No. 07-

IN THE

Supreme Court of the United States

SERGIO MARTINEZ-GUERRERO,
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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QUESTION PRESENTED

The Fifth Circuit in this case affirmed a criminal sentence requiring that petitioner's federal sentence run consecutively to a state sentence that has yet to be imposed. That ruling perpetuates a direct and acknowledged circuit conflict concerning a federal district court's authority under 18 U.S.C. § 3584(a) – the statute governing consecutive and concurrent sentences – to order a federal sentence to be served consecutively to a future state sentence. Four circuits have held that district courts have authority to impose such sentences, while four circuits have held that district courts lack such authority.

The question presented is:

Whether a district court has authority to order a defendant's federal sentence to be served consecutively to a state sentence that has not yet been imposed.

PARTIES TO THE PROCEEDING

Petitioner is Sergio Martinez-Guerrero, defendant-appellant below.

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sergio Martinez-Guerrero respectfully petitions for 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 unreported but is available at 2008 WL 245010 and reprinted at App. 1a-2a. The district court issued no opinion; its judgment is reprinted at App. 13a-15a.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2008. App. 2a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced at App. 20a-23a.

INTRODUCTION

This case presents a question that has deeply divided the federal circuits: whether a district court has authority to order a federal sentence to be served consecutively to a state sentence that has not yet been imposed. Of the eight circuits that have addressed the question, four have held that a district court lacks authority to impose such a sentence, while four have held that a district court has such authority. The Government has acknowledged the circuit conflict.

Despite the controversy in the circuits on the question, its proper resolution is not difficult. The statute governing a court's authority to impose a consecutive sentence, 18 U.S.C. § 3584(a), simply does not give a federal district court the authority to order a federal sentence to be served consecutively to a state sentence that has not yet been imposed. Indeed, in recent filings in this Court, the Government has not even attempted to defend the practice on its merits.

In this case, the district court, over petitioner's objection, ordered petitioner's federal sentence to be served consecutively to a state sentence yet to be imposed. In reliance on longstanding circuit precedent authorizing such sentences, the court of appeals affirmed. This Court should grant review to resolve the circuit conflict and end this impermissible federal sentencing practice.

STATEMENT OF THE CASE

1. Petitioner is a citizen of Mexico. On August 31, 2006, he was deported from the United States to Mexico. App. 11a. On January 26, 2007, he was found by an immigration agent in Tahoka, Texas. *Id.*

On February 21, 2007, the government filed a single-count indictment against petitioner, alleging that he had illegally re-entered the United States after deportation, in violation of 8 U.S.C. § 1326. App. 7a-8a. Petitioner pleaded guilty to the indictment pursuant to a written plea agreement. *See* App. 4a.

2. On July 20, 2007, the United States District Court for the Northern District of Texas sentenced

petitioner to 42 months of imprisonment and 3 years of supervised release. App. 4a-5a. The district court specifically ordered that the federal term of imprisonment "run consecutive with any sentence imposed in Case Number 01CR055949 pending in the Durham County District Court of Durham, North Carolina." *Id.* The case pending in North Carolina involves a charge of misdemeanor assault on a female. PSR ¶ 28. Petitioner "object[ed] to the imposition of time consecutive to an, as yet, unimposed sentence." App. 5a. The district court overruled the objection.

Later that day, petitioner filed a motion to correct his sentence on the ground that, because he had no prior criminal convictions, the statutory maximum sentence was 24 months. The district court agreed and changed the sentence to 24 months, again "to run consecutive with any sentence imposed in Case No. 01CR0055949, Durham County District Court, Durham, North Carolina." App. 15a.

3. Petitioner appealed and argued that "the district court reversibly erred" when it ordered that his federal sentence run consecutively to a yet-to-be-imposed state sentence. Pet. C.A. Br. 6-7. Petitioner recognized that the Fifth Circuit's decision in *United States v. Brown*, 920 F.2d 1212 (5th Cir. 1991), foreclosed his claim. In *Brown*, the Fifth Circuit held that a district court has authority to order that a federal sentence be served consecutively to a future state sentence. *Id.* at 1217.

