No.

In The Supreme Court of the United States

TOMMY RAY ROLLINS, JR.,
Petitioner,
v.
UNITED STATES,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was prosecuted on federal weapons possession charges at the same time state authorities tried and convicted him for the same conduct (and other, related offenses). The federal court declared that its sentence would be "consecutive to" whatever sentence the state court, which had yet to sentence, would later impose.

The questions presented are:

1. Whether the statutory provision governing consecutive and concurrent sentencing in the federal courts, 18 U.S.C. § 3584, allows district courts to impose an anticipatory consecutive sentence.

2. If so, whether the decision to impose an anticipatory consecutive sentence is subject to the same rules – focused on the overlap between the conduct charged in the two prosecutions – that govern federal courts' sentencing of defendants already-sentenced in state courts.

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OPINION BELOW

The court of appeals' opinion (App., *infra*, 1a-7a) is reported at 552 F.3d 739. The district court's ruling from the bench on sentencing (App., *infra*, 8a–12a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 21, 2009. On April 9, 2009, Justice Alito extended the time within which to file this petition until May 21, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The language of the relevant portions of 18 U.S.C. § 3584 is quoted at p. 3, *infra*.
Sentencing Guideline § 5G1.3 is reproduced in the Appendix, at 16a.

STATEMENT

This case concerns the authority of a federal district to impose a sentence "consecutive to" an as-yet- unannounced state court sentence for the same criminal conduct.

A. Statutory Background

1. Before the 1984 Sentencing Reform Act, no federal statutory provision addressed federal courts' power to impose consecutive and concurrent sentences generally, or their

authority to take account of sentences imposed by state courts.

As both federal and state laws shifted in the direction of determinate, "real-time" and "real-offense" sentencing models, and as state and federal authorities made increased use of their historic powers to initiate dual prosecutions, see *United States* v. *Marigold*, 50 U.S. 560, 569 (1850), such questions took on greater salience – but yielded conflicting answers from the federal courts.[1] A number of cases, for example, held that federal courts were without authority to make their sentences concurrent to the defendant's state court sentence, see, *e.g.*, *United States* v. *Segal*, 549 F.2d 1293, 1301 (9th Cir. 1977), and the Second and Ninth Circuits disagreed whether pre-Act law allowed a federal court to impose

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[1]When state and federal authorities both prosecute, the sovereign that detained the individual first is deemed to have "primary jurisdiction" over him. See *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922). In order that the defendant's appearances and trial in the second jurisdiction are not delayed, that jurisdiction "borrows" the defendant, issuing a writ of *habeas corpus ad prosequendum* to his custodian in the primary state. See *Carbo* v. *United States*, 364 U.S. 611 (1961). In cases where both trials result in convictions and terms of imprisonment, the defendant ordinarily serves the sentence imposed by primary jurisdiction first. See generally Goffete, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. UNIV. L. REV. 1035, 156-57 (2003).

an anticipatory consecutive sentence. Compare *Salley* v. *United States*, 786 F.2d 546 (2d Cir. 1986) with *United States* v. *Eastman*, 758 F.2d 1315 (9th Cir. 1985); see generally Goffette, 37 VAL. UNIV. L. REV. at 1061-63.

2. Section 3584 of Title 18 was enacted as part of the landmark 1984 sentencing reform legislation. It first provides:

> **(a) 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.

Section 3584(b) directs that, in deciding whether to impose a concurrent or consecutive sentence, the district court must consider "the factors set forth" in 18 U.S.C. § 3553(a), *e.g.*, "the nature and circumstances of the offense and the history and characteristics of the defendant"; "the kinds of sentence" indicated

by the Sentencing Guidelines; and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(1),(3), (4). See also *Kimbrough* v. *United States*, 128 S. Ct. 558, 570 (2007) (highlighting Congress's "overarching" directive that federal sentences "'be sufficient, but not greater than necessary,'" to achieve purposes of punishment) (quoting 18 U.S.C. § 3553(a)).

3. Congress made clear that these new provisions were to apply to defendants who have been tried in both state and federal court. See *United States* v. *Fuentes*, 107 F.3d 1515, 1520 (11th Cir. 1997); *United States* v. *Gonzales*, 520 U.S. 1, 5-8 (1997) (rejecting argument that reference to "any term of imprisonment" in special provision prohibiting concurrent sentencing should be construed as applying only to federal sentences).

Indeed, one of the primary aims of the new provisions was to confirm federal courts' power to take account of state sanctions against the defendant. See *United States* v. *Hardesty,* 958 F.2d 910, 914 (describing § 3584 as "expressly grant[ing] federal judges the discretion to impose a sentence concurrent to a state prison term"), aff'd *en banc,* 977 F.2d 1347 (9th Cir. 1992). Decisions like *Segal,* Congress recognized – combined with dual sovereignty principles and increasingly rigid sentencing rules – heightened "the possibility that the

fortuity of two separate prosecutions will grossly increase a defendant's sentence," *United States* v. *Witte*, 515 U.S. 389, 405 (1995), and impeded the goal of reducing unwarranted sentencing disparities. See S. Rep. No. 98-225, at 126-27 & nn. 310, 314 (describing provisions as "intended to overrule *Segal* and similar cases").

4. To implement this regime, the United States Sentencing Commission promulgated Sentencing Guideline § 5G1.3, which, in broad terms consists of three instructions: § 5G1.3(a) directs that a federal sentence for a crime *committed* after the defendant was sentenced for another offense should be consecutive; § 5G1.3(b) states that a sentence "shall be imposed to run concurrently" to one for "another offense that is relevant conduct [see Guideline § 1B1.3(a)(1-3)] to the instant offense of conviction and that was the basis for an increase in the offense level for the instant offense"; while § 5G1.3(c), which applies to "any other case involving an undischarged term of imprisonment," directs the court to "to run [a sentence] concurrently, partially concurrently, or consecutively" so as to "achiev[e] a reasonable punishment for the instant offense."

As described by this Court,

> [Section] 5G1.3[(b)] * * * attempts to achieve some coordination of sentences imposed in * * * situations [where a defendant is prosecuted in more than one

> jurisdiction for the same criminal conduct], with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (i.e., had all of the offenses been prosecuted in a single proceeding).

