No. 08-1453

In the Supreme Court of the United States

TOMMY RAY ROLLINS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court directed that petitioner's federal sentence run consecutively to a state sentence that had not yet been imposed, and, if so, whether the court thereby committed reversible plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 552 F.3d 739.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2009. On April 9, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 21, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the Western District of Missouri, petitioner was convicted of one count of possessing unregistered firearms (destructive devices), in violation of 26 U.S.C. 5841, 5861(d), and 5871. He was

sentenced to 120 months of imprisonment, to be followed by three years of supervised release. The district court denied his request for an order that his federal sentence run concurrently with his anticipated state sentences on pending charges. Pet. App. 9a, 11a, 13a, 15a. The court of appeals affirmed. *Id.* at 1a-7a.

1. On May 28, 2005, at approximately 2:00 a.m., petitioner was driving on an interstate highway in a car that had no registration. Trooper Brandon Brashear of the Missouri State Highway Patrol signaled petitioner to pull over, and after a brief chase, the car stopped on the shoulder. As Trooper Brashear got out of his patrol car, petitioner got out of his vehicle carrying a 9mm handgun. Trooper Brashear drew his own firearm and ordered petitioner to drop the gun; petitioner replied, "No, you're gonna die motherfucker tonight," and began shooting. Petitioner fired at least 15 shots, 10 of which struck Trooper Brashear, inflicting life-threatening injuries. Presentence Investigation Report ¶¶ 5-6, 9 (PSR).

About an hour later, petitioner entered a pool hall in Independence, Missouri, and told patrons that he had just shot a police officer and that they needed to call the police. Within minutes, city police officers arrived on the scene and arrested petitioner. After being advised of his rights, petitioner told the police, among other things, that he had purchased the "Mac-10" to kill his former employer, Dred Scott. He also admitted shooting Trooper Brashear numerous times. PSR ¶¶ 8, 11.

Petitioner agreed to show investigators where he had discarded the firearm used to shoot Trooper Brashear, and he directed them to a nearby field that was approximately two blocks from Scott's house. Officers recovered two Molotov cocktails made out of 40-ounce beer

bottles filled with gasoline, with white washcloths serving as wicks; the 9mm pistol, loaded with eight rounds of ammunition; and a piece of white paper with directions to Scott's house. The Molotov cocktails were not registered to petitioner in the National Firearms Registration and Transfer Record. Petitioner admitted that he had planned to firebomb Scott's house and then shoot the family as they fled. PSR ¶¶ 9-10.

2. Petitioner was first charged in state court in Jackson County, Missouri, with first-degree assault on a law enforcement officer (attempted murder), armed criminal action (against Trooper Brashear), first-degree assault (against Scott), and unlawful possession of an illegal weapon. PSR ¶ 42.

Subsequently, a federal grand jury sitting in the Western District of Missouri returned an indictment charging petitioner with one count of possessing unregistered firearms, *i.e.*, the two Molotov cocktails, in violation of 26 U.S.C. 5841, 5861(d), and 5871. Indictment 1. A Molotov cocktail is a "destructive device," and a "destructive device" is a firearm under the relevant federal statute. 26 U.S.C. 5845(a)(8) and (f)(1)(A).

While the state charges were still pending, petitioner appeared in federal court pursuant to a writ of habeas corpus *ad prosequendum* and pleaded guilty to the federal indictment. Pet. App. 2a, 13a; PSR 1. The district court convened a sentencing hearing three months later, but ordered the sentencing continued and a revised PSR prepared. See PSR 2d Addendum 1.[1] Both federal and state proceedings were then continued for a lengthy period because of concerns about petitioner's compe-

[1] The district court directed that the advisory Sentencing Guidelines range be re-calculated without relying on petitioner's shooting of Trooper Brashear as relevant conduct to the firearm conviction.

tency. Once petitioner was found competent, he proceeded to trial in state court, and the jury found him guilty on all counts. See Pet. 7-8. Petitioner faced a maximum sentence of life imprisonment.

