No. 10-7387

In the Supreme Court of the United States

MONROE ACE SETSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
SUPPORTING PETITIONER

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QUESTION PRESENTED

At a federal sentencing proceeding, the district court may order that terms of imprisonment run consecutively or concurrently "[i]f 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." 18 U.S.C. 3584(a). The question presented is as follows:

Whether a federal district court has authority to order that a federal sentence run consecutively to an anticipated state sentence that the state court has not yet imposed.

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OPINION BELOW

The opinion of the court of appeals (J.A. 54-64) is reported at 607 F.3d 128.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. A petition for rehearing was denied on August 5, 2010 (J.A. 65-66). The petition for a writ of certiorari was filed on November 2, 2010, and granted on June 13, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2. He was sentenced to 151 months of imprisonment, to be followed by five years of supervised release. J.A. 14-16. The court of appeals affirmed. J.A. 54-64.

1. On October 1, 2007, local police officers observed petitioner driving with a defective headlight and stopped his car. When petitioner unexpectedly exited the car, the officers searched him. They discovered 11 grams of marijuana and $1740 in United States currency on his person. A further search of petitioner's vehicle uncovered hydrocodone, methamphetamine, pure cocaine base, a semiautomatic handgun, and assorted handgun ammunition. Petitioner was then taken into state custody on Texas state narcotics charges. J.A. 71-72.

At the time of his arrest, petitioner was on probation for a felony offense. In March 2007, petitioner had been convicted in Texas state court of possession of four to 200 grams of methamphetamine with intent to deliver. He had been sentenced to five years of community supervision (probation). J.A. 72, 78. The State applied to revoke his probation based on a number of violations, including the October 2007 drug and firearms violations. The State also obtained an indictment charging petitioner with possession of methamphetamine with intent to deliver. J.A. 78.

2. On March 28, 2008, while petitioner was in state custody and the state charges were still pending, a federal grand jury in the Northern District of Texas re-

turned an indictment charging petitioner with possession of 50 grams or more of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii) and 18 U.S.C. 2; possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) and 2; and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 2. J.A. 11-13.

The district court issued a federal writ of habeas corpus ad prosequendum, and petitioner was transferred to federal authorities for prosecution. J.A. 70. Pursuant to a plea agreement, petitioner pleaded guilty to the methamphetamine-possession count. The other federal charges were dismissed on the government's motion. J.A. 14, 70.

The Presentence Report (PSR) recommended an advisory Sentencing Guidelines range of 121 to 151 months of imprisonment for the drug conviction. The PSR also reported that petitioner faced pending Texas state charges both for the narcotics offense and for violation of probation. J.A. 87. The PSR noted that under Fifth Circuit precedent, the district court could impose a sentence consecutively to any sentence that might be imposed on the state charges. *Ibid.* (citing *United States* v. *Brown*, 920 F.2d 1212 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991)).

In *Brown*, the Fifth Circuit considered 18 U.S.C. 3584(a), which allows a federal district court to order that terms of imprisonment run concurrently or consecutively if the court is itself imposing "multiple terms of imprisonment * * * at the same time," or if the defendant "is already subject to an undischarged term of imprisonment." The Fifth Circuit concluded that the stat-

ute provided discretion broad enough to cover situations in which the defendant faced separate state proceedings, even if he had not yet been convicted or sentenced at the time of his federal sentencing. The court therefore sustained an order directing that Brown's federal sentence run consecutively to the "anticipated" state sentence he would likely receive if convicted. *Brown*, 920 F.2d at 1217.

Petitioner preserved an objection to the statement in the PSR that the district court had the power to impose a sentence consecutive to a state sentence. J.A. 93.

The district court sentenced petitioner to 151 months of imprisonment, to be followed by five years of supervised release. J.A. 15-16. The court ordered that the sentence would run concurrently with "any sentence imposed" by Texas on the pending narcotics charges, which arose from the same October 2007 conduct as petitioner's federal conviction, but consecutively to "any sentence imposed" in the pending proceedings to revoke petitioner's probation. J.A. 16.

3. Following federal sentencing, petitioner was returned to state authorities, and his federal sentence did not begin running. In December 2008, he was convicted in state court on the narcotics charge and his probation on the earlier narcotics charge was revoked. The state court sentenced him to ten years of imprisonment on the narcotics charge and five years on revocation of probation, to be served concurrently with one another. J.A. 29-40.

In March 2010, after approximately two and a half years in state custody, petitioner was paroled. J.A. 45, 53. He was then transferred to federal custody and be-

gan serving his federal sentence, with no credit for the time spent in state custody. See J.A. 42-43.

4. The court of appeals affirmed. J.A. 54-64.

Petitioner conceded that under binding circuit precedent, the district court had authority to order petitioner's sentence to run consecutively to an anticipated state sentence. The court of appeals acknowledged an extensive circuit conflict on the question whether Section 3584(a) can be read to confer such authority, but the court adhered to its precedent. J.A. 58-60 (citing *Brown*, 920 F.2d at 1216).[1]

Petitioner also contended that the consecutive-sentencing order had been rendered unreasonable by the state court's imposition of sentence. The district court had ordered that the federal sentence run consecutively to one state sentence, but concurrently to the other; the state court, however, imposed the two state sentences concurrently to one another, and petitioner served them both simultaneously. The court of appeals rejected petitioner's contention, because the federal court had acted reasonably at the time of sentencing. J.A. 61. To the extent that petitioner contended that subsequent events warranted giving him credit against his federal sentence for time he spent in state custody, the court of appeals stated, petitioner should first address that contention to the Federal Bureau of Prisons

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[1] In December 2008, the Solicitor General determined that the United States would take the position now advanced in this brief, *i.e.*, that Section 3584(a) does not permit such consecutive-sentencing orders. All federal prosecutors were informed of the government's position and directed to adhere to it, except where foreclosed by circuit precedent. Accordingly, the government agreed in the court of appeals that the issue was controlled by *Brown*. Gov't C.A. Br. 15.

(BOP) and exhaust his administrative remedies. J.A. 62-63.

SUMMARY OF ARGUMENT

I. Section 3584(a) does not give district courts the authority to order that a federal term of imprisonment run consecutively to a hypothetical future state term. Section 3584(a) is a limited grant of authority that applies in only two situations. First, when the federal court itself imposes multiple terms of imprisonment "at the same time," the court may specify whether those sentences run concurrently or consecutively. Second, when the federal court sentences a defendant who is "already subject to an undischarged term of imprisonment," the court may specify whether the federal sentence shall run concurrently with or consecutively to the earlier sentence. Petitioner fits into neither category, because he received only a single federal term and was not subject to any "undischarged" state term at the time of his federal sentencing.