Witte, 515 U.S. at 404; accord *Fuentes*, 107 F.3d at 1522 ("The purpose * * * is to provide one, uniform punishment for the same criminal activity").

B. Proceedings Below

1. On May 28, 2005, petitioner Tommy Rollins, Jr. drew a gun and opened fire on a Missouri state trooper who had pulled his car over for a routine traffic violation, and, having seriously wounded the trooper, drove away. Govt. C.A. Br. 5. About an hour later, Rollins entered a bar and told the patrons what he had done, asking that they call the police. *Ibid.* Upon being taken into custody, Rollins waived his *Miranda* rights and told police that when the trooper stopped him he had been on his way to the home of his former employer, a school principal named Dred Scott, whom he believed was harassing him. Rollins stated that he had planned to set fire to the principal's residence and to kill Scott and his family. *Id.* at 6. Rollins then led police to a wooded area where he had left a gun and two homemade Molotov cocktails he would have used to start the fire. *Ibid.*

2. One month later, a Missouri grand jury issued a four-count indictment, charging Rollins with (1) first degree assault on a law enforcement officer;[2] (2) armed criminal action (also for the attack on the trooper); (3) first-degree assault (for the contemplated attack on Scott and his family); and (4) unlawful possession of weapons. Docket entry (June 25, 2005).[3]

3. In November 2005, a federal grand jury indicted Rollins, charging him with a single count of possession of unregistered destructive devices (the Molotov cocktails), in violation of 26 U.S.C. §§ 5841, 5861(d). See also *id.* § 5871 (limiting sentence for that offense to a maximum of ten years' imprisonment).

Rollins appeared in federal court on November 22, 2005, on writ of *habeas corpus ad prosequendum* to the Jackson County Jail, and on April 29, 2006, he pleaded guilty to the federal charge. Rollins had not entered a plea agreement, App. 2a, and he was not sentenced by the federal court at the time.

4. In the ensuing months, Rollins's federal sentencing (and his state trial) were postponed

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[2]Missouri law punishes "attempt[ing] to kill or knowingly caus[ing] or attempt[ing] to cause serious physical injury to another person" as "first degree assault," See Mo. Rev. Stat. § 565.050.

[3]As used herein,"Docket entry" refers to the docket in the state proceedings against petitioner, No. 0516-CR03550-01 (Mo. 16th Jud. Cir.).

repeatedly, on account of his deteriorating mental health. In December 2006, the Missouri court found Rollins lacked the capacity to understand the proceedings against him or assist in his own defense and committed him to the custody of state mental health authorities. Docket entry (Dec. 4, 2006).

After undergoing extensive psychiatric treatment, Rollins was pronounced competent to stand trial on the state charges. In April 2008, a Missouri jury convicted him on all counts, and Rollins's state sentencing was scheduled for May 30, 2008.

5. On May 1, 2008, the district court convened a hearing to resolve sentencing and other outstanding issues in the federal case. Petitioner personally renewed, without success, a previously denied motion that his guilty plea be vacated, on the ground that he had not been "in a right frame of mind," when he entered it. Tr. 17-18.

The defense asked the district court to refrain from imposing its sentence until after the state court had imposed its (then scheduled for four weeks later). Tr. 9-14. Although not disputing that Eighth Circuit law permitted district courts to impose a sentence "consecutive to" an as-yet-imposed state sentence, see *United States* v. *Mayotte,* 249 F.3d 797, 799 (8th Cir. 2001), counsel explained that this way of proceeding would enable the federal court "to take whatever

those final sentences are into account before it imposes final sentence in this case," Tr. 14. He alternatively asked that the court make its sentence concurrent, highlighting the overlap between the federal offense (and various sentencing adjustments urged by the government) and the conduct on which the state court had convicted him, and disputed the Government's proposed calculation of his offense level under the Sentencing Guidelines. *Id.* at 45-47.

After hearing argument on these issues, the district court rejected Rollins's postponement request and sentenced him to the ten-year statutory maximum, directing that it be served consecutively to the impending, but still unannounced, state sentences.

On the question of the length of the sentence, the court generally rejected the prosecution's arguments that the actions involving the trooper should be treated as "relevant conduct" for purposes of calculating Rollins's offense level, App. 9a, but accepted its proposal to increase the level to reflect his intent to injure the Scotts. Because the Guidelines range so calculated was 135 to 168 months, *id.* at 10a, the court explained, the 120-month statutory maximum was reasonable.

On the question of a consecutive, as against concurrent, sentence, the district court recognized the overlap between the federal and state weapons possession convictions, but

explained that it "suppos[ed]" that the Missouri court would make Rollins's sentence on that charge *concurrent to* those it imposed for the two most serious felony charges. See also *id.* at 9a ("my supposition is that [those charges] * * * would not result in consecutive sentencing in state court"). The court also rejected Rollins's contention that § 5G3.1(b) supported concurrency on the ground that the conduct supporting the offense level increases was also the basis for the state court assault conviction, explaining that it would instead "operat[e] under [§] 5G3.1(c)" and attempt to arrive at a "reasonable punishment" *id.* at 10a.

6. On June 13, 2008, the state court sentenced Rollins, imposing two separate (but concurrent) life sentences for his actions against the trooper. The state court then imposed sentences of seven and 15 years, respectively, for the weapons-related charges and the intended attack on the Scotts. Contrary to the federal court's "supposition," however, the court directed that these sentences be served *consecutively* to those imposed for attacking the trooper. Docket entry (June 13, 2008).

7. On appeal, the Eighth Circuit, affirmed both the conviction and the district court's sentence.

The appeals court upheld the district court's authority to impose an anticipatory consecutive sentence, explaining that while

five other courts of appeals have held that Section 3584 does not permit federal courts to make sentences consecutive to ones state courts have not yet imposed, the Eighth Circuit and three other circuits had held to the contrary. App. 5a n.3.

The court then rejected Rollins's argument that the overlap between the conduct at issue in the state and federal proceedings warranted a concurrent, rather than a consecutive, sentence. Whether Guideline § 5G1.3(b) would call for a concurrent sentence on that basis, the Eighth Circuit ruled, was irrelevant because that Guideline only addresses the sentencing of defendants who are "subject to a term of imprisonment" when the federal court is announcing its sentence. See App. 4a-5a. A district court, the Eighth Circuit held, may impose a federal sentence consecutive to a not-yet-imposed state court sentence even when the convictions cover *identical* conduct. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents an opportunity to bring needed clarity to a practically important, complex, and constitutionally sensitive area of federal law.