Petitioner returned to federal court for sentencing. Defense counsel asked the district court to continue the sentencing proceeding until after petitioner was sentenced in his state case, noting that the court could then take into account the length of the state sentence and that petitioner would then have a stronger basis under the Sentencing Guidelines for asking the district court to order that his federal sentence run concurrently with his state sentence. See 5/1/2008 Sent. Tr. 7-8, 13-14; see also *id.* at 46-47.[2] The government opposed a continuance, citing the previous postponements of sentencing. *Id.* at 8-9, 15. The court denied the request for a continuance. *Id.* at 16.

The district court adopted the Second Addendum to the PSR, which calculated an advisory Sentencing Guidelines range of 87 to 108 months based on a total offense level of 27 and a criminal history category of III. 5/1/2008 Sent. Tr. 44; PSR 2d Addendum ¶ 19.[3] Peti-

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[2] Petitioner cited Sentencing Guidelines § 5G1.3(b), which provides in relevant part that "[i]f * * * a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction * * * and that was the basis for an increase in the offense level for the instant offense * * * (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment."

[3] The base offense level was 24 under the guideline for the offense for which the Molotov cocktails were to be used. See Sentencing Guidelines §§ 2A1.4(a)(1), 2K2.1(c)(1), 2X1.1(a). Petitioner also received a six-level enhancement under Sentencing Guidelines § 3A1.2(c), because the victim was a law enforcement officer, and a three-level reduction for ac-

tioner faced a statutory maximum sentence of 120 months of imprisonment. See 26 U.S.C. 5871.

Defense counsel asked the court to impose a below-Guidelines sentence within a range of 24 to 30 months. 5/1/2008 Sent. Tr. 47. Alternatively, if the court were inclined to impose a sentence within or above the advisory Guidelines range, counsel asked the court to order that the federal sentence run concurrently with petitioner's not-yet-imposed state sentence. *Id.* at 45-47. Defense counsel did not discuss whether the district court had authority to direct that his federal sentence be served consecutively or concurrently; he only asked that the court order a concurrent sentence.

The government asked the court to depart upward and to sentence petitioner to the statutory maximum of 120 months in light of the severity of petitioner's crime and his intent to inflict serious harm on the Scott family by firebombing their house. 5/1/2008 Sent. Tr. 48-50. The government also asked the court to order that petitioner's federal sentence run consecutively to his not-yet-imposed state sentence. *Id.* at 50.

Before imposing sentence, the district court denied petitioner's request that his federal sentence run concurrently with his not-yet imposed state sentence; the court entered no order at all on concurrent or consecutive sentencing. The court stated:

> I will use the statutory ten-year sentence in this case and I would not direct that it be applied concurrently, so *my supposition is* that it will be—would be served consecutively. I'm not sure how you have a consecutive sentence after a life sentence, if the pa-

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ceptance of responsibility under Sentencing Guidelines § 3E1.1. See PSR 2d Addendum ¶¶ 6-17.

> role commission does not release the defendant. It does seem to me that the state court convictions are sufficiently separate from the Molotov cocktail situation here. That it would be pretty much allowing the tail to wag the dog if I would treat them as essentially overlapping.

Pet. App. 9a (emphasis added).

The district court then sentenced petitioner to the statutory maximum of 120 months. Pet. App. 11a. The court explained that it was departing upwards by four levels because it found that petitioner had "inten[ded] to injure members of the Scott family through the intended arson at their home." *Id.* at 10a. The resulting revised Guidelines range was 135 to 168 months, above the statutory maximum. *Ibid.* The court therefore imposed the statutory maximum sentence of 120 months of imprisonment, to be followed by three years of supervised release. *Id.* at 10a-11a.[4] The court's oral pronouncement of sentence did not direct that the sentence run consecutively to the future state sentence. See *id.* at 11a-12a. Nor did the district court's written judgment memorializing the sentence contain any such direction. See *id.* at 13a-15a.

3. Several weeks after petitioner's federal sentencing, the state court sentenced petitioner to concurrent sentences of life imprisonment for assaulting a law enforcement enforcer and armed criminal action; 15 years for his other assault (his intended attack on Scott); and

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[4] The court also noted that, even without the upward departure for the arson, it likely would have imposed the statutory maximum on the alternative ground that petitioner's criminal history category did not adequately represent his past criminal conduct or dangerousness to the public. Pet. App. 10a; see Sentencing Guidelines § 4A1.3(a), p.s.

seven years for his unlawful weapons possession. The state court ordered that the latter two sentences run consecutively to the life sentences and concurrently with each other. Pet. App. 2a; Pet. 10.