Section 3584(a) also provides two default rules, one for each of the two situations in which Section 3584(a) gives district courts authority. If the court does not expressly exercise that authority, then the presumption is that "[m]ultiple terms of imprisonment imposed at the same time run concurrently" and "[m]ultiple terms of imprisonment imposed at different times run consecutively."

Some courts have misread the latter default rule as a grant of power to the district court to order consecutive service whenever "[m]ultiple terms of imprisonment [are] imposed at different times," even when one of those "terms of imprisonment" has not yet been imposed but may be at some future time. But that interpretation

would read Section 3584(a)'s limitations out of the statute. If district courts could order consecutive or concurrent service whenever "multiple terms of imprisonment" are imposed or anticipated, Congress would have had no reason to specify that the district court's authority extends to defendants with "undischarged" sentences.

A consecutive-sentencing order that looks into the future is also at odds with the statutory structure. When deciding whether to impose concurrent or consecutive terms under Section 3584, federal courts must consider a set of prescribed factors, such as the need to provide "just punishment," "deterrence," and protection for the public. 18 U.S.C. 3553(a), 3584(b). Those factors can sensibly be applied when the district court is considering whether to make *existing* terms concurrent or consecutive, but they are hard to apply to a term that is only anticipated. And imposing a binding order that any future term run consecutively, no matter when it is imposed or how long it is, would conflict with the sentencing authority of the court that actually imposes that future term of imprisonment—authority that, in federal court, comes from Section 3584(a) itself. Reading the statute to apply only to existing terms of imprisonment, not future ones, avoids these significant problems inherent in the reading adopted by the court of appeals.

The legislative history confirms that Congress intended for Section 3584(a) to apply in only two situations: when two terms of imprisonment "are imposed at the same time," and when "one term of imprisonment is imposed while the defendant is serving another one." S. Rep. No. 225, 98th Cong., 1st Sess. 126 (1983) (Senate Report). The Sentencing Commission, which implements Section 3584(a) through policy statements, reads

the statute the same way. That reading does not infringe on courts' inherent authority in any way.

II. Under the legal framework that governs the imposition and service of terms of imprisonment, when a court imposes a first term of imprisonment but anticipates that the defendant may later receive a second in another court, the first sentencing court does not have the responsibility or the authority to specify concurrent or consecutive service. Rather, once the first sentence is imposed, that sentence will inform the second sentencing court's judgment about how much additional incremental punishment is warranted.

A second means of making the consecutive-versus-concurrent determination remains with the custodian: one sovereign may, if it chooses, count against its sentence the time that a defendant spends in another sovereign's custody. In the federal system, deciding where a defendant serves his sentence is an executive function that the BOP performs on behalf of the Attorney General. The BOP has established procedures that allow a defendant to request that he be permitted to serve his federal sentence in state custody. The BOP makes those determinations with the benefit of the first federal sentencing judge's view, to which it gives great deference, but also with the benefit of additional information that may develop after the first federal sentencing, such as the details of the second offense, conviction, and sentence and the inmate's disciplinary history. Because the BOP retains the ability to exercise discretion in this area and to decide whether concurrent or consecutive service is warranted once the second sentence is imposed, there is no reason to distort the text of Section

3584(a) to allow that decision to be made prematurely, at the time of the first federal sentencing.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY ORDERING THAT PETITIONER'S TERM OF IMPRISONMENT RUN CONSECUTIVELY TO AN ANTICIPATED FUTURE STATE TERM

Section 3584(a) gives district courts the authority to order that terms of imprisonment run consecutively or concurrently, but that authority is limited to two circumstances: if the court is itself imposing "multiple terms of imprisonment * * * at the same time," or if the defendant "is already subject to an undischarged term of imprisonment." Because a state term of imprisonment cannot be imposed "at the same time" as a federal term, a district court may direct that a federal term run consecutively to a state term only if the state term is "undischarged" at the time of sentencing. When petitioner was sentenced in federal court, he was not "already subject" to any "undischarged" term of imprisonment, because Texas had not yet imposed one. Thus, Section 3584(a) confers no authority to enter a consecutive-sentencing order like the one the district court imposed here.

A. Section 3584(a) Applies To Cases Involving Simultaneous Or "Undischarged" Terms Of Imprisonment, Not Anticipated Future Terms

Section 3584(a) contains three sentences. The first grants authority to district courts to prescribe consecutive or concurrent service in two situations; the second and third specify what happens, in those two situations,

when district courts remain silent. No other reading can be reconciled with the text, structure, and context of Section 3584(a).

1. Under Section 3584(a), authority to order consecutive or concurrent service is limited to two specific situations

The first sentence of Section 3584(a) provides:

> 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.

This sentence identifies the two situations in which a district court may specify how terms of imprisonment are to run: (1) when "multiple terms of imprisonment are imposed on a defendant at the same time," and (2) when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." The sentence also identifies the only exception to that grant of authority: even in those two situations, the district court may *not* order consecutive terms for an attempt and the sole object of the attempt.

In the two situations that Section 3584(a) addresses—simultaneously imposed terms and undischarged terms—the district court may expressly specify that terms of imprisonment shall run concurrently, consecutively, or partly consecutively. If the district court does *not* so specify, the statute prescribes default rules in the second and third sentences of Section 3584(a). Each of

those two sentences sets the default rule for one of the two situations that Section 3584(a) addresses.

The second and third sentences provide: "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." Both sentences refer to the authority of the district court under the first sentence; both sentences specify what is to happen "unless" the court exercises that authority (or another statute requires consecutive service, see, *e.g.*, 18 U.S.C. 924(c)). Those two sentences correspond to the two situations set out in the first sentence.

The logic of the statute makes that relationship clear. The first sentence encompasses simultaneously imposed terms and undischarged terms. The second sentence sets a presumption for defendants with simultaneously imposed terms, *i.e.*, "[m]ultiple terms of imprisonment imposed at the same time." The third sentence sets the presumption for defendants with an undischarged term at the time they receive their federal term, *i.e.*, "[m]ultiple terms of imprisonment imposed at different times."

