No. _____

IN THE

Supreme Court of the United States

ROBERT DEMETRIUS BARNES,
Petitioner,

v.

B. MASTERS, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

With respect to a defendant subject to a prior undischarged term of imprisonment, Section 5G1.3(c) of the United States Sentencing Guidelines provides sentencing courts with authority to impose a federal sentence to "run concurrently" to the "prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c) (U.S. SENTENCING COMM'N 2002) (effective Nov. 1, 2002).[1]

The question presented is:

Whether the word "concurrently" in Section 5G1.3(c) authorizes a sentencing court to run a sentence concurrently from the start of the pre-existing sentence, as the Third Circuit has held; or instead, whether the word "concurrently" only permits the sentencing court to run the sentence concurrently with the remainder of the pre-existing sentence (i.e. not concurrently with the full pre-existing sentence), as the Second Circuit and, in the decision below, the Fourth Circuit have held.

[1] Unless otherwise noted, "Section 5G1.3" in this petition refers to the 2002 version of Section 5G1.3 applicable to Mr. Barnes. *See* App. 32a-35a. The language of the 2002 version of Section 5G1.3 came into effect with the 1995 amendments to the Guidelines, *see* App. 60a-63a, and did not change until the 2003 amendments, *see* App 63a-67a. Accordingly, the language of Section 5G1.3 applicable to Mr. Barnes at the time of his sentencing is also applicable to defendants sentenced under Section 5G1.3 after the 1995 amendments, but before the 2003 amendments.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Demetrius Barnes respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's unpublished opinion is available at 733 F. App'x 93 and attached at App. 1a-11a. The opinion of the district court is unpublished and attached at App. 15a-20a.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2018. App. 12a-14a. The court of appeals denied Petitioner's timely petition for rehearing and rehearing en banc on July 6, 2018. App. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 18 U.S.C. §§ 3584, 3585 are reproduced at App. 30a-31a. Section 5G1.3 of the United States Sentencing Guidelines is reproduced at App. 32a-35a.

INTRODUCTION

The Fourth Circuit's decision deepens a longstanding circuit split regarding the contours of a sentencing court's authority under Section 5G1.3(c) of the United States Sentencing Guidelines. The Third Circuit has held that 18 U.S.C. § 3584(a) and Section 5G1.3(c) authorize sentencing courts to impose concurrent sentences that run retroactively concurrent with the start date of the defendant's prior undischarged

sentence. However, in the decision below, the Fourth Circuit, aligning with the precedent set by the Second Circuit, held that Section 5G1.3(c) only authorizes sentencing courts to impose concurrent sentences going forward from the date the second sentence is imposed.

The Court should grant this petition. Section 5G1.3(c) authorizes sentencing courts to order a concurrent sentence for a defendant serving an undischarged term of imprisonment when doing so will achieve a "reasonable punishment." U.S.S.G. § 5G1.3(c). The Third Circuit's construction of "concurrently" under Section 5G1.3(c) achieves this purpose by allowing courts the option of including time the defendant has already served on a pre-existing sentencing in determining a "reasonable incremental punishment" to impose. *Ruggiano v. Reish*, 307 F.3d 121, 130-31 (3d Cir. 2002). That discretion is critical when, as was true here, the timing of separate prosecutions and sentencings would otherwise increase the length of the combined sentence. Absent review by this Court, this circuit split will remain, undermining the goal of the Sentencing Guidelines to ensure consistent and fair interpretation of sentences.

