No. 08-1427

IN THE
Supreme Court of the United States

COREY ALAN BROCKMAN,
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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government's opposition concedes virtually every element of the case for certiorari. In particular, the Government recognizes that "the courts of appeals are divided"—four to four—"over whether a district court has the authority to direct that a sentence run consecutively to a state sentence that has not yet been imposed." Opp. 4, 5-7. It "agrees with petitioner that district courts lack such authority under 18 U.S.C. 3584(a)." *Id.* at 4. It acknowledges that the Fifth Circuit has denied a petition to review this issue en banc. *Id.* at 13. And it does not deny that the order below *requires* petitioner to serve *two* additional years of imprisonment that the Bureau of Prisons (BOP) would otherwise have discretion to eliminate. *Id.* at 10-11.

The Government nonetheless opposes review on the ground that the question presented is not important. Opp. 8-12. But the Government's own actions demonstrate otherwise. The issue is important enough for the Executive Office of the United States Attorneys to issue specific advice to every U.S. Attorney on how to address it. *Id.* at 15. It is important enough that every U.S. Attorney must explicitly urge every district court in every case that it should not engage in the challenged practice. *Id.* at 16. And it is important enough that, in "appropriate case[s]," the Government will advise four circuits to grant rehearing en banc to reverse their decisions on the issue. *Id.* at 12. Despite all that, the Government turns around here and insists that the issue is not important enough for this Court, in a single (and plainly suitable) case, to simply bring an end to this

concededly unlawful practice. The Government's position not only lacks merit—it lacks credibility.

1. The Government argues that unlawful consecutive sentencing orders have no practical impact because state courts can circumvent them by cutting the length of the state sentence by the amount of the federal sentence. Opp. 8. But the Government fails to explain why state courts faced with federal court consecutive sentence "orders" would not feel either bound by them or compelled by considerations of comity to follow them.

To the extent that state courts try to circumvent the illegal orders, moreover, the result is unseemly gamesmanship that damages federal-state relations. As the Government views current law and procedure in four circuits, a federal court essentially attempts to trick a state court into ordering a consecutive sentence with an "order" that, while binding in appearance, actually lacks legal effect. The state court should then respond, the Government submits, by invoking available state-law means to circumvent the meaningless order. Opp. 8-9. That approach is patently incompatible with this Court's call for a "spirit of reciprocal comity and mutual assistance" between state and federal courts in sentencing. *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922).

The Government's proposed tactic for defeating illegitimate federal court orders also cannot work when state law imposes a mandatory minimum sentence. And cutting the state sentence by the length of the federal sentence would entirely defeat state sentencing objectives when the federal sentence is subsequently vacated because of an error in the pro-

ceedings or reduced because a defendant cooperated with federal authorities.

A system under which a federal court issues "orders" that are not binding also cannot be reconciled with the requirements of Article III. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995). And even if such ersatz orders are consistent with Article III, it nevertheless denigrates federal judicial power for federal courts to issue orders that can be freely ignored. Those harmful effects on the administration of justice easily justify review of a 4-4 circuit split on an issue on which the Government has confessed error.

2. This case illustrates an additional serious consequence of consecutive sentencing orders that heightens the need for review: they illegally deprive persons like petitioner of the opportunity to petition the BOP to make their federal sentences concurrent with the time they have served in state prisons. The effect on petitioner is palpable. The unlawful order here requires petitioner to serve two extra years of imprisonment that the BOP would otherwise have had discretion to eliminate. And that same effect is experienced by the entire class of persons who serve their state sentences before being transferred to federal custody.

The Government argues that this effect is no cause for concern because not many inmates would likely obtain relief from the BOP. Opp. 11. But that is pure speculation; the Government offers not a shred of evidence to support it. In fact, it is impossible to know how many defendants would receive a lower sentence. What can be known is that a con-

secutive sentence order unlawfully deprives every person who serves his state sentence first of the opportunity to persuade the BOP to credit his time served against his federal sentence. That systemic denial of the opportunity to obtain a reduced sentence requires correction.

