No. 08-

IN THE

# Supreme Court of the United States

COREY ALAN BROCKMAN,
*Petitioner*,

v.

UNITED STATES OF AMERICA
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Fifth Circuit in this case affirmed a criminal sentence requiring that petitioner's federal sentence run consecutively with a state sentence that had yet to be imposed. That ruling perpetuates a direct and acknowledged circuit conflict concerning a federal district court's authority under 18 U.S.C. § 3584(a)—the statute governing consecutive and concurrent sentences—to order a federal sentence to be served consecutively with a future state sentence. Four circuits have held that district courts have authority to impose such sentences, while four circuits have held that district courts lack such authority. The Government has acknowledged that conflict and conceded that district courts lack the authority to impose such a sentence.

The question presented is:

Whether a district court has authority to order a defendant's federal sentence to be served consecutively with a state sentence that has not yet been imposed.

## PARTIES TO THE PROCEEDING

Petitioner is Corey Alan Brockman, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Corey Alan Brockman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is unreported but available at 2009 WL 405868 and reprinted at App. 4a-5a. The district court issued no opinion; its judgment is reprinted at App. 1a-3a.

## JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. App. 6a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The relevant statutory provisions are reproduced at App. 15a-18a.

## INTRODUCTION

This petition raises the question whether a district court has authority to order a federal sentence to be served consecutively with a state sentence that has yet to be imposed. This Court has been holding two petitions presenting that issue since the February 20, 2009 conference, *see Goodgion v. United States*, No. 08-5920 (filed Aug. 20, 2008); *Garcia v. United States*, No. 08-6756 (filed Oct. 6, 2008), and two other petitions on the issue are also pending before the Court. *Smith v. United States*, No. 08-8118 (petition filed Jan. 3, 2009; opposition filed April 29,

2009); *Brent v. United States*, No. 08-9319 (petition filed Mar. 16, 2009; response due May 20, 2009).

In its responses to those petitions, the Government has acknowledged that the courts of appeals are divided, 4-4, over this question. And after remaining silent on the merits over the course of many years, the Government has finally conceded in these responses that sentences like the one imposed by the district court in this case are unlawful.

Even after confessing error, however, the Government has continued its longstanding practice of opposing this Court's review of the issue. The Government has argued that the unlawful sentencing practice has not significantly harmed any of the petitioners. And it has argued that the issue may be reconsidered by the circuits that have approved the practice.

Neither argument withstands analysis in this case. The unlawful sentence in this case demonstrably harms petitioner. Absent the consecutive sentencing order, petitioner could obtain credit on his federal sentence for the time he serves on his state sentence, reducing his total period of incarceration by two years. The illegal sentencing order categorically bars petitioner from obtaining that credit and thus condemns him to two additional years of incarceration. And even after the Government confessed error, the Fifth Circuit denied en banc review of the question. Having only recently denied en banc consideration, there is no realistic possibility that the Fifth Circuit will correct this indefensible sentencing practice. The Court should therefore grant the petition and reverse the decision below.

## STATEMENT OF THE CASE

1. On December 15, 2007, local law enforcement officers received a phone call from petitioner's grandmother alerting them that petitioner, a convicted felon, had taken her husband's deer rifle and pawned it at a pawn shop. Petitioner's Presentence Report ("PSR") ¶ 12. After the officers investigated the matter, they located petitioner and informed him that, by pawning the rifle, he had been in possession of a firearm in violation of federal and state law. *Id.* ¶ 17.

On February 13, 2008, the Government filed a three-count indictment against petitioner, alleging, *inter alia*, that he had violated 18 U.S.C. § 922(g)(1) by possessing a firearm as a convicted felon. PSR ¶ 1. Pursuant to a written plea agreement, petitioner pleaded guilty to that charge. *Id.* ¶ 3.

2. Petitioner's PSR noted that charges were pending against petitioner in the District Attorney's Office for Taylor County, Texas, for Forgery, Illegal Dumping, and Assault, and that there was a pending case in Taylor County against petitioner for Criminal Mischief. PSR ¶ 77-78. The PSR advised the district court that it could "exercise discretion" in determining whether to make petitioner's federal sentence consecutive with "sentences anticipated, but not yet imposed, in separate state court proceedings." *Id.* ¶ 76. Petitioner filed a written objection to the court imposing a sentence "consecutive to any as-yet-unimposed sentence." PSR Addendum.