Thus, a district court imposing a term of imprisonment may order that the term run consecutively to another term that is being imposed "at the same time," or to another, "undischarged" term that has "already" been imposed. But nothing in Section 3584(a) allows the court to anticipate a term of imprisonment that *may* be imposed in the future. A defendant is not "already subject to an undischarged term of imprisonment" unless that

term has been imposed but not completed. See *Black's Law Dictionary* 417 (5th ed. 1979) (in criminal law, "discharge" means "[t]he act by which a person in confinement * * * is set at liberty"); *Webster's Third New International Dictionary* 644 (1976) ("discharge" means "to set at liberty[,] release from confinement, custody, or care <[discharge] a prisoner>"). A term that does not yet exist cannot be discharged, nor can it be called undischarged (any more than it could be called "incomplete" or "unfinished" before it begins). Petitioner was not "already subject to an undischarged term" when his single federal term of imprisonment was imposed, and Section 3584(a) therefore did not apply.[2]

2. Section 3584(a)'s limitations cannot be read out of the statute

Some courts have read the third sentence of Section 3584(a) as allowing district courts to regulate (or as regulating of its own force) even terms of imprisonment that are outside the scope of the first sentence. See, *e.g.*, *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995); *United States* v.

[2] Although petitioner was in state *pretrial* custody when he was produced to the federal district court for arraignment, plea, and sentencing, pretrial custody is not a "*term* of imprisonment" as used in Section 3584(a). Cf. 18 U.S.C. 3581(a) ("A defendant who has been found guilty of a crime may be sentenced to a term of imprisonment."); 18 U.S.C. 3585(b) (time spent in pretrial or presentence "official detention" may be *credited* against "a term of imprisonment"); *Reno* v. *Koray*, 515 U.S. 50, 59 (1995). Even if some of petitioner's pretrial custody was *later* credited against his state term of imprisonment, at the time of his federal sentencing petitioner was not "already subject to an undischarged term of imprisonment." Petitioner's only undischarged sentence was not a term of imprisonment, but probation, which had not yet been revoked.

Ballard, 6 F.3d 1502, 1505, 1506 (11th Cir. 1993). That reading is mistaken, because it would confer authority that swallows up the more limited grant set out in the first sentence and renders the limitations surplusage.

To begin with, reading the third sentence as an independent grant of authority would read the limitations in the first sentence out of Section 3584(a). Congress began the subsection by specifying which terms of imprisonment may be ordered to run concurrently or consecutively: two or more terms that are imposed at the same sentencing, and two or more terms of which some are "undischarged" when the rest are imposed. When Congress chooses to enact a limited grant of authority, the words of limitation should be construed to have real meaning; "[i]t would be illogical to assume that Congress * * * would turn around and nullify its own choice" with the next words in the same subsection. *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 343 (1994); see *id.* at 340 (rejecting a construction under which one subdivision prohibits what the adjacent one allows); see generally, *e.g.*, *Board of Trs. of the Leland Stanford Jr. Univ.* v. *Roche Molecular Sys.*, 131 S. Ct. 2188, 2196 (2011) (declining to read a statutory phrase as "add[ing] nothing that is not already in the [statute]"). Yet the reading espoused by the Tenth and Eleventh Circuits would deprive the limitations in the first sentence of any effect. Considered in isolation and without reference to the first sentence, the second and third sentences of Section 3584(a) together would cover *all* cases in which a defendant receives "[m]ultiple terms of imprisonment." That would include all cases that fall within the first sentence, but also cases like petitioner's that the first sentence excludes because the state term

was not "undischarged" at the time the federal term was imposed. For the limiting conditions in the first sentence to have any meaning, therefore, the first sentence must set the scope for Section 3584(a) as a whole: cases involving simultaneous or undischarged terms. In cases within that scope, the second and third sentences set the default rule; in cases outside that scope, the second and third sentences simply have no role to play.[3]

In addition, the first sentence contains not only a scope limitation (applying only to cases with simultaneous or "undischarged" terms), but also a substantive limitation (requiring the court to impose concurrent terms of imprisonment for attempt and the object of the attempt). Treating the second or third sentences as independent grants of authority threatens to negate that substantive limitation as well. If the third sentence authorized the district court to order petitioner's federal term of imprisonment (for possession of methamphetamine) to run consecutively to an anticipated future state term (also for possession of methamphetamine), then the third sentence presumably could also authorize

[3] The Seventh Circuit has incorrectly suggested that the canon against creating surplusage cuts in the opposite direction—that the *third* sentence would be reduced to "surplusage" if it operated only in "those situations also covered by the first sentence (that is, to defendants serving undischarged terms, or other terms imposed on the same occasion)." *Romandine* v. *United States*, 206 F.3d 731, 738 (2000). As explained in the text, the third sentence still does independent work even when (properly) applied only within the scope set out by the first sentence: in such cases, if the district court fails to expressly invoke the authority given it by the first sentence, the third sentence makes the sentences run consecutively. And in any event, the Seventh Circuit did not read the third sentence as an affirmative grant of authority for district courts—only as a presumption that applies no matter what the court says. *Id.* at 737, 738.

the court to order consecutive terms for possession and *attempted* possession. Congress placed considerable importance on the principle that attempt crimes and their objects should not produce consecutive terms of imprisonment. Congress identified other circumstances in which it directed the Sentencing Commission to prescribe guidelines limiting consecutive terms.[4] But attempt crimes were the only crimes for which Congress specifically forbade courts to impose consecutive terms. Congress surely did not intend to nullify that important limitation in the next two sentences. And if the first sentence's substantive limitation applies, so does its scope limitation.

Indeed, the placement of the two limitations on authority to order consecutive sentences—limitations both as to substance and scope—in the first sentence is further confirmation that the authority itself also comes from that sentence. If the authority to impose a consecutive term came from the third sentence (or the second), it would be highly unusual for the limitations on that authority to come beforehand and appended to a different sentence.

3. The sentencing factors Congress prescribed cannot readily be applied to anticipated future sentences

Congress directed federal judges, in considering whether to impose consecutive or concurrent terms of imprisonment, to consider "the factors set out in [18 U.S.C.] 3553(a)," the same factors considered in deter-

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[4] See 28 U.S.C. 994(*l*)(2) (conspiracy or solicitation and the sole object of the conspiracy or solicitation); 28 U.S.C. 994(v) ("violation of a general prohibition" and "violation of a specific prohibition encompassed within the general prohibition").

mining the nature and length of a sentence, "as to each offense for which a term of imprisonment is being imposed." 18 U.S.C. 3584(b). Applied in the context of concurrent and consecutive terms of imprisonment, the Section 3553(a) factors logically govern the relationship between two actual, definite terms of imprisonment, not between an actual term and a hypothetical one.

Section 3553(a)(2) requires a federal sentencing court to fashion a sentence that will, *inter alia*, "provide just punishment," "afford adequate deterrence," and "protect the public from future crimes of the defendant." 18 U.S.C. 3553(a)(2)(A)-(C). And Section 3553(a)(6) requires the sentencing court to consider "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). In general, deciding whether a federal sentence should run consecutively to another sentence will often require knowing the total time the defendant will spend in prison, which depends on what the other sentence will be—and, indeed, whether the defendant will be incarcerated on the other sentence at all, or will instead obtain an acquittal, fine, probation, or suspended sentence.