The government filed a motion to dismiss petitioner's appeal or summarily affirm the district court's judgment on the ground that petitioner's "argument is foreclosed . . . pursuant to *United States v.*

Brown, 920 F.2d 1212 (5th Cir. 1991)." Gov't C.A. Motion 1-2. The court of appeals granted the motion for summary affirmance. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit in this case held that a district court has authority to order that a federal sentence run consecutively to a yet-to-be-imposed state sentence. That holding perpetuates an entrenched circuit conflict. Four circuits, including the Fifth Circuit, have held that a district court has discretion to order a sentence to be served consecutively to a future state sentence. Four circuits have held that a district court has no such authority. Review is warranted to resolve that conflict.

Review is also warranted because the decision below approves a wholly unjustified sentencing practice. A district court's authority to impose a consecutive sentence is governed by 18 U.S.C. § 3584(a), and the plain language of that provision does not authorize the court to order a federal sentence to be served consecutively to a future state sentence. All other relevant sources of statutory construction confirm that a district court lacks such authority.

The question presented is also one of recurring importance to the administration of justice in the federal system. It potentially arises in every case in which there is a federal and state prosecution for the same underlying criminal conduct. And it has enormous practical significance. The length of a criminal defendant's combined state and federal incarceration can vary tremendously depending on whether the defendant receives a consecutive or a concurrent state sentence. The fact that criminal

defendants in four circuits can obtain the benefit of a concurrent state sentence, while criminal defendants in four other circuits cannot, is an intolerable disparity in federal criminal punishment standards.

In filings in this Court, the Government has acknowledged the conflict in the circuits on the question presented in this case. And in recent filings, it has declined to defend the practice of ordering a sentence to be served consecutively to a future state sentence. The time has come to resolve the conflict in the circuits and to end this unauthorized and unlawful federal sentencing practice.

I. The Circuits Are Deeply Divided On The Question Presented

The courts of appeals are divided on the question 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. The Second, Sixth, Seventh, and Ninth Circuits have held that a district court lacks authority to impose such a sentence. *See United States v. Donoso*, ___ F.3d ___, 2008 WL 878562, at *1, *3 (2d Cir. 2008) ("[U]nder 18 U.S.C. § 3584(a) [a] district court [i]s not authorized at the . . . sentencing hearing to direct that [defendant's] sentence run consecutively to a not-yet-imposed state sentence."); *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998) ("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."); *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. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991) (A "federal court may not direct a federal sentence to be served consecutive to a state sentence not yet imposed."); *see also United States v. Smith*, 472 F.3d 222, 225 (4th Cir. 2006) ("The plain language of [§ 3584(a)] does not grant a district court authority to order that its sentence run consecutively to a future sentence.").

In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has authority to order a federal sentence to be served consecutively to a future state sentence. *See United States v. Brown*, 920 F.2d 1212, 1216 (5th Cir. 1991) (per curiam) ("[A] federal district court may prospectively forbid its sentence from being served concurrently with any sentence that may subsequently be handed down by a state court."); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) ("Neither the statute nor the Guidelines directly address whether the district court may impose a federal sentence to be served consecutively to a yet-to-be-imposed state sentence," and therefore, the authority to do so is within the district court's "broad discretion."); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir. 1995) ("The plain meaning of [Section 3584(a)] is that multiple terms of imprisonment imposed at different times will normally run consecutively[,]" and "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. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993) ("[A] dis-

trict court [has] the authority to impose a federal sentence consecutive to an unrelated, unimposed state sentence on pending charges."); *United States v. Andrews*, 330 F.3d 1305, 1307 (11th Cir. 2003) (per curiam) ("[W]e cannot ignore *Ballard*'s clear holding that a court does have the authority to impose a consecutive sentence to an unimposed, future sentence.").

This case directly implicates that circuit conflict. Over petitioner's objection, the district court ordered petitioner's sentence to be served consecutively to a future state sentence. Relying on its decision in *Brown*, the Fifth Circuit affirmed that sentence as within the district court's discretion. Had petitioner appealed in the Eighth, Tenth, or Eleventh Circuits, his sentence would also have been affirmed. On the other hand, if petitioner had appealed in the Second, Sixth, Seventh, or the Ninth Circuits, his sentence would have been reversed. That categorical geographic disparity in federal sentencing is irrational, unfair, and unacceptable, and it should not be allowed to persist.

