No. 03-136

In the Supreme Court of the United States

JOHN ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, in revoking petitioner's supervised release and imposing a sentence of imprisonment because he had violated the conditions of his supervision by committing crimes while on release, erred by expressing its intent that the sentence would run consecutively to any sentences imposed for petitioner's underlying criminal conduct, including sentences not yet imposed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 330 F.3d 1305.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2003. The petition for a writ of certiorari was filed on July 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States District Court for the Northern District of Florida revoked petitioner's supervised release and sentenced him to a term of 24 months of imprisonment, to run "consecutively to any other term of imprisonment * * * imposed for any criminal conduct that is the basis of the underlying [supervised

release] violation." Pet. App. 8a. The court of appeals affirmed.

1. In late 1990, following his guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of possessing phenylacetic acid with reasonable cause to believe that it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(d)(2) (1988). On January 28, 1991, the court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1a-2a.

2. On April 12, 1999, petitioner was released from prison and began serving his term of supervised release in northern Florida. United States Probation Office, Request for Transfer of Jurisdiction 1 (Dec. 1, 2000) (RTJ). On November 4, 2000, petitioner was arrested in Hamilton, Mississippi, as he was attempting to deliver 50 pounds of marijuana to a buyer. *Ibid.* Law enforcement agents then obtained a search warrant and searched petitioner's apartment in Pensacola, Florida, and a storage facility he rented there, where they found an additional 51 pounds of marijuana and $185,000 in currency. RTJ 2. On February 15, 2001, the United States District Court for the Northern District of Florida issued a warrant for petitioner for violation of the terms of his supervised release based on his arrest and the marijuana seizure, and because he had left the jurisdiction of the court without permission by traveling to Mississippi.[1] United States Probation Office, Dispositional Report 2 (Oct. 8, 2002) (DR).

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[1] On December 4, 2000, jurisdiction over petitioner's supervised release was transferred from the United States District Court for the Middle District of Florida to the United States District Court for the Northern District of Florida. RTJ 2-3.

On March 20, 2001, before he was transferred to federal authorities for supervised release revocation proceedings, petitioner escaped from the Monroe County, Mississippi, jail by bribing a guard with $5000. Pet. App. 2a; DR 3. On September 19, 2001, while petitioner was at large, he was indicted in the United States District Court for the Northern District of Mississippi on one count of conspiracy to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), (b)(1)(C), and 846, and one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). Indictment, *United States* v. *Andrews*, No. 1:01CR098 (N.D. Miss.). Petitioner also was charged in Florida state court with trafficking in marijuana based on the seizure made there. DR 3.

Nearly a year after his escape, on February 24, 2002, petitioner was arrested in Panama City, Florida, driving the jail guard's truck. DR 3; Tr. of Revocation Hearing 11 (Oct. 11, 2002) (Hearing Tr.). When he was arrested, petitioner produced a counterfeit New Hampshire driver's license bearing a false name. DR 3. Petitioner was charged with escape in Mississippi state court. *Ibid.* That charge is still pending. Petitioner also was charged in Florida state court with felony possession of a counterfeit driver's license. *Ibid.* On August 13, 2002, petitioner entered a plea of nolo contendere to the driver's license charge and was sentenced to 170 days of imprisonment in the county jail, representing the time he had been detained before disposition of the charge. *Ibid.*; Pet. App. 2a.

3. After his recapture, petitioner was temporarily transferred from state custody to the custody of the district court for a supervised release revocation hearing, which the court held on October 11, 2002. The

district court concluded that petitioner had violated the terms of his supervised release by committing three crimes (marijuana trafficking, escaping from jail, and possessing a counterfeit driver's license), and by leaving the jurisdiction of the court without permission by traveling to Mississippi. Hearing Tr. 21-22. The court concluded that petitioner's Guidelines sentencing range was 18 to 24 months. See Sentencing Guidelines § 7B1.4(a), p.s.; see also *id.* § 7B1.1(a)(1), p.s. The district court sentenced petitioner to 24 months of imprisonment, at the high end of the Guidelines range, "in light of the seriousness of [petitioner's] offenses and the compound[] nature of the offenses." Hearing Tr. 25-26.