As the decision below readily acknowledged, the courts of appeals remain sharply divided as to the basic ground rules governing sentencing in dual prosecution cases, and petitioner's case well illustrates the significance of this divergence: the consecutive

sentence imposed here would be impermissible in seven other circuits – five of which prohibit anticipatory consecutive sentences altogether and two others, which limit consecutive sentences to cases where one would be authorized for a similarly situated already-sentenced defendant.

Petitioner's case also well illustrates the dangers – and error – of each aspect of the Eighth Circuit's rule: because the district court was permitted to impose a consecutive sentence based on its "supposition" as to what the state court would do, petitioner was sentenced to a combined 17 years' imprisonment for conduct that the district court expected would result in ten years' total incarceration. Likewise, the Eighth Circuit regime, allowing consecutive sentencing in dual prosecutions when the conduct overlap is complete (but only when the federal court sentences first), collides with Congress's directives that federal sentences avoid disparities unrelated to the characteristics of the offense or the offender and be no more onerous than necessary to accomplishes the purposes of punishment.

Although cases like petitioner's arise frequently enough – and the Eighth Circuit's errors are consequential enough – to warrant intervention by this Court, there are other important reasons why the current, unsettled state of the law should not be tolerated. In addition to the unfairness and inequalities in

individual sentences the Eighth Circuit's system generates, uncertainty as to the basic ground rules infects the decisionmaking of prosecutors, defense counsel, judges, and prison authorities in both the federal and state systems – and induces needless conflict and friction between the two systems.

Indeed, to consider the various ad hoc "correctives" and "accommodations" the Government's previous submissions to this Court have identified – *e.g.,* that state courts may compensate for unauthorized federal sentences by shortening their own – only highlights the need for this Court to provide definitive guidance.

I. The Decision Below Conflicts With Governing Law In All But One Other Circuit

In upholding petitioner's consecutive sentence, the Eighth Circuit took the minority position on two distinct, but related, issues dividing the federal courts of appeals: five circuits have decided, in direct conflict with the decision below, that anticipatory consecutive sentencing is categorically impermissible, and two of the four circuits that *allow* such sentencing permit it only when the factual overlap between the prosecutions would not support a *concurrent* sentence for a defendant already sentenced in state court.

A. The Courts of Appeals Are Deeply Divided as to the Meaning of Section 3584

As the decision here – and those of six other circuits – have recognized, the courts of appeals are deeply splintered as to when, if ever, a district judge may make a defendant's federal sentence "consecutive" to one not yet imposed by a state court. See App. 5a n.3; *United States* v. *Donoso*, 521 F.3d 144, 147 (2d Cir. 2008) (per curiam); *United States* v. *Smith*, 472 F.3d 222, 226 (4th Cir. 2006); *United States* v. *Randolph*, 80 Fed. App'x 190, 193 (3rd Cir. 2003); *Romandine* v. *United States*, 206 F.3d 731, 738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1040-1041 (6th Cir. 1998); *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir. 1995); see also *McCarthy* v. *Doe*, 146 F.3d 118, 120 (2d Cir. 1998) ("The law governing prisoners subject to multiple sentences, particularly prisoners subject to multiple state and federal sentences, is hardly a model of clarity").

1. Decisions of the Second, Fourth, Sixth, and Ninth Circuits (and to a some extent, the Seventh Circuit, as well, see *infra*) have construed 18 U.S.C. § 3584 as forbidding anticipatory consecutive sentencing. See, *e.g.*, *Donoso*, 521 F.3d at 149; *Smith*, 472 F.3d at 227 (concerning a not-yet-imposed federal sentence, but recognizing that its construction would apply to not-yet-imposed state sentences); *Quintero*, 157 F.3d at 1039; *United States* v. *Clayton*, 927 F.2d 491, 493 (9th Cir. 1991).

In so holding, these courts have pointed both to the conceptual difficulty inherent in a sentence that is "consecutive" to one that does not "exist at the time the district court imposes its sentence," *Smith*, 472 F.3d at 226, and to the language and structure of the statute. The first sentence of § 3584(a), these courts have reasoned, is naturally understood as enumerating the *only* two circumstances in which a district court may properly impose a consecutive sentence: "[1]If multiple terms of imprisonment are imposed on a defendant at the same time or [2] if the defendant is *already* subject to an undischarged term of imprisonment." See *Smith*, 472 F.3d at 226; accord *Donoso*, 521 F.3d at 149.

This interpretation, these courts have reasoned, is reinforced by statutory structure and policy. Section 3584(b) directs courts making the consecutiveness/concurrency decision to consider the factors set forth in § 3553(a), and many of these entail determinations that can only meaningfully be made after the other court's sentence has been imposed and "the circumstances attending [that other] sentence" are known. *Smith*, 472 F.3d at 227.

Finally, these courts have observed, "[s]erious federalism concerns," *Smith,* 472 F.3d at 226 n.*, support their construction. Making a federal sentence consecutive to a future state one risks "preempt[ing] the right of the state to apply its own laws on

sentencing for violation of state criminal laws," *Clayton,* 927 F.2d at 493; while *denying* power to anticipate a state sentence helps reduce friction, by ensuring that "neither sovereign binds the sentencing discretion of the other," *ibid.*

2. Four Circuits have taken the opposite view of the statute's meaning. Like the decision below, the Fifth, Tenth and Eleventh Circuits have held that Section 3584 allows a district court to impose a sentence consecutive to the not-yet-imposed state sentence. See *United States* v. *Brown,* 920 F.2d 1212, 1216-1217 (5th Cir. 1991), overruled on other grounds, *United States* v. *Candia,* 454 F.3d 468, 473 (5th Cir. 2006); *United States* v. *Williams,* 46 F.3d 57, 59 (10th Cir. 1995); *United States* v. *Ballard,* 6 F.3d 1502, 1503 (11th Cir. 1993); but see *United States* v. *Lowe,* No. 08-2304 (8th Cir. Apr. 22, 2009) (granting rehearing *en banc* on this issue); see n.6, *infra.*

Disagreeing with decisions that have read the first sentence of § 3584(a) as a "prohibit[ion]" on anticipatory consecutive sentences, *Mayotte,* 249 F.3d at 799, these courts have (1) reasoned that "[n]either the statute nor the Guidelines directly address" the issue, *id.,* (2) construed the language of the provision's *last* sentence, which states that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently," as applying to cases like this

one, and (3) concluded that not to impose a consecutive sentence would thwart statutory policy. See, e.g., *Ballard,* 6 F.3d at 1506 (describing the statute as "empower[ing], even encourag[ing], district judges to give consecutive sentences"); accord *Williams*, 46 F.3d at 59.