II. The Court of Appeals' Decision Is Incorrect

The Fifth Circuit erred as a matter of law in approving the sentence in this case. A federal district court's authority to impose a consecutive sentence is governed by 18 U.S.C. § 3584(a), which does not authorize a court to order a federal sentence to be served consecutively to a future state sentence.

1. Section 3584(a) authorizes a district court 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). Neither circumstance is present when a court imposes a federal sentence on a defendant who has not yet received a state sentence. The federal and state sentences are not imposed *"at the same time,"* and the defendant is not *"already subject* to an undischarged term of [state] imprisonment." The plain language of § 3584(a) therefore does not authorize a district court to order a sentence to be served consecutively to a future state sentence.

In *Brown*, the Fifth Circuit nevertheless held that § 3584(a) allows such sentences. *See* 920 F.2d at 1216-17. But the court made no effort to reconcile that holding with the plain language of the statute. *Id.* Indeed, a subsequent panel of the Fifth Circuit has criticized *Brown* on precisely this ground. *See United States v. Hernandez*, 234 F.3d 252, 256 (5th Cir. 2000) (per curiam). But the Fifth Circuit has repeatedly reaffirmed *Brown*, with no further explanation of that decision. *See infra* note 1.

2. Other courts, however, have sought to justify the kind of consecutive sentence imposed in this case primarily on the basis of the second and third sentences of § 3584(a). The second sentence provides that "[m]ultiple 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." 18 U.S.C. § 3584(a). The third sentence provides that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." *Id.*

Those two sentences neither add nor detract from the court's authority to impose a consecutive or concurrent sentence under the first sentence of § 3584(a). They merely establish default rules that apply in the two circumstances in which a district court has such authority, but fails to make its sentencing intentions clear. Thus, tracking the first circumstance – when sentences are imposed "at the same time" – the second sentence specifies that "multiple terms of imprisonment imposed at the same time run concurrently" unless the court directs otherwise. 18 U.S.C. § 3584(a). And tracking the second circumstance – when a defendant is "already subject" to another sentence – the final sentence of § 3584(a) specifies that "[m]ultiple terms of imprisonment imposed at different times run consecutively" unless the court directs otherwise. *Id.*

A number of courts have nonetheless read the final two sentences as if they were freestanding rules, unconnected to the first sentence. The Tenth Circuit, for example, has read the final sentence to apply to the circumstance in which a state sentence has not yet been imposed and to authorize a district court to order a consecutive sentence in that circumstance. *Williams*, 46 F.3d at 59. And the Seventh Circuit has interpreted the final sentence to make a future state sentence "automatically consecutive." *Romandine*, 206 F.3d at 738. Both readings violate the cardinal principle that the words of a statute cannot be read "in isolation," but must be read in the "context" of the statute as a whole. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

When read in context, the meaning of the final two sentences is clear. As the Sixth Circuit has ex-

plained, the language in those two sentences "neither abrogates the requirement that to run consecutively there be an undischarged sentence or sentences imposed at the same time nor expands a district court's authority; it establishes a default rule that applies if a district court fails to specify whether a sentence should run concurrently or consecutively *and* either of the initial two conditions are satisfied." *Quintero*, 157 F.3d at 1040 (emphasis added). The Second Circuit and the Fourth Circuit have similarly pointed out that the "presumptions established by the last two sentences of § 3584(a) must be read in light of [the] limiting language at the beginning of the section," *McCarthy v. Doe*, 146 F.3d 118, 121-22 (2d Cir. 1998), and that the "presumption" of a consecutive sentence established by the final sentence therefore "does not take effect unless a court imposes a sentence *after* a defendant is already subject to an undischarged term of imprisonment," *Smith*, 472 F.3d at 226 (emphasis added).

