No. 08-1453

In the Supreme Court of the United States

TOMMY RAY ROLLINS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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In the decision below, the Eighth Circuit embraced a startling rule for cases in which a dually-prosecuted defendant is sentenced first in federal court: district courts not only have authority to impose anticipatory consecutive sentences, but they may do so without regard for rules that ordinarily would "safeguard[] * * * against having the length of [a] sentence multiplied by duplicative consideration of the same criminal conduct," *Witte* v. *United States*, 515 U.S. 389, 405 (1995) (describing Guideline § 5G1.3).

Accordingly, defendants tried in the Eighth and Fifth Circuits face consecutive sentences in cases where five other courts of appeals would reject such sentences as unlawful, Pet. 14-16, and where two other circuits would require a *concurrent* sentence, Pet. 19-21. Moreover, the court arrived at this rule by construing the language "subject to an undischarged term of imprisonment" in opposite ways in the statute and in the sentencing guideline that implements it. Pet. 31-32.

The government makes no effort to defend this strange and highly inequitable rule. In fact, its brief in opposition expounds on the rule's error. Opp. 10-11. Nor does the government dispute that the courts of appeals have long been widely and sharply divided on the questions presented. See Opp. 11-12.

Rather, the government confines its opposition to claims (1) that the issues dividing the lower courts are less practically important than they appear; (2) that the courts of appeals could resolve their conflicts without this Court's intervention; and (3) that this case is not an appropriate vehicle for settling these conflicts.

Each of these assertions fails on its own terms and all raise a more basic question: What interest is served by leaving undisturbed a regime where federal courts continue to impose—and affirm—non-uniform and, by the government's admission, illegal federal sentences?

I. This Court Is The Proper Authority To Ensure Uniform Adoption Of The Correct Interpretation Of Federal Law

A. The Limited Potential For Ad Hoc Mitigation By Other Actors Does Not Diminish The Importance of These Issues

The government's assertion that the questions are not "important" enough to warrant certiorari is exceedingly strange. Whatever the government (now) says about petitioner's case, see *infra*, it is plain that the Eighth and Fifth Circuits authorize consecutive sentences in cases where other courts of appeals will not and still other circuits would require concurrent sentences; that the Bureau of Prisons ("BOP") gives binding effect to these (admittedly unlawful) pronouncements, see Opp. 10; and that dually-prosecuted defendants in the Eighth Circuit are subject to essentially opposite sentencing rules depending on whether the federal court sentences first or second. These differing rules produce dramatic practical consequences for individual defendants. See *Oregon* v. *Ice*, 129 S.Ct. 711, 721 (2009) (Scalia, J., dissenting).

The government denies none of this, but reprises its familiar claim that anticipatory consecutive sentences are not "practical[ly]" important, Opp. 13, because (a) state courts "generally" have authority to and "often" do "adjust

sentences," Opp. 13-14, and (b) BOP likewise has "discretion" to take corrective action "under certain circumstances," Opp. 14.

But as this qualifying language signals, there are many cases where no such corrective is available. State courts have no power to shorten mandatory minimums, see, *e.g.*, *United States* v. *Ballard*, 6 F.3d 1502, 1504 n.1 (11th Cir. 1993), and, as the government acknowledges, BOP takes the position that when an anticipatory consecutive sentence is specified on the face of the criminal judgment it will not even consider a concurrent one. Opp. 10.

Moreover, the government's wholly unsubstantiated claim that ad hoc neutralization "often" occurs in state courts, Opp. 13, is undermined by its concession that there remains widespread uncertainty whether such countermeasures are even legally *permissible* or whether, as Eighth and Tenth Circuit opinions have indicated, evasive actions violate the principle that federal law binds state courts, Opp. 15-16. As for BOP, in the limited circumstances where it will even consider the issue, it does so under standards, focused on discerning the sentencing judge's intention, that would support implementing, rather than correcting, an illegal anticipatory sentence. Opp. 14-15.