Noting that the Sentencing Commission has specified that "[i]t is the policy of the Commission that the sanction imposed upon revocation [of supervised release] is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation," Sentencing Guidelines Ch. 7, Pt. B, intro. comment., the court stated "[i]t is the intent of the Court for the sentence to be consecutive to the term imposed on conduct that led to th[e] underlying violation." Pet. App. 8a; Hearing Tr. 26, 28 ("That's clearly what the policy set out in the [G]uidelines is."). The court rejected petitioner's contention that the court lacked authority "to run [the sentence] consecutively to some possible future sentence * * * on pending charges." Hearing Tr. 23. In addressing whether the sentence actually would be served consecutively to as-yet-unimposed sentences, the court stated, "of course, I think that depends in part upon what the other Courts want to do."[2] *Id.* at 26-27. See

[2] In accordance with petitioner's request, the court also "recommend[ed] to the Bureau of Prisons" that "[t]he sentence * * *

generally *United States* v. *Ballard*, 6 F.3d 1502, 1509 (11th Cir. 1993).

4. The court of appeals affirmed. Pet. App. 1a-5a. The court rejected petitioner's contention that the district court lacked authority to order that the sentence imposed upon revocation of supervised release be served consecutively to any future sentences imposed as a result of the criminal conduct that was the basis for the revocation. Citing *Ballard*, the court held that district courts "ha[ve] the authority to impose a consecutive sentence to an unimposed, future sentence." *Id.* at 4a. The court emphasized, however, that "[b]y this opinion, we conclude only that the federal court may control the federal sentence and whether a defendant will receive *federal* credit for the time served on his state sentence." *Id.* at 4a-5a n.1. Again citing *Ballard*, the court emphasized that "the state sentencing judge is free to disregard the intent of the federal sentence and make the state sentence concurrent with the federal sentence." *Id.* at 5a n.1.

5. Petitioner subsequently pleaded guilty in Florida circuit court to trafficking in cannabis. On December 17, 2002, the Florida court sentenced petitioner to three years of imprisonment, which the court specified was to run consecutively to "any active sentence being served." Judgment 4, *State* v. *Andrews*, No. 02-3921CFA (Fla. Cir. Ct. Dec. 17, 2002).

On December 6, 2002, the United States Attorney's Office for the Northern District of Mississippi placed a

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commence immediately." Pet. App. 8a. The court recognized that the Bureau of Prisons likely would be unable to honor that request because petitioner had been temporarily transferred from state custody for the hearing and would be returned to state custody following it. Hearing Tr. 26.

detainer on petitioner. Petitioner has not requested that a final disposition be made of the pending federal drug charges under Article III of the Interstate Agreement on Detainers Act. See 18 U.S.C. App. 2, Art. III(a). Those charges remain pending.

ARGUMENT

Petitioner renews his contention (Pet. 12-17) that the district court erred when it expressed its "intent" that the sentence imposed upon revocation of his supervised release would run consecutively to any term of imprisonment imposed for the conduct that led to the revocation of petitioner's supervised release. Petitioner contends that the courts of appeals are "divided" about "whether a district court * * * may insist that its sentence be served consecutively to an *unimposed* sentence" (Pet. 6-7), and that this court should grant certiorari to resolve the conflict.

Petitioner is correct that the courts of appeals disagree about whether a federal district court has authority to order that a sentence it imposes run consecutively to a state sentence that has not yet been imposed.[3] The courts of appeals for the Fifth, Eighth,

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[3] No court of appeals has, to our knowledge, explicitly addressed whether a district court has authority to order that a sentence run consecutively to a *federal* sentence that has not yet been imposed. See *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (noting disagreement about "whether the district court may impose a federal sentence to be served consecutively to a yet-to-be-imposed *state* sentence") (emphasis added). Although 18 U.S.C. 3584(a) does not distinguish between federal and state sentences, state sentences present distinct dual sovereignty issues not present in cases involving separate federal sentences. See *United States* v. *Clayton*, 927 F.2d 491, 493 (9th Cir. 1991) (noting concerns about "the infringement of state * * * rights" and "potential difficulties arising from dual sovereignty"). In any

Tenth, and Eleventh Circuits have held that district courts have such authority. See *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995);[4] *United States* v. *Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993); *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir.), cert. denied, 500 U.S. 925 (1991). The courts of appeals for the Sixth, Seventh, and Ninth Circuits have held that district courts lack that authority.[5] *Romandine* v. *United*

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event, no other federal sentence has been imposed on petitioner. Petitioner has not yet been arraigned on the charges pending in the United States District Court for the Northern District of Mississippi, much less been tried on them, convicted, and sentenced.

