No. 10-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Does a district court have authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence?

II

Is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?

PARTIES TO THE PROCEEDING

Petitioner is Monroe Ace Setser, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Monroe Ace Setser respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Setser*, 607 F.3d 128 (5th Cir. 2010). The slip opinion is reprinted in the Appendix to this Petition. Pet. app. 1a–8a. The district court's sentencing decision was issued orally, but a copy of the judgment is reprinted in the Appendix. Pet. app. 10a.

JURISDICTION

The court of appeals entered judgment on May 11, 2010. Pet. app. 1a. Petitioner filed a timely request for rehearing *en banc*, which was denied on August 5, 2010. Pet. app. 9a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 3584(a) provides, in relevant part:

> **Imposition of concurrent or consecutive terms**.--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 concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

INTRODUCTION

This petition presents the opportunity to resolve a persistent and pernicious circuit split over whether a federal district judge has the authority to order a sentence to run consecutive to an anticipated, but as-yet-unimposed state sentence. The Government has acknowledged that the courts of appeals are divided, four to four, over this question, and has conceded that the court below has reached the wrong conclusion.

The Government has previously opposed review in this Court, however, by arguing that it would be more prudent to allow the court below to correct its error through *en banc* proceedings. That is no longer a realistic possibility; the court below announced in a published decision that it would not take up the issue *en banc* and that it would await correction by this Court. Pet app. 5a, n.**. In a separate case, the court denied another request for *en banc* hearing even after the Government joined the petition and asked the court to overrule its offending precedent. *See* Order Denying Rehearing, *United States v. Vargas-Solis*, No. 09-50240 (5th Cir. July 7, 2010), *pet. for cert. filed*, No. 10-6866 (U.S. pet. filed Oct. 5, 2010). Only this Court can resolve the split and correct the erroneous law of the Fifth Circuit. The Court should therefore grant the petition and reverse the decision below.

STATEMENT

On October 1, 2007, Lubbock police officers arrested Petitioner after finding suspected narcotics during a traffic stop. At the time he was arrested,

Petitioner was serving a five-year term of probation stemming from a previous state conviction (the "2006 state case").[1] State authorities subsequently charged Petitioner with possession of a controlled substance with intent to deliver in the state court arising from the activities of October 1, 2007 (the "2007 state case"). They also filed a motion to revoke his probation in the 2006 state case.

Before the state cases could be resolved, the federal government stepped in and charged Petitioner for his activities on October 1, 2007 with three offenses: (1) possession with intent to distribute at least 50 grams of methamphetamine (count one); (2) possession of a firearm in furtherance of a drug trafficking crime (count two); and (3) convicted felon in possession of a firearm (count three). The United States Attorney's Office then issued a writ to bring Petitioner into federal custody. Petitioner pleaded guilty to count one of the indictment and in exchange the Government agreed to dismiss the remaining two counts.

At sentencing, the federal district court sentenced Petitioner to 151 months of imprisonment and ordered the sentence to run consecutive to whatever sentence might be imposed in the pending state case the 2006 state case, and concurrent to whatever sentence might be imposed in the 2007 state case. Pet. app. 12a. Neither case had been resolved in state court. The district court relied upon *United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir. 1991),

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[1] *State v. Setser*, No. 2006-412,543 (137th Dist. Ct. Lubbock Co., Tex. March 6, 2007).

abrogated on other grounds by United States v. Candia, 454 F.3d 468, 472–73 (5th Cir. 2006), which held that a federal court does have authority to order a sentence to run consecutive to an anticipated but as-yet-unimposed state sentence.

After the federal judgment was entered, the state court entered convictions in the 2007 state case and revoked probation in the 2006 state case. The state court sentenced Petitioner to five years incarceration on the 2006 state case, and ten years on the 2007 state case. The state court directed that the sentences run concurrently. Pet. app. 15a–19a.[2]

Petitioner appealed his federal sentence and argued that the district court had exceeded its statutory authority in ordering that his federal sentence run consecutively to a state sentence that had yet to be imposed. Petitioner acknowledged that Fifth Circuit precedent foreclosed this claim, but sought to preserve the issue for *en banc* review or for certiorari in this Court. Alternatively, Petitioner argued that entry of the consecutive term rendered the resulting sentence unreasonable, as it was impossible for BOP to fully effectuate the judgment as written.

The court of appeals affirmed the district court in a published decision. Pet. app. 1a–8a. The court acknowledged the conflict of authority, but stated

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[2] On March 31, 2009, the court of appeals granted Petitioner's motion to supplement the record on appeal to include the state court conviction documents.

that "any future reversal of [the Fifth Circuit's] decision in *Brown* is best left to the discretion of our Supreme Court." Pet. app. at 5a, n.**.

REASONS FOR GRANTING THE PETITION

This case demonstrates that chaos and confusion result from allowing a district court to order that a federal sentence run consecutive to a yet-to-be-imposed state sentence. As it stands, the federal judgment orders BOP both to grant Petitioner credit against his federal sentence for each day he spent in state custody, and to *not* grant him credit for each day he spent in state custody. The court of appeals's holding perpetuates an entrenched, four-to-four circuit conflict that the Government has acknowledged, and it affirms a sentencing practice that the Government has conceded is unlawful. The arguments the Government has made against review in other cases presenting this issue provide no reason to deny review in this case. This Court should therefore grant the petition and stop this unlawful practice.