The fallacy in the Government's position is illustrated by the following example. Suppose courts throughout the country were imposing two-year mandatory minimum sentences based on what the government conceded was a misreading of federal law. In that situation, it would be impossible to know how many defendants would receive sentences of less than 24 months if the district courts had been afforded the discretion to impose them. Yet that uncertainty could not possibly justify tolerating the continuance of that illegal practice. The same is true here.

The Government also asserts that petitioner himself is unlikely to obtain relief. *Id.* at 11-12. But that too is pure speculation. There is no way to know what the BOP would do if it were permitted to consider petitioner's application. The Government's one-sided account is no substitute for the BOP's consideration of all the relevant facts. *Id.* at 10-11.

For example, in considering petitioner's "history and characteristics," 18 U.S.C. § 3621(b)(3), the BOP would not be limited to the government's slanted account; it would also learn that (i) petitioner's mother abandoned him when he was 12, placing him in a boys' "ranch," Petitioner's Presentence Report (PSR) ¶ 49; (ii) petitioner was sexually abused for the next five years by a man who eventually received a life

sentence for his crimes, *id.* ¶ 50; (iii) petitioner suffered from severe depression at the time of his federal offense of possessing a firearm as a convicted felon, *id.* ¶¶ 60-63; (iv) petitioner "clearly demonstrated acceptance of responsibility for his [federal] offense," *id.* ¶ 24; and (v) petitioner has sought and received medication to treat his "Major Depressive Disorder," *id.* ¶ 64. In assessing "the nature and circumstances of petitioner's offense," 18 U.S.C. § 3621(b)(2), the BOP would consider many of those same factors. It would also take into account that petitioner's federal offense involved "no identifiable" individual victim. PSR ¶ 21.

The Government's account is not only one-sided, but premature. In making its determination, the BOP would certainly consider how petitioner's confinement in state prison affected his suitability for release, a determination that cannot be made until petitioner completes his state sentence in 2011. BOP Program Statement 5160.05, *Designation of State Institution for Service of Federal Sentence* § 8(a) (Jan. 16, 2003). Another factor that cannot be determined until then is whether the resources of available federal facilities would argue in favor of petitioner's release. 18 U.S.C. § 3621(b)(1).

In arguing that petitioner would have only a slight chance of obtaining relief, the Government claims that the BOP would not credit the time petitioner served on his mischief offense. Opp. 11. But even if that were so, it would not affect petitioner's request for credit for the time served on his assault conviction. And that time is sufficient by itself to entirely eliminate petitioner's two-year federal sentence.

With respect to the time served for assault, the sole argument the Government makes is that petitioner's criminal history points would count against him. *Id.* at 12. That argument not only ignores all the other relevant circumstances discussed above; it also ignores the circumstances of petitioner's criminal history. The criminal history relied on by the Government consists of two offenses petitioner committed at age 18, the year he left the ranch at which he was sexually abused. One was for shoplifting a camera, pregnancy test, and photo paper refill; the other was for shooting at a building's windows with "a BB gun." PSR ¶¶ 37-38. It is implausible that the BOP would view those two relatively minor offenses that petitioner committed when he was 18 as precluding release if it were disposed to release petitioner based on other factors. And that does not even account for the possibility that those offenses may already have been factored into petitioner's sentence for assault, a circumstance that would make them even less relevant to the BOP's determination.

3. The only other argument the Government offers against review is that its own efforts to advise district courts not to impose consecutive sentences and to recommend review en banc in four circuits will be sufficient to resolve the issue. Even if the Government's efforts were ultimately successful, it could only be after an enormous expenditure of resources and extended period of time. There is no reason to prefer that drawn-out, resource-intensive solution to the much more efficient one of a single decision by this Court ending the practice. Why the Government objects to the latter approach is mystifying.

