No. 10-7387

In The Supreme Court of the United States

MONROE ACE SETSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I

Does a district court have authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence?

II

Is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Setser*, 607 F.3d 128 (5th Cir. 2010). J.A. 54-64. The district court did not issue a written opinion, but the sentencing transcript and written judgment are reprinted in the joint appendix. J.A. 14-27.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010, and a timely petition for rehearing en banc was denied on August 5, 2010. The petition for writ of certiorari was filed on November 2, 2010, and granted on June 13, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTE

A district court's authority to impose concurrent or consecutive terms of imprisonment is governed by 18 U.S.C. § 3584(a):

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except

that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT OF THE CASE

This case presents the related questions of whether a court may order a federal sentence to run consecutively to a state sentence that does not yet exist, and whether such an order should be vacated as unreasonable when it is contradicted by another term in the same federal judgment.

Interaction of Federal and State Sentences

A defendant subject to multiple terms of imprisonment will serve them concurrently or consecutively. When a defendant is subject to multiple federal sentences, the United States Bureau of Prisons ("BOP") aggregates the sentences as though the defendant were subject to a single term of imprisonment. *See* 18 U.S.C. § 3584(c).

When a defendant is subject to both federal and state sentences, the matter is more complicated

because multiple sovereigns are involved. A defendant will first serve the sentence of the sovereign that maintains primary custody over him. Upon completion of that sentence, the defendant will then serve the sentence of the sovereign with secondary jurisdiction. Primary custody is acquired by arrest and relinquished by bond, acquittal, dismissal of charges, parole, probation or discharge of sentence. *See Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922); *United States v. Poole*, 531 F.3d 263, 271 (4th Cir. 2008); *United States v. Cole*, 416 F.3d 894, 896-97 (8th Cir. 2005); *United States v. Warren*, 610 F.2d 680, 684-85 (9th Cir. 1980).

A defendant in primary *federal* custody will generally serve his federal sentence first. If state authorities then count the federal time toward his state sentence, the federal and state terms will effectively run concurrently. If state authorities do not do so, the terms will run consecutively.

A defendant in primary *state* custody will generally serve his state sentence first. In order to achieve concurrent service of the federal and state sentences, BOP must designate the state institution as the place for service of the federal sentence. 18 U.S.C. § 3621; BOP Program Statement No. P5160.05 § 9(b)(1) (January 16, 2003). If BOP does so, then the defendant's federal sentence starts on the date of federal sentencing, and all subsequent time in state custody is counted toward his federal term of imprisonment. 18 U.S.C. § 3585. If BOP does not designate the state facility for service of the federal sentence, then the

defendant's sentence will start on the day he completes service of his state sentence and enters federal custody.

In general, BOP has discretion to decide whether to designate the state facility for service of the federal sentence, and the district court can provide only a non-binding recommendation. 18 U.S.C. § 3621. However, under § 3584(a), the district court has authority to compel a consecutive or concurrent sentence if multiple federal sentences are imposed at the same time or if the defendant is "already subject to an undischarged term of imprisonment." Where a defendant is in primary state custody, a concurrent order under § 3584(a) requires BOP to count the time in state custody toward the federal sentence and a consecutive order forbids BOP to count the state time against the federal sentence.

BOP typically designates the state facility for service of the federal sentence when the district court orders or recommends concurrent service. BOP Program Statement No. P5160.05 § 9(b)(1). Sometimes BOP effects a concurrent sentence even when the judgment is silent. BOP Program Statement No. P5160.05 § 9(b)(4-5). Courts have held that BOP may retroactively designate the state institution to effect a concurrent sentence even after the defendant has been released from state custody into federal custody. *See*, *e.g., Barden v. Keohane*, 921 F.2d 476 (3d Cir. 1990).

Monroe Setser's Case

On October 1, 2007, Monroe Setser was serving a five-year term of probation for a 2006 state offense ("2006 state probation case") when Lubbock, Texas, police officers stopped his car. The officers found methamphetamine, cocaine, marijuana, and two pistols. Mr. Setser's resulting arrest led to prosecutions in both state and federal court. State authorities charged him with possession of methamphetamine with intent to distribute ("2007 state drug case") and filed a motion to revoke his state probation. Before those state cases were resolved, federal authorities interrupted the proceedings by filing a writ of habeas corpus *ad prosequendum*, which brought Mr. Setser into federal custody.[1] J.A. 1; S.J.A. 70. He was indicted for the federal offenses of possession of methamphetamine with intent to distribute, possession of a firearm by a felon, and possession of a firearm in furtherance of a drug trafficking crime. J.A. 11-13. The drug distribution charge was based upon the same conduct underlying the state drug case. S.J.A. 70, 78.

Federal Proceedings

Mr. Setser pleaded guilty to the federal drug charge, and the government agreed to dismiss the

[1] The State of Texas maintained primary custody of Mr. Setser until his eventual parole from state prison, even while he was in the physical custody of federal authorities for the district court proceedings.

gun-related counts. S.J.A. 70, 71. The Presentence Investigation Report ("PSR") calculated the advisory guideline range as 121-151 months' imprisonment. S.J.A. 87. The PSR noted that the 2007 state drug case remained pending and was "directly related to the instant federal offense of conviction." S.J.A. 87. It concluded that "the court should order any sentence to be imposed for the instant federal offense to be served concurrently with any sentence that may be imposed" in the 2007 state drug case. S.J.A. 87. The PSR also noted that a motion to revoke was pending in Mr. Setser's 2006 state probation case. S.J.A. 87. It concluded that "the court may wish to impose the federal sentence to run concurrently with, partially concurrently with, or consecutive to any sentence to be imposed in the probation revocation." S.J.A. 87.