3. The practice of ordering a sentence to be served consecutively with a future state sentence also cannot be reconciled with 18 U.S.C. § 3584(b). That provision requires a district court, when "determining whether the terms imposed are to be ordered to run concurrently or consecutively," to consider "the factors set forth in [18 U.S.C. §] 3553(a)." Section 3553(a), in turn, instructs the court to consider, *inter alia*, (1) the need for the sentence "to provide just punishment for the offense" and "to afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(A), (B); and (2) "the need to avoid unwarranted sentence disparities among defendants

with similar records who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6).

A district court cannot intelligently perform its duty to consider those factors in determining whether to impose a consecutive or concurrent sentence when it does not know what the state sentence will be. As the Fourth Circuit has explained, "[o]nly a court that sentences a defendant already subject to an undischarged term of imprisonment could properly consider whether a consecutive or concurrent sentence best serves the goals of § 3553(a), as only that court knows the circumstances attending the later sentence." *Smith*, 472 F.3d at 227.

This Court's decision in *Rita v. United States*, 127 S. Ct. 2456 (2007), confirms that a court cannot properly exercise its authority to determine whether to impose a consecutive or concurrent sentence in light of the factors set forth in § 3553(a) without knowing what the length of the state sentence will be. In *Rita*, the Court held that a district court's sentence must be the product of a "reasoned" decisionmaking process. *See id.* at 2468. A court cannot engage in "reasoned" decisionmaking when it does not have any idea of the length of the sentence that a state court will impose. As Judge Newman has explained, "[t]he length of a primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it consecutively." *Salley v. United States*, 786 F.2d 546, 548 (2d Cir. 1986) (Newman, J., concurring in result).

The Fifth Circuit's decision in *Brown* illustrates the dimensions of this problem. In that case, the

Fifth Circuit affirmed a district court's order that the federal sentence be served consecutively to a future state sentence even though the range of the state sentence for the crime could have been from ten years to 99 years without benefit of parole, probation, or suspension of sentence. *See Brown*, 920 F.2d at 1213 (sentence ordered consecutive to any future Louisiana state sentence for same bank robbery); La. Rev. Stat. § 14:64(B) (establishing the sentencing range for armed robbery). Without knowing where in that range the state sentence would fall, the district court could not make a reasoned decision on whether to impose a consecutive or concurrent sentence.

4. There is another reason § 3584(a) cannot be read to authorize a court to order a sentence to be served consecutively with a future state sentence. When a federal court imposes such a sentence, it intrudes on a state court's legitimate interest in deciding for itself whether to make a state sentence concurrent or consecutive to a preexisting sentence. Most states give the trial court authority to order a state sentence to be served concurrently to a preexisting federal sentence. *See Note, Sovereignty In Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 Val. U. L. Rev. 1035, 1050 & n.67 (2003); *see also* N.C. Gen. Stat. § 15A-1354(a) ("[W]hen a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court."). When a federal court orders a

federal sentence to be served consecutively to a future state sentence, it necessarily "infringes on the right of the state to exercise its own sentencing prerogatives." *Clayton*, 927 F.2d at 493. Such a federal sentence, "if given effect, would preempt the right of the state to apply its own laws on sentencing for violation of state criminal laws." *Id.* (internal quotation marks omitted).

Congress would presumably have authority under the Supremacy Clause to preempt the state's traditional exercise of sentencing authority. But Congress is not presumed to encroach on significant state interests unless Congress has "ma[d]e its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). While "Congress may legislate in areas traditionally regulated by the States," this is "an extraordinary power in a federalist system" – a power courts "must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Nothing in the language of § 3584(a) reflects any intent by Congress to intrude on the state court's traditional authority to make its sentence concurrent to a preexisting sentence. To the contrary, the language of § 3584(a) expressly confines a federal court's authority to the situation in which a state court has already imposed a sentence. The rule reflected in § 3584(a) thus harmonizes federal and state interests by recognizing that the second sentencing court is in the best position to determine whether a state and federal sentence should run consecutively or concurrently.