Finally, these courts have disputed that considerations of federalism support a no-anticipatory-consecutive-sentencing construction. To the contrary, the Eleventh Circuit reasoned, principles of dual sovereignty make it reasonable for a federal court to require a defendant "to serve a *separate sentence* as punishment for his *federal crime*," *Ballard* 6 F.3d at 1510 (emphasis in original). When a consecutive sentence is imposed in this type of case, that court continued, the "entitle[ment]" of "each sovereign" "to have the defendant serve its respective sentence" is preserved, *id.*

3. Even this clear and widely acknowledged split does not capture the full extent of the disagreement among the courts of appeals. The Fifth Circuit has made its construction of Section 3584(a) dependent on whether the "anticipated but not-yet-imposed sentence is a federal sentence [or a state one]." *United States* v. *Quintana-Gomez*, 521 F.3d 495 (5th Cir. 2008). Having previously sustained district courts' authority to make their sentences consecutive to future *state court* ones, see, *e.g.*, *Brown*, that court recently held that, when the other court

is *federal,* "§ 3854 does not provide a district court authority to order that its sentence run consecutively to an anticipated but not-yet-imposed * * * sentence," 521 F.3d at 497. In so holding, however, the court did not identify any particular textual basis for this dual rule.[4]

Finally, the Seventh Circuit's leading decision on the subject, *Romandine* v. *United States*, 206 F.3d 731 (7th Cir. 2000), while agreeing with the Second, Fourth, Sixth, and Ninth Circuits that § 3584(a) does not "authorize[] a federal judge to *declare* that his sentence must run consecutively to some sentence that may be imposed in the future," *id.* at 737 (emphasis original), has nonetheless joined the Fifth, Eighth, Tenth, and Eleventh Circuits in reading the section's final sentence as providing independent ground for

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[4]Indeed, the opinion left little doubt that its conclusion was influenced by *criticism* of the court's earlier § 3584 decisions. *Quintana-Gomez* noted that an intervening Fifth Circuit decision had highlighted the inconsistency between *Brown* and the "'plain language of § 3584,'" *ibid.* (citing *United States* v. *Hernandez*, 234 F.3d 252, 256 (5th Cir. 2000)), and the opinion relied heavily on the reasoning of the Fourth Circuit – *i.e.*, that a consecutive sentencing decision cannot "'properly'" be made and the obligations imposed under § 3584(b) without knowing the terms of the other court's sentence, see 521 F.3d at 498 (quoting *Smith*, 472 F.3d at 227). The Fifth Circuit nonetheless recently denied a request that the full court reconsider its decision in *Brown*. See n. 6, *infra*.

consecutive sentences in dual prosecution cases. *Ibid.* (asserting that "the final sentence of § 3584(a) makes the federal sentence presumptively consecutive in all unprovided-for cases" and "disagree[ing] with the reasoning of *McCarthy* [146 F.3d at 121-22], to the extent the Second Circuit believes that the final sentence of § 3584(a) is limited to those situations also covered by the first sentence").[5]

B. The Courts That Agree With The Eighth Circuit On The Authority Question Are Further Split As To How Anticipatory Sentencing Decisions Should Be Made

Those circuits which *allow* district courts to order an anticipatory consecutive sentence are themselves divided as to how such authority is to be exercised. Rejecting petitioner's plea for a concurrent sentence, the court below held that fundamentally different rules apply to sentencing dually prosecuted defendants who have already been sentenced by a state court

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[5]The Seventh Circuit's distinctive thesis is that this language is directed at the Bureau of Prisons, and that since a federal court is without power to overcome the "presumption" (because the statute does not authorize anticipatory *concurrent* sentences), terms of imprisonment in cases like this will effectively run consecutively (although, that court further noted that state courts may achieve "practical" concurrency, by "discounting" their sentences). See 206 F.3d at 737-38.

and those, like Rollins, whose state sentence has not been imposed.

While in the former class of cases, Eighth Circuit precedent (and federal law generally) base the concurrent/consecutive decision almost entirely on the extent to which the conduct overlaps, see *Witte*, 515 U.S. at 505 (noting aim of "having [multiple] punishments approximate the total penalty that would have been imposed * * * in a single proceeding"); *United States* v. *Washington*, 17 F.3d 230, 234 (8th Cir. 1994) (remanding "with instructions to the district court to enter an order which ensures that [defendant] serves his federal sentence concurrently with his Missouri sentence, as is his entitlement"), the court below held, those considerations have no purchase in cases like Rollins's, where the defendant is not *already* subject to a state "'term of imprisonment'" at the time of federal sentencing. See App. 4a (citing Guideline § 5G1.3 and quoting 8 U.S.C. § 1101(a)(48)(B)).

The Fifth Circuit has long followed a similar approach. In *Brown*, that court refused to consider the overlap between the federal charges and (potential) state court proceedings involving the same conduct, reasoning that "§ 5G1.3 * * * deals with imposition of a sentence on a defendant already serving an unexpired term of imprisonment," 920 F.2d at 1216. See also *United States* v. *Boutte*, No. 08-40610, 2009 WL 742338 (5th Cir. Mar. 23,

2009) (non-precedential opinion), *6 ("Boutte has not established the applicability of this guideline, because he has not shown his not-yet-imposed sentence(s) to be 'undischarged' within the meaning of Guideline § 5G1.3(b)").