At sentencing, petitioner renewed this objection. App. 10a-11a. The Government responded that "*Brown* [*United States v. Brown*, 920 F.2d 1212 (5th

Cir.) (per curiam), *cert. denied*, 500 U.S. 925 (1991)] settles the law in the Fifth Circuit." App. 11a. The district court concluded that the objection "should be overruled for the reasons as set forth in the [PSR] addendum." App. 11a; *see* PSR Addendum (stating that "Fifth Circuit law" authorized such a consecutive sentence). The district court sentenced petitioner to 24 months of imprisonment and 3 years of supervised release. And it further ordered that petitioner's federal sentence "be served consecutive with any sentence imposed in the case presently pending against [him] in the 350th District Court of Taylor County, Texas, as well as consecutive with any future charges and case that might be filed against [him] and sentence to be imposed against [him] if [he were to be] found guilty of those charges that are currently pending in the Taylor County District Attorney's Office, Taylor County, Texas." App. 12a.

3. A state court subsequently sentenced petitioner on the pending Taylor County charges, ordering him to serve one year and eight months for the offense of criminal mischief and four years for aggravated assault. The state court ordered the criminal mischief sentence to run "concurrently" (without specifying whether that included petitioner's federal sentence) and did not state whether the four-year assault term should be served concurrently or consecutively. *See* Judgment of Conviction, *Texas v. Brockman*, No. 08223D (Taylor County Nov. 6, 2008) (mischief); Judgment of Conviction, *Texas v. Brockman*, No. 8823D (Taylor County Nov. 6, 2008) (assault). That order has the effect, under state law,

of requiring petitioner's sentence to run concurrently with previously imposed sentences.[1]

Petitioner's projected release date from the state penitentiary is January 25, 2012. *See* Tex. Dep't Crim. Justice Offender Information Detail, Corey Brockman, *available at* http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=06300347.

4. Petitioner appealed his federal sentence and argued that the district court had exceeded its statutory authority in ordering that his federal sentence run consecutively with state sentences that had yet to be imposed. *See* Pet'r C.A. Br. 2-4. Petitioner acknowledged that Fifth Circuit precedent foreclosed his claims but sought summary adjudication to preserve the issue for review in this Court. *Id.* The court of appeals summarily affirmed. App. 4a-5a.

## REASONS FOR GRANTING THE PETITION

In this case, the Fifth Circuit held that a district court has authority to order that a federal sentence run consecutively with a yet-to-be-imposed state sentence. That holding perpetuates an entrenched, 4-4 circuit conflict that the Government has acknowledged, and it affirms a sentencing practice that the Government has conceded is unlawful. The argu-

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[1] Under Texas law, all sentences run concurrently unless "cumulated in the proper manner." Michael J. McCormick et al., 7A Tex. Prac., Criminal Forms and Trial Manual § 77.16 (11th ed. 2009). That "proper manner" requires the sentencing court to designate, among other things, "the convicting courts, the offenses upon which convictions were had, the dates of the sentences [to which the imposed sentence is to be cumulative], and the terms of years assessed." *Young v. State*, 579 S.W.2d 10, 11 (Tex. Crim. App. 1979).

ments the Government has made against review in other cases presenting this issue provide no reason to deny review in this case. This Court should therefore grant the petition and stop this unlawful practice.

## I. THE COURT OF APPEALS' DECISION PERPETUATES AN ACKNOWLEDGED CONFLICT AMONG THE CIRCUITS AND AFFIRMS A SENTENCING PRACTICE THE GOVERNMENT ADMITS IS UNLAWFUL

As the Government has acknowledged, the courts of appeals are divided, 4-4, on the question whether a federal district court has authority to order a federal sentence to be served consecutively to a state sentence that has yet to be imposed. *See, e.g.*, Br. in Opp., *Smith v. United States*, No. 08-8118, at 21-22 (filed Apr. 29, 2009) ("*Smith* Opp.") (describing split). The Second, Sixth, Seventh, and Ninth Circuits have all held that a district court lacks the authority to issue such a sentence. *See United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (per curiam); *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991). In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has such authority. *See Brown*, 920 F.2d at 1216; *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir.), *cert. denied*, 516 U.S. 926 (1995); *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993).

