No. 10-7502

IN THE

Supreme Court of the United States

CHARLES LEE REYNOLDS,

Petitioner,

v.

J.E. THOMAS,

Respondent.

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

AMICI CURIAE BRIEF OF THE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

SUMMARY 2

REASONS FOR GRANTING THE PETITION 5

1. The Situation Arises with Frequency, Due to the Extensive Overlap in Federal and State Criminal Jurisdiction 5

2. Allowing BOP-Driven Consecutive Sentences Violates Fundamental Fifth and Sixth Amendment Guarantees, as Well as Separation of Powers and Comity for State Judgments 8

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Barden v. Keohane,
921 F.2d 476 (3d Cir. 1991) 5

Del Guzzi v. U.S.,
980 F.2d 1269 (9th Cir. 1992) 5

Gardner v. Florida,
430 U.S. 349 (1977) 10

Halbert v. Michigan,
545 U.S. 605 (2005) 4

Oregon v. Ice,
129 S. Ct. 711 (2009) 11

Reynolds v. Thomas,
603 F.3d 1144 (9th Cir. 2010) . . . . *passim*

Taylor v. Sawyer,
284 F.3d 1143 (9th Cir. 2002) 5

U.S. v. Leonti,
326 F.3d 1111 (9th Cir. 2003) 10

U.S. v. Wade,
388 U.S. 218 (1967) 10

Page

STATUTES

U.S. Const., amend. VI 10

18 U.S.C. § 3006A 1

18 U.S.C. § 3584(a) 2, 3, 10

18 U.S.C. § 3621(b) 10

28 U.S.C. § 2241 4

RULES

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES

Beale, Sara Sun, *Overcriminalization: The Politics of Crime*, 54 Am. U. L. Rev. 747 (Feb. 2005) 8

Beale, Sara Sun, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979 (Apr. 1995) 8

Cited Authorities

Page

Bunin, Alexander, *Time and Again: Concurrent and Consecutive Sentences Among State and Federal Jurisdictions*, 21 The Champion 34 (Mar. 1997) 6, 9

Bureau of Prisons Program Statement 5160.05 10

Bureau of Prisons Program Statement 5880.28 10

Bureau of Prisons website, http://www.bop.gov/news/quick.jsp#1 5

Campbell, A., Law of Sentencing § 9:22 (3d ed. 2004) 11

Sadowski, Henry J., *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction*, http://www.bop.gov/news/ifss.pdf (last accessed July 27, 2010) 7

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The Ninth Circuit Federal Public and Community Defenders provide representation, in each district of the Ninth Circuit, to accused persons who lack the financial means to hire private counsel; this representation is pursuant to 18 U.S.C. § 3006A.[2] The Arizona Attorneys for Criminal Justice is a statewide professional organization of attorneys, investigators, paralegals, law students, and other legal professionals, dedicated to protecting the rights of the accused and to ensuring the fair administration of justice. Founded in 1986, the AACJ has more than 400 members. *Amici* regularly

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1. Pursuant to S. Ct. Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* and their counsel made a monetary contribution intended to fund its preparation or submission.

Pursuant to Rule 37.2(a), *amici* counsel informs the Court that counsel of record for all parties received timely notice of the intent to file this brief, and all parties consented to its filing.

2. The *amici* Ninth Circuit Federal Public or Community Defenders are: Sean Kennedy, California Central Federal Public Defender; Daniel J. Broderick, California Eastern Federal Public Defender; Barry J. Portman, California Northern Federal Public Defender; Reuben Cahn, Executive Director, Federal Defenders of San Diego, Inc.; John T. Gorman, Guam Federal Public Defender; Peter C. Wolff, Jr., Hawaii Federal Public Defender; Samuel Richard Rubin, Exec. Dir., Federal Defender Services of Idaho, Inc.; Tony Gallagher, Exec. Dir., Federal Defenders of Montana; Frances A. Forsman, Nevada Federal Public Defender; Roger Peven, Exec. Dir., Federal Defenders of Eastern Washington; and Thomas W. Hillier, II, Washington Western Federal Public Defender.

advocate on behalf of the criminally accused in federal or state court, or both, with a core mission of protecting the rights of their clients and safeguarding the integrity of the federal and state criminal justice systems.

