No. 05-454

In the Supreme Court of the United States

WILLIAM ALLEN COX, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has the authority under 18 U.S.C. 3584(a) to direct that a federal sentence be served consecutively to a state sentence that may be imposed in future state court proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 125 Fed. Appx. 973.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 2005. A petition for rehearing was denied on June 7, 2005 (Pet. App. 12a). On August 25, 2005, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including October 5, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In September 2004, in the United States District Court for the District of Colorado, petitioner pleaded guilty to interference with commerce by threats and violence in furtherance of a robbery, in violation of the Hobbs Act, 18 U.S.C. 1951; possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); and possession and brandishing of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A). He was sentenced to a total of 168 months of imprisonment. The court directed the sentence to run consecutive to any sentence yet to be imposed in state court. The court of appeals affirmed. Pet. App. 1a-2a.

1. a. On February 19, 2003, petitioner murdered a man in a drug-related dispute. According to the autopsy report, the victim suffered multiple stab wounds to the head and neck and a gunshot wound to the face. The state of Colorado charged petitioner with First Degree Murder After Deliberation. See Presentence Investigation Report paras. 71-74 (PSR).

b. On March 31, 2003, petitioner and an accomplice entered a gun store in Adams County, Colorado. Petitioner brandished a pistol, assaulted the gun owner, and stole 47 firearms and approximately $900 in cash. Petitioner fled in his car, and police pursued him. Petitioner crashed his car and attempted to flee on foot. The police seized the 47 firearms from petitioner's car, as well as the loaded firearm used by petitioner to commit the offense. Petitioner was later apprehended. Petitioner's actions with respect to the gun store robbery resulted in the federal indictment, to which petitioner pleaded guilty. PSR paras. 5-7.

2. On February 12, 2004, between petitioner's indictment and his guilty plea on the federal charges, petitioner pleaded guilty to second-degree murder in state court in Colorado as a result of the February 2003 murder. Pet. App. 1a-2a; PSR para. 71. The state court sentenced petitioner to 48 years of imprisonment to run "concomitant to the federal sentence." PSR para. 71. On June 9, 2004, however, the state court vacated that sentence upon being advised by petitioner's counsel that the federal court likely would impose a sentence to run consecutively to the state sentence. See Second Addendum to the PSR A-1; see also PSR para. 120; Gov't Sentencing Br. 1-2.[1]

3. On September 1, 2004, petitioner was sentenced on the federal offenses. Petitioner's sentencing range under the federal Sentencing Guidelines for the Hobbs Act and Section 922(g)(1) offenses was 84 to 105 months of imprisonment. His sentencing range for the Section 924(c)(1)(A)(ii) offense was seven years, which had to be imposed consecutive to any other term of imprisonment. PSR paras. 117, 119.

Petitioner objected to any sentence that would run consecutive to his state sentence on the murder conviction. The district court overruled the objection, observing that the state and federal offenses were not, "as a matter of fact and law * * * part of a single criminal episode," 9/1/04 Tr. 17, that the federal charges constituted "most serious felony offenses," *id.* at 19, and that

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[1] The state court originally scheduled a resentencing hearing for two days after the federal sentencing date. See Second Addendum to the PSR A-1. As of the filing of the petition for a writ of certiorari in this case, however, the state court had not resentenced petitioner, Pet. 4, and it is the United States' understanding that the state court has not done so as of the filing of this response.

petitioner was "as dangerous a person as has come into my courtroom." *Id.* at 18.

The district court sentenced petitioner to 84 months on the Hobbs Act and Section 922(g)(1) counts, and a consecutive seven-year sentence on the Section 924(c)(1)(A) count, for a total of 168 months. The court directed that the total term of imprisonment be "served consecutively to any term of imprisonment yet to be imposed in any court, including, but not limited to, the sentence to be imposed" in the state murder case. 9/11/04 Tr. 26. In so doing, the district court acknowledged the state court's efforts to have the state sentence run concurrently with the federal sentence, but noted its duty to impose a "lawful and just sentence" under the circumstances of the federal offenses. *Id.* at 18. The district court indicated its understanding that the state court could nevertheless take steps "[t]o put itself in a position to sentence [petitioner] concurrently." *Id.* at 16.

4. The court of appeals affirmed in a short, unpublished per curiam opinion. Pet. App. 1a-2a. The court rejected petitioner's argument that the district court lacked authority to direct that his sentence be served consecutively to a state sentence not yet imposed. It explained that, as petitioner had conceded, the argument was foreclosed by the Tenth Circuit's decision in *United States* v. *Williams*, 46 F.3d 57, cert. denied, 516 U.S. 826 (1995). Pet. App. 2a.

