

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

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Thomas B. Plunkett, III
Clerk

No. 25-10850

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID DANIEL KOAN,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CR-137-1

Before SMITH, HAYNES, and ENGELHARDT, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

David Koan pled guilty to production of child pornography. At the time of sentencing, he had already spent almost 40 months in Texas state custody for aggravated sexual assault of a child. At sentencing, defense counsel requested that the court adjust the sentence to account for the time served in state custody on the relevant Texas offense. The district court determined that it lacked the ability to do so, deferring the request and decision to the Bureau of Prisons, and Koan was sentenced to a total of 60 years of imprisonment to run concurrently with the state sentence. For the

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reasons that follow, we VACATE the judgment of sentence and REMAND for resentencing.

I.

David Daniel Koan pled guilty to two counts of production of child pornography in violation of 18 U.S.C. § 2251(a). He had previously pled guilty in Texas state court to two counts of aggravated sexual assault of a child and was sentenced to 35 years of imprisonment. Koan produced the child pornography at issue in the federal offense during his commission of the sexual assault upon which the state offense was based. At the time of sentencing for the federal offense, Koan had served 39 months and 28 days in custody for the state offense.

The presentence investigation report (PSR) calculated a Guidelines range of life imprisonment. The PSR reduced the Guidelines range to 60 years of imprisonment because the statutory maximum sentence was 30 years of imprisonment for each count. The PSR noted that § 5G1.3(b) of the U.S. Sentencing Guidelines was applicable because the state sexual assault offense was “relevant conduct” to the federal offense. The PSR quoted § 5G1.3(b), stating:

(1) the Court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the Court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

The PSR therefore recommended that the court adjust Koan’s sentence to account for the 39 months and 28 days Koan had served in state custody.

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At sentencing, the district court confirmed that the Guidelines range was life imprisonment but that the statutory maximum for each count was 30 years of imprisonment. Defense counsel asked the court to impose the two 30-year sentences concurrently because Koan experienced neglect and abuse as a child.

The district court sentenced Koan to 30 years of imprisonment on each count and ordered the counts to run consecutively for a total of 60 years of imprisonment. The district court acknowledged that Koan had “a very rough life,” but also noted that “what [he] did was horrific, horrific. . . . It’s just so bad that we’re going to have to do something about it.” Aside from that statement, the district court did not state its reasons for imposing the sentence, nor did it expressly refer to the 18 U.S.C. § 3553(a) factors.¹

Probation then asked the court how the federal sentence was to run with the remainder of the state sentence. The district court ruled that the federal sentence would run concurrently with the remaining state sentence. Then, the following exchange ensued:

DEFENSE: And Your Honor, I would ask that it — that he be given credit back to the time that he was —

COURT: I can’t do that. I’ll — I’ll let the Bureau of Prisons do that.

DEFENSE: What that means is that it will be stacked on to the last three years.

COURT: I can’t help it.

¹ The government and defense counsel, however, each provided reasons for the court to consider when sentencing Koan. And these reasons implicitly or explicitly referenced the § 3553(a) factors.

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DEFENSE: That's not — okay. I believe that's incorrect. I believe that you could either order that it be backdated or, rather, I believe the BOP's preference is that the Court adjust the sentence accordingly and therefore, rather than sentencing him to 60 years —

COURT: What do you say, Probation?

PROBATION: He's on a writ, Your Honor. So at this point, it would — he's not getting credit for the time he's in custody right now because it's being credited to his State case.

COURT: So —

PROBATION: So that's something that we would defer to the BOP.

COURT: Anything else? We will be in recess.

Defense counsel then added that she believed she had preserved the substantive-reasonableness objection by asking for a lower sentence and the procedural-reasonableness objection as to the mitigating issues in the case. Koan timely appealed.

Koan raises two arguments on appeal: (1) the district court erred in its application of U.S.S.G. § 5G1.3, and (2) the district court improperly delegated its sentencing authority during the sentencing hearing. Because we resolve this appeal on the first issue, we need not reach the second.

II.