Practical efficacy aside, the government's second-best solutions raise troubling questions of principle. Relying on state courts to correct federal courts' errors of federal law "blur[s] * * * the distinct responsibilities of the State and National Governments," *Alden* v. *Maine*, 527 U.S. 706, 751 (1999), in ways irreconcilable with premises of dual sovereignty. And it is no less worrying to rely upon Executive Branch agencies to review and correct legal errors made by federal judges.

B. This Court Is Best Suited To Secure Uniform And Correct Application Of Federal Law

Equally startling is the government's view that the lower federal courts are better suited than this Court to resolve these issues. As the brief in opposition acknowledges, those same courts have long been—and remain—sharply divided on these issues. In addition to the much-discussed division over the meaning of each sentence in section 3584(a), the courts of appeals have fractured as to (1) the rules that govern the availability of concurrent sentences, see Pet. 19-20; (2) the preemptive effect, if any, of an anticipatory federal sentence, see Pet. 29 n.8; and (3) whether different rules govern cases where the "anticipated but not-yet-imposed sentence is a federal sentence [rather than a state one]." *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008).

Accordingly, the government would require independent action by (at least) four courts of appeals, each of which would have to decide first to reconsider the issue en banc and then to overrule existing circuit precedent. The government's best evidence of progress in this direction—that it is "aware of no case since [mid-April 2009] * * * in which * * * [a] court of appeals[] has denied a petition for rehearing en banc on this issue," Opp. 18—is underwhelming. A grant, not an absence of denials, is necessary and no court has *granted* en banc review since then. Indeed, the only material intervening development is the Eighth Circuit's *dismissal* of en banc review in *United States* v. *Lowe*. See Opp. 16. Indeed, no court has switched positions in the 18 years since the circuits first split.

Nor should one assume that the government's change in position, in particular the January 2009

directive from the Executive Office for United States Attorneys announcing that the Department of Justice has "adopted [a new] interpretation," Opp. 17-18, will induce multiple courts of appeals to reverse course. As the government candidly acknowledges, Opp. 18, this new policy has *not* prevented some district courts from imposing sentences the government agrees are illegal—nor has it dissuaded the Fifth Circuit, historically the court with the largest number of such sentences, from affirming them on appeal. Opp. 18.

Indeed, the government surely oversells the catalytic potential of its reversal. While claiming to have "encouraged * * * re-examination in the courts of appeals," Opp. 16, the government has, since the issuance of the guidance, *opposed en banc* reconsideration of the issue in both the Fifth and Eighth Circuits, see Opp. 16-17; and the directive that anticipatory consecutive sentences no longer be defended, Opp. 18, does not apply "*where circuit precedent* * * * dictates otherwise" or the government can argue forfeiture below or some other vehicle defect, Opp. 18 (emphasis added).[1]

[1] Notably, while the case was pending, the government never notified the court of appeals that it had reversed its position.

II. This Case Is An Appropriate Vehicle To Resolve These Issues

The government proffers an assortment of reasons why this case is not an appropriate vehicle: that petitioner inadequately preserved the questions in the courts below, Opp. 9, 18; that petitioner's "substantial rights" are not at issue because his state sentence will be served first, Opp. 9, 19, 20; and that the first question presented is not "implicated" in petitioner's case, because BOP (now) says it will not treat the district court's decision as a binding directive that his sentences be served consecutively, Opp. 9-10. Indeed, the government has worked so creatively to develop these claims that its reinterpretation of the district court proceedings bears no resemblance to the account it presented below. The government is wrong at every turn and the larger point remains: none of these supposed "defects" affects this Court's ability—let alone power—to decide the legal questions presented.

A. The Questions Presented Are Properly Before The Court

There is no merit to the government's argument that review should be denied because of petitioner's "failure" to preserve the questions below. In fact, the government's attention-grabbing claim that the questions presented are being "raised for the first time" in this Court, Opp. 19, depends entirely on its view that petitioner's appeal required the Eighth Circuit to review only the district court's refusal to make his sentence concurrent and did not raise the "entirely distinct," Opp. 18, issue of its authority to impose a consecutive sentence.