I. THE COURT OF APPEALS'S DECISION PERPETUATES AN ACKNOWLEDGED CONFLICT AMONG THE CIRCUITS AND AFFIRMS A SENTENCING PRACTICE THE GOVERNMENT ADMITS IS UNLAWFUL.

As the Government has acknowledged, the courts of appeals are divided, 4-4, over whether a federal district court has authority to order a federal sentence to be served consecutively to a state sentence that has yet to be imposed. *See*, *e.g.*, Br. in Opp., *Smith v. United States*, No. 08-8118, at 21–22 (filed Apr. 29, 2009) ("*Smith* Opp.") (describing split). The Second, Sixth,

Seventh, and Ninth Circuits have all held that a district court lacks the authority to issue such a sentence. *See United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (per curiam); *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991). In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has such authority. *See Brown*, 920 F.2d at 1216; *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir.), *cert. denied*, 516 U.S. 926 (1995); *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993).

The Government has conceded, moreover, that "Section 3584(a) does not confer th[e] authority" to "direct that a sentence be served consecutively to a yet-to-be-imposed state sentence." *Smith* Opp. at 20-21. Indeed, the text of 18 U.S.C. § 3584(a) makes clear that a district court is authorized to impose a consecutive sentence in two, and only two, circumstances: (1) "[i]f multiple terms of imprisonment are imposed on a defendant *at the same time*," or (2) "if a term of imprisonment is imposed on a defendant who is *already subject* to an undischarged term of imprisonment." 18 U.S.C. § 3584(a) (emphasis added). As the Government has acknowledged, to hold that a district court also has authority to order a federal sentence consecutive to a state sentence that has not yet been imposed would render a large portion of Section 3584(a) surplusage.

Smith Opp. at 22. Furthermore, as the Government has conceded, a district court "cannot logically" "consider the sentencing factors set out in 18 U.S.C. 3553(a) in making a decision whether to impose a term of imprisonment consecutively or concurrently to another term" when "one of [those] sentences has not yet been determined." *Smith* Opp. at 23. Thus, the sentence imposed by the district court in this case is indisputably unlawful.

II. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW PROVIDE NO BASIS FOR DENYING THE PETITION IN THIS CASE.

The Government concedes that a district court has no authority to order a federal sentence to run consecutive to an as-yet-unimposed state sentence, but has resisted review in various cases which have presented the issue to this Court. The Government has offered two reasons for its opposition. First, it has argued that the unlawful sentencing practice does not have any significant impact on criminal defendants. *See Smith* Opp. at 23, 28; Br. in Opp., *Cortes-Beltran v. United States*, No. 08-8243, at 21 (filed Apr. 13, 2009) (same). Second, it has argued that the circuits that currently sanction illegal consecutive sentences might reconsider their view in light of the Government's confession of error. This case demonstrates the flaws in both of those arguments.

A. Petitioner's unlawful sentence prevents the Bureau of Prisons from granting him credit for time he spent in state custody.

Under Bureau of Prisons ("BOP") regulations, federal prisoners have the ability to request credit for time they previously served in state custody. BOP "has the authority to implement a concurrent sentence by retroactively designating the state prison in which the defendant served his state sentence as the place for service of his federal sentence as well." *United States v. Garcia-Espinoza*, 325 F. App'x 380, 382 (5th Cir. 2009) (unpub.) (Owen, J., concurring); *accord*, Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction* 4, available at http://www.bop.gov/news/ifss.pdf (last accessed Nov. 1, 2010).

In the absence of a controlling district court order, Petitioner could ask the BOP to retroactively designate the facility where he served out his 2007 state case sentence for service of his federal sentence. *See Barden v. Keohane*, 921 F.2d 476, 478 (3d Cir. 1990) (remanding case to BOP for consideration of prisoner's requrest for *nunc pro tunc* designation). BOP has codified the procedures for *nunc pro tunc* designation requests. *See* BOP, *Designation of State Institution for Service of Federal Sentence*, Program Statement 5160.05 (Jan. 16, 2003), available at http://www.bop.gov/policy/progstat/5160_005.pdf (last accessed Nov. 1, 2010).

If, however, a district court has exercised its purported authority under

18 U.S.C. § 3584, then BOP has no statutory or inherent authority to reject that order. The BOP honors its role *vis-a-vis* the district court through its program statement: "The Bureau will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service of sentence (e.g., the federal sentencing court ordered the sentence to run consecutively to any other sentence." BOP Program Statement 5160.05 at 6–7, § 9.b.(4)(f). Thus, the district court's unlawful order stands between Petitioner and any credit (through retroactive designation) for the time he spent in state custody.