[4] The defendant in *Williams* sought review in this Court, arguing that the district court that sentenced him lacked authority to direct that his federal sentence run consecutively to state sentences that had not been imposed at the time of his federal sentencing. The government opposed the petition for a writ of certiorari on three grounds: first, the petitioner had not suffered prejudice because the state courts and prison authorities effectively had run his state sentences concurrently to the federal sentence; second, the last sentence of 18 U.S.C. 3584(a), which provides that terms of imprisonment imposed at different times "run consecutively unless the court orders that the terms are to run concurrently" (18 U.S.C. 3584(a)), authorized the court to order the sentence to run consecutively; and third, further review would not alter the result in the case because if the sentence were vacated and remanded, the district court would be free to order the sentence to run consecutively to the state sentences, which had been imposed while petitioner's case was on appeal. See Br. in Opp., *Williams* v. *United States*, No. 94-8967.

[5] Petitioner errs in stating (Pet. 8-9) that the Seventh Circuit's decision in *Romandine* v. *United States*, 206 F.3d 731 (2000), creates a "three-way conflict" (Pet. 6), by holding that Section 3584(a) creates a default rule that such sentences imposed at

States, 206 F.3d 731, 737-738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1040 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (9th Cir. 1991). Resolution of that disagreement is not warranted here, however. Even if this Court were to hold that district courts are without authority to order that a sentence run consecutively to an as-yet-unimposed state sentence, it would not affect the outcome of petitioner's case because his sentences nevertheless would run consecutively by operation of federal law. No further review is warranted.

1. a. The last sentence of Section 3584(a) provides that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." 18 U.S.C. 3584(a). As petitioner notes, "[t]he final provision * * * 'establishes a default rule'" (Pet. 15 (quoting *Quintero*, 157 F.3d at 1040)) that applies if a sentencing court fails to specify whether a sentence should run concurrently or consecutively. See *United States* v. *Vazquez-Alomar*, 342 F.3d 1, 5 (1st Cir. 2003); *United States* v. *Rahman*, 189 F.3d 88, 155 n.33 (2d Cir.), cert. denied, 528 U.S. 982 (1999). Regardless of whether Section 3584(a) authorizes a district court to order that its sentence be served consecutively to an

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different times are to be served consecutively, and "the Attorney General (acting through the Bureau of Prisons)" and state judges have "the 'effective last word' to decide whether the sentence will be served consecutively" or concurrently. We are not aware of any court that has disagreed with that conclusion. Cf. *United States* v. *Eastman*, 758 F.2d 1315, 1317 (9th Cir. 1984) (stating, before the enactment of Section 3584, that "[w]hen the District Judge imposed a federal sentence to run consecutively to a state sentence which had yet to be imposed, it was an exercise of authority which belonged exclusively to the Attorney General").

as-yet-unimposed sentence, it provides that once a subsequent sentence *has* been imposed, the federal judicial system will presume that the two sentences are to be served consecutively unless the sentencing court provided otherwise. *Romandine*, 206 F.3d at 738 ("the final sentence of § 3584(a) makes the federal sentence presumptively consecutive in all unprovided-for cases"); but see *McCarthy* v. *Doe*, 146 F.3d 118, 121-122 (2d Cir. 1998) (stating that last sentence of Section 3584(a) does not apply unless defendant was "already subject to [a] state sentence when his federal sentence was imposed").

There is no dispute that the Florida state-court sentence and the sentence given on revocation of petitioner's supervised release were "imposed at different times." 18 U.S.C. 3584(a). There is likewise no dispute that *neither* the district court nor the Florida state court "order[ed] that the terms [of imprisonment] are to run concurrently." 18 U.S.C. 3584(a). Indeed, the state court ordered that the sentence was to run consecutively to "any active sentence being served."[6]

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[6] The state court's order does not, by its own terms, apply to petitioner's federal sentence on revocation, because the federal sentence was not then "being served" as petitioner remained in state custody. Florida state law presumes, however, that federal and state sentences are to run consecutively in the absence of an explicit statement by the Florida sentencing court that they are to run concurrently. See Fla. Stat. Ann. § 921.16(1) (West 2001) ("Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently."); *Loving* v. *State*, 379 So. 2d 968, 969 (Fla. Dist. Ct. App. 1979) (per curiam) (holding that state sentence was to run consecutively to prior federal sentence because "[i]t is well settled that sentences for different crimes run consecutively unless otherwise directed by the trial judge" and there was "no indication

Judgment 4, *State* v. *Andrews*, No. 02-3921CFA (Fla. Cir. Ct. Dec. 17, 2002). Accordingly, regardless of whether the district court had authority to order that its sentence run consecutively to the state sentence, the two sentences are presumed to run consecutively under federal law.