Of course, the question of the existence of authority is always "implicated," Opp. 8, when its

purported exercise is challenged, see, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 84 (1995), and distinctions between the two sorts of challenges are notoriously gossamer, see *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment) ("[T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. * * * Virtually any * * * action can be characterized as either the one or the other."). And the government's brief below took an entirely different, less narrow, view of petitioner's claim, describing the issue presented as "[w]hether the district court abused its discretion in ordering Rollins' federal sentence to run consecutively to a state court sentence that had not yet been imposed." Gov't C.A. Br. 2. Far from emphasizing a "distinct[ion]" between the existence and exercise of authority, the government urged that "[t]he authority to impose * * * a federal sentence to be served consecutively to a yet-to-be-imposed state sentence falls within the broad discretion granted to the court." *Id.* at 25-26.

But none of this even matters. It is settled law that issues actually passed upon by the lower court may properly be presented to this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41-46 (1992); Eugene Gressman et al., *Supreme Court Practice* § 6.26(b), at 464 (9th ed. 2007). The Eighth Circuit's decision expressly decided both questions presented, see Pet. App. 5a ("[T]he district court had discretion to impose a federal sentence to be served consecutively to a yet-to-be-imposed state sentence."); Pet. App. 4a–5a (holding that Guideline rules governing concurrent sentencing did not apply).

If any argument is made for the first time before this Court it is the government's contention that the more demanding plain error standard should govern. The government's appellate brief argued that the authority issue was presented and it expressly stated that the ordinary "reasonableness" standard of review, not Rule 52's plain-error standard, should govern, Gov't C.A. Br. 21, a suggestion the appeals court accepted. Under these circumstances, the attempt to raise a "plain error" roadblock cannot succeed. As the government has recently explained, that standard is inoperative in cases where "the [court of appeals] decided [an issue] [under its ordinary] standard * * * and * * * the government waived any forfeiture argument by failing to assert it on appeal." Opp., at 13-14 n.2, *McSwain* v. *United States*, No. 08-9560 (filed Aug. 5, 2009).

The government's forfeiture aside, petitioner takes exception to the revisionist account of the district court proceedings, particularly the suggestion that he "affirmatively urged the district court to use the authority that he now claims it lacks." Opp. 9. Petitioner actively undertook to dissuade the district court from imposing an anticipatory sentence, see Tr. 9-14, in the only way he could under circuit precedent. Cf. *Johnson* v. *United States*, 520 U.S. 461, 467-468 (1997) (rejecting reading of plain error rule that "would result in counsel[] inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent"). When the court decided that it would not await the state sentence and would decide the consecutiveness/concurrency question, petitioner understandably (and correctly) urged that a concurrent sentence was appropriate. The government, in contrast "affirmatively" asked the district court to

impose, and the court of appeals to affirm, an anticipatory consecutive sentence.

The government offers no reason why this Court should now consider questionable waiver arguments it failed to raise below. Nor does it suggest that this Court's consideration would be any different (or this case would be a better "vehicle") had the purely legal issue been briefed more extensively below.

B. The Questions Presented Directly Affect Petitioner

The government's other effort to leverage its reinterpretation of the district court proceedings into a vehicle defect fares no better. Relying on the fact that the district court judgment did not specifically mention the words "consecutive sentence," the government now represents that (1) contrary to its claims below, it does not regard the district court's decision as compelling a consecutive sentence, and (2) BOP will not treat the district court's statements as the equivalent of a binding order. The government then argues that the questions presented are no longer implicated here.