The possibility of a retroactive designation is not so remote at to justify denial of review, particularly where the Government has conceded that the district court order itself is unlawful. The time for which Petitioner would seek credit—namely, the time he spent in state custody between the date his federal sentence was issued and the date he was released from primary state custody—was served for the very same offense conduct (the 2007 state case) underlying his instant federal conviction. He was also sentenced to custody on an unrelated revocation matter (the 2006 state case), but his parole eligibility and the length of time he served in state custody was logically dictated by the longer sentence imposed in the related 2007 state case. Where the district court is silent, BOP basis its retroactive designation decision on a number of factors, including "inmate discipline history," "institutional adjustment," and the "recommendations of the Wardens at the state and federal institutions." BOP

Program Statement 5160.05 at 4, § 8.a (referenced in *id.* at 6, § 9.b.(4)(e)). Of course, an attack on the federal judgment would not provide a proper vehicle to litigate that administrative issue. But under the same reasoning, the direct appeal of the unlawful term of the judgment provides Petitioner's only avenue for relief against an unlawful term of the judgment itself.

Here, the district court prevented Petitioner from pursuing the remedy of retroactive designation when it entered an unlawful order that the federal sentence be served consecutive to the as-yet-unimposed sentence in the 2006 state case. Thus, the unlawful order has a palpable effect on Petitioner, and on all similarly-situated defendants. This Court's review is therefore warranted.

B. The Fifth Circuit will not reconsider its precedent.

The Government has also argued that this Court should not intervene because the Fifth Circuit may reverse its precedent. For example, in August of 2009, the Government argued that review in this Court would be "premature" because, in the Government's view,

> the conflict over the interpretation of Section 3584(a) is best suited to resolution in the lower courts. Indeed, the courts of appeals that disagree with the government's interpretation (and petitioner's), including the court below, have begun to reconsider that stance. The government has taken active steps both to encourage that re-examination in the courts of appeals and to oppose consecutive-sentencing orders in the district courts.

Brief in Opp. 12, *Brockman v. United States*, No. 08-1427 (filed Aug. 25, 2009) ("*Brockman* Opp."). In the present case, however, the Fifth Circuit announced in a published decision that it would not reconsider or overrule *Brown* unless it

was ordered to do so by this Court: "[G]iven this Court's recent refusal to reconsider *Brown* en banc, any future reversal of the Court's decision in *Brown* is best left to the discretion of our Supreme Court." Pet. app. 5a, n.**. And consistent with that announcement, the Fifth Circuit denied requests for hearing or rehearing en banc in the present case and at least two others. Pet. app. 9a–10a; *see* Order Denying Petition for Hearing En Banc, *United States v. Garcia*, No. 09-10797 (5th Cir. filed Oct. 18, 2010); Order Denying Rehearing, *Vargas-Solis*, No. 09-50240. In *United States v. Vargas-Solis*, the government actually joined the petition for rehearing en banc, but as anticipated by the panel opinion in the present case, the court below awaits correction from "our Supreme Court." Pet. app. 5a, n.**.

The time to end this practice is now, and this is the case in which to do so. The arguments advanced by the Government against review in previous cases carry no weight here: Petitioner has properly preserved the issue for plenary review, and the harm caused by his unlawful sentence is demonstrable. This Court should grant the petition and resolve this conflict once and for all.

III. THE SENTENCE HERE ILLUSTRATES THE ABSURDITY THAT CAN RESULT FROM JUDICIAL ATTEMPTS TO PREEMPTIVELY DICTATE THE INTERACTION AMONG SEPARATE-SOVEREIGN SENTENCES WHEN SOME SENTENCES DO NOT YET EXIST.

As stated previously, the BOP has the authority and the ability to make a federal sentence fully or partially concurrent with a state sentence. Where the offender first spends time in state custody, the BOP effectuates a concurrent

order by designating the state facility for service of the federal sentence. Even where service of the state sentence is completed, the BOP can retroactively grant credit by entering a *nunc pro tunc* designation of the state sentence. When the district court exercises its authority under 18 U.S.C. § 3584(a), then BOP is required to effectuate that order.

Here, the district court ordered the federal sentence to run *consecutive to* the 2006 state case, but *concurrent with* the 2007 state case. Pet. app. 12a. The trouble is, the state court ordered those two sentences to run concurrent with each other. Pet. app. 15a ("This sentence shall run concurrent.") Each day that Petitioner spent in state custody was, in some sense, served on the 2006 state case and also served on the 2007 state case. Thus, for each day beginning with the entry of the federal sentence and ending with Petitioner's release from state custody, the BOP is required both to retroactively designate the state facility for service of the federal sentence (to effectuate the concurrent order), and to *not* designate that facility (to effectuate the consecutive order).

The court below was unperturbed by this dilemma. The court implicitly acknowledged that the federal judgment's terms were "irreconcilab[le]" with the subsequently-issued state sentences, and that in this case, the federal sentence would be "partially foiled." Pet. app. 7a (quoting *United States v. Cibrian*, 374 F. App'x 524 (5th Cir. Mar. 14, 2010) (unpub.)). In the Fifth Circuit's view, any ambiguity or frustration was the result of the state court sentences. Pet. app. 7a. But it was the district court who created the possibility for irreconcilability and

frustration when it chose to enter consecutive and concurrent orders despite its ignorance of the length of the anticipated state sentences. The decision should not be inoculated against reasonableness review merely because the *possibility* of frustration created by the federal court's unlawful order *actually came to fruition* when the state court entered its sentences.