Amici have a strong interest in the controversy presented in *Reynolds v. Thomas*. With extensive dual criminal jurisdiction, our clients frequently face prosecutions in both state and federal court for the same or related conduct. In these cases, the difficulties surrounding federal and state sentences, their consecutive or concurrent ordering, and the role of the Bureau of Prisons, are notorious and frequently occurring. As defender offices and organizations, *amici* have a unique and compelling interest in seeing this area clarified and corrected, to prevent future violations of our clients' statutory and constitutional rights.

SUMMARY

The scenario presented in this case occurs frequently—a person prosecuted under the overlapping criminal jurisdiction of the state and federal governments is subjected to consecutive terms of imprisonment, even though the state court ordered concurrent time and the federal court, having sentenced first, was necessarily silent on the subject.[3]

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3. *Amici* agree with the Ninth Circuit that, under the plain language of 18 U.S.C. § 3584(a), a federal sentencing court may not order a sentence to run concurrently or consecutively with an as yet unimposed sentence. *See Reynolds v. Thomas*, 603 F.3d 1144, 1149 (9th Cir. 2010); 18 U.S.C. § 3584(a) ("if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively").

This counterintuitive result typically comes about as follows.

1) A defendant who is under the primary jurisdiction of the state is brought into federal court on criminal charges, usually via a writ of *habeas corpus ad prosequendum*.

2) The defendant is convicted and sentenced. As directed by 18 U.S.C. § 3584(a), the federal court is silent as to whether the sentence will run concurrent with, or consecutive to, the yet–to–be–imposed sentence in the pending state court matter.

3) The defendant is returned to state court, convicted, and sentenced to a term of imprisonment; the state court orders that the sentence run concurrently with the previously imposed federal sentence.

4) The defendant—along with the judges, defense attorneys, prosecutors, and probation officers in both the state and federal cases—believes that the federal time and state time are running concurrently. They do not realize that the BOP treats federal sentences as presumptively consecutive to state sentences, absent contrary orders from the federal sentencing judge.

5) At some point, the defendant learns that his federal time has not commenced. Instead, he is subject to a federal detainer, and upon his release from state custody will be picked up by the U.S. Marshal and delivered into the custody of the Bureau of Prisons.

6) The defendant attempts to redress this situation, requesting that the BOP, *nunc pro tunc*, designate the state institution as the place where the federal sentence commences. The defendant has no recognized right to counsel at this stage, and the underlying criminal cases have been closed. Under these circumstances, it is very difficult for indigent defendants to obtain representation. Many or most are left to proceed *pro se*, via a writ of habeas corpus under 28 U.S.C. § 2241. Proceeding *pro se* greatly diminishes the possibility of achieving meaningful redress; as the Court has noted, indigent defendants and prisoners are "particularly handicapped as self-representatives," given their low rates of literacy and high rates of learning disabilities and mental impairments. *Halbert v. Michigan*, 545 U.S. 605, 620-21; (2005).

The BOP's denial of these *nunc pro tunc* designation requests is the functional equivalent of the BOP imposing a consecutive sentencing structure — a structure not ordered by any judge. This effectively thwarts the judgment and sentence lawfully imposed by the state court; it also raises serious constitutional concerns related to procedural due process, separation of powers, equal protection, and the doctrines of comity and full faith and credit.

Notwithstanding these grave implications and consequences, the Ninth Circuit Court of Appeals held below that the BOP has the discretion and authority to deny such a *nunc pro tunc* request, based on the Bureau's independent determination that a consecutive federal sentence is appropriate. *Reynolds v. Thomas*,

603 F.3d 1144, 1151 (9th Cir. 2010) (citing *Taylor v. Sawyer*, 284 F.3d 1143, 1149 (9th Cir. 2002)). Because of the gravity of these issues, and the pervasive, intractable, and profoundly unjust burdens they place on defendants subjected to dual federal and state prosecutions, we urge this Court to grant review.

REASONS FOR GRANTING THE PETITION

1. The Situation Arises with Frequency, Due to the Extensive Overlap In Federal And State Criminal Jurisdiction.

The existence and implications of the problem presented in *Reynolds v. Thomas* have been recognized for at least two decades. *See, e.g., Barden v. Keohane*, 921 F.2d 476 (3rd Cir. 1991); *Del Guzzi v. U.S.*, 980 F.2d 1269 (9th Cir. 1992). Certainly, *amici* and our federal and state colleagues encounter the problem with troubling frequency. The number of people affected is unknown, although it is likely that, at any given time, thousands of the 210,000–plus federal prison inmates[4] are serving additional time as a result of the BOP's policies and practices regarding concurrent and consecutive state and federal sentences.[5] We base this

4. According to the BOP's website, there are currently more than 210,000 federal prison inmates. *See* http://www.bop.gov/news/quick.jsp#1 (accessed Dec. 10, 2010).