Mr. Setser objected to the PSR's suggestion that the court could order the federal sentence to run consecutively "to the as yet unimposed state sentence" from the 2006 state probation case. S.J.A. 93. He acknowledged the Fifth Circuit's precedent which held the district court had such authority, but noted a circuit split on the question. S.J.A. 93. Mr. Setser renewed his objection at sentencing, but the government responded that the issue was foreclosed by Fifth Circuit precedent. J.A. 22-23. The district court overruled the objection and sentenced Mr. Setser to 151 months' imprisonment. J.A. 15-16, 23, 25. The court ordered its sentence to be served consecutively to any sentence that might be imposed in the 2006 state probation case and concurrently with any sentence that

might be imposed in the 2007 state drug case. J.A. 16, 25. Mr. Setser timely appealed. J.A. 4. The government neither objected to the concurrent order nor cross-appealed.

State Proceedings

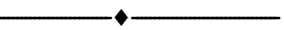
While the case was on direct appeal, federal authorities returned Mr. Setser to state custody. He pleaded guilty in the 2007 state drug case, and the state court revoked his probation in the 2006 case. The state court sentenced Mr. Setser to serve five years' imprisonment in the 2006 state probation case and ten years' imprisonment in the 2007 state drug case. J.A. 29-30, 35-36. Further, the state court ordered these sentences to run concurrently with each other. J.A. 29-30, 35-36. Under Texas law, the "concurrent" orders also applied to the federal sentence. *See Ex parte Spears*, 235 S.W.2d 917, 917-18 (Tex. Crim. App. 1951) (noting that a state sentence runs concurrently with a previously-imposed federal sentence unless the trial court orders consecutive service). *See also Cook v. State*, 824 S.W.2d 634 (Tex. App. 1991) (holding that present version of TEX. CODE CRIM. PROC. art. 42.08 gives Texas courts authority to order a state sentence consecutively to or, by implication, concurrently with previously imposed federal sentences).

Mr. Setser remained in state custody until he was paroled on March 17, 2010. J.A. 44, 53. He then entered exclusive federal custody, where he remains.

BOP has not credited him for any time spent in state custody even though the federal district court ordered its sentence to run concurrently with the sentence in the 2007 state drug case. J.A. 44.

Federal Appeal

Mr. Setser asserted two claims at the Fifth Circuit: 1) that the district court had no authority to order its sentence served consecutively to a future state sentence; and 2) that the federal sentence was impossible to fully implement, and therefore was unreasonable. The circuit court affirmed. It held that it was bound to follow its precedent in *United States v. Brown*, 920 F.2d 1212 (5th Cir. 1991), and rejected the unreasonableness claim. J.A. 54-64.



SUMMARY OF THE ARGUMENT

I. The district court had no authority to impose a consecutive term of imprisonment.

Congress has authorized district courts to issue consecutive sentencing orders in two circumstances: when "multiple terms of imprisonment are imposed on a defendant at the same time," or when "a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." 18 U.S.C. § 3584(a). The statute provides no authority to order a federal sentence to run consecutively to a state term of imprisonment that has not yet been imposed. That is, a federal court may order

consecutive service as to a term of imprisonment imposed before the federal sentence, or at the same time as the federal sentence, but not after the federal sentence.

This reading comports with the plain language of the statute. It honors Congress's choice of the phrase "already subject to," which requires an existing term of imprisonment, not a future one. And it honors Congress's choice of the word "undischarged" to modify the phrase "term of imprisonment." The word "undischarged" implies that the relevant term of imprisonment has begun, or at least that it already exists.

This reading also gives meaning to each sentence of § 3584(a). The first sentence of the statute contains limitations on the district court's authority to impose a concurrent or consecutive sentence. Important canons of statutory construction counsel against casting those limitations aside. Likewise, the principle that all portions of a statute should be construed as a functional whole supports this view. Section 3584(b) requires the district court to consider certain statutory factors when deciding whether to order consecutive service of two terms of imprisonment. That mandate cannot be fulfilled with respect to an unknown and unknowable state sentence.

Legislative history and the work of the Sentencing Commission further confirm the limits on the district court's consecutive sentencing authority. The relevant Senate Judiciary Report does not contemplate extension of this authority to future state sentences. Similarly, the Sentencing Commission construed § 3584(a)'s

phrase "undischarged term of imprisonment" to include only previously imposed terms of imprisonment.

Section 3584(a) clearly articulates the district court's consecutive sentencing authority. Because Congress spoke directly to this subject, this case presents no opportunity to examine the contours of a district court's inherent authority.

Any contrary application of the statute would be unworkable and arbitrary. If a district court has the power to issue orders relative to sentences that do not exist, its orders can become impossible to implement. Mr. Setser's case illustrates this problem. The district court ordered its sentence run consecutively to one future state term of imprisonment, but concurrently with a different future state term of imprisonment. Yet the state court ultimately ordered the two state terms to run concurrently with each other, so the federal sentence became impossible to fully implement.

Furthermore, there is no textual reason to distinguish between a district court's power to order a consecutive sentence with respect to a future *state* term of imprisonment and its power to do so with respect to a future *federal* term of imprisonment. The statute simply does not distinguish between state and federal sentences. Yet § 3584(a) plainly authorizes a second federal court to run its sentence concurrent with an earlier federal sentence. Accordingly, if the statute authorizes a district court to order its sentence to run consecutively to a future federal sentence, it invites conflicting federal court orders.

Federalism and comity concerns likewise support the limits on federal consecutive sentencing authority. An anticipatory consecutive sentencing order deprives the state court of the power to determine the effect of its own judgment. It also instructs BOP to dishonor an otherwise valid state concurrent sentencing order. This practice should be disfavored in the absence of explicit Congressional authorization.

Neither Mr. Setser's probationary term nor the pending motion to revoke that probation can reasonably be considered an undischarged term of imprisonment within the meaning of § 3584(a). The district court therefore lacked authority to issue the consecutive sentencing order.

II. Alternatively, inclusion of the consecutive order resulted in an unreasonable sentence.

The district court ordered its sentence to run concurrently with any sentence imposed in the 2007 state drug case but consecutively to any sentence imposed in the 2006 state probation case. The state court later ordered these two sentences to run concurrently with each other, effectively rendering them a single term of imprisonment. The district court's judgment thus cannot be implemented; the federal sentence cannot run both concurrently with, and consecutively to, the single term of imprisonment resulting from the state sentences. There is no possible application of this

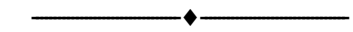
judgment that would not violate some provision of the judgment.