Thus, to apply the Section 3553(a) factors to the question of consecutive versus concurrent service, the court may need to know whether the defendant will begin serving his consecutive federal sentence five years from now or 45 years from now. And even if some aspects of the answer can be predicted, others may change. Cf., *e.g.*, *Pepper* v. *United States*, 131 S. Ct. 1229, 1242-1243 (2011) (changes in defendant's conduct and characteristics between original sentencing and resentencing were relevant to Section 3553(a) factors); *United States* v.

Wilson, 503 U.S. 329, 334 (1992) (district court lacked authority to make sentencing-credit determination under 18 U.S.C. 3585, because "[a]t [the time of] sentencing, the [court] only could have speculated about" the facts necessary).

In this case, the district court directed that petitioner's federal sentence run consecutively to any state sentence that might be imposed for petitioner's possession of methamphetamine in 2006. Petitioner's state offense was a first-degree felony, for which the minimum sentence is five years and the maximum is life imprisonment. Tex. Health & Safety Code §§ 481.102(6), 481.112(d) (Vernon 2010); Tex. Penal Code § 12.32(a) (Vernon 2011). In considering the Section 3553(a) factors and deciding whether the federal and state sentences should run consecutively, the district court may have speculated about whether the state court would in fact order petitioner incarcerated and, if so, for how long.[5] Removing future sentences from the sentencing calculus avoids the need to speculate about future contingencies, in which the range of possible outcomes can be extremely broad. In this case, petitioner's state proceedings could have produced anything from acquittal to life imprisonment.

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[5] Petitioner committed his federal offense while on probation for a state offense; under those circumstances, a consecutive sentence might be warranted under the Section 3553(a) factors irrespective of the length of the consecutive sentence. The Sentencing Commission's policy statement, which is a relevant consideration for both the sentencing court, see 18 U.S.C. 3553(a)(5), and the BOP, see 18 U.S.C. 3621(b)(5), recommends that a new sentence run consecutively to a sentence imposed for revocation of parole or probation, to ensure that each offense carries some incremental punishment. Sentencing Guidelines § 5G1.3 comment. (n.3(C)).

4. Construing Section 3584(a) to reach future sentences would disrupt the statutory scheme

Reading Section 3584(a) to reach future sentences is also untenable because it would effectively deprive federal judges in future cases of their authority under Section 3584(a) itself. Statutes should be construed to create "a symmetrical and coherent regulatory scheme." *E.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). But reading Section 3584(a) to cover future sentences would introduce a significant asymmetry. If the first federal judge to sentence a defendant could order that existing *and future* terms of imprisonment all run consecutively, that order would effectively remove the comparable authority of the second federal judge, *i.e.*, the judge who will impose that future term.

When a defendant who is serving one federal sentence commits another federal crime, the federal judge in the second case has the express authority to run the second term of imprisoment consecutively, because the defendant "is already subject to an undischarged term of imprisonment." 18 U.S.C. 3584(a). Allowing the district judge in the first case to instead make that decision in advance lacks any basis in Section 3584(a); usurps the second judge's authority; and leaves the second judge "with the Hobson's choice of either ignoring his own judgment [that a concurrent or consecutive sentence was appropriate] or disobeying the order of another district court." *United States* v. *Smith*, 472 F.3d 222, 226-227 (4th Cir. 2006).

For that reason, every circuit to consider the question has concluded that a federal court may not order that a term of imprisonment run consecutively to an antici-

pated future *federal* sentence. See *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497-498 (5th Cir. 2008); *Smith*, 472 F.3d at 226-227 & n.*; see also *ibid.* (citing cases involving state sentences). Indeed, while the court below has adhered for 20 years to its view that Section 3584(a) confers such a power with respect to a future *state* sentence, see J.A. 57-60, it reached the opposite conclusion with respect to a future *federal* sentence. *Quintana-Gomez*, 521 F.3d at 497-498.[6] The court noted that "as a general principle, one district court has no authority to instruct another district court how, for a different offense in a different case, it must confect its sentence." *Id.* at 498. Yet that is the result of reading Section 3584(a) to allow federal judges to prescribe concurrent or consecutive treatment for anticipated terms.

The court below has sought to avoid that problem by applying different rules for future federal sentences (anticipatory consecutive sentencing precluded) and future state sentences (anticipatory consecutive sentencing permitted). But that distinction has no basis in the text of Section 3584(a), which refers generally to "terms of imprisonment" without specifying which court imposes them. See *Quintana-Gomez*, 521 F.3d at 497-498. The Fifth Circuit asserted that "principles of dual sovereignty" supported giving federal courts authority to direct a consecutive sentence with respect to a future state sentence. *Id.* at 497. But respect for the State's role counsels *against*, not for, construing Section 3584(a) to give federal courts authority to direct how future state sentences shall be treated. This Court has recognized

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[6] Although three other circuits agree with the court below about future state sentences, those circuits do not appear to have addressed future federal sentences.

that "administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain." *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009). To the extent that the first court's consecutive-sentencing order actually binds the second court,[7] therefore, that binding order would be especially problematic if it is a state court that is bound.[8] Section 3584(a) should be read to avoid those significant pitfalls. See *Brown & Williamson*, 529 U.S. at 133; cf. *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 140-141 (2004) ("working assumption" that Congress usually does not "trench on the States' arrangements for conducting their own governments").

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[7] Recognizing the potential friction that otherwise could result, several courts have suggested that when a federal court orders that the federal sentence run consecutively to a future state sentence, the federal court's order does not actually bind the state judicial or executive branches or preclude them from reducing the state sentence because of the federal time the defendant will serve. See, *e.g.*, *Quintana-Gomez*, 521 F.3d at 497 (circuit precedent "did not hold that the state court was so legally bound by the federal court's order that the state court could not order its sentence to run concurrently with the federal sentence if it chose to do so"); *United States* v. *Andrews*, 330 F.3d 1305, 1307 n.1 (11th Cir.) (per curiam) ("The fact that the federal district court elected to sentence Andrews to a consecutive federal sentence by no means limits the sentencing options available to the state court."), cert. denied, 540 U.S. 1003 (2003).

[8] Cf. *United States* v. *Gonzales*, 520 U.S. 1, 11 (1997) (reserving the analogous question whether 18 U.S.C. 924(c)'s consecutive-sentencing requirement binds state courts that impose sentence after a federal court imposes a sentence under Section 924(c)).