Further, the Fourth Circuit's decision is incorrect. The text of Section 5G1.3 and the Sentencing Commission's corresponding commentary establish that sentencing courts have broad authority under Section 5G1.3(c) to impose a concurrent sentence to run retroactively from the start of a defendant's pre-existing sentence, thus counting time already served. Moreover, the Fourth Circuit declined to consider that the authority of a federal district court to impose a concurrent sentence is

distinct from the authority of the Bureau of Prisons (BOP) to award credit for time the defendant has already served. The district court's authority to impose a retroactively concurrent sentence does not impede BOP's ability to calculate credits.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Federal sentencing courts may order that a term of imprisonment run consecutively or concurrently with another previously-imposed imprisonment sentence. 18 U.S.C. § 3584(a). Section 3584(b) directs sentencing courts to consider factors set forth in 18 U.S.C. § 3553(a) in determining whether to impose concurrent or consecutive sentences. Section 3553(a), in turn, directs the court to consider "any pertinent policy statement . . . issued by the Sentencing Commission . . . in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(5). Together, § 3584 and § 3553 provide the statutory basis for the sentencing court's authority under Section 5G1.3(c) of the Sentencing Guidelines to determine how to coordinate a defendant's multiple sentences.

The text of Section 5G1.3 consists of three subsections. Subsection (a) applies when the new offense was committed while the defendant was serving a term of imprisonment. Subsection (b) applies when the multiple offenses involved the same crime and directs courts to impose the later sentence to run "concurrently to the undischarged term of imprisonment." U.S.S.G. § 5G1.3(b). Although the text of subsection (b) does not define the term "concurrently," the Sentencing Commission provides commentary for this subsection in Application Note 2, which contemplates a court's authority to include in the sentence time for "any period of imprisonment

already served as a result of the conduct taken into account." U.S.S.G. § 5G1.3(b) cmt. n.2. Subsection (c) applies "[i]n circumstances not covered under subsection (a) or (b)." U.S.S.G § 5G1.3(c) cmt n.3. Subsection (c) authorizes courts to impose sentences to "run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to *achieve a reasonable punishment for the instant offense*." U.S.S.G § 5G1.3(c) (emphasis added).[2] Mr. Barnes was sentenced under Section 5G1.3(c). App. 4a-6a.

II. FACTUAL BACKGROUND

On April 25, 2001, Maryland authorities arrested Mr. Barnes and held him in state custody. App. 3a. Mr. Barnes was convicted in state court on a prior robbery and handgun violation offense that had occurred on March 1, 2001. App. 3a. He was sentenced on November 6, 2001 for that state charge to 14 years imprisonment.[3] App. 3a.

While serving his state sentence, Mr. Barnes pleaded guilty to two federal charges: (1) bank robbery; and (2) a violation of 18 U.S.C. § 924(c). App. 3a-4a, 9a. The federal charges did not include the March 1, 2001 offense underlying the state charge but rather were for similar offenses that took place in the March 2001 timeframe. App. 3a-4a. On June 13, 2003, the federal court sentenced Mr. Barnes to 230 months imprisonment: 146 months for the bank robbery, running consecutively

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[2] Although Section 5G1.3(c) is a policy statement, it is enforced as a guideline. *United States v. Mosley*, 200 F.3d 218, 222 n.5 (4th Cir. 1999) (per curiam); *United States v. Wiley-Dunaway*, 40 F.3d 67, 70-71 (4th Cir. 1994).

[3] Mr. Barnes received credit towards his state sentence beginning on June 13, 2001. App. 22a.

with 84 months for the § 924(c) offense. App. 4a. Explicitly invoking its authority under Section 5G1.3(c), the sentencing court further ordered that the federal sentence "run concurrent[ly] with the sentence now being served in the state system." App. 4a (quoting sentencing order). Federal authorities designated the state facility for service of Mr. Barnes' federal sentence beginning on the date of his federal sentencing. App. 23a.

When Mr. Barnes was returned to federal custody upon completion of his state sentence in 2011, BOP gave him prior custody credit towards his federal sentence for time spent in state custody from the date of his arrest (April 25, 2001) until the date of his state sentencing (November 6, 2001). App. 23a. Of critical importance, however, BOP failed to count towards Mr. Barnes' federal sentence the nineteen months he served in prison between the date of his state sentencing (November 6, 2001) and the date of his federal sentencing (June 13, 2003), notwithstanding the sentencing court's order imposing a "concurrent" sentence. App. 4a-5a.