Because the State had primary jurisdiction over petitioner, he began serving his state sentence immediately upon sentencing. His federal sentence has not yet commenced.

4. Petitioner appealed. As relevant here, petitioner contended in his appellate brief that Sentencing Guidelines § 5G1.3(b) had required the district court to order that his sentence run concurrently with his anticipated state sentence. Under specified circumstances, where "a term of imprisonment resulted from another offense that is relevant conduct" under the Guidelines, Section 5G1.3(b) directs the district court to impose a sentence concurrent with the remainder of the undischarged term of imprisonment. See note 2, *supra* (quoting provision). Petitioner contended that, as a factual matter, the conduct underlying his state convictions had been used to enhance his federal sentence and that, therefore, the sentences should have been ordered to run concurrently. Pet. C.A. Br. 24-25. Petitioner did not argue that the district court had lacked authority to direct whether his sentence should run consecutively or concurrently.

5. The court of appeals affirmed. Pet. App. 1a-7a.

As relevant here, the court of appeals held that Sentencing Guidelines § 5G1.3(b) did not bind the district court in petitioner's case, because that provision applies only when the defendant has a prior "'undischarged term of imprisonment,'" and "[a]t the time of federal sentencing, [petitioner] was not subject to a 'term of imprisonment.'" Pet. App. 5a (quoting Sentencing Guidelines § 5G1.3(b)). The court of appeals therefore con-

cluded, based on circuit precedent, that "the district court had discretion" to order that the federal sentence run either consecutively to or concurrently with the yet-to-be-imposed state sentence. *Ibid.* (citing *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam)).

6. Petitioner did not seek rehearing.

ARGUMENT

Petitioner contends for the first time (Pet. 13-41) that the district court lacked authority to determine whether his federal sentence should be served consecutively to or concurrently with his subsequently imposed state sentences. But in this case the district court did not make any such determination; it simply "suppos[ed]" that the sentences would run consecutively, Pet. App. 9a, and the judgment of conviction is silent on the matter. Accordingly, the legal issue that petitioner asks this Court to review is not presented in this case, and petitioner is free to ask the Federal Bureau of Prisons (BOP) to make his federal sentence concurrent with his state sentences by commencing his federal sentence while he is serving his state sentence.

Even if the district court could be read to have ordered that petitioner's sentences run consecutively, this case would not warrant review. Although the government agrees with petitioner that district courts lack the authority under 18 U.S.C. 3584(a) to enter such an order, this Court has repeatedly declined to resolve the circuit conflict on that issue, because it lacks real significance and because it may be re-examined in the courts of appeals. And this case would not be an appropriate vehicle to resolve that conflict in any event: even if petitioner's case implicated the question, petitioner pre-

served no objection and, indeed, affirmatively urged the district court to use the authority that he now claims it lacks. Petitioner could not establish reversible plain error; among other reasons, his state sentences—totaling life imprisonment plus 15 years—make it unclear whether petitioner's federal sentence will ever affect his substantial rights at all.

1. Petitioner is incorrect in asserting that "the district court * * * direct[ed] that [petitioner's federal sentence] be served consecutively to the impending, but still unannounced, state sentences." Pet. 9; see Pet. 11-12. The district court made no such direction, in either its oral pronouncement of sentence (Pet. App. 11a-12a) or the written judgment (*id.* at 13a-15a). To the contrary, the court declined to direct that the sentence be served concurrently with petitioner's anticipated state sentences, and it stated its "supposition" that petitioner would therefore serve his sentences consecutively, by operation of law and not by direction of the court. *Id.* at 9a ("I will use the statutory ten-year sentence in this case and I would not direct that it be applied concurrently, so my supposition is that it will be—would be served consecutively.").