B. The Legislative History Confirms That Section 3584(a) Does Not Apply To Anticipated Future State Sentences

Section 3584 was adopted as part of the Sentencing Reform Act of 1984.[9] That statute was itself one chapter of a larger criminal-justice bill, the Comprehensive Crime Control Act of 1984,[10] that received extensive consideration in both Houses of Congress over many sessions before its enactment. See, *e.g.*, *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 399-400 & n.2 (1991); Senate Report 1-2. Section 3584(a) passed the Senate just as it reads today, see 130 Cong. Rec. 1595 (1984), and the Senate Judiciary Committee's extensive report on the omnibus measure explains the provision as enacted. Senate Report 125-128.[11]

The Senate Report carefully sets out the scope of Section 3584(a), but never mentions anticipated or future sentences. To the contrary: the report first summarizes "current law" as it then applied to "[t]erms of imprisonment imposed at the same time" and to "[a] term of imprisonment imposed on a person already serving a prison term." Senate Report 126. The report then explains that the new legislation would cover the same ground: "[p]roposed 18 U.S.C. 3584(a) provides that sentences to multiple terms of imprisonment may, with one exception, be imposed to be served either concurrently or consecutively, whether they are imposed at the

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[9] Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987.

[10] Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.

[11] The House adopted the Senate version of the Comprehensive Crime Control Act verbatim (in adding it to another piece of omnibus legislation), see 130 Cong. Rec. at 26,834, 26,836, 26,838, and although some changes were made to other provisions of the Sentencing Reform Act in conference, Section 3584(a) was not amended.

same time or one term of imprisonment is *imposed while the defendant is serving another one*." *Ibid.* (emphasis added).

As the Senate Report explains (at 126), Section 3584(a) has its origins in a report of the National Commission on Reform of Federal Criminal Laws (National Commission), a body chartered by Congress,[12] numbering several federal judges and Members of Congress among its members, and aided by an advisory committee chaired by retired Justice Clark. *Final Report of the National Commission on Reform of Federal Criminal Laws* at v-vi, xi (1971) (*National Commission Report*). The operative text of the National Commission's proposal is nearly identical to the first sentence of Section 3584(a) as subsequently enacted.[13] And the National Commission made clear that it did not intend its proposal to extend to future state sentences: the sentencing authority it proposed—which included several substantive limitations—"shall apply not only when a defendant is sentenced at one time for multiple offenses but also when a defendant is sentenced at different times for multiple offenses *all of which were committed prior to the imposition of any sentence for any of them*." *Id.* at 292 (proposed § 3204(6)) (emphasis added).

Furthermore, the explanations of the Senate committee and the National Commission confirm that the sec-

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[12] See Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516.

[13] The National Commission's proposal read: "When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently or consecutively as determined by the court." *National Commission Report* 291 (proposed § 3204(1)).

ond and third sentences of Section 3584(a) provide default rules, not new grants of authority that override the limitations set out in the first sentence. The Senate committee stated that "Subsection (a) is intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject." Senate Report 127. And the committee reiterated that Subsection (a)'s presumptions applied "where both sentences are for Federal offenses" and where "a person sentenced for a Federal offense * * * is *already serving* a term of imprisonment for a State offense." *Ibid.* (emphasis added).[14]

The National Commission used a similar construction, with a grant of authority followed by a presumption. The National Commission's first subsection was entitled "Authority of Court"; the first sentence contained the grant of authority, and the next sentence stated the default rule. *National Commission Report* 291 (proposed § 3204(1)); see also *id.* at 294 (comment). (The National Commission favored a presumption of concurrent sentencing in all cases. See *id.* at 291 (proposed § 3204(1).)

In the extensive consideration of the proposal that became Section 3584(a), Congress never referred to authority to order that terms run consecutively to future sentences. The legislative history, therefore, confirms the natural reading of the text.

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[14] Previously, judge-made law presumed that federal and state sentences should run concurrently; the Senate committee recognized that its statutory proposal would "change the law" in that respect. Senate Report 127.

C. The Sentencing Commission Has Read Section 3584(a) To Apply Only To Simultaneous And "Undischarged" Terms Of Imprisonment

Congress has involved the Sentencing Commission in the process of determining when a consecutive term is appropriate, in two ways. First, Congress has directed judges considering whether to impose a consecutive or concurrent term to consider the Section 3553(a) factors, which include the Sentencing Commission's applicable policy statements. See 18 U.S.C. 3553(a)(5), 3584(b). Second, Congress has affirmatively directed the Sentencing Commission to promulgate policy statements listing some circumstances where a consecutive sentence is generally not appropriate. See note 4, *supra*.

In carrying out that function, the Commission has promulgated guidelines for when terms imposed at the same time should run consecutively, Sentencing Guidelines § 5G1.2, and for when the defendant has an "undischarged term of imprisonment," *id.* § 5G1.3. The latter guideline makes clear that it applies only when the defendant "was serving" another term when he committed the federal offense; when another crime has already "resulted" in a term of imprisonment; or "[i]n any other case involving an undischarged term of imprisonment." *Id.* § 5G1.3(a), (b) and (c); see also *id.* § 5G1.3, comment. (n.3(A)(iv)) (noting that the undischarged term may have been imposed by a state court). In more than two decades under Section 3584(a), during which time the Sentencing Commission has repeatedly revised Section 5G1.3, it has never promulgated guidelines or policy statements recommending when to order a consecutive sentence in cases where the other sentence has not been imposed but is merely anticipated.

Although the Sentencing Commission has no formal, delegated authority to interpret Section 3584, its reading of the statute is the natural one. No guidance is needed in cases that involve anticipated state sentences, because Section 3584(a) does not cover them.

D. The District Court Has No Inherent Authority To Disregard Section 3584(a)'s Limitations And Direct A Consecutive Sentence

Some courts of appeals have suggested that the district court's power to impose a consecutive-sentencing order like the one in this case comes not from Section 3584(a) but from the court's inherent authority. Those courts have opined that even if Section 3584(a) does not "directly address whether the district court may impose a federal sentence to be served consecutively to a yet-to-be-imposed state sentence," at least the statute "do[es] not prohibit it." *E.g.*, *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam).

