No. 10-7387

IN THE SUPREME COURT OF THE UNITED STATES

MONROE ACE SETSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred by directing that petitioner's federal sentence be served consecutively to a state sentence that had not yet been imposed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 607 F.3d 128.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. A petition for rehearing was denied on August 5, 2010 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on November 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2. He was sentenced to 151 months of imprisonment, to be followed by five years of supervised release. Pet. App. 11a-14a. The court of appeals affirmed. Id. at 1a-8a.

1. On October 1, 2007, police officers observed petitioner driving with a defective headlight and stopped his car. Presentence Report (PSR) ¶ 8. When petitioner unexpectedly exited the car, the officers searched him. They discovered 11 grams of marijuana and $1740 in United States currency on his person. PSR ¶ 9. A further search of petitioner's vehicle uncovered hydrocodone, methamphetamine, pure cocaine base, a semiautomatic handgun, and assorted handgun ammunition. PSR ¶¶ 10-11. Petitioner was then taken into custody on Texas state narcotics charges. PSR ¶ 12. While he was in custody, agents discovered that petitioner had previously committed a felony drug offense -- for which he was still on probation -- and was not legally allowed to possess a firearm. PSR ¶ 14.

2. A federal grand jury sitting in the Northern District of Texas returned a three-count indictment charging petitioner with possession of 50 grams or more of methamphetamine with intent to

distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2; possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) and 2; and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and 2. PSR ¶ 2. Petitioner pleaded guilty to the methamphetamine-possession count. PSR ¶ 1.

The PSR recommended an advisory Sentencing Guidelines range of 121 to 151 months of imprisonment. PSR ¶ 85. The PSR reported that petitioner faced pending Texas state charges both for the narcotics offense and for violation of probation. PSR ¶¶ 87-88. The PSR noted that under Fifth Circuit precedent, the district court had the discretion to impose a sentence consecutive to any sentence that might be imposed on the state charges. PSR ¶ 86 (citing United States v. Brown, 920 F.2d 1212 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991)). Petitioner objected to the probation officer's statement that the district court had the power to impose a sentence consecutive to a not-yet-imposed state sentence. Add. to PSR 2.

The district court sentenced petitioner to 151 months of imprisonment, to be followed by five years of supervised release. See Pet. App. 11a-13a. The court provided that the sentence would run concurrently with any sentence imposed by Texas for the narcotics charges, which arose out of the same offense conduct for which the district court was sentencing petitioner, and consecu-

tively to any sentence imposed for petitioner's probation violation. Id. at 12a.

Following sentencing, petitioner was returned to state custody. He was then convicted in Texas state court on the narcotics charges, and his probation on the 2006 offense was revoked. A Texas state court sentenced him to ten years of imprisonment on the narcotics charge and five years on revocation of probation, to be served concurrently with one another. Pet. App. 2a. After approximately two and a half years in state custody, petitioner's state convictions were deemed satisfied and he was paroled to federal custody. Ibid.; Gov't C.A. Mot. to Supplement Record Exh. A at 5-6. Petitioner began serving his federal sentence on March 17, 2010. His projected release date from federal prison is March 3, 2021. Petitioner was not accorded credit against his federal sentence for any of the time he had served in the state system. Id. at 3, 4; see Pet. App. 2a-3a.

3. The court of appeals affirmed. Pet. App. 1a-8a. Petitioner acknowledged, and the court of appeals agreed, that under binding circuit precedent, the district court had discretion to order petitioner's sentence to run consecutively to a not-yet-imposed state sentence. Id. at 3a-5a (citing Brown, supra).

ARGUMENT

Petitioner contends (Pet. 5-7) that this Court's review is warranted because the courts of appeals are divided over whether a

