No. 08-1427

In the Supreme Court of the United States

COREY ALAN BROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court erred by directing that petitioner's federal sentence be served consecutively to a state sentence that had not yet been imposed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and guidelines:

In the Supreme Court of the United States

No. 08-1427

COREY ALAN BROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-5a) is not published in the Federal Reporter but is reprinted in 310 Fed. Appx. 681.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on February 18, 2009. A petition for rehearing was denied on April 13, 2009 (Pet. App. 7a-8a). The petition for a writ of certiorari was filed on May 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of being a felon in possession of a firearm, in

violation of 18 U.S.C. 922(g)(1). He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. Pet. App. 1a-3a. The court of appeals affirmed. *Id.* at 4a-5a.

1. On December 12, 2007, petitioner pawned a Remington .270-caliber bolt-action rifle at Wild Bill's Pawn Shop in Abilene, Texas. When he returned the following day and attempted to retrieve it, he falsely stated on an ATF Form 4473 that he had never been convicted of a felony. In fact, he had previously been convicted in Texas state court of the felony offense of criminal mischief. The pawnshop employee refused to allow petitioner to redeem the weapon. Three days later, the Callahan County Sheriff's Office received a call from petitioner's grandmother advising that petitioner had taken her husband's deer rifle and pawned it in Abilene. Petitioner ultimately admitted to Abilene police officers that he had pawned the weapon, but suggested that he had permission from his grandmother to do so. Presentence Report ¶¶ 8-20 (PSR).

2. A federal grand jury sitting in the Northern District of Texas returned a three-count indictment charging petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); possession of a stolen firearm, in violation of 18 U.S.C. 922(j); and making a false statement to a federal firearms dealer, in violation of 18 U.S.C. 922(a)(6). Pursuant to a writ of habeas corpus *ad prosequendum*, petitioner was temporarily released from state custody on unrelated state charges to face the federal charges. PSR ¶¶ 1-2.

Pursuant to the terms of a written plea agreement, petitioner pleaded guilty to the felon-in-possession charge and the remaining charges were dropped. PSR 1 & ¶¶ 4-6. The PSR recommended an advisory Sen-

tencing Guidelines range of 18-24 months. PSR ¶¶ 26-27, 31-32, 75.

The PSR noted that petitioner faced a pending probation revocation for the offense of criminal mischief in Taylor County, Texas (Case No. 8223D), as well as three pending state charges in Taylor County for assault, forgery, and illegal dumping. PSR ¶¶ 77-78. The PSR noted that under Fifth Circuit precedent, the district court had the discretion to impose a sentence consecutive to any sentence that might be imposed on the state charges. PSR ¶ 76 (citing *United States* v. *Brown*, 920 F.2d 1212 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991)). Petitioner preserved an objection to that practice. Pet. App. 10a-11a; Pet. PSR Resp.; PSR Addendum.

The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. The court provided that the sentence would run consecutively to any future state sentences imposed on the charges then pending in Taylor County. Pet. App. 3a, 12a.

Following sentencing, petitioner was returned to state custody. On October 29, 2008, the state trial court revoked his probation for his criminal-mischief conviction; sentenced him to 20 months of imprisonment on that charge; and sentenced him to four years of imprisonment on the aggravated-assault charge. (The state court also imposed a sentence of 16 months of imprisonment on a theft charge apparently not covered by the federal court's consecutive-sentencing order.) The state judgment of conviction indicates that the criminal mischief sentence is to run concurrently, but does not indicate whether the four-year sentence on the aggravated-assault conviction should be served consecutively or con-

currently.[1] Petitioner is currently serving those sentences and has not yet begun serving his federal sentence. His projected release date from state prison is January 25, 2012. Texas Dep't of Crim. Justice, *Offender Information Detail* (visited Aug. 25, 2009) <http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=06300347>.[2]

3. The court of appeals affirmed summarily, in an unpublished, per curiam decision. Pet. App. 4a-5a (citing *Brown*, 920 F.2d at 1216-1217).