In response to Koan's first argument, the government contends that Koan failed to preserve his objection under U.S.S.G. § 5G1.3(b). Whether an objection is preserved determines the standard of review, so we start with the government's contention.

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When an error is preserved by specific objection in the district court, we review the district court's findings of fact for clear error and its application of the federal sentencing guidelines *de novo*. *United States v. Chavez-Hernandez*, 671 F.3d 494, 497 (5th Cir. 2012). But if the defendant failed to make his objection to the Guidelines calculation "sufficiently clear," then the issue is considered forfeited, and we review for plain error. *Id.*

To preserve an error, an objection must be "sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for correction." *United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017) (citations and internal quotation marks omitted). The government argues that Koan's "request for 'credit'" was insufficient to preserve his argument that § 5G1.3(b)(1) required a sentence adjustment. The government makes much of the fact that Koan did not "invoke[]" or "reference" § 5G1.3(b). But the standard for preserving an error is not so strict. *See United States v. Peterson*, 977 F.3d 381, 393 (5th Cir. 2020).

In *Peterson*, we found an error properly preserved when the objection merely "suggested" the district court "follow a procedure consistent with" the relevant Guidelines provision. *Id.* In that case, we focused on whether the objection in the district court used language that was sufficient to convey the "nature," or "essence," of the alleged error. *Id.* Importantly, the defendant did not cite the specific Guidelines provision during the district court proceeding. *Id.* Nevertheless, we found the error preserved. *Id.*

Like *Peterson*, Koan preserved his argument that the district court should have applied § 5G1.3(b) by using language that apprised the district court of the "essence" of his claim. At sentencing, Koan requested that "he

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be given credit back” for the time he served in state custody.² After the district court stated that it did not have the power to award credit for time served, Koan responded that the court could either “backdate” or “adjust the sentence accordingly” to account for the time served. Koan did not explicitly cite to § 5G1.3(b), but he requested the exact relief that he would have received under § 5G1.3(b)—that is, adjusting his sentence for time served on an undischarged term of imprisonment. *See* U.S.S.G. § 5G1.3(b) (“[T]he court shall *adjust the sentence* for any period of imprisonment already served on the undischarged term of imprisonment” (emphasis added)).

The government makes much of Koan’s “give[] credit back” language. But whether Koan requested he be given credit back, a backdated sentence, or an adjusted sentence, the gist is the same: Koan was requesting that his sentence be adjusted for time served on an undischarged term of imprisonment for a related state offense, which is the very essence of § 5G1.3(b). *See, e.g., United States v. Figueroa*, 215 F. App’x 343, 344 (5th Cir. 2007) (per curiam) (speaking of § 5G1.3(b)’s sentence adjustment in terms of “time . . . credited”); *United States v. Massey*, 79 F.4th 396, 398 (5th Cir. 2023) (referring to § 5G1.3(b) when stating “[i]t is true that the Sentencing Guidelines call for *credit for time served* if there are two related offenses” (emphasis added)); *United States v. Estrada*, 312 F. App’x 664, 668 (5th Cir. 2009) (per curiam) (“We conclude that the district court considered whether to give Estrada *credit for time served* under § 5G1.3(b)” (emphasis added)). Therefore, Koan’s objection was specific enough to alert the district court as to the nature of alleged error and provided an opportunity for correction. *See Nesmith*, 866 F.3d at 679.

² Koan did not argue in his sentencing memorandum that § 5G1.3(b) should apply, but he did not need to request application of § 5G1.3(b) because the PSR already noted that the court should apply that Guidelines provision.

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Further, an improper statement does not nullify Koan's proper request for relief under § 5G1.3(b). In *United States v. Massey*, the defendant argued both for application of § 5G1.3(b) and for credit he was already entitled to under 18 U.S.C. § 3585. 79 F.4th at 399. The court found that even though the argument was "imperfect," the § 5G1.3(b) issue was preserved—the argument "put the district court on notice of the back-time request and directed it to the applicable Guideline." *Id.* Koan's request for credit for time served or for a backdated sentence may have been technically improper, but like in *Massey*, those requests did not waive his "imperfect" request for application of § 5G1.3(b). Accordingly, Koan preserved his argument under § 5G1.3(b).