district court has the authority under 18 U.S.C. 3584(a) to direct that a sentence run consecutively to a state sentence that has not yet been imposed. The government agrees with petitioner that district courts lack such authority. Nevertheless, for two reasons, further review in this case is not warranted to resolve the circuit conflict on that issue. First, the issue lacks real significance because, as a practical matter, state courts and the Federal Bureau of Prisons (BOP) can reach their own decisions about whether to take into account service in another sovereign's correctional system, irrespective of whether Section 3584(a) authorizes federal district courts to embody such decisions in a judgment of conviction and sentence. Consistent with that conclusion, this Court has denied numerous petitions raising the issue. Second, petitioner's contention is that the district court's consecutive-sentence order precludes him from asking the BOP to credit his state imprisonment against his federal sentence by designating his state prison, nunc pro tunc, as his federal place of incarceration. But before making any such nunc pro tunc determination, the BOP always seeks the views of the sentencing judge. Thus, the question whether the sentencing judge may embody those views in a judgment has no real practical significance. Because petitioner would be highly unlikely to qualify for a favorable exercise of BOP's discretion to make a nunc pro tunc

determination even if the consecutive-sentence order were stricken from the judgment, that order has had no practical effect on him.

1. As petitioner points out (Pet. 5-7), the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively to a yet-to-be-imposed state sentence. In the government's view, contrary to the current position of the court below, Section 3584(a) does not confer that authority. Nevertheless, further review is not warranted.

The first sentence of Section 3584(a) identifies two situations in which a district court may take into account other sentences: when "multiple terms of imprisonment are imposed on a defendant at the same time," and when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." The second and third sentences establish the default presumptions that correspond to each of those two situations when the district court's order is silent on whether the sentences are to be consecutive or concurrent. A federal defendant who has not yet received, but may one day receive, a sentence in a separate state court proceeding does not fall within either of the two situations specified in the first sentence of Section 3584(a). For that reason, in the government's view, the presumptions set out in the remainder of that subsection have no application to such a defendant.

The Second, Sixth, and Ninth Circuits have taken that view. United States v. Donoso, 521 F.3d 144, 146-149 (2d Cir. 2008) (per curiam); United States v. Quintero, 157 F.3d 1038, 1039-1041 (6th Cir. 1998); United States v. Clayton, 927 F.2d 491, 492-493 (9th Cir. 1991); see also United States v. Smith, 472 F.3d 222, 225-227 (4th Cir. 2006) (holding that a federal district court lacks authority to impose a federal sentence consecutive to an as-yet-unimposed federal sentence). The Seventh Circuit has also held, for distinct reasons, that federal district courts lack authority to impose a sentence that runs consecutively to a future sentence. See Romandine v. United States, 206 F.3d 731, 737-738 (2000).

Four courts of appeals, including the court below, have taken the contrary view. Those courts have concluded either that federal district courts have the inherent authority to impose consecutive sentences and that Section 3584(a) does not withdraw it, see United States v. Brown, 920 F.2d 1212, 1217 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991); United States v. Mayotte, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam), or that Section 3584(a)'s third sentence affirmatively permits terms of imprisonment to be run consecutively even before the second term of imprisonment has been imposed, see United States v. Williams, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995); United States v. Ballard, 6 F.3d 1502, 1507-1510 (11th Cir. 1993). If those interpretations

were correct, however, Congress's specification, in the first sentence of Section 3584(a), of two situations in which the court has discretion to run sentences concurrently or consecutively would have been unnecessary: if courts had inherent authority to make consecutive-versus-concurrent determinations, the limiting conditions in the first sentence would be beside the point, and if Section 3584(a)'s third sentence conferred authority to run sentences consecutively or concurrently in all cases in which sentences are imposed at different times, it would have made little sense for the first sentence to refer to a sentencing court's authority when the defendant has a prior undischarged term of imprisonment. Treating Section 3584(a) as an integrated whole avoids rendering its provisions partially superfluous.[1]

2. As the government has previously explained, however, the differences between the circuits' interpretations of Section 3584(a) have little practical impact. Accordingly, this Court has repeatedly declined to review the question presented. See, e.g., Ortiz-Coca v. United States, 130 S. Ct. 2370 (2010) (No. 09-7636); Aguilar-Mendez v. United States, 130 S. Ct. 2370 (2010) (No. 09-7639); Garcia-Quiroz v. United States, 130 S. Ct. 2370 (2010) (No.

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[1] That reading is confirmed by 18 U.S.C. 3584(b), which directs federal courts to consider the sentencing factors set out in 18 U.S.C. 3553(a) in deciding whether to impose concurrent or consecutive terms of imprisonment. Several of those factors involve consideration of the total length of incarceration, see, e.g., 18 U.S.C. 3553(a)(2)(B), (2)(C) and (6), and that analysis cannot logically take place when one of the defendant's sentences has not yet been determined, and indeed may never be imposed.