5. Finally, the legislative history of § 3584 confirms Congress's understanding that a federal court would not have authority to order a state sentence to be served consecutively to a future state sentence. In discussing when a district court would have authority to order a sentence to be served consecutively with a state sentence, the Senate Report refers to "a person sentenced for a Federal offense who is already serving a term of imprisonment for a State offense." S. Rep. No. 98-225, at 126 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3309. The Report does not suggest that a district court would have authority to order a sentence to be served consecutively to a future state sentence. In fact, the Report expresses a clear preference for providing the *last* sentencing court with the discretion necessary to tailor a sentence to the defendant's criminal history. *See id.* at 132-33 (allowing court sentencing defendant on new charges to adjust an earlier term of probation because "the new court will be in a better position to know whether a change in the term of probation is justified" and can "adjust the term of probation or supervised release as needed to serve the purpose of sentencing on the new charge").

The Senate Report thus underscores what is otherwise clear from the plain language of § 3584(a), the requirement in §§ 3584(b) & 3553(a) that the district court make a reasoned determination on whether to make a sentence concurrent or consecutive, and the strong presumption that Congress does not intend to intrude on traditional state interests: a district court is without authority to order a federal sentence to be served consecutively to a future state sentence.

III. The Question Presented Is One Of Recurring Importance To The Administration Of Justice

1. The question whether a district court may order a federal sentence to be served consecutively to a yet-to-be-imposed state sentence is a recurring issue of substantial national significance. The question potentially arises in every case in which a defendant is subject to both federal and state charges for the same underlying conduct. Given the many areas of substantial overlap between federal and state criminal law, that situation is common today. *See Lopez v. Gonzales*, 127 S. Ct. 625, 630 n.6 (2006) (discussing federal drug felonies and "their state counterparts"); Fed. R. Crim. P. 6(e)(3)(A)(ii), advisory committee note (1985 amendments) (noting overlapping jurisdiction "in organized crime and racketeering investigations, in public corruption and major fraud cases, and in various other situations").

The very fact that eight circuits have now addressed the question presented in this case attests to its recurring importance. Criminal defendants have repeatedly challenged the legitimacy of the practice in appeals to the Fifth Circuit.[1] The issue also has

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[1] In addition to this case, see *United States v. Lowery*, No. 07-11117, 2008 WL 899234, at * 1 (5th Cir. April 4, 2008); *United States v. McEver*, No. 07-10773, 2008 WL 244961, at *1 (5th Cir. Jan. 30, 2008); *United States v. Moreno-Calzada*, No. 07-10526, 2008 WL 205076, at *1 (5th Cir. Jan. 24, 2008); *United States v. Johnson*, 257 F. App'x 798, 799 (5th Cir. 2007) (no plain error); *United States v. Williams*, 256 F. App'x 729 (5th Cir. 2007); *United States v. Noyola*, 254 F. App'x 317 (5th Cir. 2007) (issue raised but mooted when state charges dismissed); *United States v. Gamez*, 253 F. App'x 437 (5th Cir. 2007); *United States v. Goodgion*, 253 F. App'x 403 (5th Cir.

repeatedly arisen in other circuits. Courts of appeals regularly confront the issue not only in direct appeals[2] but also in petitions for federal post-conviction or habeas relief.[3]

2007); *United States v. Hughes*, 237 F. App'x 980 (5th Cir. 2007) (no plain error); *United States v. Rothrock*, 234 F. App'x. 230 (5th Cir. 2007); *United States v. Rivero-Formoso*, 239 F. App'x 60 (5th Cir. 2007) (no plain error); *United States v. Blakey*, 237 F. App'x 927 (5th Cir. 2007); *United States v. King*, 225 F. App'x 250, 250-251 (5th Cir. 2007); *United States v. Guerrero*, 225 F. App'x 239 (5th Cir. 2007) (no plain error); *United States v. Lopez*, 222 F. App'x 404, 405 (5th Cir. 2007) (per curiam); *United States v. Rodriguez-Gutierrez*, 119 F. App'x 681 (5th Cir. 2005) (no plain error), *cert. granted and remanded on other grounds*, 544 U.S. 1047, *sentence aff'd*, 428 F.3d 201 (5th Cir. 2005), *cert. denied*, 546 U.S. 1193 (2006); *United States v. Lackey*, 115 F. App'x 260 (5th Cir. 2004); *United States v. Martinez*, 110 F. App'x 462 (5th Cir. 2004); *United States v. Lujan*, 996 F.2d 307 (5th Cir. 1993); *see also United States v. Quintana-Gomez*, No. 07-10139, 2008 WL 763368 (5th Cir. March 25, 2008) (district court lacks authority to order sentence consecutive to future federal sentence).