The governing rule in the two other Circuits that permit anticipatory sentences is altogether different. For example, in *United States* v. *McDaniel*, 338 F.3d 1287 (11th Cir. 2003) (per curiam), the Eleventh Circuit vacated the defendant's sentence, explaining that the district court had power to impose an anticipatory concurrent sentence – and indicating that its § 3584 decision should attempt to approximate what would have happened "if, at the time of [the defendant's] federal sentencing, he had already been sentenced in state court," *i.e.*, "his federal sentence would fall under the provisions of U.S.S.G. § 5G1.3 (b) or ©, which would mandate or at least allow for concurrent sentencing." 338 F.3d at 1287.

Similarly, in its (non-precedential) opinion in *United States* v. *Floyd*, 80 Fed. App'x 87, 89 (10th Cir. 2003), the Tenth Circuit sustained a district court decision to make the defendant's "federal sentence * * * run consecutively to an unimposed, future state sentence," *id.* at 87-88, but only after examining whether a "federal enhancement fully accounted for the conduct involved in the pending state trial." It recognized that in such

cases, the defendant's sentence would be "requir[ed to] * * * run concurrently under U.S.S.G. § 5G1.3(b)." *Id.* at 89-90. See *ibid.* (noting that "the province of the guideline is to 'ensure that no defendant is punished twice for the same crime.'") (quoting *United States* v. *Hurlich*, 293 F.3d 1223, 1229 (10th Cir.2002)).

* * *

As the foregoing attests, the rules governing sentencing of "defendant[s] * * * under the primary custodial jurisdiction of state authorities * * * * is probably the single most confusing and least understood" subject in federal sentencing law. Regional Counsel's Memo, Fed. Bur. of Prisons, Memo: Interaction of Federal and State Sentences When the Federal Defendant Is under State Primary Jurisdiction" (Oct. 11, 2006) at 1, http://www.bop.gov/news/ifss.pdf. The federal courts of appeals not only remain sharply divided as to the meaning of the central statutory provision, but they have so far settled on four entirely different rules for sentencing dually prosecuted defendants who have not been sentenced by the other court: (1) in four Circuits, anticipatory consecutive sentences are categorically prohibited; (2) in one, they are prohibited in federal-federal cases (but permitted in state-federal ones); (3) in two others, they are prohibited in cases where § 5G1.3 would support a concurrent

sentence; and (4) in the Fifth and Eighth Circuits such sentences are within the essentially plenary discretion of district courts (at least in federal state cases).[6]

II. The Rule Announced Below Is Seriously Wrong

Review is especially warranted because the rule applied below, which authorizes anticipatory consecutive sentences even when a *concurrent* sentence would have been imposed had the same defendant already been sentenced in state court, is entirely incompatible with the text, structure, and purposes of the Sentencing Reform Act and raises serious (and needless) fairness and federalism problems.

A. The Eighth Circuit's Interpretation of 18 U.S.C. § 3584(a) Is Incorrect

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[6]The Eighth Circuit's recent grant of *en banc* review in *United States* v. *Lowe* – over the Government's opposition— does not significantly affect, let alone obviate, the need for this Court's intervention. Even a reversal in that case would have no effect on the three other courts that permit anticipatory consecutive sentences; indeed, the Fifth Circuit very recently denied *en banc* review on the issue. See Order, *United States* v. *Garcia-Espinoza,* No. 08-10775 (Apr. 13, 2009). And if *Lowe* is affirmed en banc, the Eighth Circuit's erroneous ruling on the second question presented here will remain binding precedent. And a reversal in *Lowe* will not (absent this Court's intervention) avail petitioner, whose case was litigated when the Government still adhered to what it has since conceded to be an erroneous reading of the statute. See n.7, *infra.*

As the majority of Courts of Appeals have recognized – and the Government has recently come to accept – the text and structure of the Sentencing Reform Act do not permit district courts to impose the kind of anticipatory consecutive sentence at issue here. See, *e.g.*, Br. in Opp., *Hayes* v. *United States*, No. 08-7215 at 11 (cert. denied Apr. 17, 2009) ("contrary to the precedent of the [Eighth Circuit], Section 3584(a) does not give the district court the authority to impose" an anticipatory consecutive sentence).[7]

The language of Section 3584(a) itself argues overwhelmingly against the minority

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[7]Accord Br. in Opp. *DeLeon* v. *United States*, No. 08-6055, at 6 (cert. denied Feb. 23, 2009) ("In the government's view, contrary to the current position of the [Fifth Circuit], Section 3584(a) does not confer" discretion to impose a sentence "consecutively to a yet-to-be-imposed state sentence").

In its (August 2008) appellate brief in this case, however, the Government maintained that "the district court had discretion to impose a federal sentence * * * consecutively to * * * Rollins'[s] unimposed, future state sentence," and argued that the language of § 3584 supported a consecutive sentence. See C.A. Br. 24. Accordingly, even if the issues presented were not ones warranting plenary review, these circumstances, particularly the Government's subsequent concession of error on the outcome-determinative legal question, would warrant granting the petition, vacating the judgment below, and remanding the case. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

construction. The ordinary import of stating that "terms *may* run * * * consecutively" "[1] *if* 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), is to preclude a "consecutive" sentence where neither of those predicates is present. See *Donoso*, 521 F.3d at 149; accord *Smith,* 472 F.3d at 225; *Quintero,* 157 F.3d at 1039-1040. Indeed, this central, operative language (not to mention its repetition of the word "if" and inclusion of "already") would be surplusage if some other source conferred a general power to impose consecutive sentences, including in "all" cases, *Romandine*, 206 F.3d at 738, that *do not* satisfy the enumerated conditions.

As courts recognized even before the Sentencing Reform Act took effect, moreover, there are both conceptual and practical difficulties with a court's making its sentence "consecutive" to one that does not yet exist. As Judge Newman observed in *Salley*, a proper consecutive sentencing determination "requires * * * awareness of [the] sentence already imposed," because "[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," 786 F.2d at 548 (Newman, J., concurring). As noted above, the

district court here could not have known how the Missouri court would punish Rollins for his state weapons possession conviction; it nonetheless based its decision on its "supposition," later proven erroneous, that the state court would "subsume" that sentence within those imposed for assaulting the trooper. Cf. *Salley,* 756 F.2d at 548 (Newman, J.) (observing that "[w]hen the District Judge in this case decided to impose the 57 months consecutively, he had no idea of the length of the New York sentence to which those 57 months would be consecutive").