09-7643); Mancilla-Lopez v. United States, 130 S. Ct. 2370 (2010) (No. 09-7644).[2]

The question does not require resolution by this Court because under current law, 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. For example, if a defendant is sentenced in state court after being sentenced in federal court, the state court can adjust the length of the state sentence (or suspend a portion of the sentence) to take into account the time the defendant has served or will serve in federal custody. See, e.g., Romandine, 206 F.3d at 738 (explaining that the correct "answer" to the circuit conflict "does not matter, and the conflict is illusory").

Even when a defendant faces both federal and state sentences, the terms often do not overlap, simply because the sovereign with primary jurisdiction over the defendant is not required to yield custody to the other sovereign; it may keep control over the defendant until the sentence expires. See generally Ponzi v. Fessenden, 258 U.S. 254, 261 (1922) (explaining primary jurisdiction over defendants prosecuted by separate sovereigns). Even if, as here, the sovereign with primary jurisdiction permits the other

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[2] The same question is also asserted by the pending petitions for writs of certiorari in Vargas-Solis v. United States, No. 10-6866 (filed Oct. 5, 2010); and Gayford v. United States, No. 10-7343 (filed Oct. 12, 2010).

sovereign to try and convict the defendant during that time, the other sovereign is not entitled to execute its sentence by immediately taking the defendant into custody.

Of the four courts of appeals that permit federal courts to impose a sentence consecutively to a not-yet-imposed state sentence, two (including the court below) have mitigated the effect of that holding by suggesting that a federal judgment containing such a directive does not bar the state court from taking steps in the future to permit a concurrent sentence. See United States v. Quintana-Gomez, 521 F.3d 495, 497 (5th Cir. 2008); United States v. Andrews, 330 F.3d 1305, 1307 n.1 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); see also United States v. Douglas, 569 F.3d 523, 527 n.2 (5th Cir. 2009) (defendant withdrew his challenge "because the state proceedings concluded and the state court has chosen to run his state sentence concurrently with the time he is serving in federal custody"). The other two circuits have not clearly spoken to the question whether a state court is so bound. The Tenth Circuit has said that a state court cannot override a federal court's determination, but on the facts of that case, the State effectively did so by releasing the defendant to federal custody with the statement that he had satisfied his state sentence. Williams, 46 F.3d at 58. The Eighth Circuit has said that "the federal sentence controls" in the event of a conflict, Mayotte, 249 F.3d at 799, but did not address the practical implementation of that statement. See also United States v. Hayes,

535 F.3d 907, 910 (8th Cir. 2008) (district court recognized that any direction it might give would have no effect if "the state court decides to run its sentence concurrently, which they are free to do"), cert. denied, 129 S. Ct. 1983 (2009). Thus, even in the circuits that read Section 3584(a) to authorize a sentence consecutive to a future sentence, any practical impact of that interpretation on subsequent sentencing courts is speculative at best.

3. a. The BOP's procedure for considering administrative concurrent-sentencing requests further illustrates why a consecutive-sentencing order like the one in this case has scant practical impact on a defendant in petitioner's position. Striking the consecutive-sentencing order from the judgment in petitioner's case would not entitle petitioner to a concurrent sentence, as petitioner concedes. Rather, petitioner argues (Pet. 8-10) that the district court's consecutive-sentence order precluded him from asking the BOP to exercise its discretion to make a nunc pro tunc determination that would effectively credit his state imprisonment against his federal sentence. But in making that determination, even if the district court had said nothing in its judgment about consecutive or concurrent sentencing in this case, the BOP would still have sought the district court's views on whether petitioner's federal sentence should be served concurrently or consecutively to his state sentences. See Federal Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5160.05,

Designation of State Institution for Service of Federal Sentence § 9(4)(c), at 6 (2003) ("In making the determination, if a designation for concurrent service may be appropriate (e.g., the federal sentence is imposed first and there is no order or recommendation regarding the service of the sentence in relationship to the yet to be imposed state term), [a BOP official] will send a letter to the sentencing court * * * inquiring whether the court has any objections."); see 18 U.S.C. 3621(b)(4). As 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 unlikely to respond to such a letter by endorsing a request to run the federal sentence concurrently with petitioner's state sentence for violating probation. That is a further reason why the question whether Section 3584(a) permits a sentencing court to order, or merely recommend, a consecutive sentence is not a significant one warranting plenary review.