[2] *See, e.g., United States v. Crawford*, 217 F. App'x 774 (10th Cir. 2007); *United States v. Shehadeh*, 193 F. App'x 626 (7th Cir. 2006); *United States v. McDaniel*, 338 F.3d 1287, 1288 (11th Cir. 2003); *United States v. Sumlin*, 317 F.3d 780, 782 (8th Cir. 2003); *United States v. Randolph*, 80 F. App'x 190 (3d Cir. 2003) (district court did not commit plain error in ordering federal sentence consecutive to any subsequent state sentence); *United States v. Samour*, 199 F.3d 821 (6th Cir. 1999) (holding argument waived); *United States v. Abro*, 116 F.3d 1480, 1997 WL 345736, at *1 (6th Cir. 1997) ("A district court does not have the authority to impose a federal sentence to run concurrently to a state sentence that had not yet been imposed.").

[3] *See, e.g., Brown v. Ashcroft*, 41 F. App'x 873 (7th Cir. 2002); *Jones v. Winn*, 13 F. App'x 419 (7th Cir. 2001); *Romandine*, 206 F.3d at 737; *see also Cozine v. Crabtree*, 15 F. Supp. 2d 997 (D. Or. 1998).

The proper interpretation of § 3584 has also spawned satellite litigation on related issues. For example, one related question is whether, in order to enter an intelligent guilty plea, a defendant must be informed of the court's authority to enter a consecutive sentence. *See United States v. Neely*, 38 F.3d 458, 461 (9th Cir. 1994) ("[b]ecause the imposition of a consecutive sentence is a direct consequence of a federal guilty plea where the federal court lacks discretion to order a concurrent sentence, a federal defendant must be advised of the court's lack of discretion before he can enter a voluntary plea of guilty"). *But see Hernandez*, 234 F.3d at 256 (holding information not required regardless of proper interpretation of § 3584(a)). Another related question is whether a defense counsel who fails to raise the issue has engaged in ineffective assistance. *United States v. Smith*, 101 F. Supp. 2d 332, 346 (W.D. Pa. 2000) (rejecting defendant's argument that counsel was ineffective because he failed to request that federal sentence be made concurrent to future state sentence, on the ground that court had no authority to make such an order).

Litigation over the proper interpretation of § 3584(a) and the related litigation that controversy has spawned places a significant and needless drain on the federal judicial system. And there is no end in sight. On the contrary, the number of cases presenting that issue will inevitably increase until this Court settles the matter.

2. There is also an urgent need for the Court to resolve this issue because of its importance to the fair administration of justice in the federal system. The length of time that a criminal defendant is in-

carcerated can differ dramatically depending on whether his federal and state sentences or concurrent or consecutive. Whatever the difference in sentences, however, one thing should be clear: a defendant's opportunity to obtain a concurrent state sentence should not vary depending on the circuit in which he is sentenced. That is true even when the difference between a concurrent and a consecutive sentence can be measured in months rather than years. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.").

IV. The Government's Categorical Reasons For Opposing Review Of The Conflict Are Unpersuasive

Given the breadth and the depth of the circuit conflict on this issue, it is no surprise that certiorari has been sought in prior cases. The Government successfully opposed review in those cases, but it has primarily emphasized case-specific objections with no application here. The Government has also offered two categorical reasons for denying certiorari, but especially given the importance and recurring nature of the issue, those reasons do not support continued avoidance of this question.