Impossible sentences are unreasonable sentences. Such sentences fail to provide the requisite level of certainty and fail to exclude "any serious misapprehensions by those who must execute them." *United States v. Daugherty*, 269 U.S. 360, 363 (1926). Such sentences, moreover, cannot reasonably be said to achieve the goals specified in 18 U.S.C. § 3553(a).

Mr. Setser's sentence was based upon a false assumption that the federal sentence could run concurrently with one state sentence but consecutively to the other. The court of appeals knew that the assumption turned out to be false but upheld the sentence anyway. This was reversible error.

III. The proper remedy is to strike the consecutive term of the judgment.

The consecutive order should be stricken from the judgment. The government has never challenged the concurrent order. Thus, the appropriate relief under the party presentation principle would leave the concurrent order undisturbed while striking the consecutive order.



ARGUMENT

I. The district court had no authority to impose a consecutive term of imprisonment.

A district court has the authority to order its sentence served consecutively to any other term of imprisonment imposed at the same time or to any sentence of imprisonment the defendant is already serving. 18 U.S.C. § 3584(a). But as to terms of imprisonment which do not exist, a district court has no statutory or inherent authority to order consecutive service.

A. A federal district court's consecutive sentencing authority does not extend to future state sentences.

1. The plain text of 18 U.S.C. § 3584(a) does not authorize a district court to order a sentence to run consecutively to a future state sentence.

Statutory analysis begins with the plain language. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989). The authority to impose a consecutive or concurrent sentence is found in 18 U.S.C. § 3584(a):

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except

> that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

The statute accomplishes two things. Its first sentence authorizes the district court to order concurrent or consecutive service when multiple terms of imprisonment are imposed at the same time or when the defendant is already subject to an undischarged term of imprisonment. In its second and third sentences, it provides default principles for interpreting the federal judgment if the court remains silent on the consecutive or concurrent question. This constitutes the full reach of the statute. It does not authorize a district court to order a federal sentence to run consecutively to a *future* state sentence.

a. The statute's first sentence grants consecutive sentencing authority only as to simultaneously-imposed and already-imposed sentences.

The statute's plain language confers only limited authority on a sentencing court. The clause authorizing a consecutive order when multiple terms of

imprisonment are imposed "at the same time" is not applicable here. The question here is whether a defendant who might be facing a future state sentence is one "who is already subject to an undischarged term of imprisonment." Textual analysis demonstrates that the answer is no.

"[W]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). Two word choices made by Congress resolve any dispute as to the statute's scope. First, the grant of consecutive sentencing authority applies to one who is "already subject to" to a prison term. "Already" is consistently defined to mean "by or before the given or implied time." WEBSTER'S NEW WORLD DICTIONARY 40 (2d College ed. 1984); *see also* THE RANDOM HOUSE COLLEGE DICTIONARY REVISED EDITION 39 (1988) ("already . . . *adv*. 1. Previous to a given or implied time . . . "). The use of the qualifying word "already" limits the statute's reach to existing sentences – those to which a defendant is subject on or before the date of federal sentencing.

"Subject to" possesses a range of meanings in common usage. *See* THE RANDOM HOUSE COLLEGE DICTIONARY REVISED EDITION 1308 (1988) ("subject . . . *adj*. . . . 13. being under the dominion rule, or authority of a sovereign, state, etc. . . . 14. open or exposed . . . 16. being under the necessity of undergoing something . . . "). It likewise has an open-ended use in its legal sense. *See* BLACK'S LAW DICTIONARY 1425 (6th ed. 1990) ("subject to. liable, subordinate,

subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for."). Yet the word "already" suggests that Congress intended to reach those defendants facing a prison term that had been previously established by a discrete event. Thus, a defendant who has merely been charged is not "already subject to" a term of imprisonment within the meaning of the statute.

Second, Congress specified "undischarged" terms of imprisonment, which indicates that the term of imprisonment has been imposed. Indeed, construing the word "undischarged" as it appears in the applicable Sentencing Guidelines, federal courts have concluded that it does not include unrevoked terms of parole or supervised release. *See United States v. Turnipseed*, 159 F.3d 383, 387 (9th Cir. 1998); *United States v. Blackwell*, 49 F.3d 1232, 1241 (7th Cir. 1995); *United States v. Ogg*, 992 F.2d 265, 266 (10th Cir. 1993). To describe a term of imprisonment that has not even been imposed as "undischarged" is like saying that a race is "unfinished" when nobody has even decided whether to have a race. If no term of imprisonment exists, there is nothing to discharge. A defendant is thus "already subject to an undischarged term of imprisonment" only if another term has been imposed at or before the time of federal sentencing.

Where the plain text yields a clear answer, further inquiry is unnecessary. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981). The plain text of § 3584(a) leads to the conclusion that a district

court's consecutive sentencing authority reaches existing state sentences, but does not extend to future state sentences.

b. The statute's second and third sentences provide no additional consecutive sentencing authority.

While the first sentence of § 3584(a) provides consecutive sentencing authority, the second and third sentences establish default rules for interpreting a silent judgment. When terms of imprisonment are imposed at the same time, they run concurrently unless a statute mandates otherwise or "the court orders" consecutive service. When terms of imprisonment are imposed at different times, they run consecutively "unless the court orders that the terms are to run concurrently." 18 U.S.C. § 3584(a).

The third sentence is the only one applicable to cases involving state terms of imprisonment, which are necessarily imposed at a different time than the federal term of imprisonment. This part of the statute does not broaden the class of cases in which a district court may issue a consecutive order. Rather, it establishes an applicable rule when the court *could have* issued a concurrent or consecutive sentencing order but did not do so. It does not purport to enlarge the grant of authority already defined in the first sentence of the statute.