ARGUMENT

Petitioner contends (Pet. 5-14) that this Court's review is warranted because the courts of appeals are divided over whether a district court has the authority to direct that a sentence run consecutively to a state sentence that has not yet been imposed. The government agrees with petitioner that district courts lack such authority under 18 U.S.C. 3584(a). Nevertheless, for two reasons, further review in this case is not warranted to resolve the circuit conflict on that issue. First, the issue lacks real significance, because as a practical matter, state courts and the Federal Bureau of Prisons (BOP) can reach their own decisions about crediting service in another sovereign's correctional system, irrespective of whether Section 3584(a) authorizes federal district courts to embody such decisions in a judgment of convic-

---

[1] Under Texas law, sentences are to run concurrently unless they are "cumulated in the proper manner." Pet. 4-5 & n.1 (citation omitted).

[2] Petitioner received credit for time spent in jail while the state charges against him were pending, which reduced his sentence on the aggravated-assault conviction by 279 days. See Judgment of Conviction at 1, *State* v. *Brockman*, No. 8823D (Tex. 350th Dist. Ct. Taylor County Nov. 6, 2008).

tion and sentence. Consistent with that conclusion, this Court has denied numerous petitions raising the issue. Second, any need for this Court to resolve the circuit conflict is diminishing: the issue is under active re-examination in the courts of appeals, and in the meantime all federal prosecutors have been directed to urge sentencing courts not to impose consecutive-sentencing conditions of the sort at issue here.

1. As petitioner points out (Pet. 6-7), the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively to a yet-to-be-imposed state sentence. In the government's view, contrary to the current position of the court below, Section 3584(a) does not confer that authority. Nevertheless, further review is not warranted.

The first sentence of Section 3584(a) identifies two situations in which a district court may take into account other sentences: when "multiple terms of imprisonment are imposed on a defendant at the same time," and when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." The second and third sentences establish the default presumptions that correspond to each of those two situations when the district court's order is silent on whether the sentences are to be consecutive or concurrent. A federal defendant who has not yet received, but may one day receive, a sentence in a separate state-court proceeding does not fall within either of the two situations specified in the first sentence of Section 3584(a). For that reason, in the government's view, the presumptions set out in the remainder of that subsection have no application to such a defendant.

The Second, Sixth, and Ninth Circuits have taken that view. *United States* v. *Donoso*, 521 F.3d 144, 146-149 (2d Cir. 2008) (per curiam); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1041 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492-493 (9th Cir. 1991); see also *United States* v. *Smith*, 472 F.3d 222, 225-227 (4th Cir. 2006) (holding that a federal district court lacks authority to impose a federal sentence consecutive to an as-yet-unimposed federal sentence). The Seventh Circuit has also held, for distinct reasons, that federal district courts lack authority to impose a sentence that runs consecutively to a future sentence. See *Romandine* v. *United States*, 206 F.3d 731, 737-738 (2000).

Four courts of appeals, including the court below, have taken the contrary view. Those courts have concluded either that federal district courts have the inherent authority to impose consecutive sentences and that Section 3584(a) does not withdraw it, see *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991); *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam), or that Section 3584(a)'s third sentence affirmatively permits terms of imprisonment to be run consecutively even before the second term of imprisonment has been imposed, see *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995); *United States* v. *Ballard*, 6 F.3d 1502, 1507-1510 (11th Cir. 1993). If those interpretations were correct, however, Congress's specification, in the first sentence of Section 3584(a), of two situations in which the court has discretion to run sentences concurrently or consecutively would have been unnecessary: if courts had inherent authority to make consecutive-versus-concurrent deter-

minations, the limiting conditions in the first sentence would be beside the point, and if Section 3584(a)'s third sentence conferred authority to run sentences consecutively or concurrently in *all* cases in which sentences are imposed at different times, it would have made little sense for the first sentence to refer to a sentencing court's authority when the defendant has a prior undischarged term of imprisonment. Treating Section 3584(a) as an integrated whole avoids rendering its provisions partially superfluous.[3]

