No. 10-6866

IN THE SUPREME COURT OF THE UNITED STATES

ISRAEL VARGAS-SOLIS, 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 state sentences that had not yet been imposed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is available at 358 Fed. Appx. 496.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2009. A petition for rehearing was denied on July 7, 2010 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on October 5, 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 Western District of Texas, petitioner was convicted of illegal reentry after removal, in violation of 8 U.S.C. 1326. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A2.

1. Petitioner, a citizen and native of Guatemala, was removed from the United States in 2007 following a felony conviction for possession of cocaine base for sale. In June 2008, petitioner unlawfully re-entered the United States and was subsequently apprehended by the United States Border Patrol on a ranch near Asherton, Texas. Presentence Investigation Report (PSR) ¶¶ 7-10, 35 (PSR).

2. A federal grand jury sitting in the Western District of Texas returned an indictment charging petitioner with illegally reentering the United States, having previously been removed following conviction of an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b)(2). Indictment 1.

Petitioner pleaded guilty. PSR ¶ 2. The PSR recommended an advisory Sentencing Guidelines range of 57 to 71 months. PSR ¶ 62. The PSR noted that petitioner faced two bench warrants for failure to pay fines associated with earlier drug-related state convictions in Kern County, California. PSR ¶¶ 36-37. In addition, petitioner

faced a warrant in Kern County to appear and answer a state charge for providing false identification to a peace officer. PSR ¶ 43.

The district court sentenced petitioner to 60 months of imprisonment, to be followed by three years of supervised release. The court provided that the sentence would run consecutively to any future state sentences imposed in "the two pending [California] cases that have warrants outstanding." 3/12/2009 Sent. Tr. 8. Both government and defense counsel objected to the running of the sentences consecutively, but the sentencing court overruled the objection. Id. at 9.

Petitioner then began serving his federal sentence. His projected release date from federal prison is November 4, 2012. See U.S. Bureau of Prisons, Inmate Locator, http://www.bop.gov/iloc2/LocateInmate.jsp (last visited Feb. 8, 2011). The State of California has not acted on any of the pending bench warrants.

3. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. A1-A2. The court noted that petitioner's challenge to the consecutive-sentencing order was foreclosed by circuit precedent. Id. at A2 (citing United States v. Brown, 920 F.2d 1212 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991)).

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, even if petitioner faced an actual state sentence and prevailed on the question presented, he would still need to ask the BOP to exercise discretion to allow him to serve his federal and state sentences concurrently. But before making any such 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. That is all the more true in petitioner's case, because petitioner has never been tried, convicted, or sentenced on any of the state charges pending at the time of his federal sentencing. Accordingly, the district court's consecutive-sentence order has had no

practical effect on him, and this case would be an unsuitable vehicle even if the question presented warranted plenary review. The petition should therefore be denied.

1. As petitioner points out (Pet. 4-6), 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);

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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.

Aguilar-Mendez v. United States, 130 S. Ct. 2370 (2010) (No. 09-7639); Garcia-Quiroz v. United States, 130 S. Ct. 2370 (2010) (No. 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 jurisdic-

[2] The same question is also asserted by the pending petitions for writs of certiorari in Gayford v. United States, No. 10-7343 (filed Oct. 12, 2010); and Setser v. United States, No. 10-7387

tion over defendants prosecuted by separate sovereigns). Even if the sovereign with primary jurisdiction permits the other 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. Petitioner has never been sentenced on the state charges to which his federal sentence would run consecutively. Indeed, petitioner is highly unlikely to face any confinement on his state charges while his federal sentence is running. And if he completes his federal sentence next year without the State's seeking to imprison him, the district court's consecutive-sentencing order will have had no effect on him at all.

The district court ordered the sentence to run consecutively to "the two pending state cases that have warrants outstanding." 3/12/2009 Sent. Tr. 8. Those warrants were issued in November 2007, more than three years ago. Yet California has taken no action whatsoever on those warrants, much less sought to obtain custody of petitioner and impose a sentence of imprisonment. Indeed, the state court records reflect that as of August 18, 2010,

petitioner's "court file has been destroyed" and moved to electronic storage.

Petitioner is currently in federal custody, and he is expected to be released on November 4, 2012. For the consecutive-sentencing order to have any effect on him, two contingencies would have to occur before he completes his federal sentence. First, he would have to be tried, convicted, and sentenced in Kern County, California. Second, he would have to be returned to federal custody without his California sentence commencing; as explained above, California could decide to treat his state sentence as running while he is in federal custody. Only if both of those events took place would he need to ask the BOP to designate a state facility as the place for the simultaneous service of his remaining federal sentence. 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 (2003) (Designation Program Statement). Thus, the consecutive-sentencing order affects petitioner only to the extent it precludes the BOP from exercising discretion in his favor, and it is increasingly unlikely that petitioner will ever need to ask the BOP to exercise that discretion. Accordingly, the inclusion of the consecutive-sentencing order in petitioner's federal judgment has not caused him any discernible prejudice and likely will never cause any.

b. Even if those contingencies did occur, a consecutive-sentencing order like the one in this case has little to no 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. Rather, petitioner could then ask the BOP, in its discretion, to permit him to serve his federal and state sentences concurrently, in a state facility. 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 seek the district court's views on whether petitioner's federal sentence should be served concurrently with or consecutively to his state sentences. See Federal Bureau of Prisons, U.S. Dep't of Justice, Designation Program Statement § 9(4)(c), at 6 ("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 petitioner's sentences concurrently. 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 the two unrelated California offenses. PSR ¶ 39. 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)). The resolution of the question presented is thus highly unlikely to have any tangible effect on petitioner before his release from federal custody in November 2012.

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. 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, 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 Gov't Resp. to Pet. for Reh'g En Banc 1-15. 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 another panel has suggested that it may not do so. See United States v. Setser, 607 F.3d 128, 131 n.2 (5th Cir. 2010). Petitioner accordingly suggests (Pet. 8) 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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