The Government has conceded, moreover, that "Section 3584(a) does not confer th[e] authority" to "direct that a sentence be served consecutively to a yet-to-be-imposed state sentence." *Smith* Opp. at 20-21. Indeed, the text of 18 U.S.C. § 3584(a) makes clear that a district court is authorized to impose a consecutive sentence in two, and only two, circumstances: (1) "[i]f multiple terms of imprisonment are imposed on a defendant *at the same time*," or (2) "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) (emphasis added). As the Government has acknowledged, to hold that a district court also has authority to make a federal sentence consecutive with a state sentence that has not yet been imposed would render a large portion of Section 3584(a) surplusage. *Smith* Opp. at 22. Furthermore, as the Government has conceded, a district court "cannot logically" "consider the sentencing factors set out in 18 U.S.C. 3553(a) in making a decision whether to impose a term of imprisonment consecutively or concurrently to another term" when "one of [those] sentences has not yet been determined." *Smith* Opp. at 23. Thus, the sentence imposed by the district court in this case is indisputably unlawful.

## II. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW PROVIDE NO BASIS FOR DENYING THE PETITION IN THIS CASE.

For many years, the sentencing practice at issue here has been prevalent in a number of circuits, including the Fifth Circuit. And for many years, the

Government opposed review of the issue without taking any position on the merits of the practice.

Having finally decided to confess error on the issue, there was reason to hope that the Government would join with a petitioner to urge the Court to end this blatantly unlawful sentencing practice. Instead, the Government has persisted in opposing review.

The Government has offered two reasons for doing so. First, it has argued that the unlawful sentencing practice does not have any significant impact on criminal defendants. *Smith* Opp. at 23, 28; *see* Br. in Opp., *Cortes-Beltran v. United States*, No. 08-8243, at 21 (filed Apr. 13, 2009) ("*Cortes-Beltran* Opp.") (same). And second, it has argued that the circuits that currently sanction illegal consecutive sentences might reconsider their view in light of the Government's confession of error. Neither argument provides any basis for denying review in this case.

### A. Petitioner's Unlawful Sentence Forecloses A Two-Year Reduction In His Period Of Incarceration.

Petitioner has an undeniably concrete interest in obtaining a reversal of his unlawful consecutive sentence. That sentence subjects petitioner to an additional two years in prison that he might avoid under a lawful sentence.

Petitioner is currently serving a four-year state sentence in a state facility. Under settled BOP policy, petitioner may request that the BOP issue a "nunc pro tunc" designation under which his time in state detention would count toward his two-year federal sentence. 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) (Jan. 16, 2003) ("BOP Program Statement"). In petitioner's case, that would mean that the BOP could deem his entire two-year federal sentence to have been served during his period of state incarceration.

The district court's consecutive sentence order, however, categorically bars the BOP from exercising its discretion to grant a request for nunc pro tunc designation. The BOP has expressly stated that it "will not allow a concurrent designation" where, as here, "the sentencing court has already made" the sentence "consecutive." BOP Program Statement 5160.05 § 9(b)(4)(f). The district court's unlawful consecutive sentence therefore precludes petitioner from obtaining a nunc pro tunc designation that would reduce his period of incarceration by two years.

The Government has argued that persons in petitioner's position have no ground for complaint, because, even absent the court's order, the BOP would have discretion to deny a nunc pro tunc request, and, in exercising that discretion, would solicit and consider the district court's view. *Smith* Opp. at 29; *see* BOP Program Statement 5160.05 § 9(b)(4)(c) (in making nunc pro tunc determination, the BOP "will send a letter to the sentencing court . . . inquiring whether the court has any objections" to designation).

There is an enormous difference, however, between a district court order that requires petitioner to serve two additional years of imprisonment, and a

district court order that allows the BOP to exercise its discretion to eliminate that additional two years of imprisonment entirely. In one case, the district court's order is controlling, and there is no possibility that the total time of incarceration will be reduced; in the other case, the district court's view is simply one factor among others that the BOP considers, and there remains a concrete opportunity for petitioner to reduce his period of incarceration by two years. Indeed, the Government freely admits that it is bound to consider a broad range of factors in the latter situation, and that it may not treat the district court's views as "dispositive." *Smith* Opp. at 26; *see Cortes-Beltran* Opp. at 26 (citing *Trowell v. Beeler*, 135 F. App'x 590, 594-96 (4th Cir. 2005), as "holding that BOP must consider all factors set out in 18 U.S.C. 3621(b), not just the sentencing court's views").

There is also an immense difference between how a district court determines whether to make a federal sentence consecutive with a state sentence before the state sentence is imposed and how a district court decides what to recommend to the BOP after a state sentence has been imposed. As the Government observed in explaining why Section 3584 cannot be read to authorize sentences like petitioner's, a district court cannot intelligently decide "whether to impose a term of imprisonment consecutively or concurrently to another term" without "consideration of the total length of incarceration." *Smith* Opp. at 23. There is therefore no reason to believe that a district court that issues a consecutive sentencing order before knowing what the state sentence will be would make that same recommendation once it finds out

the length of the state sentence. In petitioner's case, for example, the fact that the district court issued a consecutive sentencing order when it had no idea whether petitioner would serve any time at all on his state charges says nothing about what recommendation the district court will make after learning that a state court has sentenced petitioner to four years of imprisonment.