Not so. Although petitioner accepts the government's new position, there is less to the government's carefully limited concession than meets the eye. Thus, while the Solicitor General relays BOP's position that it would not treat those district court statements that led the government to characterize petitioner's sentence as consecutive as a binding "order" and states that petitioner is therefore "not foreclosed from seeking a concurrent designation," Opp. 10, she nowhere represents that BOP will not treat those same statements as indicia of intent to which "considerable (though not dispositive) weight" is given, Opp. 15.

C. The Length Of Petitioner's State Court Sentence Should Make No Difference To This Court's Review

The government's suggestion, Opp. 19-20, that the Court should decide these issues only when the defendant's federal sentence is more imminent than petitioner's typifies the shortcomings of its indiscriminate "vehicle" objections. The government has elsewhere urged denial on the opposite ground that the defendant's sentence was too short. See Opp. at 10-11, *Martinez-Guerrero* v. *United States*, No. 07-1362 (Aug. 27, 2008). To petitioner's knowledge, it has never identified a case where the length was "just right." Except in cases raising real Article III mootness concerns, the length of the state sentence should have no bearing on the Court's consideration of the legal issues. That said, the government cites no support for the assertion that an illegal sentence that adds ten years to a defendant's imprisonment does not affect his "substantial rights." Indeed, the claim that Rollins's federal sentence is of only academic significance is contradicted by the government's determined efforts below. Fully aware that he had been convicted in state court and would serve that sentence first, the government labored to persuade the district court to impose a sentence that was lengthy, anticipatory, and consecutive.

III. The Second Question Presented Warrants Review

The government says little about the second question the petition raises—whether the availability of a concurrent sentence should be determined by the timing of the state court's announcement—save to brush it aside as a "mere[]" guidelines question, Opp. 21 n.8, and quibble whether the published opinions of the Tenth and Eleventh Circuits make their disagreement with the Eighth Circuit as clear as their unpublished ones do. The government does not deny, however, that the question is squarely raised here; nor does it defend either the legal reasoning of the decision below or the sentencing regime it sanctions. As this Court has recognized, the principle the Eighth Circuit jettisoned, that "the length of [a] sentence [not be] multiplied by duplicative consideration of the same criminal conduct," *Witte* v. *United States*, 515 U.S. 389, 405 (1995), though embodied in a guideline, implements central statutory and constitutional objectives. The issue warrants review precisely because four circuits continue to impose anticipatory sentences and the two that do so most frequently have, in published opinions, embraced this doubly wrong, worst-of-both-worlds rule.

The government's offhand assertion, Opp. 22, that "there is every reason to believe that the [district] court would have imposed a consecutive sentence" is simply incorrect. As the petition made clear, the district court's sentencing decision rested squarely on its erroneous "supposition" that the state court would impose no additional (consecutive) punishment for the state convictions that overlapped with petitioner's federal weapons offense. That the district court was prepared to depart upward in order

that petitioner would receive the statutory maximum, Opp. 21, is in no way equivalent to a determination that the conduct warranted ten years' imprisonment *in addition to* the 15 years the state court unexpectedly imposed. Such a sentence would not only be unsupported by the Guidelines, but also contrary to Eighth Circuit law and Congress's directive.

IV. This Court Should Exercise Its Jurisdiction To Promote Uniform and Correct Application Of Federal Law

It is the office of this Court to say what federal law requires, especially in cases where courts of appeals have reached conflicting results and district courts are imposing concededly illegal sentences. Petitioner therefore respectfully requests that the Court grant this petition and either set the case for plenary consideration or reverse the judgment below summarily. Alternatively, the Court should vacate and remand to the Eighth Circuit in light of the government's change of position. See *Stutson* v. *United States*, 516 U.S. 193, 196-197 (1996); *Lawrence* v. *Chater*, 516 U.S. 163, 171-173 (1996). Finally, petitioner recognizes that other petitions pending before the Court raise similar issues. See Opp. 13 n.6. In the event the Court grants review in one of those, he requests that this case be consolidated with or held pending disposition of the related case.

CONCLUSION

The petition for a writ of certiorari or alternative relief should be granted.

Respectfully submitted.

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