III. PROCEEDINGS BELOW

After exhausting BOP's remedies without success, Mr. Barnes filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. App. 5a. Mr. Barnes filed his § 2241 petition in the United States District Court for the Southern District of Western Virginia, the district in which he was in custody. 28 U.S.C. § 2241(d); App. 36a-59a. In his petition, Mr. Barnes argued that BOP circumvented the district court's order that his federal sentence "run concurrent" to his state sentence by refusing to include in its federal sentencing calculations the nineteen-month period between his state and federal sentencings. App. 5a.

The magistrate judge recommended denying Mr. Barnes' habeas petition, concluding that, under 18 U.S.C. § 3585(b), "Petitioner is not entitled to credit for the time period between November 6, 2001, and June 13, 2003, which was credited toward his state sentence and occurred prior to his federal sentencing." App. 27a. After Mr. Barnes timely filed objections to the proposed findings and recommendation, the district court denied his habeas petition, holding that "§ 3585(b) governs the situation" because "prior custody credit cannot be granted if the prisoner has received credit toward another sentence." App. 16a, 17a.

Mr. Barnes filed a timely notice of appeal. App. 6a. On appeal, he raised two arguments relevant to his petition that relied in large part upon Third Circuit precedent set forth in *Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002). First, responding to the government's argument that the sentencing court lacked authority to impose a fully concurrent sentence under Section 5G1.3(c), Mr. Barnes invoked *Ruggiano* for its holding that Section 5G1.3(c) provides sentencing courts with the authority to run a federal sentence fully concurrently with the entire duration of a prior undischarged state sentence. Mr. Barnes also relied upon *Ruggiano* to argue that BOP's award of 18 U.S.C. § 3585(b) custody credits is separate and distinct from the sentencing court's obligation to determine an appropriate sentence under the federal Sentencing Guidelines.

However, relying instead on the Second Circuit's decision in *United States v. Fermin*, 252 F.3d 102 (2d Cir. 2011), the Fourth Circuit panel held that Section 5G1.3(c) "does not authorize the sentencing court to impose a fully retroactively

concurrent sentence." App. 7a. The Fourth Circuit also concluded that Section 5G1.3(c) "does not permit a sentencing court to override BOP's exclusive authority" under § 3585 to calculate prior custody credits. App. 10a. In so holding, the Fourth Circuit failed to address (or even recognize) the Third Circuit's contrary holding in *Ruggiano*.

The Fourth Circuit affirmed the district court's denial of Mr. Barnes' § 2241 petition. App. 11a. Mr. Barnes filed a timely petition for rehearing and rehearing en banc, which the Fourth Circuit denied on July 6, 2018. App. 29a. Mr. Barnes here petitions for writ of certiorari to review the Fourth Circuit's decision.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision deepens a circuit split about whether the term "concurrently" in Section 5G1.3(c) of the Sentencing Guidelines authorizes sentencing courts to run sentences concurrently from the start of a defendant's prior undischarged sentence, or instead only concurrently going forward with the remainder of that prior sentence. The Third Circuit has read "concurrently" to allow a sentence to run fully concurrently from the start date of a defendant's pre-existing sentence. However, the Second and Fourth Circuits have determined that "concurrently" in Section 5G1.3(c) limits courts to imposing sentences that run concurrently only with the remaining portion of the defendant's pre-existing sentence.

It is important that this Court resolve this conflict to ensure that sentences are interpreted by the Bureau of Prisons uniformly across jurisdictions. Without this Court's review, this conflict will not be resolved for defendants sentenced under this version of Section 5G1.3(c) (i.e. those sentenced under the language of Section 5G1.3(c) present in the guidelines after the 1995 amendments and before the 2003 amendments). Also, because the Fourth Circuit's decision below is based upon an incorrect interpretation of Section 5G1.3 and contravenes Section 5G1.3's recognized policy objectives, this case provides an appropriate vehicle for the Court to resolve this question.