These common sense apprehensions were given the force of law by Congress in 1984. Section 3584(b) *requires* federal courts deciding whether to impose a consecutive sentence, to "consider, as to each offense * * * the factors set forth in section 3553(a)." And as the Government has acknowledged (though not in any filing in this case), "[s]everal of the Section 3553(a) factors contemplate consideration of the total length of incarceration * * * [and such an] analysis cannot logically take place when one of the defendant's sentences has not yet been determined," *Hayes* Opp. 13-14.

Nor, contrary to the views of a number of courts, does the last sentence of § 3584 and its "presumption" in favor of consecutive sentences when "[m]ultiple terms of imprisonment [are] imposed at different times" support the authority upheld in this

case. First, that language need not be read as a grant of free-standing authority. Indeed, it is more naturally read as referring to the already-"[]provided cases." See *McCarthy*, 146 F.3d at 121; see also Goffette, VAL. L. REV. at 1076. To read it otherwise, in fact, would "render * * * the limiting conditions [appearing in the earlier sentence of the same provision] surplusage," Br. in Opp., *DeLeon v. United States*, No. 08-6055 at 11.

Second, the assumption that the "different times" language refers to circumstances like those here is highly problematic. As Congress was aware, *every* dual prosecution involves sentences imposed at different times. See *Ponzi,* 258 U.S. at 260 ("One accused of crime, of course, cannot be in two places at the same time"). But a central aim of the provision was to confirm federal courts' power to make their sentences *concurrent to* state ones, see pp. 4-5, *supra*, and Congress viewed sentences arising from multiple prosecutions for a single course of conduct as paradigmatic candidates for concurrency. See S. Rep. No. 225, 98th Cong 2d Sess. at 128 ("similar offenses committed in the course of a single criminal episode would ordinarily be appropriate subjects for concurrent sentences").

Third, to interpret "different times" to mean "now *and in the future*," is to federal give courts a vast and improbable kind of power. It is not clear what temporal limits, if any, would restrain federal courts' prospective sentencing

power: although petitioner here had been convicted in state court at the time of federal sentencing, the defendant in *Ballard* had not been tried yet, 6 F.3d at 1506, and the defendant in *Brown* had yet even to face state charges, see 920 F.2d at 1216. Cf. *Gonzales*, 520 U.S. at 13 (Stevens., J., dissenting) (noting government's agreement that provision barring concurrent sentences could not "reasonably be interpreted" as reaching later-imposed sentences); *Salley,* 758 F.2d at 548 (Newman, J.) ("a sentence to commence after the expiration of a sentence not yet imposed violates the principle that sentences must be definite and unambiguous").

Fourth, leaving federalism aside, the Eighth Circuit's construction places two *federal* courts with jurisdiction over a defendant on a collision course: both the first- and the second-sentencing courts would have authority to decide whether the same two sentences should be concurrent or consecutive. But see, *e.g.*, *United States* v. *Merrifield*, 755 F.2d 895, 896 (11th Cir. 1985) (per curiam) (anticipatory concurrent sentence would impermissibly enable "a federal judge in one district [to] * * * unilaterally limit the sentencing power of * * * a federal judge, acting in a separate case, of another district"); *Quintana-Gomez*, 521 F.3d at 498.

Finally, "serious federalism concerns," *Smith*, 472 F.3d at 226 n.*, may not be left aside. See *United States* v. *Bass*, 404 U.S. 336

(1971) (statutes should be construed with regard for "the sensitive relation between federal and state criminal jurisdictions"); *Oregon* v. *Ice*, 129 S. Ct. 711, 717 (2009) (describing as "beyond question [that] the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status"). As a number of courts have recognized, anticipatory consecutive sentencing precipitates conflict and friction between state and federal courts: many States have enacted laws preferring concurrent sentencing generally, sentences, and a number have provided expressly for concurrent state and federal sentencing, and both those laws and the policies they express can be rendered ineffective when a federal court preemptively declares that any sentence the state imposes will be consecutive. See *Mayotte*, 249 F.3d at 798-99 (sustaining anticipatory consecutive sentence, though state court announced concurrent one, noting that "to the extent that the federal and state sentences conflict * * * the federal sentence controls").[8]

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[8]The precise legal effect of such declarations is itself the subject of substantial debate. While *Mayotte*, declared that the federal court's decision "controls," in cases of conflict, the Fifth and Eleventh Circuits have said precisely the opposite, see *Quintana-Gomez*, 521 F.3d at 497 (state court in *Brown* was not "legally bound by the federal court's order"); *United States* v. *Andrews*, 330 F.3d 1305, 1307 n.1 (11th Cir. 2003)

Whether or not such federal court action is "preemptive" in the Supremacy Clause sense, however, it is surely *peremptory*. By exercising what, by tradition and common sense, is the prerogative of the second-sentencing court, the federal court shows scant "respect for state functions," *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), and it puts the state court to the choice of applying its own law and thereby precipitating conflict or acquiescing. *Smith*, 472 F.3d at 227 (anticipatory sentence presents the second judge "with the Hobson's choice of either ignoring his own judgment or disobeying the order of [a federal court]"). Such treatment is especially inappropriate where the federal court is the *secondary* jurisdiction – especially where, as is often the case, the federal interests being vindicated in the district court (here, the weapons registration requirements of Title 26) are less weighty than those in the state proceedings.[9]

("We fully recognize that the Supremacy Clause does not permit federal courts to control how a state court sentences a defendant"). And numerous decisions – and the Government's briefs – have declared that, in cases of conflict, the federal Bureau of Prisons, not either court, is the decision maker. See, *e.g.*, *Romandine*, 206 F.3d at 738. But, as noted below, see p. 41, *infra*, how that agency makes such decisions (and how it lawfully should) are themselves the subject of uncertainty and disagreement.

[9]These decisions highlight the special error of the *Fifth Circuit's* rule. As noted above, that court made no

B. The Act Does Not Permit Distinctive, Unfavorable Treatment of Unsentenced Dually Prosecuted Defendants

Even if the text and structure of § 3584 did not prohibit anticipatory consecutive sentencing, however, the peculiar regime sanctioned by the decision below would still violate fundamental principles laid down in the Act and underscored in this Court's federal sentencing law decisions.