On this point, Petitioner agrees with the Government's argument in *Brockman*:

> 18 U.S.C. 3584(b) . . . 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.

Brockman Opp. at 7 n.3. It is foolhardy to expect district courts to consider "the total length of incarceration" when ignorant of yet-future components of the aggregate sentence. Where, as here, the appellate court has learned of the subsequently-issued sentences, there is no reason to ignore those facts under reasonableness review merely because the district court did not know them. That's the whole point. The district court should not be permitted to engage in this unreasonable and unlawful sentencing practice. If a court does make that kind of order, it should be upon pain of reversal in the event that the subsequently-issued state sentences render the previously issued federal sentence unreasonable.

CONCLUSION

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

Respectfully submitted,

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November 2, 2010

No. 10-_____

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, November 2, 2010, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI 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:

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

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

James Wesley Hendrix
Assistant United States Attorney
United States Attorneys Office
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

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 November 2, 2010.

JASON D. HAWKINS
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No. 10-_____

In the Supreme Court of the United States

MONROE ACE SETSER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner, Monroe Ace Setser, asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this November 2, 2010.

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Petition Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
May 11, 2010
Lyle W. Cayce
Clerk

No. 08-10835

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MONROE ACE SETSER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:

Defendant-Appellant Monroe Ace Setser appeals the district court's imposition of a federal sentence that runs consecutively to an undischarged state sentence. Because the imposition of a consecutive sentence is fully within the district court's authority, and because we conclude that the sentence is otherwise reasonable and not illegal, we find no error in the district court's sentencing of defendant. Accordingly, we AFFIRM.

I. BACKGROUND

Monroe Ace Setser pleaded guilty to possession with intent to distribute 50 grams or more of methamphetamine and aiding and abetting. At the time he committed the instant offense, Setser was still serving a five-year term of

probation in state court for a previous 2006 state offense. Additionally in 2007, Setser had been charged in state court with possession with intent to deliver a controlled substance—an offense that was directly related to the instant federal offense of conviction.

Following Setser's entry of a guilty plea, the federal district court sentenced Setser to 151 months of imprisonment. At the time of sentencing, the district court stated that the 151 months were to be served consecutively to any sentence imposed as a result of his 2006 state offense and concurrently with any sentence imposed pursuant to his 2007 state offense. Setser timely appealed his sentence, arguing that the district court's sentence was illegal since 18 U.S.C. § 3584 does not grant the district court the authority to impose a federal sentence consecutively to an undischarged state sentence.

Subsequent to the district court's imposition of the federal sentence, Setser's probation in his 2006 state case was revoked by the state court, and he was sentenced to five years of imprisonment. Additionally, Setser was convicted of possession with intent to deliver a controlled substance in the 2007 state charge, and as a result, he was sentenced to ten years of imprisonment. The state court ordered that these two state sentences would run concurrently to one another.

On April 12, 2010, the United States moved pursuant to Fed. R. App. P. 10(e)(2)(C) & (e)(3) to supplement the record with documents showing that the Texas prison system released Setser and that he is now in the custody of the federal Bureau of Prisons ("BOP"). Consequently, after serving only two-and-a-half years in the state system on both of his 2006 and 2007 state sentences, Setser is now in BOP custody. Setser's Texas parole documents show

that he was released from state custody on March 17, 2010. The BOP's "Public Information Inmate Data" sheet indicates that Setser's federal sentence began to run on March 17, 2010. The BOP did not award Setser any credit for the two-and-a-half years he spent in state custody.

II. STANDARD OF REVIEW

"A sentence is ultimately reviewed for 'unreasonableness.'" *United States v. Candia*, 454 F.3d 468, 472 (5th Cir. 2006) (quoting *United States v. Smith*, 440 F.3d 704, 705 (5th Cir. 2006)). "Under *Booker*, it is the sentence itself, including its consecutive nature, that is ultimately reviewed for reasonableness." *Id.* at 472-73 (quoting *United States v. Booker*, 543 U.S. 220, 261 (2005)). Here, where the Defendant-Appellant is only challenging the imposition of a consecutive sentence, and not the district court's application or calculation of the Guidelines themselves, "the appellate court should . . . consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 51 (2007); *see also Candia*, 454 F.3d at 474 ("We have determined that unreasonableness is the standard of review applicable to a consecutive sentence imposed both within a properly calculated sentencing range and pursuant to the applicable guidelines for imposition of a consecutive sentence."). Accordingly, this Court reviews the reasonableness of the district court's imposition of a consecutive sentence for abuse of discretion.

III. ANALYSIS

On appeal, Setser contends that the district court erred by relying on 18 U.S.C. § 3584 as authority to order his sentence to run consecutively to his undischarged state sentence in his 2006 state conviction. He acknowledges that this argument is foreclosed by the Court's decision in *United States v. Brown*,

920 F.2d 1212, 1216 (5th Cir. 1991), *abrogated on other grounds by Candia*, 454 F.3d at 472-73, where this Court held that "[w]hether a sentence imposed should run consecutively or concurrently [to an undischarged state sentence] is committed to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a)."