ARGUMENT

Petitioner renews his claim (Pet. 5-26) that the district court did not have the authority to direct that his sentence run consecutively to a state sentence that had not yet been imposed. According to petitioner, under

18 U.S.C. 3584(a), a district court's ability to impose a sentence consecutive to a state sentence is limited to instances where the defendant "is already subject to" the state sentence. 18 U.S.C. 3584(a). Petitioner contends that the court of appeals' rejection of that interpretation conflicts with decisions of other courts of appeals.

Petitioner is correct that the courts of appeals disagree about whether a federal court has the authority to direct that a sentence be served consecutively to a yet-to-be imposed state sentence. In addition to the Tenth Circuit, the courts of appeals for the Fifth, Eighth, and Eleventh Circuits have held that district courts have such authority. See *United States* v. *Andrews*, 330 F.3d 1305, 1306-1307 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); *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). The courts of appeals for the Sixth, Seventh, and Ninth Circuits have held that district courts lack that authority. *Romandine* v. *United States*, 206 F.3d 731, 737-738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1040 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (9th Cir. 1991).[2] Resolv-

[2] In *Romandine*, the Seventh Circuit concluded that, under the last sentence of Section 3584(a), whenever a state sentence is imposed at a different time than a federal sentence, those two sentences run consecutively unless the district court directed otherwise. *Romandine*, 206 F.3d at 737-738. The Tenth Circuit also reached the same conclusion. See *Williams*, 46 F.3d at 59. The Second and Sixth Circuits dispute that position, and have stated that the final sentence of Section 3584(a) applies only if the defendant is already subject to a state sentence at the time of the federal sentencing. *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 (2d Cir. 2005); *Quintero*, 157 F.3d at 1040. If

ing that conflict is unnecessary, however, and further review is not warranted.[3]

1. Resolving whether district courts have the power to impose a sentence that is to run consecutively to an as-yet-unimposed state sentence is unnecessary because a district court's order that a defendant's sentence be served consecutively to an anticipated state sentence is not binding on state courts. This Court has long recognized that although state and federal courts "co-exist in the same space, *they are independent*, and have no common superior." *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (quoting *Covell* v. *Heyman*, 111 U.S. 176, 182 (1884)) (emphasis added). "[O]ur federal system is one of 'dual sovereignty,' and not one in which the Supremacy Clause controls sentencing." *Taylor* v. *Sawyer*, 284 F.3d 1143, 1150 (9th Cir. 2002) (quoting *Strand* v. *Schmittroth*, 251 F.2d 590, 605 (9th Cir.), cert. dismissed, 355 U.S. 886 (1957)), cert. denied, 537 U.S. 1119 (2003). Each sovereign has "full power to set punishment for crimes against the * * * sovereign" unconstrained by the other sovereign. *Id.* at 1151. Consequently, "a determination as to concurrence of sentence made by one sovereign does not bind the other." *Jake* v. *Herschberger*, 173 F.3d 1059, 1065 (7th Cir.

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the Seventh and Tenth Circuits' view is correct, resolving whether the district courts have the power to impose consecutive sentences would serve no purpose, because even if a district court did not have the power to impose a sentence explicitly running consecutively to an as-yet-unimposed state sentence, it could still achieve the same result simply by not ordering that the sentences be concurrent.

[3] This Court denied review of this issue in *Lackey* v. *United States*, 125 S. Ct. 2963 (2005) (No. 04-9286), *Martinez* v. *United States*, 125 S. Ct. 1299 (2005) (No. 04-7129), and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136).

1999). Thus, as a general matter, neither state courts nor state prison systems are bound by federal court orders concerning consecutive or concurrent sentencing. Cf. Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05*, at 3 (2003) ("Just as the federal government has no authority to prescribe when a state sentence will commence, the state has no authority to order commencement of a federal sentence."); cf. *United States* v. *Gonzalez*, 520 U.S. 1, 11 (1997) (in case involving consecutive sentence under 18 U.S.C. 924(c)(1), which then provided that no term of imprisonment imposed under it "shall * * * run concurrently with any other term of imprisonment," reserving the question "whether a later sentencing state court is bound to order its sentence to run consecutively to the [18 U.S.C.] § 924(c) term of imprisonment").