The third sentence cannot be read as an independent grant of power. "Over and over [the Court

has] stressed that 'in expounding a statute, it must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850)). Rather, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The default principles of the second and third sentences immediately follow the grant of authority in the first sentence, and they all must be read together. A natural reading of the entirety of § 3584(a) shows that the default principles apply only when the court is otherwise empowered to issue a concurrent or consecutive order, but has remained silent.

This understanding is reinforced by the tight parallelism present in the structure of § 3584(a). The first sentence of § 3584(a) describes two situations in which the district court has the authority to order a concurrent or consecutive term of imprisonment. Unquestionably, the second sentence then announces a default principle pertaining to the first of these circumstances: cases where two terms of imprisonment are imposed at the same time. The third sentence continues this pattern, stating a default principle for the second of those circumstances. Nothing moves the reach of the statute to cases involving future terms of imprisonment.

Ordinary conventions of the English language suggest the same. Sentences follow one another when they pertain to a common subject, and it is not necessary to constantly restate the limited context in which they operate. It is not necessary, in other words, to restate in the third sentence the restrictive clause "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." This limitation is implied by the placement of the sentence within the statute. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. at 809 (rejecting interpretation of a statutory object that was "not inconsistent with the language of that provision examined in isolation," because "statutory language cannot be considered in a vacuum.").

This Court, moreover, has long recognized that "general words must . . . be limited . . . to those objects to which the legislature intended to apply them." *United States v. Palmer*, 16 U.S. 610, 631 (1818). It has thus repeatedly held that context may restrict the scope of statutory terms, even when they are preceded by an expansive modifier such as "any." *See United States v. Palmer*, 16 U.S. at 631 ("any person" in capital piracy statute refers only to persons owing allegiance to the United States); *Small v. United States*, 544 U.S. 385, 388 (2005) ("any court" in context means only domestic courts). Here, the phrase "multiple terms of imprisonment imposed at different times" is not preceded by an expansive modifier such as "any" or "all." There is accordingly even greater reason to understand that phrase in the context

established by § 3584(a)'s first sentence: cases where two terms of imprisonment are imposed at the same time, or where a federal defendant is already subject to an undischarged term. Indeed, it would make no sense for Congress to delineate the two circumstances in which consecutive sentences are authorized if its intent was to extend that authority to any sentence imposed at any future time.

2. Important canons of statutory construction support this conclusion.

The canon against surplusage confirms that district courts cannot reach future state sentences. It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation omitted); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation omitted). The first sentence of the statute sets plain parameters on the authority to order a consecutive sentence. If district courts may order consecutive service as to *any* sentence, even one not yet imposed, the limitations in the first sentence of the statute are superfluous. Congress included the limitations of the first sentence intending them to have effect.

The same conclusion obtains upon considering the canon of *expressio unius exclusio alterius*. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). This canon applies "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

Section 3584(a) permits consecutive sentencing with respect to terms of imprisonment imposed *before* a federal sentencing or *at the same time as* a federal sentencing. It is silent concerning terms of imprisonment imposed *after* a federal sentencing. The specific grant of authority in two of three possible circumstances implies a deliberate withholding of authority in the third circumstance, further confirming that district courts lack the authority to impose consecutive sentences with respect to terms of imprisonment imposed after the federal sentencing

The broader context of § 3584 confirms the absence of authority as to future terms of imprisonment. A court must, if possible, interpret a statute so that all parts of it comprise a "harmonious whole." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (quoting *FTC v. Mandel Brothers, Inc*., 359 U.S. 385, 389 (1959)). This rule supports Mr. Setser's reading of § 3584(a). Section 3584(b) requires the district court to consider the factors set forth in 18 U.S.C. § 3553(a) when choosing a concurrent or consecutive term. But the court cannot comply with

the mandates of § 3584(b) and § 3553(a) when future sentences are at issue because it does not know what the total sentence length will be. It cannot know whether the aggregate sentence will be greater than necessary to achieve the purposes of deterrence, incapacitation, rehabilitation, and respect for the law. *See* 18 U.S.C. § 3553(a)(2)(A). Certainly, it cannot know whether an aggregate sentence of unknown length advances or frustrates the need to avoid unwarranted disparity. *See* 18 U.S.C. § 3553(a)(6). To harmonize subsections (a) and (b) of § 3584, consecutive sentencing authority must be restricted to previously-imposed or simultaneously-imposed sentences.

3. The legislative history of § 3584 supports Mr. Setser's reading.

Legislative history may be used to shed light on the statute's meaning. *See Exxon Mobil Corp. v. Allapath Servs., Inc.*, 545 U.S. 546, 568 (2005). Among sources of legislative history, committee reports are the most likely to provide information about Congressional intent. *See Garcia v. United States*, 469 U.S. 70, 76 (1984). Section 3584(a) was passed with the sentencing reform provisions of the Comprehensive Crime Control Act. The Senate Judiciary Committee produced the most detailed explanation of the bill's intent on this Section. *See* S. REP. NO. 98-225 at 125-28 (1983).

The Senate Judiciary Committee's report indicates that Congress was concerned with previously

imposed state sentences. *See* S. REP. NO. 98-225 at 127 & n.314. The report refers only to situations in which two federal terms of imprisonment are imposed at the same time, or in which a defendant is already serving a state sentence. *See* S. REP. NO. 98-225 at 126 ("Proposed 18 U.S.C. 3584(a) provides that sentences to multiple terms of imprisonment may with one exception be imposed to be served either concurrently or consecutively, whether they are imposed at the same time or one term of imprisonment is imposed *while the defendant is serving another one*.") (emphasis added).

There is absolutely no suggestion that Congress intended either to permit or to require consecutive sentencing with respect to future state terms of imprisonment. S. REP. NO. 98-225 at 125-28. Indeed, the only circuits to consider legislative history have concluded it demonstrates no intention to reach future terms of imprisonment. *See United States v. Clayton*, 927 F.2d 491, 492 (9th Cir. 1991) ("[T]he legislative history discussing the section indicates that Congress contemplated only that federal sentencing be consecutive to state convictions for which the defendant was already sentenced."); *United States v. Donoso*, 521 F.3d 144, 147 (2d Cir. 2008) ("The legislative history of the statute demonstrates, moreover, that in enacting § 3584(a) Congress was concerned with the imposition of a federal sentence on a defendant who was already serving either a federal or state sentence.").