2. As the government has previously explained, however, the differences between the circuits' interpretations of Section 3584(a) have little practical impact. Accordingly, this Court has repeatedly declined to review the question presented. See *Valenciano-Espinoza* v. *United States*, 129 S. Ct. 2849 (2009) (No. 08-10524); *Smith* v. *United States*, 129 S. Ct. 2735 (2009) (No. 08-8118); *Garcia* v. *United States*, 129 S. Ct. 2734 (2009) (No. 08-6756); *Goodgion* v. *United States*, 129 S. Ct. 2734 (2009) (No. 08-5920); *Cortes-Beltran* v. *United States*, 129 S. Ct. 2380 (2009) (No. 08-8243); *DeLeon* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6055); *Bishop* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6175); *Dimas* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6165); *Martinez-Guerrero* v. *United States*, 129 S. Ct. 52 (2008) (No. 07-1362); *King* v. *United States*, 128

---

[3] That reading is confirmed by 18 U.S.C. 3584(b), which directs federal courts to consider the sentencing factors set out in 18 U.S.C. 3553(a) in deciding whether to impose concurrent or consecutive terms of imprisonment. Several of those factors involve consideration of the total length of incarceration, see, *e.g.*, 18 U.S.C. 3553(a)(2)(B), (2)(C) and (6), and that analysis cannot logically take place when one of the defendant's sentences has not yet been determined, and indeed may never be imposed.

S. Ct. 706 (2007) (No. 07-5307); *Lopez* v. *United States*, 128 S. Ct. 705 (2007) (No. 07-5060); *Cox* v. *United States*, 547 U.S. 1127 (2006) (No. 05-454); *Lackey* v. *United States*, 545 U.S. 1142 (2005) (No. 04-9286); *Martinez* v. *United States*, 543 U.S. 1155 (2005) (No. 04-7129); and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136).[4]

a. The principal reason why the question does not require resolution by this Court is that under current law, the second court to sentence a defendant will often make its own decision concerning how long the defendant will spend in prison, irrespective of whether the first sentencing court specified a concurrent or consecutive sentence. For example, if a defendant is sentenced in state court after being sentenced in federal court, the state court can adjust the length of the state sentence (or suspend a portion of the sentence) to take into account the time the defendant has served or will serve in federal custody. See, *e.g.*, *Romandine*, 206 F.3d at 738 (explaining that the correct "answer" to the circuit conflict "does not matter, and the conflict is illusory").

Even when a defendant faces both federal and state sentences, the terms often do not overlap, simply because the sovereign with primary jurisdiction over the defendant is not required to yield custody to the other sovereign; it may keep control over the defendant until the sentence expires. See generally *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (explaining primary jurisdiction over defendants prosecuted by separate sovereigns).

---

[4] The same question is also asserted by the pending petitions for writs of certiorari in *Farris* v. *United States*, No. 08-10700 (filed May 26, 2009); *Rollins* v. *United States*, No. 08-1453 (filed May 21, 2009); *Garcia* v. *United States*, No. 08-10721 (filed May 19, 2009); and *Brent* v. *United States*, No. 08-9319 (filed Mar. 16, 2009).

Even if, as here, the sovereign with primary jurisdiction permits the other sovereign to try and convict the defendant during that time, the other sovereign is not entitled to execute its sentence by immediately taking the defendant into custody.

Of the four courts of appeals that permit federal courts to impose a sentence consecutively to a not-yet-imposed state sentence, two (including the court below) have mitigated the effect of that holding by suggesting that a federal judgment containing such a directive does not bar the state court from taking steps in the future to permit a concurrent sentence. See *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008); *United States* v. *Andrews*, 330 F.3d 1305, 1307 n.1 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); see also *United States* v. *Douglas*, 569 F.3d 523, 527 n.2 (5th Cir. 2009) (defendant withdrew his challenge "because the state proceedings concluded and the state court has chosen to run his state sentence concurrently with the time he is serving in federal custody"). The other two circuits have not clearly spoken to the question whether a state court is so bound. The Tenth Circuit has said that a state court cannot override a federal court's determination, but on the facts of that case, the State effectively did so by releasing the defendant to federal custody with the statement that he had satisfied his state sentence. *Williams*, 46 F.3d at 58. The Eighth Circuit has said that "the federal sentence controls" in the event of a conflict, *Mayotte*, 249 F.3d at 799, but did not address the practical implementation of that statement, and in any event may be reconsidering its view of Section 3584(a) altogether, as discussed below. See pp. 12-13, *infra*; see also *United States* v. *Hayes*, 535 F.3d 907, 910 (8th Cir. 2008) (district court recognized that