III.

Because Koan preserved his argument for a sentence adjustment under U.S.S.G. § 5G1.3(b), we review the district court's interpretation of the Guidelines *de novo* and its factual findings for clear error. *Chavez-Hernandez*, 671 F.3d at 497. We conclude that the district court erred.

A.

To fully understand the district court's error, it is helpful to have some background knowledge on two relevant authorities: (1) 18 U.S.C. § 3585(b), which governs credit for time served in presentence custody, and (2) U.S.S.G. § 5G1.3(b), the authority at issue here.

Starting with 18 U.S.C. § 3585(b), a defendant must "be given credit toward the service of a term of imprisonment for any time he has spent in official detention" before his sentence begins. The defendant will not receive credit, however, for time served that was "credited against another sentence." 18 U.S.C. § 3585(b). In any event, a *district court* may not award credit for time served under § 3585(b). *United States v. Wilson*, 503 U.S. 329, 333 (1992). In other words, a court may not "backdate" the sentence (*i.e.*,

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rule that the sentence began on the date the defendant was taken into custody) nor mandate that the defendant receive credit for time already served in custody on the federal offense. *United States v. Taylor*, 973 F.3d 414, 418–19 (5th Cir. 2020). Rather, after a court sentences the defendant, the *Bureau of Prisons* is responsible for awarding time served by incorporating the defendant’s time served into his release date. *United States v. Hankton*, 875 F.3d 786, 792 (5th Cir. 2017).

Turning to U.S.S.G. § 5G1.3(b)—while the district court cannot award credit for time served under 18 U.S.C. § 3585(b), the district court “retain[s] residual authority to reduce defendants’ sentences based on previous time served related to their offenses.” *Hankton*, 875 F.3d at 792. That is, § 5G1.3(b) permits a court to adjust a sentence if the defendant has served time on a certain undischarged (*i.e.*, incomplete) term of imprisonment.³

For a district court to adjust a sentence under § 5G1.3(b), two criteria must be met: (1) the time previously served must have “resulted from another offense that is relevant conduct to the instant offense,” and (2) the previous time served “will not be credited to the federal sentence by the Bureau of Prisons.” U.S.S.G. § 5G1.3(b). When those two criteria are met, § 5G1.3(b) instructs the court to reduce the sentence for time served and impose the sentence “to run concurrently to the remainder of the undischarged term.” *Id.*⁴

³ “An ‘undischarged term’ is a sentence that is not yet complete; a ‘discharged term’ is one that is complete.” *Hankton*, 875 F.3d at 789 n.3.

⁴ If the second criterion is not met—that is, the previous time served will be credited to the federal sentence by the Bureau of Prisons—but the first criterion is met, § 5G1.3(b) still instructs the sentencing court to run the federal and state sentences concurrently.

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So, in sum, § 3585(b) governs the calculation of credit for time spent in custody prior to sentencing, which can be awarded exclusively by the Bureau of Prisons after sentencing, whereas § 5G1.3(b) governs sentence adjustments applied by a federal judge at the time of sentencing to account for time served on a related, undischarged term of imprisonment. Here, the district court erred when it seemingly conflated the two.

B.

While district courts are not bound to apply the Guidelines, they must consult the Guidelines and take them into account when sentencing. *United States v. Booker*, 543 U.S. 220, 264 (2005); *see also Hankton*, 875 F.3d at 792 n.7 (noting that district courts must consult § 5G1.3 in calculating the defendant's Guidelines range). Here, the district court erred by failing to consider all of § 5G1.3(b) when sentencing Koan.

The confusion at the sentencing hearing regarding the district court's power to award credit for time served shows that the district court refused to consider reducing Koan's sentence under § 5G1.3(b). When Koan requested that he be "given credit back" for time served in state custody on the related offense, the court responded that it could not award credit and that it would let "let the Bureau of Prisons do that." Koan clarified, requesting that the district court "backdate[]" the sentence or "adjust [it] accordingly." Then, the U.S. probation officer added that the time served in custody was "being credited to [Koan's] State case," so "that's something that we would defer to the BOP."⁵ Thus, it appears the district court and the probation officer confused the court's power to adjust a defendant's sentence under

⁵ The PSR recommended that the district court award credit for time served under U.S.S.G. § 5G1.3(b). So, it is unclear why the probation officer made an about-face at sentencing and told the district court that it could not award credit for time served on the state offense.