4. The Sentencing Commission recognizes that a defendant is "subject to an undischarged term of imprisonment" only if he has already been sentenced to prison.

Congress charged the Sentencing Commission with the duty to promulgate sentencing guidelines. *See* 28 U.S.C. § 994(a). More specifically, those guidelines must include criteria for deciding whether multiple terms of imprisonment should be served concurrently or consecutively. *See* 28 U.S.C. § 994(a)(1)(D).

The Commission's instructions for applying § 3584(a) to undischarged sentences are found in USSG § 5G1.3. *See* USSG § 5G1.3, comment. (backg'd). Guideline 5G1.3 reflects the Commission's understanding that a defendant is "subject to an undischarged term of imprisonment" only if another term of imprisonment has already been imposed. The three subsections exhaust the universe of possible undischarged terms, and each of them refers exclusively to previously imposed sentences of imprisonment. Subsection (a) calls for a consecutive sentence if the defendant committed the federal offense while he "was serving" another sentence or "after sentencing" for another offense. USSG § 5G1.3(a). Subsection (b) calls for a concurrent sentence if the other term of imprisonment "resulted from" an offense that was relevant conduct. USSG § 5G1.3(b). And subsection (c) applies "[i]n any other case involving an undischarged term of imprisonment." The text of this catch-all provision demonstrates that an "undischarged

term" is a "*prior* undischarged term of imprisonment." USSG § 5G1.3(c), p.s. (emphasis added). The district court is instructed "to achieve a reasonable punishment for the instant offense." USSG § 5G1.3(c), p.s. That objective is impossible to achieve if the district court is ignorant of the aggregate length of imprisonment.

In the guideline commentary, the undischarged sentence is always described as one previously imposed. Moreover, the commentary presumes the district court to know both the length and the nature of the undischarged sentence. For example, the Commission encourages the district court to consider "[t]he type . . . and length of the *prior* undischarged sentence," "[t]he time *served* on the undischarged sentence," and "[t]he fact that the prior undischarged sentence *may have been imposed* in state court rather than federal court, or at a different time before the same or different federal court." USSG § 5G1.3, comment. (n.3(A)(ii)-(iv)) (emphases added). Probation revocations are addressed in note 3(C), which applies only if the defendant was on probation "at the time of the instant offense and *has had* such probation . . . *revoked*." USSG § 5G1.3, comment. (n.3(C)) (emphasis added).

In short, the Sentencing Commission describes every possible case in which a defendant could be "subject to an undischarged term of imprisonment," and in every case the defendant has already been sentenced to prison. The Sentencing Commission's interpretation of § 3584(a) should not lightly be cast

aside. The Commission is an expert body, composed of persons with a deep familiarity with the federal justice system. *See Rita v. United States*, 551 U.S. 338, 347-49 (2007).

B. The district court has no inherent authority to circumvent the limitations of § 3584(a).

This case presents no opportunity to explore the existence or contours of a district court's extra-statutory or inherent sentencing authority. The Eighth Circuit held that the statute does not prohibit a consecutive order as to a future term of imprisonment, and that such an order could properly flow from a district court's "broad discretion." *See United States v. Mayotte*, 249 F.3d 797, 798-99 (8th Cir. 2001). This cannot be correct for two reasons. First, this expansive view of inherent authority would render the first sentence in § 3584(a) superfluous, and would ignore Congress's decision to exclude future sentences from the scope of the district court's consecutive sentencing authority. Second, with the exception of § 3584(a), Congress has committed the power to designate state facilities as the place for service of a federal sentence to BOP, not to district courts.

Congress crafted § 3584(a) carefully. The statute permits a district court to order consecutive or concurrent service when it possesses all of the relevant information regarding the other sentence, but it withholds that authority when the other sentence has

not yet been imposed. In that circumstance, the final decision belongs to BOP after all of the relevant information is received. This Court should not rely upon extra statutory authority to disrupt that carefully crafted scheme.

C. Mr. Setser's reading produces the only logical rule.

The statute produces a logical, workable rule only if the district court's consecutive sentencing authority is limited to existing terms of imprisonment. Any contrary rule produces grave problems of administration and arbitrary outcomes. First, if district courts are empowered to compel a consecutive sentence even as to terms of imprisonment that do not yet exist, they will be blind to the total punishment. Reserving the consecutive versus concurrent question for subsequent decision-makers avoids this problem in the large majority of cases.

Second, the text of § 3584(a) does not distinguish between future *state* and future *federal* sentences. Accordingly, if § 3584(a) permits a consecutive order with respect to a future *state* sentence, then it also permits a consecutive order with respect to a future *federal* sentence. This would make it possible for two federal courts to impose conflicting orders. The second federal court, after all, would plainly enjoy the statutory power to impose a concurrent sentence, notwithstanding an earlier consecutive order, since this second term of imprisonment would be one "imposed

on a defendant who is already subject to an undischarged term of imprisonment." § 3584(a). Thus, if district courts may impose consecutive sentencing orders as to future terms of imprisonment, the statute invites conflicting federal orders. Such conFlicts have in fact occurred. *See United States v. Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008) (reversing such an order).[2]

Third, in cases where the defendant ultimately becomes subject to multiple state sentences, the federal court will not always know whether those sentences will run concurrently or consecutively to each other. As this case demonstrates, a federal court may compel consecutive service with respect to one future state sentence and concurrent service with respect to another future state sentence. If the state court subsequently runs these two state sentences concurrently with each other, the result will be an impossible sentence. The federal sentence cannot begin at the conclusion of one state sentence and the beginning of another state sentence if those two state sentences begin at the same time.

Finally, it would be irrational for Congress to mandate that all defendants in Mr. Setser's circumstance be subjected to consecutive terms.[3] Under this

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[2] The outcome in *Quintana-Gomez* was not grounded in the text of § 3584(a).