Moreover, although the sentencing court's views are not the only factor considered, see 18 U.S.C. 3621(b)(1)-(5); Trowell v. Beeler, 135 Fed. Appx. 590, 594-595 (4th Cir. 2005), nothing indicates that the other factors would favor petitioner such that BOP might plausibly exercise its "wide discretion," Barden v. Keohane, 921 F.2d 476, 483 (3d Cir. 1990), to grant petitioner a nunc pro tunc order. Most significantly, petitioner committed the instant offense while on probation for another, unrelated drug offense. The Sentencing Commission (whose recommendation is

another pertinent factor, see 18 U.S.C. 3621(b)(5)) favors a consecutive sentence in those circumstances, so that the defendant will still face a penalty for the original crime for which probation was imposed and violated. See Sentencing Guidelines § 5G1.3, comment. (n.3(C)).

b. Petitioner contends that the unusual facts of his case have precluded the implementation of the district court's own wishes, as reflected in the consecutive-sentencing order, but petitioner has an open avenue of relief from the BOP on that issue. Petitioner asserts (Pet. 8-10) that his probation-revocation sentence (for which the district court favored a consecutive sentence) has effectively been subsumed by his longer sentence on the 2007 state conviction (for which the district court favored a concurrent sentence); that he has a good argument for running the 2007 sentence concurrently with his federal sentence, because they arose from the same conduct; and that the BOP therefore would be likely to grant him a nunc pro tunc designation if it were permitted to do so by the district court's judgment. But to the extent that petitioner relies on a circumstance that was not actually before the district court at sentencing, and that is not expressly addressed in the judgment (which presumes that the federal sentence can be run consecutively to one state sentence but not the other), the sentencing order does not prevent him from obtaining the relief he seeks from the BOP. If a sentencing order is ambiguous, the BOP always seeks the further advice of the

sentencing court when evaluating nunc pro tunc requests. Petitioner accordingly can present the facts of his case to the BOP and seek a nunc pro tunc order that would run his sentence concurrently with his state sentence for the 2007 conviction. And in the event of an adverse determination, BOP's administrative remedy program and appeals process would be open to him. See generally Federal Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 1330.16, Administrative Remedy Program (2007). In light of those unexhausted administrative remedies, the inclusion of the consecutive-sentencing order in petitioner's federal judgment has not caused him any discernible prejudice.

4. Even if the question presented had some practical significance, in petitioner's case or others, there is reason to believe that the practice of anticipatory consecutive sentencing is becoming less common. Since this case arose, the government has taken steps to ensure that federal prosecutors act consistently with the interpretation of Section 3584(a) discussed above. On January 8, 2009, after the sentence was imposed in this case, the Executive Office for United States Attorneys informed all United States Attorneys' Offices that the Solicitor General, on behalf of the Department of Justice, had adopted that interpretation. In accompanying guidance, all federal prosecutors were directed to urge sentencing courts not to order that a sentence run consecutively to (or concurrently with) a yet-to-be-imposed sentence. Although some district courts have continued to impose such

sentences even after the government expressed its position, the government will not defend such an order except where circuit precedent (or the plain-error standard of review) dictates otherwise.

The government has also urged the court below to reconsider its circuit precedent in an appropriate case. See, e.g., Gov't Resp. to Pet. for Reh'g En Banc at 1-15, United States v. Vargas-Solis, No. 09-50240 (5th Cir. filed May 27, 2010). Although the court of appeals has not yet done so, two judges of that court have expressly advocated re-examining the issue in an appropriate case. See United States v. Garcia-Espinoza, 325 Fed. Appx. 380, 382 (5th Cir. 2009) (Owen, J., joined by Dennis, J., concurring). The full court has not yet taken up that invitation, and the panel in this case suggested that it may not do so. See Pet. App. 5a & n.**. Petitioner accordingly suggests (Pet. 10-11) that plenary review is warranted. But given the doubtful significance of the question presented, the court of appeals' failure to date to reconsider its precedent is not a sufficient reason for this Court to grant plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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