1. The Government has consistently acknowledged that there is a square conflict in the circuits on the question whether a federal district court has authority to order that a federal sentence be served consecutively to a yet-to-be-imposed state sentence. *See* Br. in Opp. in *Lopez v. United States*, No. 07-5060, at 9 (identifying 4-4 circuit split); *see also* Br.

in Opp. in *King v. United States*, No. 07-5307, at 6 (identifying 4-3 circuit split on the issue); Br. in Opp. in *Cox v. United States*, No. 05-454, at 5 (identifying 4-3 circuit split). Moreover, in a departure from the Government's usual practice of defending the merits of decisions from which review has been sought, the Government in its recent filings has not offered any substantive defense of the practice of sentencing a defendant to a sentence that is consecutive to a future state sentence. Br. in Opp. in *King*, at 6-11; Br. in Opp. in *Lopez*, at 10-14; Br. in Opp. in *Cox*, at 6-9.

2. The Government has nonetheless repeatedly opposed certiorari when review has been sought on this issue. While the Government has often emphasized case-specific grounds for its opposition, it has also offered two arguments that, if accepted, would preclude review in every case. Neither argument is a valid reason for allowing an entrenched circuit conflict – and an illegitimate federal sentencing practice – to persist forever.

a. The Government's principal argument is that these unlawful sentencing orders may freely continue because they are not actually binding on state courts, contrary to the understanding of the federal courts who issue them. Br. in Opp. in *King*, at 7. In particular, the Government has asserted that a state court can negate the federal court's order and give a sentence that is effectively concurrent in two ways. On the one hand, if the defendant is in federal custody at the time of state sentencing, the state court can defy the federal court's order by designating the federal institution for service of the state sentence. *Id.* at 9. On the other hand, if the defendant is in state custody at the time of state sentencing, the

state court can circumvent the federal court's order by deducting the length of the federal sentence from the sentence that the state court would otherwise impose. *Id.* at 7-9. These proposals for circumventing the unlawful federal sentencing practice at issue here are unsound.

First, a federal court "order" that makes a federal sentence consecutive to a future state sentence places an illegitimate obstacle in the path of a defendant seeking a concurrent sentence from a state court. *See Clayton*, 927 F.2d at 493. Even assuming that a federal court order is not binding on a state court under the Supremacy Clause, that does not mean that a state court will view it as nonbinding. Moreover, even if the state court views it as nonbinding, that does not mean that the state court will not defer to a federal court order based on principles of comity. Indeed, the very case on which the Government relies (in asserting that the federal court's order is not binding) establishes that principles of comity do govern the relationship between the state and federal systems in sentencing matters. *See Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922). Accordingly, it cannot seriously be disputed that a defendant seeking a concurrent state sentence from a state court will have a better chance of obtaining one if the state court is not presented with a federal court "order" requiring the federal sentence to be served consecutively. The Government suggests no basis for concluding otherwise.

Second, while this Court has called for a "spirit of reciprocal comity and mutual assistance" between state and federal courts in the area of sentencing, *Ponzi*, 258 U.S. at 259, the Government's approach

promotes a spirit of unseemly gamesmanship. As the Government sees things, a federal court may issue an order that appears to be binding but actually is not, in the hopes of confusing or seducing the state court or otherwise affecting the state court's sentence. In response, the state court – coincidentally cognizant of the legal reality the federal court ignored or misrepresented – then uses means at its disposal to defy or circumvent the federal court's order. That is not how the relationship between federal and state courts should function. A state court should not be placed in the position of having to defy or circumvent an illegitimate federal court order in order to achieve its legitimate sentencing objectives.

Third, the Government's approach imperils a state's ability to achieve its sentencing objectives, particularly when a defendant is in state custody. In that situation, the Government recommends that a state court should cut the sentence it would otherwise impose by the length of the federal sentence. That approach may not even be feasible when there is a state mandatory minimum or when the state wishes to adhere to a specified Guidelines range. *See, e.g.*, *Ballard*, 6 F.3d at 1504 & n.1 (state mandatory minimum sentence of ten years).