[3] This reading would require the Court read the third sentence of the statute to mandate consecutive service in *any* case involving a silent judgment where multiple terms of

(Continued on following page)

reading, every defendant in primary state custody would receive consecutive sentences if sentenced first by the federal court. The accident of the defendant's order of arrest, and the order of his sentencing, would then combine to produce mandatory consecutive service of federal and state sentences. If the defendant was arrested by state authorities but sentenced first in federal court, this reading would require consecutive service even if the federal and state charges were for identical conduct. But if he was arrested by federal authorities, or sentenced first by a state court, then he could enjoy concurrent service of his sentences. The order of the defendant's arrest and sentencing would play a more significant role than the dangerousness of the defendant or the seriousness of the offense. Arbitrary circumstances of this kind were not intended to play so substantial a role in determining the length of a sentence. *See United States v. Wilson*, 503 U.S. 329, 334 (1992) (rejecting an interpretation of § 3585(b) that would have made a district court's authority to award pre-sentence custody contingent on the order of state and federal sentencing, because it could "imagine no reason why Congress would desire the presentence detention credit, which determines how much time an offender spends in prison, to depend on the timing of his sentencing.").

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imprisonment are imposed at different times, even if the judgment's silence was compelled by the first sentence of the statute.

D. The circuit court's rule raises serious concerns of federalism and comity.

The federalist system promotes a more open, responsive and accountable government, and safeguards against the concentration of power in a central government. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). Federalism depends, however, on the capacity of the states to vindicate their interests in their own courts, without federal interference. *See Younger v. Harris*, 401 U.S. 37, 44 (1971). Notably, Congress has recognized the importance of federal respect for state judgments by commanding federal courts to accord them full faith and credit. *See* 28 U.S.C. § 1738.

Federalism carries special importance in the enforcement of criminal sanctions. "Under our federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995); *see also Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998) ("It is difficult to imagine an activity over which the State has a stronger interest" than the administration of penal sanctions). More to the point, "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986).

When federal and state authorities impose overlapping criminal sanctions, the actions of each will necessarily affect the legitimate interests of the other.

Each sovereign has strong interests in defining the length of a defendant's punishment and in allocating its own penal resources. Discussing the conflicting interests at work in this situation, this Court stressed in *Ponzi* that:

> The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

Ponzi v. Fessenden, 258 U.S. at 259. Mutual deference is necessary both to avoid "embarrassing conflicts" and to maintain a federalist system in which citizens "live in the jurisdiction of two sovereignties." *Ponzi v. Fessenden,* 258 U.S. at 259.

Permitting federal courts to order consecutive sentencing with respect to future state sentences is not consistent with a system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. at 44.

And it is no good answer to say that anticipatory consecutive orders merely vindicate the federal court's interest in the full service of its own sentences. The relationship between federal and state sentences is necessarily a matter of joint federal and state

concern. Such orders denigrate the state court's interest in determining whether its own sentence shall add to the total term of punishment. They deprive the state court of the ability to decide how its own sentence shall be served, or what the consequence of its own judgment will be for the defendant. Importantly, a judgment compelling consecutive service can often be enforced only by dishonoring a state judgment.

The state court in this case imposed both state sentences concurrently with the previously imposed federal sentence. J.A. 29-30, 35-36; *see also Ex parte Spears*, 235 S.W.2d at 917-18 (Texas sentences run concurrently with previously imposed federal sentences unless state judge demands consecutive service). The federal government may well enjoy the constitutional authority to dishonor state judgments, but this is not the end of the inquiry. Federal restraint in this area will enable state institutions to exercise greater influence over the total sentence imposed. State institutions represent smaller constituencies, govern with nuanced appreciation for the local crime problems rather than by uniform national policy, and exercise the coercive power of criminal sanction over a limited geographic area. Certainly, open federal denigration of valid state judgments does not promote public respect for state institutions, or train citizens to look to state courts and executives for solutions to matters of public concern. Congress is presumed to speak clearly when it wishes to restrain state power in "traditionally

sensitive areas" affecting the federal balance. *United States v. Bass*, 404 U.S. 336, 349 (1971). It has not done so here.

E. Mr. Setser was not already subject to an undischarged term of imprisonment in his state probation case.

For the reasons discussed above, this Court should hold that a district court is without authority to order a federal sentence to run consecutively to a future state sentence. The consecutive sentencing authority is limited to existing sentences; those "undischarged terms of imprisonment" to which a defendant is "already subject." Mr. Setser's five-year term of probation, probating a five-year term of imprisonment is not such a sentence.

In its ordinary usage, "imprisonment" means physical confinement, not probationary freedom. *See* BLACK'S LAW DICTIONARY 757 (6th ed. 1990) (defining "imprisonment" as "[t]he act of confining a person, esp. in a prison."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 583 (10th ed. 1993) (primary definition of "imprison" is "to put in prison: confine in jail").

Probation, on the other hand, is a "[s]entence imposed for a commission of a crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer *in lieu of incarceration*." BLACK'S LAW DICTIONARY 1202 (6th ed. 1990) (emphasis added). Probation and imprisonment

are not fungible; they are sentences fundamentally different in character.

This Court has repeatedly noted the stark differences between a sentence of imprisonment and a sentence of probation. "Probation is 'one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.'" *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). "[I]ncarceration is an 'intrinsically different' form of punishment." *Blanton v. North Las Vegas*, 489 U.S. 538, 542 (1989) (quoting *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975)) (further quotations omitted). A person on probation, much like a person on parole,

> although subject to some restraints on liberty, is not "imprisoned" in the sense in which the term is usually used. For example, if a parolee were informed at the end of a parole revocation hearing that the outcome was "imprisonment," the parolee would not think that meant he was going to be returned to parole.

United States v. Pray, 373 F.3d 358, 361 (3d Cir. 2004) (Alito, J.).