5. Bureau of Prisons Program Statement 5160.05 (Jan. 16, 2003) details these policies; it is discussed at length in *Reynolds v. Thomas*, 603 F.3d at 1158-59 (W. Fletcher, concurring), and included in the Petition for Writ of Certiorari at App. 61.

estimate by extrapolating on the number of such cases routinely brought to our attention.[6]

Henry Martin, the Federal Defender for Middle Tennessee, is an expert on the interplay between state and federal sentencing orders and the role of the BOP in effectuating—or not—those orders. He has alerted thousands of defense attorneys across the country of the problem. According to Martin, he covers this topic in every training he conducts. "Always," he says, "attorneys come up to me afterward to describe problems their clients have gotten into because of this."[7]

Concerned about the pervasiveness of the problem, Alexander Bunin, then the Executive Director of the Federal Defenders Organization for the Southern District of Alabama, wrote about this topic more than a decade ago for *The Champion*, the publication of the National Association of Criminal Defense Lawyers. In his article, Bunin discussed the myriad ways in which the imposition of multiple sentences from different jurisdictions—in particular from federal and state courts—can frustrate the intent of the sentencing courts and the parties.[8] He noted that, while "the 'state and

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6. Additionally, a search on Westlaw quickly turns up hundreds of such cases.

7. Telephone interview with Henry Martin, Federal Defender for Middle Tennessee, conducted by Lee Tucker, Assist. Fed. Pub. Def. for the District of Arizona, July 28, 2010.

8. Alexander Bunin, *Time and Again: Concurrent and Consecutive Sentences Among State and Federal Jurisdictions*, 21 The Champion 34 (Mar. 1997); Mr. Bunin is currently the Public Defender for Harris County, Texas.

federal' scenario [ ] creates the most problems," the usual culprit is the federal case.[9]

The problematic nature of this area is recognized well beyond the defense bar. The BOP itself frankly acknowledges that how it "computes federal sentences imposed when the defendant is under the primary custodial jurisdiction of state authorities . . . . is probably the single most confusing and least understood federal sentencing issue."[10]

Amici confirm this widespread confusion. The issue comes up again and again, in our own offices and among our colleagues — and not only with defense attorneys. Prosecutors and probation officers also find themselves blindsided here. Nor are federal sentencing courts exempt; it is not unusual for district court judges to indicate, at sentencing, their belief that subsequent state court orders of concurrent time will be honored by the BOP. By the time the defendant learns otherwise, he is in prison, and without appointed counsel or the recognized right to obtain appointed counsel.

The frequency with which these situations arise reflects the marked expansion, over the past few decades, of overlapping state and federal criminal jurisdiction. There is dual jurisdiction now over a wide

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9. *Id.*

10. Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction,* http://www.bop.gov/news/ifss.pdf (last accessed July 27, 2010); Mr. Sadowski is Regional Counsel for the Northeast Region, Federal Bureau of Prisons.

swath of criminal conduct, including offenses relating to drugs, firearms, theft, fraud, extortion, briberty, carjacking, identification crimes, child pornography, and many others.[11] According to Prof. Sara Sun Beale of Duke University School of Law, "the bulk of the federal criminal code now treats conduct that is also subject to regulation under the states' general police powers."[12] Given this growth in dual jurisdiction, the problems raised in this case will continue, and likely increase in frequency, absent corrective action by this Court.

2. Allowing BOP–Driven Consecutive Sentences Violates Fundamental Fifth and Sixth Amendment Guarantees, As Well as Separation of Powers and Comity for State Judgments.

Amici agree with Petitioner that the current scheme leads to arbitrary results that trigger grave due process and equal protection concerns.[13] *See* Petition for Writ of Certiorari at 21-23. People subjected to additional imprisonment by virtue of the BOP's practices in this area—that is, by virtue of the Bureau's scheme

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11. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 997 (Apr. 1995).