Furthermore, the Government's efforts in the district courts have been an embarrassing failure. The Government asserts that since it advised U.S. Attorneys' Offices that they should urge district courts not to impose consecutive sentences, it "understands" the district courts' practice of sentencing defendants unlawfully has "generally changed." Opp. 16. In support of that generalization, the Government offers the example of a single judge who has changed his practice. *Id.* at 16-17. The very fact that the Government can cite only one judge who has changed his practice is reason enough to cast serious doubt on the Government's otherwise unsubstantiated generalization.

And the actual *evidence*—as opposed to the Government's "understanding"—is alarming. After a limited review, we have found that since the Government began advising district courts not to impose consecutive sentences, at least *nine different district court judges in Texas alone* have continued to impose these illegal consecutive sentences. *See* App., *infra*, at 1a-53a.

That is hardly surprising. District court judges who view consecutive sentences as a wise and permissible practice are unlikely to change their view based on a prosecutor's say so. As one district judge stated colorfully in response to a prosecutor's objection to a consecutive sentence: "I don't care. I'm well aware of that U.S. Attorney policy; and I haven't li[sten]ed to it before, especially because statutorily I have the authority to do so." App. at 42a.

This illegal practice persists for another reason. While the Government certainly may desire and ex-

pect that all U.S. Attorneys would follow national advice, the unfortunate reality, as the Government well knows, is otherwise. It will come as no surprise to anyone experienced with the relationship between the Department of Justice and U.S. Attorneys that since the Department provided its guidance, several prosecutors have simply ignored it, and have stood silently by while district court judges imposed illegal consecutive sentences. *See* App. at 7a-8a, 46a-47a, 50a-51a.

The real lesson of the recent district court experience is not that the practice is abating, as the Government asserts, but rather that numerous district court judges are continuing to engage in this practice and will continue to do so until a higher court directs them to stop. And these judges, unlike the Government, obviously do not believe they are doing something with little practical impact. They persist in this practice despite the Government's objections because they believe the practice results in longer sentences.

4. While the Government's district court effort has been a dismal failure, its en banc effort has not even gotten off the ground. The Government insists that it has "taken active steps" to encourage en banc review of an "appropriate case" (Opp. 12-13), but that is true only if "active steps" means "no steps at all." Since the issuance of its January advice to U.S. Attorneys, the Government has had at least 20 opportunities to recommend either initial consideration

or rehearing en banc. The Government *has not done so once.*[1]

The Government chafes at petitioner's observation that it is by now clear that the Government will never recommend en banc review. Opp. 15. What is telling, however, is that the Government still refuses to describe a single situation in which it would recommend en banc review. There is a reason for that. The Government believes every real case falls into one of two categories: (1) cases where the state court might somehow countermand the federal court's consecutive sentence order, and (2) cases where BOP might give the same consecutive sentence anyway.

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[1] *See United States v. Barron*, No. 09-10166, 2009 WL 2514011 (5th Cir. Aug. 18, 2009); *United States v. Aguilar-Mendez*, No. 08-11204, 2009 WL 2512852 (5th Cir. Aug. 18, 2009); *United States v. Mancilla-Lopez*, No. 08-11092, 2009 WL 2512850 (5th Cir. Aug. 18, 2009); *United States v. Garcia-Quiroz*, No. 09-10051, 2009 WL 2514139 (5th Cir. Aug. 18, 2009); *United States v. Clinton*, No. 08-11007, 2009 WL 2512834 (5th Cir. Aug. 18, 2009); *United States v. Ortiz-Coca*, No. 08-11055, 2009 WL 2512847 (5th Cir. Aug. 18, 2009); *United States v. Solis*, No. 08-11216, 2009 WL 2512854 (5th Cir. Aug. 18, 2009); *United States v. Collier*, No. 08-11071, 2009 WL 2513465 (5th Cir. Aug. 18, 2009); *United States v. Diaz*, No. 08-10877, 2009 WL 1687805 (5th Cir. June 16, 2009); *United States v. Ordonez*, No. 08-10752, 2009 WL 1577689 (5th Cir. June 5, 2009); *United States v. Garcia-Espinoza*, 325 F. App'x 380 (5th Cir. 2009); *United States v. Lowe*, 312 F. App'x 836 (8th Cir. 2009) (plain error); Pet. App. 4a-5a; *United States v. Farris*, 312 F. App'x 598 (5th Cir. 2009); *United States v. Scott*, 311 F. App'x 703 (5th Cir. 2009); *United States v. Valenciano-Espinoza*, 311 F. App'x 696 (5th Cir. 2009); *United States v. Maden*, 311 F. App'x 695 (5th Cir. 2009); *United States v. Garcia*, 310 F. App'x 707 (5th Cir. 2009); *United States v. Jochum*, 310 F. App'x 697 (5th Cir. 2009); *United States v. Rollins*, 552 F.3d 739 (8th Cir. 2009).

