QUESTION PRESENTED FOR REVIEW

Whether 18 U.S.C. § 3584(a) provides a district court with authority to order a federal sentence to run consecutively to a state sentence that has not yet been imposed.

No. _____

In the Supreme Court of the United States

October Term, 2010

ISRAEL VARGAS-SOLIS, PETITIONER,

v.

UNITED STATES OF AMERICA

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

Petitioner Israel Vargas-Solis respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the U.S. Court of Appeals for the Fifth Circuit on December 15, 2009, and the court of appeals's order denying rehearing on banc, entered July 7, 2010.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of the case before this Honorable Court.

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OPINION BELOW

The unpublished opinion of the U.S. Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A.

JURISDICTION OF THE UNITED STATES SUPREME COURT

The opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit were entered on December 15, 2009. The court denied Vargas-Solis's request for a rehearing en banc on July 7, 2010. Appendix B. This petition is filed within 90 days after the denial of the petition. *See* SUP. CT. R. 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 3584 is attached to this petition as Appendix C.

STATEMENT

Israel Vargas-Solis, a citizen of Guatemala, pleaded guilty to illegal reentry. At the time of his arrest, bench warrants had been issued from two California state courts for failure to pay fines. In addition, Vargas had an active bench warrant on California charges of failure to identify himself to a peace officer.

The advisory adjusted offense level for Vargas's offense was 21. *See* U.S.S.G. §2L1.2. Combined with Vargas's advisory criminal history category of IV, this offense level produced a guideline range of 57 to 71 months' imprisonment.

The district court rejected Vargas's request for a variance and sentenced him to 60 months' imprisonment. The court ordered that sentence to run

consecutively to any term of imprisonment imposed by the California state courts. Both the prosecutor and counsel for Vargas objected to that order. The court said it was aware of a new policy in the U.S. Attorney's office that sentences should not be ordered to run consecutively to unimposed state sentences but said "I don't care. . . . statutorily I have the authority."

On appeal, Vargas argued that imposing his sentence to run consecutively to unimposed state sentences was contrary to the plain language of 18 U.S.C. § 3584(a). Relying on its precedent, a panel of the court of appeals rejected this argument. *See* App. A (citing *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472–73 (5th Cir. 2006)).

Vargas sought rehearing en banc, noting that the courts of appeals were divided on the meaning of 18 U.S.C. § 3584(a) and that members of the Fifth Circuit had recently suggested en banc review might be appropriate. *See United States v. Garcia-Espinoza*, 325 F. App'x 380, 381–82 (5th Cir. 2009) (Owen, J., joined by Dennis, J., concurring in the judgment and suggesting en banc review). The Government asked that consideration of Vargas's petition be stayed, pending this Court's consideration of this issue in *United States v. Ortiz-Coca*, No. 09-7636. The Government also said a stay would give it time to investigate the status of Vargas's pending California charges.

The pending *Ortiz-Coca* case presented the same issue presented in Vargas's case. There, the Solicitor General told this Court that it disagreed with the Government's position that § 3584(a) permitted district courts to run sentences consecutively to unimposed state sentences. Nonetheless, the

Solicitor General resisted certiorari, arguing that the issue was of little practical significance and that the Government would likely support rehearing en banc in the Fifth Circuit, in the appropriate case. On April 26, 2010, this Court denied certiorari in *Ortiz-Coca*.

The Government then responded to Vargas's rehearing request in the Fifth Circuit. It said it agreed with Vargas's reading of § 3584(a) and told the Court that it should overrule or modify its precedent regarding the provision. It also conceded that the issue was not moot in Vargas's case, because California has not vacated his outstanding warrants. The Fifth Circuit denied the petition.

REASON FOR GRANTING THE WRIT

BECAUSE THE ISSUE HAS PRACTICAL APPLICATION AND BECAUSE THE CIRCUIT COURTS DO NOT APPEAR READY TO RESOLVE THEIR DIVISION, THIS COURT SHOULD DECIDE WHETHER A DISTRICT COURT MAY ORDER A FEDERAL SENTENCE TO RUN CONSECUTIVELY TO AN UNIMPOSED STATE SENTENCE.