This Court has recognized that courts imposing multiple sentences *at the same time* have long enjoyed the authority to specify whether the sentences they impose shall run concurrently or consecutively. *Ice*, 555 U.S. at 168-169. But even that power, which essentially is the power to determine the length of the total sentence, is limited. A court has no inherent authority to impose a sentence longer than the maximum the legislature has set by statute. *E.g.*, *Whalen* v. *United States*, 445 U.S. 684, 689 (1980) ("[W]ithin our federal constitutional framework, the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress."). So too, the legislature may restrict the court's discretion to impose con-

secutive or concurrent sentences within that maximum. *Ice*, 555 U.S. at 171 (noting the "salutary objectives" that statutory limits on consecutive-sentencing discretion serve) (citation omitted). In Section 3584(a) itself, for instance, Congress precluded courts from imposing consecutive terms for an attempt crime and the object of the attempt. That substantive limitation is well within Congress's power to define federal crimes and prescribe the punishment for those who commit them. The same is true of Section 3584(a)'s scope limitation, which precludes courts from relying on any asserted inherent power to run sentences consecutively to anticipated future sentences that may be imposed by another court or another sovereign. Indeed, even before Section 3584(a) took effect, courts had no clear authority to order consecutive service of such sentences. Compare *United States* v. *Eastman*, 758 F.2d 1315, 1318 (9th Cir. 1985), and *Salley* v. *United States*, 786 F.2d 546, 548-549 (2d Cir. 1986) (Newman, J., concurring in the judgment), with *Salley*, 786 F.2d at 547-548. Congress's adoption of Section 3584(a), which limits such authority to the two specified situations, has now resolved the question.[15]

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[15] Once both courts have imposed sentence, the BOP has "plenary control, subject to [the] constraints" of 18 U.S.C. 3621(b) (2006 & Supp. III 2009), over where the federal sentence will be served and when it will commence. *Tapia* v. *United States*, 131 S. Ct. 2382, 2390 (2011). Using that authority, the BOP may permit a federal defendant to serve his federal sentence in state custody—effectively, to serve his sentences concurrently. See pp. 30-36, *infra*.

II. SECTION 3584 APPROPRIATELY LEAVES THE TREATMENT OF FUTURE SENTENCES TO THE LATER-SENTENCING COURT AND TO THE SOVEREIGN CUSTODIANS

Under the legal framework that governs sentencing and imprisonment, the appropriate time to specify the relationship between sentences comes at or after the imposition of the later sentence. That process may occur in the later-sentencing court, which can take all the earlier sentences into account and determine the total quantum of punishment that the defendant should receive. Or it may occur in the prison systems of the sovereigns who incarcerate the defendant, which can reach accommodations with each other and effectively credit one sentence against another or, alternatively, require sequential service. The availability of those avenues confirms that Section 3584(a) does not empower the earlier-sentencing court to impose sentence to make the consecutive-sentencing decision in advance.

A. The Later-Sentencing Court Is Better Positioned To Consider Whether The Defendant's Terms Should Run Consecutively

When a defendant is sentenced on a later charge before he completes his sentence on an earlier charge, the second sentencing court can take full account of the defendant's "background, character, and conduct." *Pepper*, 131 S. Ct. at 1241 (quoting 18 U.S.C. 3661). Those considerations include his previous offenses and his undischarged term for previous offenses.

Where the second court is a federal court, Section 3584(a) expressly gives the court the authority to run the new term of imprisonment concurrently with the

"undischarged" one, or consecutively to it. But even courts that lack such authority to impose a concurrent sentence—such as state courts—can still take account of the first sentence. The second sentencing court knows the facts that the first sentencing court, looking into the future, could not know for certain, see p. 16, *supra*: the nature of both offenses; the fact that the defendant was convicted of both; the degree of factual overlap between the offenses; and any changes in the defendant's situation after the first sentencing, such as unusual post-sentencing rehabilitation (see *Pepper*, *supra*) or disciplinary problems while incarcerated.

Knowing these facts, the second sentencing judge may be able to impose a suspended sentence or a sentence of probation if that judge sees no need for additional incremental punishment and the applicable law permits. Or the second judge can impose a term of imprisonment, but with "a discount * * * on account of [the] undischarged federal sentence." *Romandine* v. *United States*, 206 F.3d 731, 738 (7th Cir. 2000); accord, *e.g.*, Sentencing Guidelines § 5G1.3(b)(1) & comment. (n.2(C)-(D)) (when an earlier offense for which the defendant is still serving the sentence affects the calculation of the second sentence, the district court reduces the second sentence to account for "any period of imprisonment already served" on the first sentence).[16] In either of those ways, the second judge can make the second sentence "concurrent in practical effect." *Romandine*, 206 F.3d at 738. It is the second judge who assesses whether the defendant's sentences are duplica-

[16] The Guidelines also expressly provide for a downward departure based on a previous sentence that the defendant has completed serving. Sentencing Guidelines §§ 5G1.3 comment. (n.4), 5K2.23, p.s.

tive and whether the second term of imprisonment should be adjusted accordingly. See, *e.g.*, *Witte* v. *United States*, 515 U.S. 389, 405 (1995) (noting the role that Sentencing Guidelines § 5G1.3 plays at a second sentencing in mitigating any duplication with the first). Conversely, the second judge can impose a sentence that exceeds the time remaining on the earlier sentence and thus, in practical effect, will have to be served at least partially consecutively.

When the second sentence is imposed in a jurisdiction that uses discretionary parole, as Texas does, the parole authorities may likewise take account of the earlier federal sentence (and the judge may impose a sentence with parole in mind). Indeed, petitioner served only about two and a half years of his ten-year sentence for the October 2007 drug offense before Texas paroled him and he began serving his federal sentence based on the same conduct.

The second sentencing judge may, out of comity, give weight to the first sentencing judge's view that the first sentence ought to be served consecutively or concurrently. But as this case illustrates, the first judge may not have anticipated developments that take place after the first sentencing. Here, the federal court expected that the state sentences would not be concurrent, so that the federal sentence could run consecutively to one but not the other, and the court ordered accordingly. But the state court then imposed concurrent sentences on both state charges. The second judge is better positioned to take account of such developments, which come after the first sentencing judge has imposed sentence and, at least in the federal system, would not be grounds

to modify the first sentence. See 18 U.S.C. 3582(c); Fed. R. Crim. P. 35(a), 45(b)(2).

B. The Sovereigns With Custody Over A Defendant May Make A Sentence Effectively Concurrent Or Consecutive

When a defendant receives two different sentences from two different sovereigns, the decision whether those sentences shall be concurrent or consecutive involves more than just an order of one or both sentencing courts. For a defendant to serve his sentences concurrently, one sovereign must agree to count time spent in the custody of the other. That decision goes not to the length of the sentence, but to when it commences and how and where it is carried out, and it is a quintessentially executive function, performed in the federal system by officers of the Department of Justice.