In the end, regardless of what the district court recommends, it is the BOP's responsibility to consider all the relevant circumstances and decide whether petitioner should receive credit for his period of state incarceration. Under petitioner's current, unlawful sentence, however, the BOP is categorically foreclosed from making that judgment; it has no choice other than to carry out the district court's consecutive sentence order. BOP Program Statement 5160.05 § 9(b)(4)(f). This Court's reversal of the order will eliminate that unlawful impediment to the BOP's exercise of authority and provide petitioner with a realistic opportunity to serve two less years of imprisonment.

### B. The Fifth Circuit Has Refused To Reconsider Its Precedent.

The Government's argument that review should be denied because the Fifth Circuit may reverse its precedent is equally without merit. The is no realistic prospect that the Fifth Circuit will correct the practice of imposing federal sentences that are consecutive with state sentences that are not yet imposed.

After the Government confessed error on the issue, the Fifth Circuit, in *United States v. Garcia-Espinoza*, No. 08-10775, asked whether it should grant hearing en banc to overrule its precedent. *See* U.S. Br., *Garcia-Espinoza*, No. 08-7775, at 1 (filed Mar. 4, 2009) (describing December 18, 2008 order). But the Fifth Circuit ultimately denied hearing en banc on the issue, with no judge in regular active service requesting a poll. App. 7a-8a (order rejecting Garcia-Espinoza's motion for hearing en banc). The Fifth Circuit subsequently affirmed the sentence in *Garcia-Espinoza*, with only one judge urging that the issue be resolved en banc. *United States v. Garcia-Espinoza*, No. 08-10775, slip. op. at 3 (5th Cir. May 15, 2009) (Owen, J., concurring).

The Government asserts that the Fifth Circuit may be looking for a more appropriate vehicle than *Garcia-Espinoza* to revisit its precedent. *Smith* Opp. at 28. But the experience in the Fifth Circuit provides no support for the Government's speculation. Since requesting and receiving the petition for en banc review in *Garcia-Espinoza,* the Fifth Circuit has affirmed *seven* district court orders requiring that federal sentences be served consecutively with state sentences that had yet to be imposed. *See* App. 4a-5a (petitioner's case); *United States v. Farris*, Nos. 08-10277, 08-10279, 2009 WL 464221 (5th Cir. Feb. 23, 2009) (per curiam); *United States v. Scott*, No. 08-10846, 2009 WL 415256 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Valenciano-Espinoza*, No. 08-10970, 2009 WL 413592 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Maden*, No. 08-11031, 2009 WL 413577 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Garcia*, No. 08-

50161, 2009 WL 411518 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Jochum*, No. 08-10847, 2009 WL 405865 (5th Cir. Feb. 18, 2009) (per curiam). That is hardly consistent with what a circuit would do if it were looking for an appropriate vehicle to overrule its precedent.

The Government's suggestion that the Court should wait for the Fifth Circuit to solve this problem has a particularly hollow ring because the Government does not believe that an appropriate vehicle for resolving the issue can ever exist. When a person begins by serving his federal sentence, and the state sentence has yet to be imposed, the Government invariably argues that an illegal consecutive sentence has no "concrete practical effect" because the state court may "make the state sentence effectively concurrent" by shortening the state term or suspending it completely. Br. in Opp., *Martinez-Guerrero v. United States*, No. 07-1362, at 8-9 (filed Aug. 27, 2008). And when a person begins by serving his state sentence, the Government invariably argues that an illegal consecutive sentence has "no practical effect" because the "BOP retains the discretion to deny [a] request [for nunc pro tunc designation] even when the federal court judgment is silent as to the order of the sentences." Response of the U.S. to Appellant's Pet. for Reh'g En Banc, *United States v. Lowe*, No. 08-2304, at 6 (8th Cir. Apr. 1, 2009). Not surprisingly, while holding out the possibility that the Fifth Circuit may one day solve this problem, the Government does not suggest that it will ever urge the Fifth Circuit to do so.

The time to end this practice is now, and this is the case in which to do so. The arguments advanced by the Government against review of previous cases carry no weight here: petitioner has properly preserved the issue for plenary review, and the harm caused by his unlawful sentence is demonstrable. This Court should grant the petition and resolve this conflict once and for all.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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