any direction it might give would have no effect if "the state court decides to run its sentence concurrently, which they are free to do"), cert. denied, 129 S. Ct. 1983 (2009). Thus, even in the circuits that read Section 3584(a) to authorize a sentence consecutive to a future sentence, any practical impact of that interpretation on subsequent sentencing courts is speculative at best.

b. Petitioner contends that the correct interpretation of Section 3584(a) has an impact on his ability to ask the BOP to run his federal sentence concurrently with his state sentences now that they have been imposed. That contention is not sufficient to justify plenary review.

As petitioner states, "[o]ccasionally" a federal defendant who is also serving a state sentence will request that his federal sentence be deemed to have commenced at the same time as his state sentence and to run concurrently with it. Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, *Designation of State Institution for Service of Federal Sentence* § 9(b)(4), at 5 (2003) (*Designation Program Statement*). The BOP has detailed protocols governing when to permit an inmate subject to a federal sentence to serve it in state custody. In making those decisions, the BOP gives considerable (though not dispositive) weight to the federal sentencing court's intent. See *id.* § 9(b), at 4-7; see also 18 U.S.C. 3621(b) (listing pertinent factors). Even if the sentencing court's intent is not embodied in the judgment, the BOP consults directly with the sentencing court by letter to ascertain its views on whether the sentences should be allowed to run concurrently. See *Designation Program Statement* § 9(b)(4)(c), at 6.

Petitioner notes (Pet. 8-10), however, that if the sentencing court *does* embody in the judgment its intent

that the defendant serve a consecutive sentence, the BOP will comply with that order. *Designation Program Statement* § 9(b)(4)(f), at 6-7. Petitioner contends that, as a result, the interpretation of Section 3584(a) has a concrete result on a federal prisoner whose sentencing judge wishes him to serve a consecutive sentence but whom the BOP would nonetheless permit to serve a concurrent sentence based on the other relevant factors.

That category is unlikely to include many inmates, and there is no indication that petitioner would fit into it. Even if petitioner made a request for designation to BOP and the consecutive-sentencing order did not exist, there is no indication that any of the other factors in 18 U.S.C. 3621(b) would warrant relief. To the contrary: one of the relevant factors is "any pertinent policy statement issued by the Sentencing Commission." 18 U.S.C. 3621(b)(5). Far from contradicting the sentencing court's view as expressed in its judgment, in this case the Sentencing Commission's guidance confirms it as to petitioner's state sentence for criminal mischief. Petitioner committed the offense of conviction while on probation for the criminal-mischief offense. PSR ¶¶ 37, 40, 77. His probation was subsequently revoked. See p. 3, *supra*. When, as here, "the defendant was on * * * state probation * * * at the time of the instant offense and has had such probation * * * revoked," the Sentencing Commission "recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation." Sentencing Guidelines § 5G1.3, comment. (n.3(C)). Nor can petitioner claim that his other state conviction warrants a concurrent sentence by virtue of being related to the instant offense; the aggravated-assault conviction was not related. PSR ¶¶ 44, 78; see Sentencing Guidelines

§ 5G1.3(b). As for the other factors, two of them encompass petitioner's criminal history and offense conduct, which led the district court to impose a sentence at the top of the advisory Guidelines range. See 18 U.S.C. 3621(b)(2) and (3). And the remaining factor—"the resources of the facility contemplated," 18 U.S.C. 3621(b)(1)—is unlikely to favor petitioner.

In short, even if the consecutive-sentencing order of which petitioner complains were stricken from his judgment of conviction, he would have only the most remote chance of persuading the BOP to permit him to begin serving his federal sentence before completing his state sentences. The same is true in the run of cases. Indeed, petitioner points to none where a similarly situated inmate was successful. That confirms why this issue lacks the sort of practical significance that would warrant this Court's intervention to resolve the circuit conflict.