When a federal sentence is imposed first and a state sentence second, Section 3584(a) appropriately leaves to the Executive Branch the question of how to coordinate the two sentences, if necessary. Congress has given the BOP substantial discretion to decide where an inmate serves his sentence, 18 U.S.C. 3621(b) (2006 & Supp. III 2009), and it may exercise that discretion to allow the inmate to serve his federal sentence in state custody—during which time his state sentence is also running. Conversely, if an inmate is serving his sentence in federal custody, a State may decide to count that time against a subsequently imposed state sentence, if its own procedure permits. See, *e.g.*, N.Y. Penal Law § 70.30(2-a) (McKinney Supp. 2011); 730 Ill. Comp. Stat. 5/5-4.5-50(e) (West Supp. 2011).

1. The BOP has statutory discretion to allow a federal prisoner to serve his state sentence concurrently

"After a district court sentences a federal offender, the Attorney General, through [the] BOP, has the responsibility for administering the sentence." *Wilson*, 503 U.S. at 335. As part of that responsibility, the BOP decides where to incarcerate federal prisoners once their sentences commence. 18 U.S.C. 3621(b) (2006 & Supp. III 2009). The BOP may designate a state facility if it chooses. See *ibid.* (BOP may designate a suitable facility "whether maintained by the Federal Government or otherwise"). Although Congress has set out several factors that the BOP weighs in deciding which facility to designate for service of a sentence, *ibid.*, the BOP has "plenary control, subject to [those] statutory constraints, over 'the place of the prisoner's imprisonment.'" *Tapia* v. *United States*, 131 S. Ct. 2382, 2390 (2011) (citation omitted); see Senate Report 142.

And when federal and state governments have competing claims to a single inmate, the BOP acts as the Attorney General's delegate in working with the States to accommodate the sovereign interests of each. See *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922) ("In that officer [the Attorney General], the power and discretion to practice the comity in such matters between the federal and state courts is vested."); 28 C.F.R. 0.96(c) (delegation of Attorney General's authority to the BOP).

The concept of primary custodial jurisdiction is the longstanding rule of comity by which different sovereigns in the American system accommodate each other's claims to try, convict, sentence, and imprison the same defendant. *Ponzi*, 258 U.S. at 260-261. The sovereign that first arrests the defendant has primary jurisdiction

over him until that sovereign relinquishes it—*e.g.*, by suspending custody through bail or release on recognizance, or by terminating custody upon acquittal or completion of sentence—or voluntarily agrees to transfer primary jurisdiction to another sovereign. See, *e.g.*, *Poland* v. *Stewart*, 117 F.3d 1094, 1098 (9th Cir. 1997), cert. denied, 523 U.S. 1082 (1998).

Another sovereign may request to "borrow" the defendant from the sovereign with primary jurisdiction, often by obtaining a writ of habeas corpus ad prosequendum. Federal courts have had the authority to issue such writs since the first Judiciary Act, and the authority is now codified in 28 U.S.C. 2241. See generally *United States* v. *Mauro*, 436 U.S. 340, 357-358 (1978). When a sovereign lends a prisoner in response to a writ ad prosequendum, however, that sovereign retains primary custodial jurisdiction. See *Jake* v. *Herschberger*, 173 F.3d 1059, 1061 n.1 (7th Cir. 1999); *United States* v. *Evans*, 159 F.3d 908, 912 (4th Cir. 1998); *Causey* v. *Civiletti*, 621 F.2d 691, 693 (5th Cir. 1980).

When the United States borrows a prisoner from a State and obtains a conviction and sentence of imprisonment, the federal sentence does not commence automatically. A federal sentence commences when the defendant is administratively determined to have been "received in custody awaiting transportation to * * * the official detention facility at which the sentence is to be served," or when he "arrives voluntarily" at that facility. 18 U.S.C. 3585(a). Ordinarily, a defendant who is in primary state custody but is borrowed by the United States is not "received in custody" by the BOP until the State yields its primary custody, which may not occur until the state sentence is completed. If, however, the BOP

agrees to designate the state facility as the place for service of the federal sentence, the BOP may administratively deem the defendant to have been "received in custody" under Section 3585(a), and that action starts the federal sentence while the defendant is still in state custody.

When a defendant is in primary federal custody at the time of conviction and sentencing, he is "received in custody" when the sentence is imposed and he is remanded to the United States Marshal. The BOP will decide where he is to serve that sentence. 18 U.S.C. 3621(b) (2006 & Supp. III 2009). If the defendant wishes to serve a state sentence concurrently with the federal sentence, then either the State must agree to credit the time the defendant served in a federal facility, see p. 30, *supra*, or the BOP must agree to designate the state facility as the place for service of the federal sentence, seek the State's agreement to accept the defendant, and send him there if the State agrees. See, *e.g.*, 18 U.S.C. 3623 (allowing the BOP discretion to transfer a federal prisoner to the custody of a State whose executive authority requests the transfer).

Sometimes a defendant completes his state sentence, arrives at a BOP facility, and only then asks that his state time be credited against his federal sentence. The BOP has agreed to entertain requests for such a "*nunc pro tunc* designation" of the state facility as the place for service of the federal sentence. See generally U.S. Dep't of Justice, BOP, *Program Statement 5160.05: Designation of State Institution for Service of Federal Sentence* § 9(b)(4), at 5-6 (Jan. 16, 2003), http://www.bop.gov/policy/progstat/5160_005.pdf (*Designation Program*

Statement); *Barden* v. *Keohane*, 921 F.2d 476, 480-483 (3d Cir. 1991).[17]

In making such a determination, the BOP considers the factors set out in Section 3621(b), which include "the nature and circumstances of the offense," "the history and characteristics of the prisoner," any applicable Sentencing Commission policy statement, and the views of the sentencing court. 18 U.S.C. 3621(b)(2)-(5). To assess these factors, the BOP can obtain information that would not be available to the court that first pronounced sentence on the defendant, such as the defendant's disciplinary history while in custody and assessments of his institutional adjustment. *Designation Program Statement* § 8(a) at 4. The BOP also gives considerable weight to the views of the sentencing court itself.