Moreover, the Government's approach falsely assumes that a sentence that is reduced by the length of the federal sentence will accomplish the state's sentencing goals. For example, when a federal court issues a 10-year sentence to a bank robber, and the state court believes that the defendant should receive a concurrent state sentence of 10 years and six months for the crime of armed robbery, the Government recommends that the state court circumvent

the federal court order by giving the bank robber a six-month sentence. That is no solution at all for a state court that believes that a six-month sentence under state law amounts to a slap on the wrist for a serious crime. Beyond that, the state court cannot even be sure that the defendant will serve a 10-year federal sentence. Should a federal court decide to cut the federal sentence in half in order to reward substantial cooperation, there would be nothing that the state could do. Should the defendant successfully appeal his federal conviction, and should the Government decide not to prosecute him again, there would be nothing the state could do. A state court should not have to depend on a federal sentence to vindicate its own interests.

Finally, while the Government seeks to make a virtue of the nonbinding nature of the federal court's consecutive sentence order, that actually makes matters worse, not better. There is a strong federal interest in having the orders of federal courts obeyed. When a federal court order can be freely defied or circumvented, it denigrates federal judicial power. Indeed, an Article III judge has no business issuing an order that is not binding. An order's legally binding nature is what distinguishes the exercise of legitimate judicial power under Article III from impermissible advisory opinions. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-219 (1995); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-114 (1948). Thus, if federal courts cannot issue binding orders making federal sentences consecutive to future state sentences, the proper solution is not to hope that state courts will

defy or circumvent such orders. The solution is for federal courts to stop issuing such orders.

b. The Government has also opposed review on the ground that a defendant who prevails in this Court might still be subject to a consecutive sentence on remand. In particular, the Government contends that if the Court holds that a district court has no authority to impose a sentence that is consecutive to a future state sentence, a court could impose a consecutive sentence on remand if the state court has imposed its sentence in the meantime. The federal district court would have authority to issue a consecutive sentence, the Government asserts, because the defendant by then would be "already subject to an undischarged term of imprisonment." Br. in Opp. in *King*, at 10-11 (quoting 18 U.S.C. § 3584(a)).

That analysis, however, rests on the mistaken premise that that the district court would necessarily have authority to issue a consecutive sentence in that circumstance. In cases in which a district court has committed legal error, this Court has authority to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. When a district court has erred in imposing an unlawful consecutive sentence, what is "just under the circumstances" is "to place" a defendant "in the position" he "would have occupied in the absence of" the error. *United States v. Virginia*, 518 U.S. 515, 547 (1996); *see Nix v. Williams*, 467 U.S. 431, 443 (1984). Consistent with that principle, if petitioner prevails on the question presented here, this Court can remand with directions that the sentence be modified to delete the order making the federal

sentence consecutive to the subsequent state sentence.

Even assuming that the district court would be free on remand to impose a consecutive sentence, that cannot justify failing to correct the impermissible consecutive sentence that it has imposed. It is frequently true that a district court that exercises discretion based on an impermissible view of the law will be free to make the same decision based on a permissible view of the law. But that possibility does not mean that an appellate court should leave that legal error uncorrected. Instead, the appropriate response is to reverse and remand for an exercise of discretion under the correct rule of law. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1146 (2008); *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982); *cf. Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998).

The Government's argument is also doubly speculative. It rests on speculation that the state court will issue a sentence before the case reaches the federal district court on remand. And it rests on speculation that the federal district court would then issue a consecutive sentence on remand. That kind of speculation is not a legitimate ground for failing to correct a clear legal error.

3. In the end, what should be dispositive here is that, unless this Court intervenes, a continuing and endlessly repeated sequence of events that should be unacceptable in our federal criminal justice system is guaranteed. In at least four circuits, federal district courts will continue to impose illegal consecutive sentences. Federal prosecutors will continue to

either encourage the practice or defend it on appeal. The Solicitor General apparently will continue to avoid defending the practice in this Court, yet presumably will not urge the Court to correct it. At the same time, state courts will continue to be placed in the position of having to defy federal court orders in order to fulfill their sentencing objectives or having to order statutory minimum sentences that far exceed their conception of reasonable punishment when imposed consecutively. And criminal defendants in some circuits will continue to serve significantly longer sentences than similarly situated defendants in other circuits. That cycle of events does great damage to the administration of justice in the federal judicial system. Now is the time to end it.

CONCLUSION

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

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April 29, 2008