No. 10-7387

In the
Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

JASON D. HAWKINS
COUNSEL OF RECORD
J. MATTHEW WRIGHT
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS, 75202
(214) 767-2746

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

REPLY BRIEF

The government's opposition fails to raise any compelling reason why this Court should allow the unlawful sentencing practice to continue in the courts below. As the petition makes clear, the consecutive order within the district court's judgment was unlawful and palpably harmed Petitioner. Despite the government's concession of error, the Court of Appeals has definitively stated that it will not revisit its erroneous precedent absent correction from this Court.

1. The government argues that the illegal orders "have little practical impact" because "the second court to sentence a defendant will often make its own decision concerning how long the defendant will spend in prison, irrespective of whether the first sentencing court specified a concurrent or consecutive sentence." Gov't Br. 8–9. But that argument ignores the facts before the Court in the instant case. Here, the "second court" to sentence Petitioner did exactly what the government suggests—it ordered the state sentences to run "concurrent" and "concurrently." Pet. app. 15a, 18a. Yet, because of the illegal federal consecutive order, there is no indication that Petitioner will receive credit for the time he spent in state custody.

Given these facts, it is odd that the government cites *United States v. Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008), in support of its position. *Quintana-Gomez* held that a federal district court does not have authority to order its sentence to run consecutive to an anticipated *federal* sentence in a separate district—a position that stands in stark tension with the rule

challenged here. Recognizing this tension, the *Quintana-Gomez* court suggested that, even under *United States v. Brown*, 920 F.2d 1212 (5th Cir. 1991) (per curiam), the subsequent state court was free to "order its sentence to run concurrently with the federal sentence if it chose to do so." *Quintana-Gomez*, 521 F.3d at 497. Here, that is exactly what the state court "chose to do," yet the illegal federal order remains in the federal judgment, and that is the judgment that will control B.O.P.'s execution of the sentence.[1]

2. The government also argues that this Court should ignore the illegal sentencing practice because, at present, B.O.P. inquires about a judge's preference before the agency makes a determination about nunc pro tunc designation. The government claims that

> in all cases in which the district court affirmatively orders in the judgment that the sentences be consecutive, it is apparent that the district court would be unlikley to respond to such a letter by endorsing a request to run the federal sentence concurrently with petitioner's state sentence for violating probation.

(Gov't Br. at 12.) But this claim fails (in general) for at least two reasons, and it is inapplicable (in the present case) for a third.

---

[1] This case is distinguishable from *United States v. Douglas*, 569 F.3d 523, 527 n.2 (5th Cir. 2009), because the defendant in *Douglas* was in primary federal custody. *See* Letter Responding to Supplemental Authorities, *United States v. Douglas*, No. 07-11007 (5th Cir. filed Jan. 22, 2009) ("Mr. Douglas is currently in federal custody."). As such, the subsequent state court decision to run the sentences concurrently actually eliminated the possibility of additional incarceration. In the present case, Petitioner was in primary state custody when the federal sentence was issued, so the state court's concurrent order had no effect on the previously-issued, subsequently-executed federal sentence.

First, a district court acting pursuant to 18 U.S.C. § 3584 and *Brown* believes it is acting pursuant to statutory authority about a matter of *judicial* discretion. Petitioner and the government agree that § 3584 does not authorize such action when the state sentence has not yet been imposed. However, a district judge who receives a letter from BOP such as the one described by the government would recognize that she is being asked to render advice about an area of administrative competence. Thus, the judge would be more likely to remain silent or to defer to BOP's judgment.