And the Government regards both categories as inappropriate vehicles for review.

The chimerical nature of the Government's en banc effort is confirmed by the conspicuous absence of any statement in its guidance to U.S. Attorneys that an appropriate case should be identified for en banc review. And in the two court of appeals cases in which the Government promised that it would someday recommend en banc review in an appropriate case—just not that one, as always—the Government simultaneously stated that the issue has "little practical impact." Response of the United States to Pet. for Hearing En Banc, *United States v. Garcia-Espinoza*, No. 08-10775, at 18 (5th Cir. Mar. 4, 2009); *see* Response of the United States to Pet. for Reh'g En Banc, *United States v. Lowe*, No. 08-2304, at 8 (8th Cir. Apr. 1, 2009) (arguing consecutive-sentence order had "no practical effect" given BOP discretion). It is difficult to see how the Government can simultaneously contend in an en banc submission that an issue has little practical impact and yet satisfies the "exceptional importance" standard for en banc review. Fed. R. App. P. 35(a)(2).

As one would expect given the Government's practice, two circuits, the Fifth and the Eighth, have denied en banc review. *See* Pet. App. 7a-8a (*United States v. Garcia-Espinoza*, No. 08-10775); Order, *United States v. Lowe*, No. 08-2304 (Aug. 31, 2009). The Government asserts both cases involved vehicle problems. But at least in the case of the Fifth Circuit, that assertion is meritless. There, the Government claimed the issue was moot because the defendant had begun to serve his federal sentence. But as the two judges on the panel who addressed the Gov-

ernment's mootness claim made clear, the case was not moot, because if the court vacated the defendant's consecutive sentence, he could have sought credit for his state sentence from the BOP. *United States v. Garcia-Espinoza*, 325 F. App'x 380, 382 (5th Cir. 2009) (Owen, J., concurring). That case, in other words, was no more moot than this one, which is undeniably live. The only reasonable explanation for the denial of en banc is that the Fifth Circuit did not view the issue as sufficiently important to warrant such consideration. That is consistent with the Government's insistence in its brief in that case that the issue has "little practical impact."

It is time for this shell-and-pea game to end. Criminal defendants with vital liberty interests at stake should not have to file a continuous stream of futile en banc petitions in the courts of appeals, all of which will be opposed by the Government, before this Court finally terminates this unlawful practice.

5. Finally, the Court's prior denials of certiorari on this issue (Opp. 7-8) are irrelevant here. Many occurred before the Government confessed error on the issue. Others involved real vehicle issues, such as defendants who failed to object to the illegal sentence in the district court. None involved a defendant, like petitioner here, who could demonstrate in stark terms that he would directly and materially benefit from a favorable decision by this Court. The combination of a 4-4 circuit split, a concededly illegal practice, the harmful effects on the administration of justice of allowing such a practice to persist, and a person condemned to serve two additional years of imprisonment that could potentially be avoided makes review imperative now.

CONCLUSION

The petition for a writ of certiorari should be granted and the case either set for plenary briefing and argument or summarily reversed.

Respectfully submitted,

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