The government suggested in its brief in the court of appeals that the district court had entered an order directing a consecutive sentence, Gov't C.A. Br. 22, and the court of appeals made the same assertion in reciting the facts of the case, Pet. App. 2a. Whether the district court ordered a consecutive sentence or simply stood silent on the matter was irrelevant to the issue petitioner raised on appeal—whether, under the Sentencing Guidelines, the district court should have imposed a *concurrent* sentence. Nonetheless, on further consideration of the issue in light of the record, the government's brief

and the opinion below incorrectly characterized petitioner's sentence.

As petitioner acknowledges (Pet. 40-41), BOP has discretion to start his federal sentence while he is in state custody, thereby effectively granting him the concurrent sentence he seeks. Petitioner notes that BOP will not exercise that discretion in the face of an order by a federal district court that the sentence run consecutively. See *ibid.* (citing 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)(f), at 6-7 (2003) (*Designation Program Statement*)). But there is no such order in the judgment here (which is what BOP reviews in making that determination), and we have confirmed with BOP that it would not regard petitioner as foreclosed from seeking a concurrent designation. Any error in how the government's appellate brief characterized the district court's sentencing order therefore will not have any effect on petitioner.

2. As petitioner points out (Pet. 13-23), the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively or concurrently to a yet-to-be-imposed state sentence. In the government's view, contrary to the current position of the court below, 18 U.S.C. 3584(a) does not confer that authority. Nevertheless, even if petitioner were correct that the district court had entered such an order, further review of that question would not be warranted.

a. The first sentence of Section 3584(a) identifies two situations in which a 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 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. These 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. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam); *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991), 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); see also *United States* v. *McDaniel*, 338 F.3d 1287, 1288 (11th Cir. 2003) (per curiam) (Section 3584(a) also affirmatively permits terms of imprisonment to be ordered to run *concurrently* even before the second term of imprisonment has been imposed). 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 determinations, 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.[5]

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[5] 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.

b. 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); *Maden* v. *United States*, 129 S. Ct. 2848 (2009) (No. 08-10520); *Jochum* v. *United States*, 129 S. Ct. 2782 (2009) (No. 08-10199); *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. 1734 (2009) (No. 08-5920); *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 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).[6]

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 sen-

[6] The same question is also asserted by the pending petitions for a writ of certiorari in *Farris* v. *United States*, No. 08-10700 (filed May 26, 2009); *Brockman* v. *United States*, No. 08-1427 (filed May 19, 2009); *Garcia* v. *United States*, No. 08-10721 (filed May 19, 2009); and *Brent* v. *United States*, No. 08-9319 (filed Mar. 16, 2009).

tence. For example, if a defendant is sentenced in state court after being sentenced in federal court, the state court generally 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). As here, the sovereign with primary jurisdiction may permit the other sovereign to try and convict the defendant during that time, but even then, the other sovereign is not entitled to execute its sentence by taking the defendant into custody.

Petitioner misreads this line of authority (Pet. 38-39) as questioning federal authorities' ability to obtain *temporary* custody of an inmate in primary state custody and put him on trial. That is not so, as this case illustrates: petitioner was arrested by state authorities and is in primary state custody, but was "loaned" to the federal authorities to stand trial pursuant to a writ of habeas corpus *ad prosequendum*. Rather, federal authorities may not demand that the State deliver up an inmate *so that he may begin serving his federal sentence*.

BOP does retain discretion, under certain circumstances, to allow a state inmate to begin serving his federal sentence while still physically in state custody.

BOP has detailed protocols governing such a decision, and it gives considerable (though not dispositive) weight to the federal sentencing court's intent even if that intent is not embodied in a sentencing order. See *Designation Program Statement* § 9(b) at 4-7; see also 18 U.S.C. 3621(b) (listing pertinent factors). Even if (as here) the sentencing court's intent is not embodied in the judgment, 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 has not asked BOP to commence his federal sentence, though he may still do so, as discussed above. See pp. 9-10, *supra*.

c. Of the four courts of appeals that permit federal courts to impose a sentence consecutively to a not-yet-imposed state sentence, two 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 issue 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. Thus, even in the circuits that read Section 3584(a) to authorize imposing a sentence consecutively to a future sentence, any practical impact of that interpretation on subsequent sentencing courts is speculative at best.

d. 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 displayed some willingness to reconsider that stance in an appropriate case. The government has both encouraged that re-examination in the courts of appeals and taken steps to oppose consecutive-sentencing orders in the district courts. See pp. 16-18, *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.