Setser offers several arguments as to why this Court should now revisit its decision in *Brown*. First, Setser notes that the circuits are split on this issue,[*] and he contends that *Brown* does not comport with the text of 18 U.S.C. § 3584 or its legislative history. Finally, Setser contends that the sentencing factors in

[*] The Eleventh, Eighth, Tenth, and Fifth Circuits have held that § 3584 authorizes district courts to order a federal sentence to run consecutively to an undischarged state sentence. *See United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993) ("[A] district court [has] the authority to impose a federal sentence consecutive to an unrelated, unimposed state sentence on pending charges."); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) ("[T]he authority to impose such a federal sentence to be served consecutively to a yet-to-be-imposed state sentence falls within the broad discretion granted to the court."); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995) (holding that "no language in section 3584(a) prohibit[s] a district court from ordering that a federal sentence be served consecutively to a state sentence that has not yet been imposed."); *United States v. Brown*, 920 F.2d 39 1212, 1216 (5th Cir. 1991) (holding that "whether a sentence imposed should run consecutively or concurrently is committed to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a)."). In contrast, the Second, Fourth, Seventh, Sixth, and Ninth Circuits have held that a federal district court does not have such discretion or authority. *Cf. United States v. Donoso*, 521 F.3d 144, 147 (2d Cir. 2008) (determining "that under 18 U.S.C. § 3584(a), the district court was not authorized to direct that the federal sentence run consecutively to [an undischarged] state sentence."); *United States v. Smith*, 472 F.3d 222, 225 (4th Cir. 2006) ("The plain language of this statute does not grant a district court authority to order that its sentence run consecutively to a future sentence."); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000) ("Neither § 3584(a) nor any other statute of which we are aware authorizes a federal judge to declare that his sentence must run consecutively to some sentence that may be imposed in the future."); *United States v. Quintero*, 157 F.3d 1038, 1039-40 (6th Cir. 1998) ("We hold that 18 U.S.C. § 3584(a) does not authorize district courts to order a sentence to be served consecutively to a not-yet-imposed state sentence."); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991) (holding "[t]hat a federal court may not direct a federal sentence to be served consecutive to a state sentence not yet imposed . . . .").

§ 3553(a) and U.S.S.G. § 5G1.3 run contrary to *Brown*, as do considerations of comity.

Even if we were to find Setser's arguments compelling, we are bound by *Brown*'s precedent as "[i]t is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision." *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). Thus, there are only two ways in which *Brown*'s posture as binding precedent in this Court could change: 1) an intervening decision by the Supreme Court or 2) a superseding decision by this Court sitting en banc. The Supreme Court, to date, has issued no intervening decision. Further, this Court has recently declined the opportunity to reconsider *Brown* en banc.[**] Because *Brown* is the law of this Court, we conclude that the district court had the authority to–and therefore did not abuse its discretion by—imposing a consecutive federal sentence to a yet imposed state sentence.

Despite the district court's authority to issue a consecutive sentence, Setser argues that his consecutive sentence is unreasonable because he asserts that his federal sentence is now logically impossible to carry out—as a result of

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[**] In *United States v. Garcia-Espinoza*, No. 08-10775, 2009 WL 1362199 at *1 (5th Cir. May 15, 2009) (unpublished), this Court rejected a defendant's challenge to his consecutive sentence, holding that his "challenge is foreclosed by our prior precedent." However, in light of the circuit split concerning a district court's discretion to order a federal sentence to run consecutively to an undischarged state sentence, Judge Owen and Judge Dennis, in their joint concurrence, recommended that the Court revisit the *Brown* holding en banc. *Id.* at *2. Yet when Garcia-Espinoza filed a motion for rehearing en banc, "[n]o member of the panel nor judge in regular active service on the court . . . requested that the court be polled" on a rehearing en banc. As a result, the Court denied the defendant-appellant's motion on April 13, 2009. Thus, given this Court's recent refusal to reconsider *Brown* en banc, any future reversal of the Court's decision in *Brown* is best left to the discretion of our Supreme Court.

the state court's decision to run his two state sentences concurrently. Setser contends that either the consecutive or the concurrent sentence must be given priority, and that it is not clear from the record what the district court fully intended. Initially, Setser asserted that once he was transferred to federal custody, the BOP would not be able to correctly calculate his sentence as a result of this inherent ambiguity. Setser therefore requested that this Court declare his consecutive sentence unreasonable and either reverse and remand for re-sentencing, or strike the consecutive sentence and order that his 151 months be served concurrently to both state sentences. Finding no error in the district court's sentence, we decline to reverse or remand for re-sentencing.