At least where, as here, the state court imposing a subsequent sentence does not specify that it wishes the term of imprisonment to be served concurrently, the disagreement among the courts of appeals about the district courts' ability to impose sentences to run consecutively to as-yet-unimposed state sentences "is illusory." *Romandine*, 206 F.3d at 738. As the Seventh Circuit has observed, it "does not matter" (*ibid.*) whether Section 3584(a) authorizes district courts to impose a sentence to run consecutively with an as-yet-unimposed sentence, because federal sentencing law presumes that sentences imposed at different times are to run consecutively.

b. Even if Section 3584(a) had no application to petitioner's case, he would not benefit from adoption of the rule he advocates. Because petitioner is (and has been) in primary state custody, federal law provides that his federal sentence will not begin to run until "the date [he] is received in [federal] custody awaiting transportation to * * * the official detention facility at which the [federal] sentence is to be served." 18 U.S.C. 3585(a). Because petitioner's federal sentence will not begin to run until he enters primary federal custody, his federal sentence effectively would run consecutively to

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in the record that [the] trial judge intended the state sentence to be concurrent with the federal one"); accord *Ashford* v. *State*, 652 So. 2d 1195, 1196 (Fla. Dist. Ct. App. 1995).

his state sentence even if the district court had not expressed that intension.

2. In addition, both the district court and the court of appeals in this case made clear that the district court's statement of "intent" (Pet. App. 8a; Hearing Tr. 24, 26, 27, 29) that the sentence was to be served consecutively to as-yet-unimposed sentences was not binding on state courts that subsequently sentenced petitioner. The district court recognized that whether the sentence imposed on revocation would actually be served consecutively to as-yet-unimposed sentences "of course * * * depends in part upon what the other Courts want to do." Hearing Tr. 26-27. The court of appeals likewise "fully recognize[d]" (Pet. App. 5a n.1) that under traditional principles of dual sovereignty, state and federal courts lack authority to constrain the sentencing power of courts of another sovereign, and accordingly, federal courts may not "control how a state court sentences a defendant." *Ibid.* Thus, contrary to petitioner's claims (Pet. 2), the judgment entered in this case did not purport to bind the state court that subsequently sentenced petitioner.[7]

Petitioner contends (Pet. 10-11) that state courts are obliged by the Supremacy Clause to follow a federal court's expressed wishes that later sentences run consecutively or concurrently and that a state court's failure to do so constitutes " circumvention" of a federal court order and is "rarely employed." That argument fundamentally misapprehends the coordinate nature of state and federal courts in our federal system. This Court has long recognized that although state and

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[7] Moreover, petitioner has not even been arraigned in any other federal court (much less tried, convicted, and sentenced) for the crimes underlying his revocation.

federal courts "co-exist in the same space, *they are independent*, and have no common superior." *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (quoting *Covell* v. *Heyman*, 111 U.S. 176, 182 (1884)) (emphasis added). "[O]ur federal system is one of 'dual sovereignty,' and not one in which the Supremacy Clause controls sentencing." *Taylor* v. *Sawyer*, 284 F.3d 1143, 1150 (9th Cir. 2002) (quoting *Strand* v. *Schmittroth*, 251 F.2d 950, 605 (9th Cir. 1957)), cert. denied, 537 U.S. 1119 (2003). Each sovereign has "full power to set punishment for crimes against the * * * sovereign" unconstrained by the other sovereign. *Id.* at 1151. "A corollary to this principle is that a determination as to concurrence of sentence made by one sovereign does not bind the other." *Jake* v. *Herschberger*, 173 F.3d 1059, 1065 (7th Cir. 1999).[8] Thus, as a general matter, neither state courts nor state prison systems are bound by federal court orders concerning consecutive or concurrent

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[8] Accord, *e.g.*, *Taylor*, 284 F.3d at 1151-1152; *Ballard*, 6 F.3d at 1509 (district courts may "disregard a state sentence that attempts to bind the federal sentencing court," and the "state sentencing court [is not] * * * constrained by the federal sentence"); *Del Guzzi* v. *United States*, 980 F.2d 1269, 1270 (9th Cir. 1992) (per curiam); *United States* v. *Smith*, 972 F.2d 243, 244 (8th Cir. 1992) (per curiam) ("under the dual sovereignty principle, the state court could not compel the [federal] district court to impose a concurrent sentence"), cert. denied, 507 U.S. 936 (1993); *Meagher* v. *Clark*, 943 F.2d 1277, 1281-1282 (11th Cir. 1991); *Pinaud* v. *James*, 851 F.2d 27, 30 (2d Cir. 1988) ("even if the state sentence has been imposed with the expectation that it will be served concurrently with a yet-to-be-imposed federal sentence, the federal court need not make its sentence concurrent with the state sentence but remains free to make the federal sentence consecutive"); *United States* v. *Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983) ("under the dual sovereignty principle Sackinger could not, by agreement with state authorities, compel the federal government to grant a concurrent sentence").