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§ 5G1.3(b) with the court’s lack of authority to award credit for time served under 18 U.S.C. § 3585(b). Because the district court believed it did not have the authority to award credit, it refused to consider applying a reduction for time served under § 5G1.3(b).

This case is like *United States v. Young*. No. 20-30492, 2021 WL 4515393 (5th Cir. Oct. 1, 2021) (per curiam) (unpublished). In *Young*, we vacated and remanded to the district court for reconsideration of § 5G1.3(b). *Id.* at *7. The district court had refused to consider an adjustment under § 5G1.3(b), reasoning that only the Bureau of Prisons had the power to award credit for time served. *Id.* at *3. We therefore held that “the district court did not consider Section[] 5G1.3(b) . . . and apparently misunderstood its authority to do so.” *Id.* at *7. Just like in *Young*, the district court here believed it did not have the authority to award credit and therefore refused to consider § 5G1.3(b)’s adjustment.

Further, there is no evidence that the district court would have imposed the same sentence had it understood its authority to consider the time Koan had spent in state custody. And so, like in *Young*, vacatur and remand are appropriate.

C.

The government argues that the district court considered awarding credit under § 5G1.3(b) but declined to do so. We disagree.

The government contends that because the district court followed § 5G1.3(b) in running the sentences concurrently, it necessarily rejected § 5G1.3(b)’s recommendation to award credit for time served. The record does not support this argument. Just because the district court may have considered part of § 5G1.3(b) does not mean the court considered all of it. And the record reflects that the court did not consider all of § 5G1.3(b).

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At sentencing, the district court read from a document that recommended running the sentences concurrently, similar to the language of § 5G1.3(b). The district court then followed the recommendation that the federal offense run concurrently to the state offense. But the district court never explicitly referenced §5G1.3(b), and the court later stated that it did not have the ability to award credit and therefore refused to consider Koan's argument to adjust the sentence. So, it appears that the district court considered § 5G1.3(b)(2)'s recommendation to run the federal and state sentences concurrently but refused to consider § 5G1.3(b)(1)'s recommendation to adjust the federal sentence. Therefore, the government's argument that the district court silently considered but declined to adjust Koan's sentence under § 5G1.3(b) fails.

The government's argument closely resembles that offered in *United States v. Estrada*. There, we concluded that the district court did implicitly consider whether to give the defendant credit for time served under § 5G1.3(b) but rejected the lesser sentence as unreasonable in light of its prior analysis of the § 3553(a) factors. 312 F. App'x at 668. *Estrada*, however, is factually distinguishable from the present case. In *Estrada*, the defendant objected, arguing that under § 5G1.3(b), the defendant's sentence must be reduced by the time already served on the related state sentence. *Id.* In response, the district court declined to adjust the defendant's sentence, as it thought running the state and federal sentences concurrently was alone "sufficient." *Id.* at 665. The district court here, however, did not decline to adjust Koan's sentence because it thought the sentence it imposed was sufficient; the district court declined to adjust Koan's sentence because it thought it could not do so. This difference is crucial because the former shows consideration and rejection of the adjustment (albeit implicit), while the latter shows a refusal to consider the adjustment at all. Accordingly, *Estrada* does not influence the outcome here.

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Although it is not mandatory for a district court to comply with § 5G1.3(b), the court is still required to consider that subsection as part of its determination of a reasonable sentence. *Estrada*, 312 F. App'x at 667. And the district court failed to consider all of § 5G1.3(b), namely an adjustment for Koan's related, undischarged state term of imprisonment. Therefore, remand for resentencing is warranted.⁶ See *Figueroa*, 215 F. App'x at 345.

IV.