Second, even if a court did choose to respond to such a request, it would do so with *knowledge* of subsequent state court action and of any other intervening facts (such as the prisoner's behavior while incarcerated). In its substantive analysis, the government recognizes the importance of this knowledge: the decision to run a federal sentence consecutive to or concurrent with another sentence must be based upon consideration of "the sentencing factors set out in 18 U.S.C. [§] 3553(a) . . . and that analysis *cannot logically take place* when one of the defendant's sentences has not yet been determined." Gov't Br. at 8 n.1 (emphasis added). One of the main problems with anticipatory-consecutive orders is that the court *does not have* that essential knowledge when it issues the order. As such, *subsequent* decision-making should be encouraged. The fact that a district court might *later* issue a recommendation about the proper relationship of the federal and state sentences, with the benefit of all the essential facts, actually counsels in favor of reviewing and reversing the decision

below. The fact that the court has available a lawful and more reasonable mechanism to express its intention should not shield the premature and unreasonable anticipatory decision from plenary review.

Third, in the present case, it is extremely unlikely that the district court would have imposed the same kind of Janus-faced recommendation after all the facts were in. At the time it entered the consecutive order, the court did not have one crucial fact at its disposal—that the two state sentences would be indistinguishable because they would concurrently with one another. The government assumes that the consecutive order would be preeminent among the court's preferences, so it states that "the district court would be unlikely to respond to such a letter [from BOP to the court requesting a recommendation regarding concurrent credit] by endorsing a request to run the federal sentence concurrently with petitioner's state sentence for violating probation." Gov't Br. at 12. But it is equally or even more "unlikely" that the court would endorse a request to run the federal sentences consecutive to petitioner's state sentence for the very same conduct underlying the federal sentence. And it is even less likely that the district court would issue an impossible recommendation that the federal sentence be both concurrent with and consecutive to the state sentences.

As Petitioner previously explained, there are reasons to believe that, in the absence of the unlawful consecutive order, BOP (with or without the district court's subsequent recommendation) would be inclined to grant Petitioner's request for concurrent credit. (Pet. at 9–10; *see also* Gov't Br. at 13–14.) But

unless this Petition is granted, Petitioner will be "stuck" with the unlawful consecutive order in the judgment. The government asserts that Petitioner may seek relief through "BOP's administrative remedy program and appeals process," but that assurance rings hollow in light of *Pierce v. Holder*, 614 F.3d 158 (5th Cir. 2010). In *Pierce*, the court below announced that a prisoner challenging a district court's "consecutive" order must do so in a direct appeal from that order; the claim is not cognizable in a subsequent challenge to BOP's execution of the unlawful judgment. *Id.* at 160 n.1. As such, Petitioner's direct appeal is the best and only means to correct the unlawful consecutive order.

3. The government also urged this Court to deny review because "there is reason to believe" the illegal sentencing practice "is becoming less common." Gov't Br. at 14. But the government did not provide any "reason" to believe its supposition. It merely noted that the Department of Justice had "directed" "all federal prosecutors" "to urge sentencing courts not to order that sentence run consecutively to . . . a yet-to-be-imposed sentence." Gov't Br. at 14. It also noted that prosecutors "will not defend such an order *except where circuit precedent* . . . dictates otherwise." Gov't Br. at 15 (emphasis added). But that exception swallows the rule. Just last week, the government filed a motion to summarily affirm an unlawful anticipatory consecutive order in the court below. *See* Mot. for Summary Affirmance, *United States v. Joel Arpon*, No. 10-11213 (filed Mar. 8, 2011).