Even viewed solely as a matter of textual interpretation, the Eighth Circuit's rule and its rationale are passing strange: Having declined to read *the statute*'s "already subject to an undischarged term of imprisonment" language as announcing a limit on the authority to impose a consecutive sentence,

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effort to anchor its distinction between federal-federal and state-federal cases in the text of § 3584; but it is even more striking that the Fifth Circuit rule gives federal district judges *greater* authority in cases that implicate the interests of another sovereign.

Notably, the question whether a court should be permitted to impose an anticipatory *concurrent* sentence is likely a closer one. While the language of § 3584(a) suggests that consecutive and concurrent sentencing authority are coextensive, the structural, policy, and federalism considerations that argue against consecutive sentences do not operate the same way. The § 3584(b) requirement, for example, poses no obstacle, because, *inter alia*, a court that determines a *concurrent* sentence is appropriate does not need to know the length of the other court's sentence in order to decide its own.

the Eighth Circuit, inexplicably, treated nearly identical language in the Guideline – referring to "a defendant subject to an undischarged term of imprisonment" (*i.e.*, minus the "already") – as conclusive. See *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002) (declining to "interpret the same statutory words differently in closely related contexts").[10]

The court of appeals gave no reason why Congress (or the Sentencing Commission) would have intended two different rules – indeed, opposite ones – to govern consecutive sentencing of defendants convicted *and sentenced* in state court and those, like petitioner, federally sentenced while awaiting state court action. And the rule is all the more striking because the central focus of inquiry under the Guideline – the timing and extent of overlap between the conduct giving rise to the two charges – unlike some factors

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[10]The Eighth Circuit's attempt to bolster its rule with a reference to the 8 U.S.C. § 1101(a)(48)(B) definition is conspicuously unsuccessful. Not only does the phrase "term of imprisonment" *also* appear in the consecutive sentencing *statute*, but the cited definition is legally operative only in the "chapter" in which it appears, *i.e.*, the Immigration and Nationality chapter of Title 8, see *id.* § 1101(a) ("as used in this chapter * * *") and its function in that setting is to provide a rule for determining whether certain kinds of sanctions count as prison terms, for purposes of provisions that limit the immigration law rights of aliens with prison terms of a certain length. See, *e.g.*, *id.* § 1101(a)(43)(F) (defining "aggravated felony").

that courts are already directed to consider under § 3584(b), see pp. 25-26, *supra*, *can be* ascertained before the state sentence is pronounced. And there is something at least curious, if not affirmatively perverse, about a regime that directs courts to disregard information (*i.e.*, the conduct overlap) ordinarily relevant to the consecutiveness determination in a class of cases a defining feature of which is the unavailability of *other* pertinent information (*e.g.*, the character and length of the sentence imposed in the first court).

The Eighth Circuit's rule offends two central directives of the Sentencing Reform Act: that unwarranted disparities be avoided, and that federal sentences be "sufficient, but not greater than necessary" to accomplish the purposes of punishment. There is no question that a dually prosecuted defendant with the same criminal history as petitioner who committed the same offense as Rollins would, in the Eighth Circuit (as elsewhere) almost certainly receive a *concurrent* sentence, if the state court sentenced first. See, *e.g.*, *United States* v. *Washington*, 17 F.3d 230, 234 (8th Cir. 1994); *United States* v. *Kiefer*, 20 F.3d 874 (8th Cir. 1994). Moreover, that decision would be based on the extent of overlap between the conduct underlying the state charge and the grounds of conviction (and enhancement) in federal court, and not, for example, the length of the sentence the state court had imposed.

Moreover, because a ten-year (concurrent) sentence would concededly be "sufficient" in an instance where the state court sentenced first, a *consecutive* sentence, resulting in 17 years' total confinement for the same offender and offense, is, at least presumptively "greater than necessary" to achieve the objectives of federal sentencing law. See 18 U.S.C. § 3584(b) (requiring that district courts consider § 3553 factors).

But the principles that § 5G3.1 effectuates make clear that it is not "just another" Guideline. They concern a subject that is "[f]or many defendants * * * more important than a jury verdict of innocence on any single count," *Ice*, 129 S. Ct. at 721 (Scalia, J., dissenting); and, in addition to advancing Congress's general policies of parsimony and even-handedness, they protect values that opinions of this Court have recognized to have constitutional stature. See *Witte*, 515 U.S. at 405 (describing § 5G1.3(b) as a "[s]ignificant safeguard[] * * * against having the length of [a] sentence multiplied by duplicative consideration of the same criminal conduct").

The "possibility" adverted to by this Court in *Witte* – "that the fortuity of two separate prosecutions will grossly increase a defendant's sentence" has come to pass in this case. The punishment petitioner received is not one that Congress authorized or intended, cf. 26 U.S.C. § 5871. And this "gross[] increase" is a consequence not merely of the

"fortuity of separate prosecutions," 515 U.S. at 405, but of the further "fortuity" of the timing of the announcement of sentences – and of the Eighth Circuit's strange and mistaken legal rule.

III. The Questions Dividing The Lower Courts Are Highly Important

In a series of submissions to this Court, the Government has acknowledged both the existence and magnitude of the conflict among the courts of appeals, see, *e.g.,* Br. in Opp. in *Martinez-Guerrero* v. *United States*, No. 07-1362, at 4, and it is no longer willing to defend the merits of the statutory interpretation advanced (and relied upon by the court) below. See p. 21, *supra*, & n.7. But, echoing the Seventh Circuit's opinion in *Romandine*, the Government has contended that these conflicts and acknowledged errors are not important enough to warrant intervention by this Court. See 206 F.3d at 738 (asserting that these issues "do not matter, and the conflict is illusory").