3. In the government's view, the conflict over the interpretation of Section 3584(a) is best suited to resolution in the lower courts. Indeed, the courts of appeals that disagree with the government's interpretation (and petitioner's), including the court below, have begun to reconsider that stance. The government has taken active steps both to encourage that re-examination in the courts of appeals and to oppose consecutive-sentencing orders in the district courts. See pp. 12-17, *infra*. Accordingly, even if the question had some substantive impact that gave it continuing significance, review by this Court would be premature at this time.

a. Most recently, the Eighth Circuit granted a petition for rehearing en banc to re-examine the issue and will hear reargument in September 2009. See *United States* v. *Lowe*, 312 Fed. Appx. 836 (2009), reh'g en banc granted (Apr. 22, 2009). In that case, the government

has taken the position that the Eighth Circuit's precedent interpreting Section 3584(a) was wrongly decided.[5]

The Fifth Circuit, too, has signaled some willingness to re-examine the issue. That development is particularly significant, because in recent years the vast majority of cases presenting this issue have arisen in the Fifth Circuit.[6] Some months ago, the Fifth Circuit ordered briefing on the question whether its precedent on the issue "should be overruled or modified." *United States* v. *Garcia-Espinoza*, No. 08-10775 (Dec. 18, 2008). The government filed a brief agreeing that the court should overrule that precedent in an appropriate case, but noting that Garcia-Espinoza's case was a poor vehicle because his state sentence had already expired. The court of appeals accordingly denied a hearing en banc in that case, see Pet. App. 7a-8a, but it may identify another suitable case in which to reconsider the issue. Two of the three judges in *Garcia-Espinoza* advocated that the court do just that. *United States* v. *Garcia-Espinoza*, No. 08-10775, 2009 WL 1362199, at *1 (5th Cir. May 15, 2009) (Owen, J., joined by Dennis, J., concurring) ("writ[ing] separately to recommend that the court

---

[5] Petitioner misstates the basis on which the government opposed rehearing en banc in *Lowe*. See Pet. 13. The government "agree[d] with Lowe that [the Eighth Circuit's precedent] should be overruled in an appropriate case," but explained that Lowe's was not a suitable vehicle because Lowe had not preserved an objection and could not prevail *on plain-error review*. Gov't Resp. to Pet. for Reh'g En Banc at 6, *Lowe*, *supra* (No. 08-2304).

[6] In the last five years, we are aware of only one case (*Cox*, *supra*) presenting the question that has reached this Court from any court of appeals other than the Fifth Circuit. (*Hayes*, *supra*, which came from the Eighth Circuit, presented a distinct question.)

re-examine en banc how we have previously construed 18 U.S.C. § 3584").

Despite that development, petitioner contends (Pet. 11-13) that there is in fact no realistic prospect that the Fifth Circuit will change its stance on this issue. Petitioner notes that the court of appeals denied a hearing en banc in *Garcia-Espinoza*, but that outcome is explained by the vehicle problem identified by the government. Likely for that reason, neither Judge Owen nor Judge Dennis called for an en banc ballot in *Garcia-Espinoza* itself, see Pet. App. 7a, even though both of them *subsequently* made clear their view that the Fifth Circuit should reconsider its precedent en banc, *Garcia-Espinoza*, 2009 WL 1362199, at *1-*2 (Owen, J., joined by Dennis, J., concurring).

Petitioner also notes that, even after raising the possibility of en banc consideration, the Fifth Circuit has affirmed sentencing judgments requiring that federal sentences be served consecutively with state sentences that had not yet been imposed. See Pet. 12 (citing *United States* v. *Farris*, 312 Fed. Appx. 598 (2009), petition for cert. pending, No. 08-10700 (filed May 26, 2009); *United States* v. *Scott*, 311 Fed. Appx. 703, cert. denied, 129 S. Ct. 2849 (2009); *United States* v. *Valenciano-Espinoza*, 311 Fed. Appx. 696, cert. denied, 129 S. Ct. 2849 (2009); *United States* v. *Maden*, 311 Fed. Appx. 695, cert. denied, 129 S. Ct. 2848 (2009); *United States* v. *Garcia*, 310 Fed. Appx. 707 (2009), petition for cert. pending, No. 08-10721 (filed May 19, 2009); *United States* v. *Jochum*, 310 Fed. Appx. 679, cert. denied, 129 S. Ct. 2782 (2009).