Title 18 U.S.C. § 3584(a) states that an imprisonment term imposed on a defendant who is "already subject to" an undischarged term of imprisonment may run consecutively to the undischarged term. In Vargas's case, the district court ordered that his sentence run consecutively to a state sentence to which he was not "already subject," because it had not yet been imposed. Vargas argued on appeal that, under the plain language of the statute, as well as its legislative history, this was error. In its response to Vargas's petition for rehearing en banc, the Government agreed with this view. The circuits have long been divided on this question, and this case demonstrates that they will likely not resolve the division, in spite of the Government's concession. The Court should grant certiorari to resolve the court of appeals' disagreement.

A. The Circuits are Divided Over Whether a District Court May Order a Federal Sentence to Run Consecutively to a State Sentence That Has Not Yet Been Imposed.

The Second, Fourth, Sixth, Seventh, and Ninth Circuits have all held that a district court lacks the authority to order a federal sentence to run consecutively to a state sentence that has not yet been imposed. *See United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (per curiam); *United States v. Smith*, 472 F.3d 222, 225–27 (4th Cir. 2006); *United States v. Quintero*, 157 F.3d 1038, 1039–41 (6th Cir. 1998); *Romandine v. United*

States, 206 F.3d 731, 738 (7th Cir. 2000); *United States v. Clayton*, 927 F.2d 491, 492–93 (9th Cir. 1991). By contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has such authority. *See United States v. Brown*, 920 F.2d 1212, 1216–17 (5th Cir. 1991) (per curiam), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472–73 (5th Cir. 2006); *United States v. Mayotte*, 249 F.3d 797, 798–99 (8th Cir. 2001) (per curiam); *United States v. Williams*, 46 F.3d 57, 58–59 (10th Cir. 1995); *United States v. Ballard*, 6 F.3d 1502, 1506–10 (11th Cir. 1993).

Courts ruling that the district court has this authority rely on the final sentence of § 3584(a), which establishes a presumption of consecutive sentences when punishment is set at different times: "Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a). These courts hold that this language not only permits, but encourages, ordering a sentence to run consecutively to a yet-to-be-imposed sentence. *See Mayotte*, 249 F.3d at 799 (statute does not prohibit the practice, "and suggestive of the contrary, the statute encourages consecutive sentences when prison terms are imposed at different times"); *Williams*, 46 F.3d at 57 ("The plain meaning of this provision is that multiple terms of imprisonment imposed at different times will normally run consecutively, unless the district court affirmatively orders that the terms be served concurrently."); *Ballard*, 6 F.3d at 1506 ("section 3584(a) empowers, even encourages, district judges to give a consecutive sentence as a sentence necessarily imposed at a

different time from a state sentence"); *see also Brown*, 902 F.2d at 1217 (matter within district court's discretion).

Courts concluding otherwise have held that the district court may only order consecutive sentences in the circumstances listed in § 3584(a)'s first sentence: "If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run . . . consecutively[.]" *See Donoso*, 521 F.3d at 149; *Smith*, 472 F.3d at 225–27; *Romandine*, 206 F.3d at 731; *Quintero*, 157 F.3d at 1039–40; *Clayton*, 927 F.2d at 492. "According to these courts, when, at the time of a defendant's sentencing in federal court, that defendant has not been sentenced by the state court, he is not yet subject to an undischarged term of imprisonment, and 'a court cannot impose its sentence consecutively to a sentence that does not yet exist.'" *Donoso*, 521 F.3d at 147 (quoting *Smith*, 472 F.3d at 226).