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[17] The earliest date a federal sentence can commence, however, is the date that it was imposed. See, *e.g.*, *Coloma* v. *Holder*, 445 F.3d 1282, 1284 (11th Cir. 2006) (per curiam) (applying 18 U.S.C. 3585(a)). Thus, in cases like this one, neither a district court's concurrent-sentencing order nor the BOP's *nunc pro tunc* procedure would enable an inmate to obtain credit for *all* of the time spent in state custody. Petitioner received credit toward his state sentence for the period beginning October 1, 2007, when he was arrested. J.A. 30, 36. The federal district court imposed petitioner's sentence on August 22, 2008, and the sentence began running on March 17, 2010, when he was paroled to federal custody. If the district court's order were reversed, the BOP would have discretion to treat petitioner's sentence, *nunc pro tunc*, as commencing at most approximately 19 months earlier, on the date of his federal sentencing. Although time spent in custody before the federal sentencing can sometimes result in prior-custody credit against the federal sentence, petitioner cannot receive prior-custody credit for the time following his state arrest because that time has already "been credited against another sentence" by the State. 18 U.S.C. 3585(b); see *Wilson*, 503 U.S. at 334.

Id. § 9(b)(1)-(3) at 4-5.[18] If Section 3584(a) applies but the district court entered no order or recommendation and did not otherwise indicate its intent, the BOP applies the same presumptions set out in Section 3584(a)'s second and third sentences: terms imposed at the same time run concurrently, but a later federal sentence runs consecutively to an earlier, undischarged state sentence. If the federal sentence was imposed first and, as a result, the district court entered no order under Section 3584(a), the court may have made a recommendation in the judgment or otherwise made its views known on the record. If not, BOP affirmatively solicits the original sentencing judge's views by letter, if that judge is available. *Id.* § 9(b)(4)(c), (4)(e) and (5)(a) at 6, 7.[19]

If the BOP denies a request for a *nunc pro tunc* designation, an inmate in a federal institution may challenge that denial through the BOP's administrative rem-

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[18] Similarly, if the sentencing court recommends that the inmate be imprisoned at a particular BOP facility, the BOP will consider that recommendation but will not be bound by it. See 18 U.S.C. 3621(b)(4); *Tapia*, 131 S. Ct. at 2390-2391; U.S. Dep't of Justice, BOP, *Program Statement P5100.08: Inmate Security Designation and Custody Classification*, Ch. 1, at 1 (Sept. 12, 2006), http://www.bop.gov/policy/progstat/5100_008.pdf; *id.* Ch. 3, at 3, 4; see also Fed. R. Crim. P. 38(b)(2).

[19] Because years may have passed between the time of sentencing and the time of the request, the sentencing court's views may have changed. See, *e.g.*, *Reynolds* v. *Thomas*, 603 F.3d 1144, 1147 (9th Cir. 2010) (on BOP's third request, more than six years after federal sentencing, federal sentencing judge concluded that "the objectives of sentencing have * * * been largely met" and did not oppose a designation that would permit concurrent service of federal and state sentences), petition for cert. pending, No. 10-7502 (filed Nov. 12, 2010).

edy process. See 28 C.F.R. 542.10 *et seq.*[20] Federal courts have reviewed those determinations, pursuant to habeas petitions under 28 U.S.C. 2241, but have accorded great deference to the BOP's "broad discretion." *Barden*, 921 F.2d at 478.

2. Consecutive-sentencing orders that are not authorized by Section 3584(a) wrongly limit the BOP's discretion to agree to a concurrent sentence

A formal order by the district court, pursuant to Section 3584(a), that federal and state terms of imprisonment are to be served consecutively precludes the BOP from exercising discretion to permit those terms to be served concurrently. *Designation Program Statement* § 9(b)(4)(f) at 6-7. In cases like this one, the district court has imposed such an order even though, in the government's view, the order is not authorized by Section 3584(a). Because circuit precedent holds that the district court does have such authority, the BOP (despite its disagreement with that precedent) as a matter of policy does not seek to challenge those orders administratively by making *nunc pro tunc* determinations that would be inconsistent with the court's orders. As a result, when the district court formally orders consecutive service, the defendant may not thereafter obtain a favorable exercise of BOP's discretion.[21]

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[20] If the inmate requests that the BOP designate a state facility while he is still in state custody, but the BOP denies the request, he can still invoke the administrative-remedy procedure and seek *nunc pro tunc* relief once he arrives at a federal institution.

[21] Petitioner has not asked the BOP to exercise its discretion to grant him a favorable *nunc pro tunc* determination. If he did, as the government noted at the certiorari stage (Br. in Opp. 13-14), the BOP might well conclude that the district court's sentencing order is ambiguous

In many cases, a district court's order precluding the BOP from granting a *nunc pro tunc* designation will not differ in practical effect from a district court's recommendation that the BOP deny the designation.[22] In this case, the district court might well adhere to its view that petitioner's state sentence for violating his probation should run consecutively to his federal sentence. Cf. Sentencing Guidelines § 5G1.3 comment. (n.3(C)); *id.* § 7B1.3 comment. (n.4). And the BOP would give weight to the court's view. See pp. 34-35, *supra*.

Nonetheless, an order and a recommendation are sufficiently different that petitioner, who preserved his objection to the order, is entitled to reversal. Cf. *Tapia*, 131 S. Ct. at 2391. Where Section 3584(a) does not permit the district court to order a consecutive sentence, Congress gave the BOP responsibility to decide whether to place the prisoner in a federal or a state facility, and it made the federal court's view one factor among many. 18 U.S.C. 3621(b)(4). The other factors include matters that the court imposing the first term of imprisonment is not well positioned to assess, such as the inmate's history. See pp. 16, 27-29, *supra*; cf. *Wilson*, 503 U.S. at 334 (under the Sentencing Reform Act, the Attorney

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and does not expressly preclude petitioner from seeking relief. The order does not specifically address the circumstance that ultimately transpired here: the decisions of the state court and the state parole authority made it impossible for petitioner to serve his federal term as the federal court ordered, *i.e.*, concurrently with one state term but consecutively to the other. If the BOP concludes that a sentencing order is ambiguous, it seeks clarification from the sentencing judge.

[22] If this Court holds in this case that the district court lacked authority to enter the consecutive-sentencing order, in the future the BOP would still treat such orders as recommendations to be given appropriate weight. See *Tapia*, 131 S. Ct. at 2390-2391.

General, not the district court, awards sentencing credit for pretrial or presentencing custody, matters about which "the [court] could only have speculated" at the time of sentencing). Section 3584(a) and Section 3621(b) were both enacted as part of the Sentencing Reform Act, and they are properly viewed as working harmoniously together. See *Reno* v. *Koray*, 515 U.S. 50, 56-57 & n.3 (1995). Reversing the judgment below and allowing petitioner to ask the BOP to treat his federal sentence as starting on the date when it was imposed, when he was in state custody, is the outcome consistent with Congress's allocation of responsibility to the Executive Branch.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3584 provides:

Multiple sentences of imprisonment

(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.

(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

2. 18 U.S.C. 3621 provides in pertinent part:

Imprisonment of a convicted person

(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse. Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person.

* * * * *