In each of the cases petitioner cites, however, the defendant affirmatively represented to the court of appeals that the issue was foreclosed by circuit precedent,

and did not ask the court of appeals to reconsider that precedent by petitioning for either initial hearing or rehearing en banc. Indeed, in many of those cases—including this case—the defendant affirmatively *asked* the court of appeals to affirm summarily. See Pet. C.A. Mot. for Summ. Disposition. Petitioner identifies no case since *Garcia-Espinoza*—and we are aware of none—in which the Fifth Circuit has denied a petition for rehearing en banc on this issue.

Moreover, petitioner is altogether incorrect in his suggestion (Pet. 13) that "the Government does not believe that an appropriate vehicle" for the Fifth Circuit to "resolv[e] the issue can ever exist." The government opposed rehearing en banc in *Garcia-Espinoza* because the issue had become moot: Garcia-Espinoza was effectively sentenced in the state case to time already served, and he was transferred shortly thereafter to federal custody to begin his federal sentence. We have explained that the correct interpretation of Section 3584(a) has little or no practical effect and therefore does not warrant plenary review by this Court; in *Garcia-Espinoza*, it no longer had *legal* effect, and the issue no longer presented *any* court with a live controversy.

The United States has already recommended to the Fifth Circuit that, when presented with an "appropriate case," the court should "overrule or modify [*Brown*] and hold that [Section] 3584(a) does not authorize a district court to order that the federal term of imprisonment be served consecutively to a yet-to-be-imposed state sentence." Gov't Br. at 7, *Garcia-Espinoza*, *supra* (No. 08-10775); see also pp. 12-13 & note 5, *supra* (noting the government's similar argument to the Eighth Circuit). Petitioner's suggestion (at 13) that the United States has failed to do so is inaccurate.

b. The government has also taken steps to ensure that federal prosecutors act consistently with the interpretation of Section 3584(a) discussed above. On January 8, 2009, the Executive Office for United States Attorneys informed all United States Attorneys' Offices that the Solicitor General, on behalf of the Department of Justice, had adopted that interpretation. In accompanying guidance, all federal prosecutors were directed to urge sentencing courts not to order that a sentence run consecutively to (or concurrently with) a yet-to-be-imposed sentence. In addition, except where circuit precedent (or the plain-error standard of review) dictates otherwise, the government will not defend an order that runs the federal sentence consecutively to a yet-to-be-imposed sentence.

As petitioner notes, the court below has continued to affirm sentences containing a consecutive-sentencing condition; all of those cases, however, involved sentences imposed before the Department of Justice distributed its guidance to federal prosecutors. Since that time, we understand that practice in the district courts has generally changed. As one example, the same district judge who imposed the allegedly erroneous sentencing condition in this case was also the sentencing judge in at least eight of the other cases that have reached this Court presenting the same issue—far more than any other individual judge. See also, *e.g.*, *United States* v. *Clinton*, No. 08-11007, 2009 WL 2512834 (5th Cir. Aug. 18, 2009) (same judge); *United States* v. *Collier*, No. 08-11071, 2009 WL 2513465 (5th Cir. Aug. 18, 2009) (same judge); *United States* v. *Diaz*, No. 08-10877, 2009 WL 1687805 (5th Cir. June 16, 2009) (same judge). We are informed by the supervisory Assistant United States Attorney for the relevant divisions of the Northern District of Texas

that the district judge has now abandoned his prior practice of imposing consecutive-sentencing conditions. Although we are informed that some district judges may continue to impose similar consecutive sentences, the practice appears to have substantially abated.

Accordingly, even if the courts of appeals were as intractably divided on the question presented as petitioner suggests, any significance that the issue may have had is diminishing. For that reason as well, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DEBORAH WATSON
Attorney

AUGUST 2009