This is exceedingly strange. As petitioner's case illustrates, the consequences of this division are anything but "illusory." Had a district court in the Second, Fourth, Sixth, or Ninth Circuit imposed a consecutive sentence under these circumstances, those courts would have vacated the whole sentence as invalid under § 3584. Had the federal prosecution occurred in the Tenth or Eleventh Circuits, those courts would have vacated the sentence

with instructions to follow the Sentencing Guidelines and impose a concurrent sentence instead. The 17 years of incarceration facing petitioner is nearly double what an identically situated offender in those jurisdictions would likely receive; it exceeds the total the district court "suppos[ed]" would result; it exceeds what an identically-situated defendant in the Eighth Circuit would receive if the state court had spoken two months earlier; and it exceeds by seven years the statutory maximum Congress specified for the federal offense.

Under any circumstances, divergent interpretations of federal law yielding such consequential disparities call out for this Court's review. Such stark disparities are especially intolerable when, as here, they arise in interpreting a statute whose animating purpose was to promote uniform treatment of similarly-situated individuals; when, as here, they often lead to sentences far longer than the maximum Congress thought appropriate; and, when, as here, the government itself concedes that one side of the circuit split is simply wrong.

These troubling conflicts potentially arise, moreover, in nearly every case in which charges can be brought in both state and federal court. This is an already large and ever-faster growing category of cases. Federal and state criminal law now overlap to an extent unimaginable even a half century ago. See John S. Baker, Jr., *State Police Powers and*

the Federalization of Local Crime, 72 Temp. L. Rev. 673, 678 (1999) ("In 1997, less than 5% of federal prosecutions involved federal statutes that do not duplicate state statutes"); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am. Acad. Pol. & Sci. 39, 40 (1996) (describing historically limited reach of federal criminal law). And questions of concurrent and consecutive sentencing have taken on more importance in regimes where courts, rather than parole authorities, have a primary role in determining the actual duration of a defendant's incarceration. See *Ice*, 129 S. Ct. at 721 (Scalia, J., dissenting).

The uncertainty these conflicts create threatens another central purpose of the Sentencing Reform Act. As then-Judge Breyer noted, Congress passed the Act not only to promote fairness to defendants, but also to foster clarity for the many other actors who participate in and are affected by the criminal justice system:

> Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four. Since release by the Parole Commission in such circumstances was likely, but not inevitable, this system sometimes fooled the judges, sometimes disappointed the offender, and often misled the public.

Breyer, *The Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988). The present disagreement and uncertainty with respect to these issues, which are, by their nature, complex and sensitive, leaves those charged with making decisions – involving charging, plea bargaining, scheduling, sentencing, and prison administration – in both the state and federal systems to guess as to what the legal consequences of their actions will be.

In various filings before this Court, the Government has argued that the conflicts presented in the case are unimportant because, among other things, the States themselves could prevent impermissible anticipatory sentences, by refusing to allow defendants within their custody to appear before federal courts, see, *e.g.*, Br. in Opp., *Bishop* v. *United States*, No. 08-6175 at 22 (asserting that "the sovereign with primary jurisdiction over the defendant is not required to yield custody to the other sovereign; it may keep control over the defendant until the sentence expires") – and that the harms of unauthorized consecutive sentences may be undone by later-sentencing state courts or by the federal Bureau of Prisons, see *Martinez-Guerrero* Opp. at 8-9 (noting that defendants may ask the state court to shorten its sentence, to take into account the consecutive character of the federal one); *id.* at 7 (suggesting that "'only the BOP has

authority'" to make consecutiveness decision in these cases and might treat anticipatory sentence as only a "'recommendation'") (quoting *United States* v. *Hayes*, 535 F.3d 907, 910 (8th Cir. 2008)). Such assertions are problematic on their own terms and underscore the need for this Court's to address these issues directly and definitively.

First, the suggestion that States could avoid any problem by simply refusing to produce defendants for federal trial is a startling one, especially for the United States to make. Existing case law casts much doubt on this proposition. See, *e.g.*, *United States* v. *Bryant*, 612 F.2d 799, 802 (4th Cir.1979) (a State "does not have authority to reject a federal writ of *habeas corpus ad prosequendum*"), and there is every reason to expect that the United States would argue aggressively against it in an actual case. In so doing, it surely and properly would highlight the dramatic consequences such a veto would have for the administration of criminal justice. See *Ponzi*, 258 U.S. at 260 (explaining that producing defendants vindicates both their constitutional rights and the public's interest in speedy and fair trials); see also *Smith* v. *Hooey*, 393 U.S. 374, 379 (1969) (defendant's incarceration elsewhere does not relieve prosecuting authority of its speedy trial obligation).

Second, that a state court might in some cases be able to alter the sentence it would

impose to effectively negate a federal consecutive sentence imposed earlier is no consolation. In many cases, shorter sentences are prohibited under state law. See, *e.g.*, *Ballard*, 6 F.3d at 1504 & n.1 (noting that state charges carried mandatory minium). But even when state courts can artificially truncate the sentences they would impose in order to compensate for federal consecutive sentences imposed earlier, such "accommodations" inevitably smell of subterfuge and preclude courts from imposing the sentences their laws and policies actually support. State courts attempting to counteract a federal court's improper consecutive sentence in this way, moreover, run the risk that the defendant would escape appropriate punishment in the event the federal sentence is later overturned. It is telling that even the courts on the Eighth Circuit's side of the split do not agree as to the legal effect of a state court's *adhering* to its own state's punishment policies and imposing a concurrent sentence, in the face of a district court's anticipatory consecutive one. See n. 8, *supra*.

Finally, the BOP's own rules cast doubt on the United States's argument that the agency can, by use of its power to decide the "place" of federal confinement, see 18 U.S.C. § 3621(b)), replace a federal court's unlawful anticipatory sentence with an effectively concurrent one. Whether the BOP has the power to do so, it has announced that it

> will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service (e.g., the federal sentencing court ordered the sentence to run consecutively to any other sentence

BOP Program Statement § 5160.5(9)(b)(4)(f). Such language would appear to preclude the agency's "correcting" federal courts' improper consecutive sentencing decisions. But even if it does not completely foreclose remedial action, it fails to provide the clarity and compliance with the statute that review by this Court would bring.

CONCLUSION

The petition for a writ of certiorari should be granted.[11]

Respectfully submitted,

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[11]While the questions raised here warrant this Court's plenary consideration, petitioner requests, in the alternative, that the Court vacate the judgment in his case and remand the case to th Eighth Circuit for reconsideration in light of the Government's reversal of position.

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