Federal courts interpreting the phrase "term of imprisonment" under USSG § 5G1.3, which implements 18 U.S.C. § 3584(a) and reproduces its language, have with near uniformity concluded that parole, probation, and supervised release do not qualify as

imprisonment. *See United States v. Pray*, 373 F.3d at 361 (parole); *United States v. Tisdale*, 248 F.3d 964, 976 (10th Cir. 2001) (probation); *United States v. Cofske*, 157 F.3d 1, 1-2 (1st Cir. 1998) (probation); *Prewitt v. United States*, 83 F.3d 812, 817-18 (7th Cir. 1996) (probation); *United States v. Bernard*, 48 F.3d 427, 431 (9th Cir. 1995) (supervised release). *See also United States v. Stewart*, 49 F.3d 121, 123 (4th Cir. 1995) (finding parole not "imprisonment" under USSG § 4A1.1). *But see United States v. French*, 46 F.3d 710, 716-17 (8th Cir. 1995) (relying on South Dakota law to conclude that parolee was legally "confined" and therefore subject to undischarged "term of imprisonment" under USSG § 5G1.3(b)).

Simply put, probation is a form of "conditional liberty," *Black v. Romano*, 471 U.S. 606, 611 (1985), while imprisonment is not liberty at all. Mr. Setser's sentence of probation was not an "undischarged term of imprisonment" and did not come within § 3584(a)'s grant of consecutive sentencing authority.

As discussed above, the statute permits a consecutive sentence only if the defendant is "already subject to" a term of imprisonment. A person is "already subject to" a term of imprisonment only if there is a judgment requiring that person to go to prison. To hold that Mr. Setser was "already subject to an undischarged term of imprisonment" merely because his probation might have been revoked would ignore Congress's choice to distinguish between defendants who were and were not sentenced. It would ignore

Congress's use of the phrase "term of imprisonment," rather than a broader phrase encompassing probationary sentences. It would ignore Congress's use of the word "already," which emphasizes finality. And it would ignore Congress's description of the necessary term of imprisonment as "undischarged," which plainly implies that the term of imprisonment has begun.

The legislative history likewise indicates that Congress focused on imprisonment, not probation. In discussing consecutive sentencing under § 3584(a), the legislative history refers to "a person already serving *a prison term*," a "*term of imprisonment* . . . imposed while the defendant *is serving another one*," and a person "who is already serving a term of *imprisonment* for a state offense." *See* S. REP. NO. 98-225 at 127-28 (emphases added).

At the time of federal sentencing, the state court had not yet acted on the motion to revoke. It had reached no conclusion as to whether it would revoke, modify, or continue Mr. Setser's probation. The state court had not imposed any term of imprisonment. Consequently, Mr. Setser was not "*already subject to* an *undischarged* term of *imprisonment*" at the time of his federal sentencing.

II. Alternatively, inclusion of the consecutive order resulted in an unreasonable sentence.

This Court need not reach the second question if it holds the consecutive sentencing order is unlawful.

Even if a court may impose its sentence consecutive to a future state sentence, Mr. Setser's sentence is unreasonable because it contradicts itself and cannot be fully implemented. Appellate courts review sentences for reasonableness. *See United States v. Booker*, 543 U.S. 220, 261 (2005). The circuit courts have concluded that *Booker* reasonableness review applies to the decision to run a sentence consecutive. *See, e.g.*, *United States v. Padilla*, 618 F.3d 643, 647 (7th Cir. 2010) ("Because the court conducted an intelligent and exhaustive analysis of the § 3553(a) factors, its decision to impose a consecutive sentence was reasonable.").[4]

The Sentencing Commission agrees that a court's decision to impose a federal sentence consecutive, concurrent, or partially concurrent to an undischarged sentence must be made with an eye to "achiev[ing] a

[4] *See also United States v. Harmon*, 607 F.3d 233, 236 (6th Cir. 2010) (applying a reasonableness standard of review to a challenge to a consecutive sentence); *United States v. Carrasco-De-Jesus*, 589 F.3d 22, 26-30 (1st Cir. 2009) (reviewing consecutive order for procedural and substantive unreasonableness); *United States v. Hahn*, 551 F.3d 977, 981 (10th Cir. 2008) ("We review the district court's [consecutive sentencing] decision for abuse of discretion."); *United States v. McDonald*, 521 F.3d 975, 980 (8th Cir. 2008) ("We review a district court's decision to impose a consecutive or concurrent sentence for reasonableness." (quoting *United States v. Winston*, 456 F.3d 861, 867 (8th Cir. 2006))); *United States v. Matera*, 489 F.3d 115, 123-24 (2d Cir. 2007) (reviewing consecutive sentences for "reasonableness"); *United States v. Candia*, 454 F.3d 468, 471 (5th Cir. 2006) ("[U]nder *Booker*, the consecutive nature of a properly calculated guidelines sentence is reviewed for unreasonableness.").

reasonable punishment for the instant offense." USSG § 5G1.3(c), p.s.; *see also* § 5K2.23 (permitting a downward departure where defendant has been released from a prior sentence which would otherwise warrant concurrent sentencing under § 5G1.3 so long as it is "fashioned to achieve a reasonable punishment for the instant offense").

Whatever else "reasonable" means, it surely does not encompass absurd results. "[A] sentencing court's ultimate responsibility is to articulate a plausible rationale and arrive at a sensible result." *United States v. Carrasco-De-Jesus*, 589 F.3d 22, 30 (1st Cir. 2009). Because the judgment is self-contradictory, the result here is neither "sensible" nor "reasonable."

A. The district court's judgment is impossible to implement.

The district court ordered Mr. Setser's sentence to run consecutively to any term of imprisonment in the 2006 state probation revocation case but concurrently with any term of imprisonment in the 2007 state drug case. J.A. 15-16. However, the state cases produced only one term of imprisonment because the state court ordered them to run concurrently with each other. J.A. 30, 36. A federal sentence cannot run both concurrently with and consecutively to the same state term of imprisonment.