B. The Fifth Circuit's Interpretation of § 3584(a) Is Incorrect.

As the Government has conceded, the Fifth Circuit's interpretation of § 3584(a) is incorrect. It is contrary to the plain language of the statute, as well the usual rules of statutory construction, which require that effect be given, "if possible, to every word of the statute." *See, e.g.*, *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983). It also infringes upon the interests of state courts.

The final sentence of § 3584(a) "neither abrogates the requirement that to run consecutively there be an undischarged sentence or sentences imposed at the same time nor expands a district court's authority[.]" *Quintero*, 157

F.3d at 1040. Instead, "it establishes a default rule that applies if a district court fails to specify whether a sentence should run concurrently or consecutively *and* either of the two initial conditions are satisfied—'multiple terms of imprisonment are imposed on a defendant at the same time, or . . . a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment.'" *Id.* (quoting § 3584(a)).

This reading of § 3584(a) is supported by the statute's legislative history. *Id.* at 1040–41; *Clayton*, 927 F.2d at 492. That history indicates that Congress intended federal sentences to be ordered to run consecutively to state sentences only when the defendant had already been sentenced for the state offense. *See Clayton*, 927 F.2d at 492 (citing S. REP. NO. 98-225, at 126–27 (1983), *as reprinted in* 1984 U.S.C.C.A.N 3182, 3309–10). The default rules established the last two sentences of § 3584(a) are "intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject." S. REP. NO. 98-225, at 127 (1983), *as reprinted in* 1984 U.S.C.C.A.N 3182, 3310; *see Quintero*, 157 F.3d 1040–41. They are not intended to permit the court to preemptively order consecutive sentences when a state sentence has not yet been imposed.

The contrary reading infringes upon the ability of state courts to impose sentences consistent with their own laws. *Clayton*, 927 F.2d at 493. A federal court should not be able to effectively limit a state court's sentencing discretion by preemptively ordering that the federal sentence run consecutively to a state sentence that has not even been imposed. Tying the state court's hands in this way offends principles of federalism by denying

the state court its power to consider and to impose an appropriate sentence, including a sentence that would run concurrently with an already-imposed federal sentence. *Id*. "Such potential difficulties arising from dual sovereignty are best avoided if neither sovereign binds the sentencing discretion of the other." *Id*.

C. Resolution of this Issue Is Important to the Federal Administration of Justice.

Whether a district court may order a federal sentence to run consecutively to an unimposed state sentence presents an important question of federal law. The Government now agrees that courts may not do so. However, in circuits such as the Fifth, judges like the one in Vargas's case may continue to impose consecutive sentences. See also Petitioner's Reply to Government's Response to Petition for Writ of Certiorari, *United States v. Ortiz-Coca*, No. 09-7636, at 4 (citing case in which district court refused to follow Government's understanding of the statute). And, because the Fifth Circuit has refused to reconsider its precedent, even in the face of a Government concession, the practice is likely to continue.

This question should be decided uniformly for all the circuits: it affects matters as varied and serious as the total length of a defendant's term of imprisonment, and the ability of state courts to decide appropriate sentences for defendants with federal convictions. Conflicting precedent regarding these matters thwarts Congress's goal of "mov[ing] the sentencing system in the direction of increased uniformity[,]" *United States v. Booker*, 543 U.S. 220, 253 (2005), and injects uncertainty into a defendant's criminal

proceedings, making it difficult for him to make such fundamental decisions as whether to plead guilty in his federal or his state proceedings.

This Court should grant certiorari to resolve the disagreement of the courts of appeals, and to answer a question that is important to the administration of the federal criminal justice system.

CONCLUSION

FOR THESE REASONS, Vargas prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted.

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DATED: October 5, 2010.

APPENDIX A

United States v. Vargas-Solis,
No. 09-50240, unpub. op. (5th Cir. Dec. 15, 2009)

APPENDIX B

United States v. Vargas-Solis,
No. 09-50240, Denial of Petition for Rehearing,
July 7, 2010

APPENDIX C

18 U.S.C. § 3584(a)