As the PSR recommends, § 5G1.3(b) applies to Koan's sentence. Section 5G1.3(b) applies when a defendant has served time on an undischarged term of imprisonment that (1) "is relevant conduct to the instant offense of conviction" and (2) the time served "will not be credited to the federal sentence by the Bureau of Prisons." U.S.S.G. § 5G1.3(b). Both prerequisites are met here. At the time of federal sentencing, Koan had served almost 40 months in state custody for aggravated sexual assault of a child. The parties do not dispute that the state offense is relevant conduct to the federal offense because Koan committed the federal child pornography offense during his commission of the state sexual assault offense. Second, Koan cannot receive credit toward his federal sentence because the 40 months he served in state custody is being credited toward his state offense.⁷

⁶ It is true that the district judge on remand may sentence the defendant as she sees fit (if she stays within the statutory max, of course). But the dissent's claim that "she gave Koan the highest sentence she could" is not correct. If she wanted to give Koan the highest sentence allowed, she would have run his state and federal sentences consecutively, not concurrently. Therefore, it is not evident that she "would have preferred to assign Koan a life sentence." Although the district court can grant the same sentence on remand, she must consider all of § 5G1.3(b) when doing so.

⁷ The government argues that there is no evidence that Koan will not ultimately receive credit for the time he served in state custody. That argument is belied by the text of 18 U.S.C. § 3585(b), as well as by the probation officer's representation at sentencing that Koan is "not getting credit for the time that he's in custody right now because it's being credited to his State case." See *Smith v. McConnell*, 950 F.3d 285, 288 (5th Cir. 2020)

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See 18 U.S.C. § 3585(b) (stating that a defendant may not receive credit for time served that was “credited against another sentence”). Therefore, the district court erred when it refused to consider an adjustment under § 5G1.3(b) in its sentencing calculation.

Accordingly, the sentence is VACATED, and we REMAND for resentencing.

(“[A] prisoner cannot receive credit for time that was already credited toward a state sentence.”); *Young*, 2021 WL 4515393, at *6 (rejecting the same argument).

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CATHARINA HAYNES, *Circuit Judge*, dissenting:

I respectfully dissent from the majority opinion, and I would affirm. One thing is obvious: The district judge would have preferred to assign Koan a life sentence. A life sentence, however, is not available here so she gave Koan the highest sentence she could.¹ On remand, she can do the same thing, and I think she will. The district judge is not required to give Koan credit for his previous time served in state custody.

I agree with the government’s argument that the alleged preserving of the objection under U.S.S.G. § 5G1.3(b) did not occur, so plain error review applies. *Puckett v. United States*, 556 U.S. 129, 135 (2009).² I respectfully disagree that Koan’s defense counsel properly objected in the district court; I would use plain error review, which clearly is not satisfied here.

Addressing the discussion of the probation officer, as we have previously decided and the government noted, “a district court cannot delegate to a probation officer the core judicial function of imposing a sentence.” *United States v. Barber*, 865 F.3d 837, 839 (5th Cir. 2017) (citation modified). But, district judges are not “prohibit[ed] . . . from using nonjudicial officers to support judicial functions, as long as that judicial

¹ As explained below, she did grant the concurrence with the upcoming time in the state court which the majority opinion argues about my view on. That is a different arena, and I think she respectfully thought that it was an appropriate thing to do since a life sentence is not available.

² This case explains that to demonstrate plain error, a defendant must show that (1) there is an error or defect; (2) the legal error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant’s substantial rights; and (4) if the three prongs are satisfied, the court has the discretion to remedy the order which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

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officer retains and exercises ultimate responsibility.” *Bucci v. United States*, 662 F.3d 18, 35 (1st Cir. 2011) (citation omitted).

Additionally, I think the district judge allowing the Bureau of Prisons to decide whether to grant some time makes sense. Again, it is clear that the district judge wanted to grant as high a sentence as possible, so she only considered whether she had to grant the almost 40 months served. Thus, while I am respectful of her to do what she decides on remand by the majority opinion, I do not think she wanted to grant anything less. Frankly, she could have given a lower sentence regardless of the time served on the state offense, and she did grant concurrence with the state offense on the sixty years. That was sufficient, so I see no reason to remand.

Accordingly, I respectfully dissent.