BOP could have implemented either the concurrent or consecutive sentencing order, but it could not implement both. BOP could have implemented the

concurrent sentencing order by designating the state institution for service of the federal sentence. *See* BOP Program Statement No. P5160.05 § 9; *see also* Henry J. Sadowski, *Interaction of Federal and State Sentences When the Federal Defendant is Under Primary Jurisdiction* 3-4 (July 7, 2011), http://www.bop.gov/news/ifss.pdf (last visited August 16, 2011).[5] Alternatively, it could have implemented the consecutive sentencing order by refusing to designate the state institution as the location for the service of the federal sentence, so that the defendant's federal sentence would not start until he was released from state custody. *See* BOP Program Statement No. P5160.05 § 9; Sadowski, *supra*, at 4.

Here, the federal judgment gives inconsistent instructions. Until his release from state custody, Mr. Setser was serving "state time" for both his trafficking offense and his probation revocation. Thus, the federal judgment orders BOP to count and not count the same period of time toward the federal sentence. In other words, the judgment effectively ordered BOP to start the sentence on the date of federal sentencing and to wait until the conclusion of the defendant's state imprisonment to start the sentence. To follow the consecutive order is to violate the concurrent order and vice versa. The federal judgment is not

[5] Even if that designation is not made at the time of federal sentencing, BOP can retroactively identify the state institution as the place for service of the federal sentence. *See* BOP Program Statement No. P5160.05 § 9; Sadowski, *supra*, at 4.

merely "ambiguous," (Brief in Opp. at 13), it is at war with itself.

B. An impossible sentence is an unreasonable sentence.

"Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." *United States v. Daugherty*, 269 U.S. 360, 363 (1926). This Court has long held, moreover, that a defendant should not be sentenced on the basis of "materially untrue" assumptions. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Here, it is impossible to follow the sentencing court's intent. Its consecutive order can be followed only to the extent that its concurrent order is violated. Describing this judgment as "reasonable" does violence to the concept of reason. The circuit court could not bring itself to call the outcome "reasonable." Instead, it recognized that the sentence was "irreconcilab[le] with the state sentence" and at least "partially foiled." J.A. 62. Yet, the court upheld the sentence. J.A. 64.

But a judgment with "irreconcilable" or "foiled" terms cannot be "reasonable." A sentence that cannot be implemented cannot sensibly be said to achieve the goals enumerated at § 3553(a)(2). If nothing else, such a self-contradicting judgment fails Congress's mandate that sentences "promote respect for the law" and "provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).

Here, the government recognizes that Mr. Setser's federal judgment "presumes that the federal sentence can be run consecutively to one state sentence but not the other." (Brief in Opp. at 13.) But, as demonstrated above, that assumption was false.

The Fifth Circuit acknowledged that a federal sentence must not be "ambiguous with respect to the time and manner in which it is to be served" or "internally self-contradictory." J.A. 61 (quoting *United States v. Dougherty*, 106 F.3d 1514, 1515 (10th Cir. 1997)). That principle should have settled the matter in Mr. Setser's favor. However, the circuit court declined to correct the error because:

> [T]here is nothing *plainly* self-contradictory or uncertain about the sentence in and of itself. . . . Any ambiguity in the district court's sentence was not introduced until after the state court ordered Setser's two state sentences to run concurrently.

J.A. 61 (emphasis added). Apparently, the circuit court thought it unfair or otherwise inappropriate to reverse the district court based upon events which had not yet come to pass at the time the district court acted.

At least two fatal flaws undercut this reasoning. First, the district court itself created the possibility that the sentence would become "internally self-contradictory" when it sought to manipulate sentences that did not exist.

Second, when appellate courts become aware of facts that bear on the reasonableness of a sentence, they should not ignore them. The judgment directs action with respect to "the sentence imposed" in the 2006 state probation case and to "the sentence imposed" in the 2007 state drug case, but both of those phrases refer to a single term of imprisonment. Once that fact is known, the federal sentence is "plainly self-contradictory." J.A. 61. The Fifth Circuit knew and acknowledged that the state sentences would be served as a single term of imprisonment, but it chose to ignore that fact when reviewing the federal sentence.

III. The proper remedy is to strike the consecutive term of the judgment.

The relief in this case should eliminate the district court's consecutive sentencing order and preserve the concurrent sentencing order. The party presentation principle compels relief because the government declined to challenge the concurrent order at every stage. It did not object to the order in the district court and, in fact, affirmatively argued that the court had the authority to issue anticipatory sentences. It declined to cross-appeal, and did not challenge the concurrent order before the court of appeals.

"Our adversary system is designed around the premise that the parties know what is best for them and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United*

States, 554 U.S. 237, 244 (2008) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring)) (alteration omitted). Because the government never challenged the concurrent order, "an appellate court may not alter [the] judgment to benefit" the government. *See Greenlaw v. United States*, 554 U.S. at 244. Nor should Mr. Setser suffer the loss of that favorable order. A reviewing court should not enlarge the relief given a non-appealing party even if an error is plain or arguably results in a sentence imposed "in violation of law." *Greenlaw v. United States*, 554 U.S. at 247-53.

If the case returns to the district court for a full resentencing, Mr. Setser will irretrievably lose the concurrent order, because both state sentences have been discharged. At resentencing, he would come before the district court with no "undischarged term of imprisonment," and the court would not have authority under § 3584(a) to impose a concurrent sentence. *See United States v. Cruz*, 595 F.3d 744, 745 (7th Cir. 2010) ("[A]lthough he was paroled rather than released unconditionally, his state sentence was 'discharged' for purposes of deciding whether the federal judge could impose a concurrent sentence.").

On the other hand, if this Court strikes the consecutive order, but leaves intact the concurrent order, Mr. Setser could receive the benefit of the concurrent order. This could be accomplished through retroactive designation of his state facility as the "place of imprisonment" for service of his federal sentence, effectively granting him concurrent service of his federal

sentence and his 2007 state drug sentence. *See* BOP Program Statement No. P5160.05 § 9.

CONCLUSION

For the foregoing reasons, Mr. Setser requests that this Court strike the consecutive sentencing term from the district court's judgment, or remand the case to the court of appeals with instructions to strike it. Alternatively, he requests that this Court reverse the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

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