A sentence may be illegal if it is "'ambiguous with respect to the time and manner in which it is to be served, is internally self-contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the statute or is a sentence which the judgment of conviction did not authorize.'" *United States v. Dougherty*, 106 F.3d 1514, 1525 (10th Cir. 1997) (quoting *United States v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991)). "Criminal sentences must 'reveal with fair certainty the intent of the court to exclude any serious misapprehensions by those who must execute them.'" *United States v. Garza*, 448 F.3d 294, 302 (5th Cir. 2006) (quoting *United States v. Daugherty*, 269 U.S. 360, 363 (1926)). In the present case, however, there is nothing plainly self-contradictory or uncertain about the sentence in and of itself. Quite to the contrary, the federal sentence alone is quite clear. Any ambiguity in the district court's sentence was not introduced until after the state court ordered Setser's two state sentences to run concurrently.

It is important to note that Setser's "contention that the sentence is 'impossible' to fulfill stems not from an inherent flaw on the face of the court's sentencing papers, . . . but from the very practical problems that arise in carrying out overlapping state and federal sentences in a dual sovereignty." *United States v. Cibrian*, 2010 WL 1141676, *5 (5th Cir., Mar. 14, 2010) (unpublished). That is, in *Cibrian*, this Court noted that "[t]he irreconcilability of [a defendant's] federal and state sentences is a well-documented practicality of our system of contemporaneous jurisdiction." *Id.* at 7. As a result of this dual system of jurisdiction, in some instances—as in here—it is "the federal sentence [that may be] partially foiled, [and] in other cases, it is the state sentence that suffers the intrusion." *Id.* A subsequently issued state court sentence, therefore, does not render an otherwise legal federal sentence illegal.

Furthermore, now that Setser is in the custody of the BOP, and the BOP has determined that Setser is not entitled to any credit for the time he spent in state custody, we are currently without the power or the authority to order the BOP to calculate Setser's sentence in any certain manner. Notably, "the United States Supreme Court [has] held that § 3585(b) does not authorize a . . . court to compute credit for time spent in official detention at sentencing, but [rather,] credit awards are to be made by the Attorney General, through the Bureau of Prisons, after sentencing." *United States v. Dowling*, 962 F.2d 390, 393 (5th Cir. 1992) (citing *United States v. Wilson*, 503 U.S. 329 (1992)). In the event that a prisoner feels he has been improperly refused credit for time he has served in state custody, the prisoner must first "seek administrative review of the computations of [his] credit, and, once [he has] exhausted [his] administrative remedies, [the] prisone[r] may only *then* pursue judicial review of these

computations." *Id.* (citing *Wilson*, 503 U.S. at 335; 28 C.F.R. §§ 542.10-542.16 (1990)) (internal citations omitted); *see also Lundy v. Osborn*, 555 F.2d 534, 534-35 (5th Cir. 1977) ("[G]rievances of prisoners concerning prison administration should be presented to the Bureau [of Prisons] through the available administrative channels. Only after such remedies are exhausted will the court entertain the application for relief in an appropriate case.").[***]

Thus, although his appeal began as a challenge to the ambiguity regarding how the BOP might interpret and carry out the district court's sentence, the BOP has subsequently interpreted and carried out the sentence. The BOP's interpretation of Setser's sentence, however, is not properly before this Court. At this juncture, should Setser wish to contest the BOP's denial of credit for the time he served in state custody, Setser must first pursue his administrative remedies pursuant to 28 C.F.R. §§ 542.10-542.16 (2002).

IV. CONCLUSION

For the aforementioned reasons, we conclude that the district court's imposition of a consecutive sentence was well within the district court's authority pursuant to 18 U.S.C. § 3584, and as a result, the district court's sentence was not illegal or unreasonable. Accordingly, we find that the district court did not abuse its discretion, and we AFFIRM. All pending motions are denied.

[***] This Court has previously dismissed a prisoner's appeal of the BOP's interpretation and calculation of his sentence if the prisoner has failed to exhaust his administrative remedies. That is, once a prisoner has exhausted his administrative remedies, he may "fil[e] a pro se petition for habeas relief under 28 U.S.C. § 2241, challenging the BOP's computation of his sentence . . . ." *Dominguez v. Williamson*, 251 F.3d 156, at *2 (5th Cir. 2001). However, "this court has determined that a § 2241 petitioner must first exhaust his administrative remedies through the Bureau of Prisons." *Rourke v. Thompson*, 11 F.3d 47, 49 (5th Cir. 1993).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-10835

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MONROE ACE SETSER

Defendant - Appellant

Appeal from the United States District Court for the Northern District of Texas, Lubbock

ON PETITION FOR REHEARING EN BANC

(Opinion 5/11/2010, 5 Cir., _____, _____, F.3d _____)

Before BENAVIDES, STEWART, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG6A

United States District Court

Northern District of Texas
Lubbock Division

UNITED STATES OF AMERICA

v.

Case Number 5:08-CR-024-01-C
USM No. 34437-177

MONROE ACE SETSER
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, MONROE ACE SETSER, was represented by Helen M. Liggett.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to this defendant.

The defendant pleaded guilty to count 1 of the indictment filed on 03/12/2008. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
21 USC § 841(a)(1) & (b)(1)(A)(viii) and 18 USC § 2	Possession With Intent to Distribute 50 Grams or More of Methamphetamine and Aiding and Abetting	10/01/2007	1

As pronounced on 08/22/2008, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 22nd day of August, 2008.

DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 151 months with this term of imprisonment to be served consecutive with any sentence imposed in Case No. 2006-412,543, pending in the 137th District Court, Lubbock County, Texas, and to be served concurrently with any sentence imposed in Case No. 2007-418,142 pending in the 137th District Court, Lubbock County, Texas.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

□ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $40.00 per month.

2. The defendant shall cooperate in the collection of DNA as directed by the probation officer, as authorized by the Justice for All Act of 2004.

CASE NO. 2007-418,142 COUNT I
INCIDENT NO./TRN: 912692398X

THE STATE OF TEXAS	§	IN THE 137TH DISTRICT
	§	
V.	§	COURT
	§	
MONROE A. SETSER	§	LUBBOCK COUNTY, TEXAS
	§	
STATE ID NO.: TX 4522486	§	

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BY _____ DEPUTY
2008 DEC 18 PM 1:28

JUDGMENT OF CONVICTION BY COURT—WAIVER OF JURY TRIAL

Judge Presiding: HON. CECIL G PURYEAR
Date Judgment Entered: 12/18/08

Attorney for State: AMANDA SAY
Attorney for Defendant: MIKE BROWN

Offense for which Defendant Convicted:
POSSESSION W/INT. TO DELIVER CONTROLLED SUBSTANCE PG1 METHAMPHETAMINE 200-400 grams

Charging Instrument: **INDICTMENT**
Statute for Offense: **§ 481.112(f)**

Date of Offense: **OCTOBER 1 ,2007**

Degree of Offense: **AGGRAVATED 1st DEGREE FELONY**
Plea to Offense: **GUILTY**
Findings on Deadly Weapon: **NA**

Terms of Plea Bargain: **TEN (10)) YEARS TDCJ-ID**

Plea to 1st Enhancement Paragraph: NA
Plea to 2nd Enhancement/Habitual Paragraph: NA
Findings on 1st Enhancement Paragraph: NA
Findings on 2nd Enhancement/Habitual Paragraph: NA

Date Sentence Imposed/to Commence: 12/18/08

Punishment and Place of Confinement: **TEN (10) YEARS TDCJ-ID**

THIS SENTENCE SHALL RUN CONCURRENT

☐ **SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR.**

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$1.00	$ 634.00	$140.00	☐ VICTIM (see below) ☒ AGENCY/AGENT

Sex Offender Registration Requirements DOES NOT APPLY **to the Defendant.** TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was NA .

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:
From 10/1/07 to Present From _____ to _____ From _____ to _____
From _____ to _____ From _____ to _____ From _____ to _____

If Defendant is to serve sentence in jail or is given credit toward fine and costs, enter days credited below.

TOTAL DAYS: NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Lubbock County, Texas. The State appeared by her District Attorney.
Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.
☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea indicated above. The Court then admonished Defendant as required by law. It appeared to Court that Defendant was mentally competent to stand trial, made the plea freely and voluntarily and was aware of the consequences of this plea. The Court received the plea and entered it of record. Having heard the evidence submitted, the Court found Defendant guilty of the offense indicated above. In the presence of the Defendant, the Court pronounced sentence against Defendant.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the TDCJ-ID. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of **Lubbock** County, Texas on the date the sentence is to commence. Defendant shall be confined in the **Lubbock** County Jail for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY.** The Court **ORDERS** Defendant to proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☒ The Court **ORDERS** Defendant's sentence **EXECUTED.**

☐ The Court **ORDERS** Defendant's sentence of confinement **SUSPENDED.** The Court **ORDERS** Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

Court Costs	$ 333.00
Attorney Fee	$ 300.00
Fine	**$1.00**

Dismissals: COUNT II

The Defendant waives any and all interest in any property seized in connection with this case (real or personal, tangible or intangible) which is the subject of any civil forfeiture action.

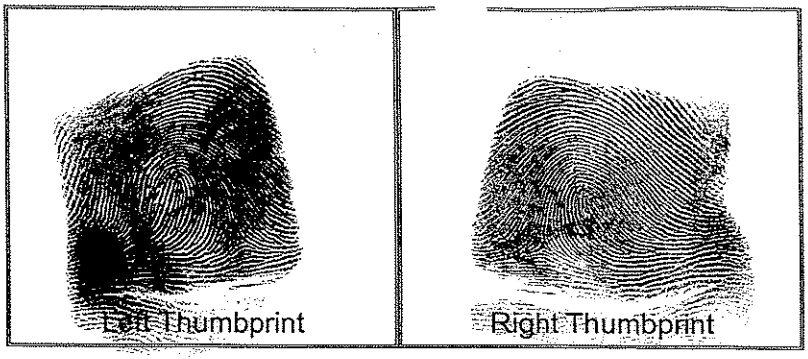
Signed and entered on this the 18th **day of** December, **2008.**

X
CECIL G PURYEAR
JUDGE PRESIDING

UNDER EXCHANGE OF BENCHES

MONROE A. SETSER

2007-418,142 137TH



RECEIPT OF DEFENDANT

I, the undersigned Defendant in the above described cause, on this day received from the clerk of this Court a copy of the above Order

SIGNED this the 18 day of December ,2008 A.D.