The Eighth Circuit recently granted a petition for rehearing en banc to re-examine the issue. See *United States* v. *Lowe*, 312 Fed. Appx. 836 (2009), reh'g en banc granted, No. 08-2304 (Apr. 22, 2009), reh'g vacated and opinion reinstated (Aug. 31, 2009). In that case, the government took the position 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). Lowe subsequently filed a pleading essentially agreeing with the

government that he could not show any effect on his substantial rights, and the court of appeals therefore vacated its grant of rehearing en banc as improvidently granted.

Some months ago, the Fifth Circuit, too, 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 recommending that, when presented with an "appropriate case," the court should "overrule or modify [its precedent] 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, *United States* v. *Garcia-Espinoza*, 325 Fed. Appx. 380 (5th Cir. 2009) (No. 08-10775). The government noted, however, that Garcia-Espinoza's case was a poor vehicle, because his state sentence had already expired and his demand for a concurrent sentence was essentially moot. The Fifth Circuit accordingly denied a hearing en banc in that case, see *United States* v. *Garcia-Espinoza*, No. 08-10775 (Apr. 13, 2009), 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. *Garcia-Espinoza*, 325 Fed. Appx. at 381 (Owen, J., joined by Dennis, J., concurring) ("writ[ing] separately to recommend that the court re-examine en banc how we have previously construed 18 U.S.C. § 3584").

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, after sentencing and completion of appellate briefing in this case, 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, as here, 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.

We are aware of some district courts that have continued to order that their sentences run consecutively to future state sentences consecutive-sentencing orders. And the Fifth Circuit has affirmed some such sentences summarily, based on circuit precedent. We are aware of no case since *Garcia-Espinoza*, however, in which the Fifth Circuit (or any other court of appeals) has denied a petition for rehearing en banc on this issue. (Petitioner did not seek rehearing en banc.)

3. Even if the issue were presented on the facts of this case and warranted review by this Court, this case would not be a suitable vehicle. Petitioner never raised his argument about the correct interpretation of Section 3584(a) in the district court. To the contrary, he affirmatively asked the district court to use its authority to direct a concurrent sentence. Accordingly, he is limited to seeking review for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725 (1993). Moreover, petitioner did not raise the issue in the court of appeals, see p. 7, *supra*, and the court did not address it except in addressing the entirely distinct question whether the district court was bound by Sentencing Guidelines § 5G1.3(b) or whether it instead had discre-

tion. This Court does not generally review issues raised for the first time on certiorari review.

Petitioner could not prevail on plain-error review, because he could not meet his burden to show an effect on his "substantial rights," Fed. R. Crim. P. 52(b), even if the district court had truly entered an order precluding him from obtaining a concurrent sentence through the exercise of BOP's discretion. Petitioner is in primary state custody, serving two concurrent terms of life imprisonment, to be followed by an additional consecutive sentence of fifteen years. Accordingly, petitioner's federal sentence will have no effect on his total time of incarcaration unless he is paroled by the State or otherwise released before serving a life term on his state sentences. Petitioner may not even be eligible for parole at all. See Board of Probation & Parole, Missouri Dep't of Corr., *Procedures Governing the Granting of Paroles and Conditional Releases* § 28(C) at 13 (Apr. 2009) <http://www.doc.mo.gov/division/prob/pdf/Blue%20Book.pdf> ("Offenders who receive sentences consecutive to a parolable life sentence when the consecutive sentences are for crimes occurring on or after August 28, 1994, may not be eligible for parole. Parole eligibility will be determined on a case by case basis."); *id.* § 19(E) at 10 ("For offenders serving *multiple life sentences or other sentences concurrent or consecutive to a life sentence* the Board may, due to the nature and length of the sentence, determine not to set a minimum eligibility date."); see also *Pettis* v. *State*, 212 S.W.3d 189, 194 (Mo. Ct. App. 2007) (describing Missouri rule that "upon imposition of a consecutive term of imprisonment, [prisoner's] parole-eligible life sentence would definitely, immediately, and automatically convert to a sentence of life without possibility of parole"). At a minimum, peti-

tioner will serve more than 38 years in state prison before he becomes eligible for parole, as his assault convictions were for "dangerous felon[ies]" under Mo. Ann. Stat. § 556.061(8) (West Supp. 2009).[7] And even if petitioner is eventually eligible for parole, there is no guarantee that he will be paroled. See Mo. Ann. Stat. § 217.690 (West 2004).

