorney General wide discretion in choosing the place of a prisoner's confinement. Former § 4082(b) applied to commitments prior to November 1, 1987. It reads:

> The Attorney General may designate as a place of confinement any available, suitable and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

18 U.S.C.A. § 4082(b). Section 4082(b) was replaced by § 3621(b), effective November 2, 1987. Whether former § 4082(b) or present § 3621(b) applies to Barden's case is immaterial because the legislative history of the amendatory act that transferred the power to designate places of confinement from the Attorney General under former § 4082(b) directly to the Bureau under current § 3621(b) shows that the current version was not intended to change pre-existing law with respect to the authority of the Bureau.

Thus, the legislative history of § 3621(b) indicates that the Attorney General had

ognize the possibility that Barden may be entitled to relief in light of the statement by a Bureau attorney that the Bureau can make such relief available. Specifically, in a July 28, 1987, letter to the former Trial Chief in the Office of the District Attorney of Beaver County, Pennsylvania, who had handled Barden's case and was now inquiring on his behalf, the Bureau's Assistant Regional Counsel wrote:

> The Bureau can designate the state institution where he served his state sentence as the place of service of the federal sentence nunc pro tunc, thus giving him credit for some or all of the time he spent there after being sentenced on the federal charges.

Letter from Sheree L. Sturgis to Joseph M. Stanichak (July 28, 1987), *reprinted in* Exhibit H to letter of Joseph M. Stanichak to the United States District Court for the Middle District of Pennsylvania (Jan. 23, 1989). Despite the fact that this statement was made while Barden was still seeking relief from the Bureau, the government has consistently ignored the possibility that this relief might be available to Barden.

designated the Bureau of Prisons as the party that should handle requests concerning former § 4082(b). *See* S.Rep. No. 98–225, 98th Cong., 2d Sess. 141, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3324 (amendment "generally follows existing law, except that custody of Federal prisoners is placed in the Bureau of Prisons *directly* rather than in the Attorney General") (emphasis added); *id.* ("Existing law provides that the Bureau may designate a place of confinement that is available, appropriate and suitable."); *see also Barden v. Keohane*, No. 88–1788, slip op. at 4 (M.D.Pa. June 19, 1989) (noting that designation).[11]

Moreover, whether the Bureau acts under delegated power from the Attorney General in accord with former § 4082(b) or the power now given it by § 3621(b), its discretion to designate a state prison as a place of federal confinement for Barden is not materially affected. This is again shown by the legislative history of § 3621(b). That history states that the listing of factors in § 3621(b) was not intended "to restrict or limit the Bureau in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the Bureau, but intends simply to set forth the appropriate factors that the Bureau should consider in making the designations." S.Rep. No. 98–225, 98th Cong., 2d Sess. 141, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3325; *see Darsey v. United States*, 318 F.Supp. 1346 (W.D.Mo.1970). In either case, nothing deprives it of power to make a *nunc pro tunc* designation. Both U.S.C. and U.S.C.A., in reprinting the former version of § 4082(b) after setting forth its present text, include a heading referring to the former version as "applicable to offenses committed prior to November 1, 1987."

We are not provided with a copy of the Bureau's decision in Barden's case; nevertheless, the portion that the district court quotes demonstrates the Bureau's failure to recognize the statutory discretion it has to grant relief. That quote from the Bureau's decision reads:

> "Because there was no recommendation by the federal judge for concurrent service, the U.S. Marshall Service lodged the judgment and commitment order as a detainer with the state authorities.... [A]lthough Pennsylvania state authorities had directed your state sentence to run concurrently with your federal sentence, the federal sentence was never directed to run concurrent with your state custody. Following state sentencing, the state authorities could have turned you over to federal custody which would have allowed your federal sentence to begin and allowed the state sentence to run concurrently with the federal sentence as recommended by the state judge. Accordingly, *we are unable to retroactively designate* the state facility for concurrent service as you request."

Barden, slip op. at 4–5 (emphasis added).

[3] Instead of exercising the discretion the Attorney General had given it under

11. Section 3621(b) (West 1985) reads:

> The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets the minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—
>
> (1) the resources of the facility contemplated;
>
> (2) the nature and circumstances of the offense;
>
> (3) the history and characteristics of the prisoner;
>
> (4) any statement by the court that imposed the [federal] sentence—
>
> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
>
> (B) recommending a type of penal or correctional facility as appropriate; and
>
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.
>
> The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

18 U.S.C.A. § 3621(b) (West 1985).

old § 4082(b), the Bureau concluded it had none because the federal sentencing judge did not order concurrency. This is wrong. It is the federal sentencing court that lacks the power to order concurrency on the facts of this case, not the Bureau. *See Gomori*, 533 F.2d at 875. Only the Attorney General or the Bureau, as his delegate, has this power. *Id.* The Program Statement that Barden cites in his reply brief shows that the Bureau now recognizes it has this discretion, though it denied the ability even to consider Barden's request. *See* Program Statement, *supra* note 9, at 2–3, 6–7.