States may make their sentences concurrent to federal sentences if a defendant is in primary federal custody by designating the defendant's federal institution for service of the state sentence. If a defendant is in primary state custody, the state court can make the state sentence effectively concurrent to a subsequent federal sentence by deducting the length of the federal sentence from the time spent in the state system at sentencing, or by suspending a portion of the sentence. In addition, a defendant in state custody, a state court, or a state prison system can seek to have the Bureau of Prisons designate the state facility as the place for service of his federal sentence. See *Program Statement No. 5160.05*, *supra*, at 4-7.

Petitioner disputes (Pet. 10-14) the effectiveness of such measures and argues that they require state courts to engage in unseemly maneuvers to effectuate their sentencing intentions, which is asserted to be "an

affront to federal-state comity" and "state sovereignty." Pet. 12. But the interplay of state and federal sentencing intentions simply reflects the fact that each sovereign is entitled to decide whether its punishment should be cumulative of the other's. This case illustrates that the later-sentencing sovereign often has an advantage in effectuating its goal. If the state court had not vacated its initially-imposed sentence, petitioner would have been "already subject" to an undischarged state sentence at the time of his federal sentencing. Thus, but for the state court's actions, the federal court would have had the ability, even under petitioner's view of Section 3584(a), to order the federal sentence to run consecutively to the state sentence—despite the state court's previous (and still extant) decision that the state sentence should run concurrently. Such a federal sentence would have had, if anything, greater implications for the state court's ability to effectuate petitioner's state plea agreement (see Pet. 12-13) than the sentence that the federal court did impose. The interpretation of Section 3584(a) adopted by the court below thus does not significantly add to any federalism tensions created by the statute.

2. In any event, this case is not a suitable vehicle to resolve the conflict among the courts of appeals. Petitioner is currently serving his federal sentence and has not been resentenced on his state murder conviction. See Pet. 4; note 1, *supra*. The state court has indicated that it will seek to impose a sentence that will run concurrently with the instant federal sentence. Moreover, the federal court, despite its stated intent that the federal sentence run consecutive to any state sentence, expressly recognized that the state court could take steps "[t]o put itself in a position to sentence [peti-

tioner] concurrently." 9/1/04 Tr. 16. Accordingly, it is at best unclear how the state and federal sentences will interact. Indeed, given that the state court will have the last word on the issue, the state court's resentence could render irrelevant the district court's order that its sentence run consecutive to the state sentence.[4] At bottom, any claim of harm to petitioner from the order of consecutive sentences is speculative.

Moreover, petitioner may not obtain the relief he seeks even if this Court were to adopt the rule he advocates with respect to the construction of 18 U.S.C. 3584(a). As petitioner notes (see Pet. 25), the state court may resentence petitioner while this case is pending. In that event, if this Court were to adopt the rule he advocates, vacate the judgment of the court of appeals, and remand the case for resentencing, petitioner would be "already subject to an undischarged term of imprisonment," 18 U.S.C. 3584(a), (*i.e.* his state prison sentence) at the time of imposition of his federal sentence. Accordingly, even under petitioner's reading of Section 3584(a), the district court would be free in that circumstance to order that the federal sentence run consecutively to the state sentence.[5]

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[4] It is an open question whether the state court could order its sentence to run concurrent with petitioner's seven-year sentence for the Section 924(c)(1)(A) conviction, which Section 924(c)(1)(D)(ii) requires be consecutive to any other sentence. See *Gonzalez*, 520 U.S. at 11.

[5] Petitioner suggests that, if the Court were to hold that the district court lacked the authority to run its sentence consecutively to an unimposed state sentence, "that error could be remedied simply by striking that designation from the sentence of the trial court," without the need to remand for resentencing. Pet. 25. If the Court were to adopt petitioner's construction of Section 3584(a), however, a remand for resentencing would be appropriate to allow the district court to reconsider its entire sentence in light of the Court's ruling. The district

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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court here might, for example, want to reconsider its order running the sentences on the Hobbs Act and Section 922(g)(1) counts concurrently if this Court were to hold that it lacked the authority to run the federal sentence consecutively to a future state sentence. Cf., *e.g.*, *United States* v. *Rivera*, 327 F.3d 612, 614-615 (7th Cir.) (holding that, where appellate court has reversed the conviction on one count, district court on remand can refashion the sentence on the remaining count to run it consecutively to a prior undischarged sentence even though, before the appeal, it had ordered the sentence to run concurrently), cert. denied, 540 U.S. 922 (2003); *United States* v. *Moreno-Hernandez*, 48 F.3d 1112, 1116-1117 (9th Cir.) (holding that, on remand for resentencing, district court may reconsider entire, interrelated sentencing package), cert. denied, 515 U.S. 1151 (1995); see also 28 U.S.C. 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").