Rumors of the practice's demise have been greatly exaggerated. The Fifth Circuit regularly and habitually affirms anticipatory consecutive sentences despite defendants' challenges. *See*, *e.g.*, *United States v. Hartwell*, 2011 WL 507455 (5th Cir. Feb. 15, 2011) (unpub.) (holding that *Brown* foreclosed challenge to anticipatory consecutive sentence); *United States v. Cates*, 2011 WL 507450 (5th Cir. Feb. 15, 2011) (unpub.) (same); *United States v. Gonzalez*, 2010 WL 53956652 (5th Cir. Dec. 29, 2010) (unpub.) (same); *United States v. Brown*, 2010 WL 5185492 (5th Cir. Dec. 15, 2010) (unpub.) (same); *United States v. Alfaro-Hernandez*, 2010 WL 5029525 (5th Cir. Dec. 8, 2010) (unpub.) (same); *United States v. Palacios*, 2010 WL 4705836 (5th Cir. Nov. 19, 2010) (unpub.) (same); *United States v. Garcia*, 2010 WL 4559004 (5th Cir. Nov. 8, 2010) (unpub.) (same); *United States v. Bustos*, 2010 WL 4269369 (5th Cir. Oct. 26, 2010) (unpub.) (same); *United States v. Mendoza*, 2010 WL 4116881 (5th Cir. Oct. 19, 2010) (unpub.) (same); *United States v. Johnson*, 396 F. App'x 82 (5th Cir. Sept. 23, 2010) (unpub.) (same); and *United States v. Geurin*, 391 F. App'x 373 (5th Cir. Aug. 17, 2010) (unpub.). Every one of those cases arose because a district court ordered a federal sentence to run consecutive to an as-yet-unimposed state sentence, and more appeals will follow because district courts continue to do this. *See also Davis v. United States*, 2011 WL 121911 (N.D. Tex. Jan. 12, 2011) (No. 3:09-CV-2229-B) (applying *Brown* in context of ineffective assistance challenge); *United States v. Castro*, No. 3:10-CR-204-P (N.D. Tex. Jan. 20, 2011), *appeal docketed*, No. 11-10133 (5th Cir. Feb. 2, 2011) (ordering

a federal sentence to run consecutive to as-yet-unimposed state sentence); and *United States v. Arpon*, No. 4:06-CR-179-A(01) (N.D. Tex. Nov. 22, 2010), *appeal docketed*, No. 10-11213 (5th Cir. Dec. 6, 2010) (same). Moreover, district courts continue to order federal sentences consecutive to some unimposed sentences, and concurrent with others. *See*, *e.g.*, *United States v. McCullough*, No. 3:10-CR-125-L (N.D. Tex. Dec. 6, 2010). Thus, absent this Court's intervention, cases will continue to present the same kind of unreasonable and self-contradictory instructions that are presented in the present case. As long as *Brown* remains good law, district courts will continue to order federal sentences to run consecutive to some anticipated sentences, without any knowledge of the nature or length of those sentences.

Finally, the government argues that the Fifth Circuit may reconsider *Brown* en banc and reverse its position. However, the Court has repeatedly refused to do so, despite numerous petitions from defendants in a variety of procedural postures. In addition to the present case, the Fifth Circuit denied request for *en banc* hearing or rehearing in *United States v. Garcia-Espinoza*, *United States v. Elizz Garcia*, and in *United States v. Vargas-Solis*. The government even joined the petition in *Vargas-Solis*, but the result was the same. As the Court stated in the opinion in this case, the judges have decided to await correction from this Court. This is the right case in which to issue that correction.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JASON D. HAWKINS
Counsel of Record
J. MATTHEW WRIGHT
Federal Public Defenders Office
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas, 75202
(214) 767-2746

March 14, 2011

No. 10-7387

In the Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PROOF OF SERVICE

I, JASON D. HAWKINS, do swear or declare that on this date, March 14, 2011, as required by Supreme Court Rule 29 I have served the enclosed REPLY TO BRIEF IN OPPOSITION on each party to the above proceeding or that party's counsel, and on every other document required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Neal Katyal
Acting Solicitor General of the United States
Room 5614, Department of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

James Wesley Hendrix
Assistant United States Attorney
1100 Commerce Street, 3rd Floor
Dallas, Texas 75202
(214) 659-8600
Counsel for the United States

and by electronic mail today to the Office of the Solicitor General at SupremeCtBriefs@USDOJ.gov.

I further certify that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 14, 2011.

_____

JASON D. HAWKINS
Counsel of Record
Assistant Federal Public Defender
Federal Public Defenders Office
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas, 75202
(214) 767-2746