sentencing. Cf. Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, at 3 (2003) ("Just as the federal government has no authority to prescribe when a state sentence will commence, the state has no authority to order commencement of a federal sentence."); see also *United States* v. *Gonzalez*, 520 U.S. 1, 11 (1997) (in case involving consecutive sentence under 18 U.S.C. 924(c)(1), which then provided that no term of imprisonment imposed under it "shall * * * run concurrently with any other term of imprisonment," reserving the question "whether a later sentencing state court is bound to order its sentence to run consecutively to the § 924(c) term of imprisonment").

As petitioner notes (Pet. 10), States may make their sentences concurrent to federal sentences if a defendant is in primary federal custody by designating the defendant's federal institution for service of the state sentence.[9] See Pet. App. 4a-5a n.1. If a defendant is in primary state custody, the state court can make the state sentence effectively concurrent to a subsequent federal sentence by deducting the length of the federal sentence from the time spent in the state system at sentencing, or by suspending a portion of the sentence. In addition, a defendant in state custody, a state court,

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[9] Petitioner errs in suggesting (Pet. 10) that the Bureau of Prisons can "refuse[] to accept the designation." The Bureau has no occasion to accept or reject the designation because the state prison system simply decides to credit time spent in a federal penal institution towards the state sentence. To the extent that *Commonwealth* v. *Mendoza*, 730 A.2d 503, 504 n.2 (Pa. Super. Ct. 1999), cited by petitioner (Pet. 10), suggests that the Bureau of Prisons exercises control over a state prison system's ability to give state credit to a defendant for time spent in federal prison, the decision is mistaken.

or a state prison system can seek to have the Bureau of Prisons designate the state facility as the place for service of his federal sentence. See *Program Statement No. 5160.05*, at 4-7.

3. There is another reason that petitioner would not obtain the relief he seeks even if this Court were to adopt the rule he advocates with respect to the construction of 18 U.S.C. 3584(a). Petitioner is currently serving his Florida sentence and has not yet begun to serve his federal sentence that was imposed on revocation of his supervised release. See pp. 4-5 n.2, *supra*. If this Court were to adopt the rule he advocates, vacate the judgment of the court of appeals, and remand the case for resentencing, petitioner would be "already subject to an undischarged term of imprisonment" (18 U.S.C. 3584(a)) (*i.e.*, his state prison sentence) at the time of imposition of his federal sentence. Accordingly, even under petitioner's reading of Section 3584(a), the district court would be free to order that the federal sentence run consecutively to the Florida state sentence petitioner is now serving. Cf. *Clayton*, 927 F.2d at 493 ("had the district court delayed sentencing until the state sentence had been imposed, the [federal district] court could have exercised discretion to impose a consecutive sentence").

Indeed, the Sentencing Guidelines themselves evidence a policy in favor of consecutive sentencing when a defendant has a sentence imposed on revocation of supervised release and a sentence imposed for convictions based on that new conduct. See Sentencing Guidelines Ch. 7, Pt. B, intro. comment. A consecutive sentence will ensure that a defendant receives some discrete punishment for committing the offense while still under a sentence for his earlier crime. As the Commission explained, a defendant's "failure to follow

the court-imposed conditions of * * * supervised release [i]s a breach of trust" and "the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct." Sentencing Guidelines Ch.7, Pt. A, intro. comment. (n.3). For that reason, the Sentencing Commission has adopted a policy "that the sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation." Sentencing Guidelines Ch. 7, Pt. B, intro. comment. Accordingly, "it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation." Guidelines § 7B1.3, comment. (n.4); see also § 5G1.3, comment. (n.6) ("the sentence for the instant offense should be imposed to run consecutively to the term imposed for the violation of * * * supervised release"). If this case were remanded for resentencing, the sentence given for the violation of supervised release would be imposed after the state sentence for the underlying conduct, and this policy in favor of consecutive sentencing would apply. See Guidelines § 7B1.3(f), p.s. ("Any term of imprisonment imposed upon the revocation of * * * supervised release shall be ordered to be served consecutively to any sentence of imprisonment the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis for the revocation of * * * supervised release.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2003