Thus, to establish a genuine effect on his substantial rights—*i.e.*, an effect on the outcome—petitioner would have to show that (a) he is eligible for and likely to receive parole or otherwise likely to be released from state confinement during his lifetime, and (b) absent the supposed order from the federal court requiring a consecutive sentence, BOP would likely agree to commence his federal sentence during his state term in order to run the sentences concurrently. Because petitioner can only speculate that those events would occur, he cannot meet his burden to show prejudice. *Olano*, 507 U.S. at 734-735.

4. Petitioner also suggests (Pet. 19-22) that there is a conflict warranting review on the question that petitioner *did* preserve in this case, *i.e.*, whether Sentencing Guidelines § 5G1.3 governs a district court's decision to impose a consecutive or concurrent sentence when the second sentence has not yet been imposed. That contention lacks merit. The sole published decision on which

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[7] The minimum prison term before parole eligibility for a "dangerous felony" generally is 85% of the sentence imposed by the court, with a life sentence deemed to be 30 years for those purposes. Mo. Ann. Stat. § 558.019(3) and (4)(1) (West Supp. 2009); see Mo. Ann. Stat. § 556.061(8) (West Supp. 2009) (definition of "dangerous felony"). Computing 85% of petitioner's life sentences for assaulting Trooper Brashear and his 15-year sentence for assaulting Scott yields 25.5 years and 12.75 years, respectively, which total 38.25 years.

petitioner relies, *McDaniel*, *supra*, simply reversed a district court's ruling that it lacked authority to direct that a federal sentence run concurrently with a not-yet-imposed state sentence. The Eleventh Circuit, relying on circuit precedent, held that the district court did have such authority and remanded for the exercise of that authority. The court of appeals did not affirm that Section 5G1.3 would apply on remand. 338 F.3d at 1288. Indeed, in the precedent relied upon in *McDaniel*, the Eleventh Circuit held that although the "catchall" provision of Section 5G1.3(c) was "the most analogous guideline" and that provision "recommend[ed] a consecutive sentence," the Guidelines ultimately "do not address * * * [the situation] of a federal defendant being sentenced while in state custody and awaiting trial and potential sentencing on a state charge." *Ballard*, 6 F.3d at 1505-1506 & n.8.[8]

Furthermore, even a holding that Section 5G1.3 applies before a state sentence is imposed would not entitle petitioner to reversal. The district court *departed upward* from the otherwise-applicable Guidelines range to give the statutory maximum sentence, and the court added that if further departures would have affected the sentence, it would have also departed upward in calculating petitioner's criminal history category to better reflect his criminality and dangerousness. Pet. App. 10a. Accordingly, even if the district court had not concluded that there was no relevant overlap between peti-

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[8] Even if there were a genuine circuit conflict over the applicability of Section 5G1.3, this Court's review would not be warranted merely to clarify the interpretation of the advisory Sentencing Guidelines. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991).

tioner's federal and state convictions[9]—a wholly fact-bound issue that does not warrant this Court's review—there is every reason to believe that the court would have imposed a consecutive sentence nonetheless. See *Ballard*, 6 F.3d at 1505 n.5 ("Had the Sentencing Guidelines explicitly addressed Ballard's situation by dictating that the sentence should be either consecutive or concurrent, we have recognized that the sentencing judge still has discretion under section 3584(a) to give either sentence appropriate for the defendant, provided that the judge follows the procedures for departing from the Sentencing Guidelines.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Before sentencing, at petitioner's urging, the district court had ordered the Guidelines range recalculated to remove the treatment of the assault on Trooper Brashear as relevant conduct. Including all of that incident as relevant conduct would have yielded a Guidelines range of 360 months to life. PSR ¶ 62.