12. *Id.* at 980-81. There are currently more than 4,000 federal crimes. Sara Sun Beale, *Overcriminalization: The Politics of Crime*, 54 Am. U. L. Rev. 747, 753 (Feb. 2005).

13. A further equal protection concern emerges from the fact that poor defendants are arbitrarily imprisoned under this scheme to a far greater degree than the non–poor. Again, Federal Defender Alex Bunin:

(Cont'd)

of default consecutive sentencing and presumption of authority to deny unilaterally *nunc pro tunc* designation requests—have no due process rights with which to protect themselves against this BOP action. They are not given warning at the time of their federal sentencing that, even though the court has not ordered it, their punishment may nonetheless be imposed consecutively—or rather, will be imposed consecutively, unless the BOP decides otherwise. Even after they are sentenced in state court and serving their punishment, they are not given timely notice that the BOP intends to run their federal sentence consecutively; they may not receive notice until months or years into their state sentence. In fact, there is no guarantee that they will receive notice significantly prior to their release from state custody, directly into the embrace of the federal detainer. They are not given the opportunity for a hearing. Finally, and perhaps most harmful, they are not given the right to an attorney.

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> One factor that can affect this situation is whether a defendant is indigent or not. Like all other areas of life, dual prosecutions are usually worse for poor defendants. This is because most states still rely on a system that uses surety and cash bonds. If the defendant makes a state bond he is no longer in state custody even though he may remain in federal custody . . . a defendant released from state custody, would not have [this] problem . . ."

Bunin, 21 The Champion at 34. If a defendant is able to bond out of state custody subject to a federal detainer, the problem outlined in *Reynolds* will not occur, because the federal government will then have primary jurisdiction over the defendant.

It is settled Sixth Amendment jurisprudence that sentencing is a critical stage of criminal proceedings, at which defendants are entitled to the effective representation of counsel. *Gardner v. Florida*, 430 U.S. 349, 358; (1977). The essence of a "critical stage" is "the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." *U.S. v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (citing *U.S. v. Wade*, 388 U.S. 218, 228-29; (1967)). Here, defendants are significantly prejudiced by the absence of counsel to advocate against BOP-imposed consecutive prison terms. And although there is no adversary procedure, that is precisely the problem; there is no process because of the odd and rickety mish–mash—discussed in the concurrence below—created by the interplay of 18 U.S.C. § 3584(a), 18 U.S.C. § 3621(b), and BOP Program Statements 5160.05 and 5880.28. *See Reynolds*, 603 F.3d at 1156-57. In other words, there should be a proceeding, as the nature of the decision at stake is unquestionably adversarial. That the current scheme allows an end–run around due process exacerbates, rather than lessens, the Sixth Amendment concerns.

Not only is due process required, but that process properly belongs in federal court, rather than in the ministerial arms of the BOP. One reason for this is the separation of powers — an agency of the prosecuting authority ought not to have discretion to impose prison time not ordered by any judge. *See* Petition at 20-21. Further, this Court has recognized—and recently reiterated—that "'the selection of either concurrent or consecutive sentences rests within the discretion of the

sentencing judges.'" *Oregon v. Ice*, U.S. ; 129 S. Ct. 711, 717 (2009) (citing A. Campbell, LAW OF SENTENCING § 9:22, p. 425 (3d ed. 2004)). Although addressing a different issue—whether juries or judges should find the facts supporting imposition of consecutive, rather than concurrent, sentences—the Court's analysis is relevant here. Just as judges have traditionally decided whether to impose consecutive sentences, so judges, not prison administrators, should make that decision today.

Finally, in addition to the Fifth and Sixth Amendment concerns discussed above, *amici* strongly concur with Petitioner that the scheme of BOP–mandated consecutive prison terms violates core statutory and constitutional precepts of federalism, full faith and credit, comity for state judgments, and finality of judgments. *See* Petition at 13-20.

CONCLUSION

As Judge Fletcher noted in the decision below, "[t]here is a great deal not to like about the *nunc pro tunc* procedure followed by the BOP." *Reynolds v. Thomas*, 603 F.3d 1144, 1160 (9th Cir. 2010) (Fletcher, W., concurring). The procedure is not merely unlikeable, however — it is unconstitutional and statutorily unsound. For the reasons set forth above, as well as those appearing in the Petition, *amici* respectfully request that the Court grant review.

Respectfully submitted,

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