Monroe Lee Setser
Defendant

I, Barbara Sucsy, District Clerk, in and for Lubbock County, Texas, do hereby certify this to be a true and correct copy of a like instrument now on file in this office.

This 11 day of Mar 200 9

Clerk of District Court, Lubbock County, Texas pg 2 of 3 Deputy

CASE NO. 2006-412,543
INCIDENT NO./TRN: 9126769883

THE STATE OF TEXAS	§	IN THE 137TH DISTRICT
	§	
V.	§	COURT
	§	
MONROE A. SETSER	§	LUBBOCK COUNTY, TEXAS
	§	
STATE ID NO.: TX 4522486	§	

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JUDGMENT REVOKING COMMUNITY SUPERVISION

Judge Presiding: HON. Cecil G. Puryear
Date Judgment Entered: 12/18/08

Attorney for State: Amanda Say
Attorney for Defendant: Mike Brown

Date of Original Community Supervision Order: March 6, 2007
Statute for Offense: § 481.112 H&S

Offense for which Defendant Convicted: Possession of a Controlled Substance with Intent to Deliver PG1 Methamphetamine 4-200 grams

Date of Offense: March 25, 2006

Degree of Offense: 1st Degree Felony
Plea to Motion to Revoke: TRUE
Findings on Deadly Weapon: NA

Original Punishment Assessed: Five (5) Years TDCJ-ID Probated Five (5) Years FINE: $NA

Shock Community Supervision: FINE: $ NA

Date Sentence Imposed/to Commence: 12/18/08

Punishment and Place of Confinement: **Five (5) Years TDCJ-ID**

THIS SENTENCE SHALL RUN **Concurrently.**

Fine:	Court Costs:	Restitution:	Restitution Payable to:
$	$ 120	$ 140.00	☐ VICTIM (see below) ☒ AGENCY/AGENT

IS ORIGINAL JUDGMENT / SENTENCE REFORMED? NO

☐ In accordance with Section 12.44(a) Penal Code, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. Defendant is adjudged to be guilty of a state jail felony and is assessed punishment indicated above.

Sex Offender Registration Requirements Does not apply **to the Defendant.** TEX. CODE CRIM. PROC. chapter 62

The age of the victim at the time of the offense was .

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:
From 3/25/06 to 4/1/06 From 10/1/07 to PRESENT From _____ to _____
From _____ to _____ From _____ to _____ From _____ to _____

If Defendant is to serve sentence in jail or is given credit toward fine and costs, enter days credited below.

TOTAL DAYS: NOTES:

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called in **Lubbock** County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

The State filed a motion to revoke Defendant's community supervision. After hearing the State's motion, Defendant's plea, the evidence submitted, and reviewing the record, the Court **GRANTS** the State's motion. The Court's record indicates that Defendant was

previously convicted of a felony offense and punishment was assessed as indicated above. The record indicates the Court ordered imposition of Defendant's sentence of confinement suspended and placed Defendant on community supervision for **Five (5) Years.**

The Court **FINDS** Defendant has violated the conditions of community supervision as set out in the State's Amended Motion to Revoke Community Supervision as follows: **A,B,D,F,K(1&2),Q,V-See Attached**

Accordingly, the Court **ORDERS** the previous orders in this cause suspending imposition of sentence of confinement and placing Defendant on community supervision **REVOKED. (select one of the following)**

☒ The Court **ORDERS** Defendant punished in accordance with the judgment and sentence originally entered in this cause.

☐ Finding it to be in the interest of justice, the Court **ORDERS** Defendant punished in accordance with the reformed judgment and sentence indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division.** The Court **ORDERS** the authorized agent of the State of Texas or the Sheriff of this County to take, safely convey, and deliver Defendant to the TDCJ-ID. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement, Defendant proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lieu of Payment.** The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of Lubbock County, Texas on the date the sentence is to commence. Defendant shall be confined in the **Lubbock** County Jail for the period indicated above. The Court **ORDERS** that upon release from confinement, Defendant shall proceed immediately to the Lubbock County Collections Department. Once there, the Court **ORDERS** Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment.** The punishment assessed against Defendant is for a **FINE ONLY.** The Court **ORDERS** Defendant to proceed immediately to the Lubbock County Collections Department County . Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

The Court **ORDERS** Defendant's sentence **EXECUTED.**

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated.

The Court further **ORDERS** Defendant to pay all fines, court costs, and restitution as indicated above.

Furthermore, the following special findings or orders apply:

Court Costs	$ 12	**APO Fee**	**$960.00**
Attorney Fees	$	**Restitution**	**$140.00**

The Defendant waives any and all interest in any cash and or real property (real or personal, tangible or intangible) subject to any pending civil forfeiture case.

Signed and entered on this the 18th **day of** December, **2008.**

x [signature]

Cecil G. Puryear

JUDGE PRESIDING UNDER EXCHANGE OF BENCHES