Of course, it is the statute and not the Program Statement that gives the Bureau the power to correct any mistake it may have made with respect to the designation of Barden's place of confinement. However, because the Program Statement seems to fall within the Bureau's statutory authority, it may, on exercising its discretion, wish to follow the guidelines the Program Statement sets forth. *See* Program Statement, *supra* note 9. In that connection, we believe the following comments are appropriate. Since the district judge who imposed the federal sentence on Barden is no longer alive, the Bureau cannot determine whether the sentencing judge would have wanted Barden's federal sentence to run concurrently with whatever sentence Pennsylvania might impose after Barden's return to state custody, as proposed in paragraph three, page one, of the Program Statement.[12] While the statute wisely requires the Bureau to solicit the views of the sentencing judge whenever possible, his decision is not controlling under the statute and his unavailability does not relieve the Bureau of the duty to act in an appropriate case.

Whether Barden's actions while under confinement in both the Pennsylvania and federal prisons, the intent of the state judge that Barden's state sentence be served concurrently with the earlier federal sentence and any other broadly relevant characteristics or circumstances entitle Barden to relief in the form of a *nunc pro tunc* designation of the state prison as a place of federal confinement, even if the failure so to designate it was the result of mistake or inadvertence, is a matter within the Bureau's sound discretion. We hold only that the Bureau has power to grant relief, that Barden is entitled to have the Bureau examine his case and that habeas as authorized by 18 U.S.C.A. § 2241 is an appropriate judicial means of compelling that examination. A redesignation of the state prison where he spent more than ten years as a place of federal confinement plainly would affect the absolute term of his confinement as well as his right to parole. As the Supreme Court wrote in *Peyton*, 391 U.S. at 66, 88 S.Ct. at 1556, "the [habeas] statute does not deny the federal courts power to fashion appropriate relief other than immediate release."

Under the statute and the Bureau's regulations, Barden is entitled to "fair treatment" on his application for *nunc pro tunc* designation of the state facility as a place of confinement for his federal sentence. *See* 28 C.F.R. 541.12 (1989) ("[Inmates] have the right to expect that as a human being [they] will be treated respectfully, impartially and fairly by all personnel.").

V.

The Bureau has wide discretion to designate the place of confinement for purposes of serving federal sentences of imprisonment. The Bureau's regulations require "fair treatment" of Barden's application. He is not fairly treated when the Bureau refuses to consider his request and denies having the discretion Congress has afforded it. In Barden's case the Bureau failed to recognize its own power because it mistakenly thought that it was solely within the province of the sentencing court to determine concurrency; however, the sen-

12. This paragraph reads, in relevant part:
Ordinarily, the principle [sic] basis for the selection of the non-federal institution is the fact that primary custody resided with the non-federal jurisdiction and it is the sentencing court's intent that the federal sentence be served concurrently with the non-federal sentence.
Program Statement, *supra* note 9, at 1.

tencing court not only was unable to order concurrency because it sentenced Barden before the state did but was actually powerless to do so. *See Gomori*, 533 F.2d at 875. Because of this combination of factors, we hold that Barden is entitled to have his request considered by the agency with the statutory power to grant it and that 28 U.S.C.A. § 2241 is available to compel that consideration. We will therefore vacate and remand the case to the district court for further proceedings in accordance with this opinion.

Elizabeth DOLE, Secretary of Labor, Petitioner,

v.

ARCO CHEMICAL COMPANY and Occupational Safety and Health Review Commission, Respondents.

No. 90-3213.

United States Court of Appeals, Third Circuit.

Argued Oct. 30, 1990.

Decided Dec. 14, 1990.

Secretary of Labor petitioned for review of Occupational Safety and Health Review Commission (OSHRC) order finalizing administrative law judge's decision denying Secretary's motion to amend complaint against employer arising out of fatal fire extinguisher explosion and granting summary judgment in employer's favor. The Court of Appeals, Mansmann, Circuit Judge, held that administrative law judge abused his discretion in failing to allow Secretary to amend her complaint to allege violation of OSHA regulation addressing fire fighting equipment made available to employees functioning as fire brigades, to add assertion that employer had duty to "remove" defective fire extinguishers from service, and to delete alleged violation of hydrostatic testing provisions of another regulation.

Petition granted and matter remanded.

Administrative Law and Procedure ⇐456
Labor Relations ⇐27

Administrative law judge abused his discretion in refusing to allow Secretary of Labor to amend her complaint against employer to allege violation of OSHA regulation addressing fire fighting equipment made available to employees functioning as fire brigades, to add assertion that employer had duty to "remove" defective fire extinguishers from service, and to delete alleged violation of hydrostatic testing provisions; Secretary did not unduly delay the filing of motion to amend, and employer did not establish prejudice sufficient to defeat Secretary's right to amend through claimed need for additional discovery. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

Robert P. Davis, Sol. of Labor, Cynthia L. Attwood, Ass'n Sol., Ann Rosenthal, Laura V. Fargas (argued), U.S. Dept. of Labor, Washington, D.C., for petitioner.

Thomas M. Melo, Gregory B. Richards (argued), Bracewell & Patterson, Houston, Tex., for respondent Arco Chemical Co.

Before MANSMANN, COWEN and ALITO, Circuit Judges.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

This case comes to us on a petition for review filed by the Secretary of Labor pursuant to Section 11(b) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 660(b) (1977). The Secretary asks that we review an order of the Occupational Safety and Health Review Commission which finalized the decision of an administrative law judge denying the Secretary's motion to amend the complaint and which granted summary judgment in favor of Arco Chemical Company, Inc. Because