I. THIS CASE RAISES A SIGNIFICANT QUESTION ABOUT THE INTERPRETATION AND APPLICATION OF SECTION 5G1.3(C) THAT HAS DIVIDED FEDERAL APPELLATE COURTS.

A. The Circuits Are Split as to Whether Section 5G1.3(c) Authorizes Sentencing Courts to Impose a Fully Concurrent Sentence from the Start of a Prior Undischarged Sentence.

Affirming the district court's denial of Mr. Barnes' § 2241 habeas petition, the Fourth Circuit held that "Section 5G1.3(c) does not authorize the sentencing court to impose a fully retroactively concurrent sentence" to include time already served on a prior sentence. App. 7a. In doing so, it deepened an existing circuit split on this question, with the Third Circuit on one side of the split, and the Fourth and Second Circuits on the other.[4]

1. The Third Circuit has held that Section 5G1.3(c) permits a concurrent sentence to run fully concurrently with the entirety of the pre-existing sentence.

The Third Circuit has interpreted the term "concurrently" in Section 5G1.3(c) to authorize sentencing courts to run a sentence fully concurrently from the start of a pre-existing state sentence. *Ruggiano v. Reish*, 307 F.3d 121, 130-31 (3d Cir. 2002).[5] In doing so, the Third Circuit explicitly acknowledged that its decision directly

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[4] *See* U.S. SENTENCING GUIDELINES MANUAL, APP'X C, HIST. NOTE TO AMEND. 660 (U.S. SENTENCING COMM'N 2003) (effective Nov. 1, 2003) (acknowledging explicitly this circuit split, comparing conflicting holdings in *Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002) (court permitted to impose fully concurrent sentence under Section 5G1.3(c)) and *United States v. Fermin*, 252 F.3d 102 (2d Cir. 2001) (court not permitted to impose fully concurrent sentence)).

[5] *See also United States v. Brannan*, 74 F.3d 448, 450 n.2 (3d Cir. 1996) (allowing sentencing court under 1994 version of Section 5G1.3(c) to include in federal sentence time served on unrelated state sentence and noting that 1995 amendments would not alter the court's analysis).

conflicted with the Second Circuit's "contrary" holding in *United States v. Fermin*, 252 F.3d 102 (2d Cir. 2001). *Id.* at 129.

In *Ruggiano*, the sentencing court had ordered the defendant's sentence to "run concurrent" so as to include the "time served" on his earlier state sentence.[6] *Id.* at 125-26. Nevertheless, BOP calculated the sentence to exclude credit for that time served on the defendant's pre-existing state sentence. *Id.* The Third Circuit held that, under Section 5G1.3(c), the sentencing court had the authority to run the sentence concurrently not only with the undischarged portion of the pre-existing sentence, but also with time already served on that sentence "in a way that is binding on BOP." *Id.* at 124. It remanded the case to the district court to direct BOP to recalculate the sentence to include the time the defendant had already served on his prior state sentence. *Id.* at 136.

In reaching its holding, the Third Circuit analyzed the meaning of "concurrently" under Section 5G1.3(b) in order to discern the meaning of that same term when used in Section 5G1.3(c). *Id.* at 130. The court observed that Application Note 2 in the commentary to Section 5G1.3(b) "makes clear that 'concurrently' in subsection (b) means fully or retroactively concurrently, not simply concurrently with the remainder of the defendant's undischarged sentence." *Id.* at 128.

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[6] In Mr. Barnes' case, the Fourth Circuit and the district court below limited their respective decisions to the issue of whether the sentencing court had the authority to run a fully concurrent sentence; neither reached the question of the sentencing court's intent to run a fully concurrent sentence.

The Third Circuit found that "it would be most anomalous if 'concurrent' were to mean retroactively concurrent in subsection (b), but could not mean the same in subsection (c)." *Id.* at 130 (citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:06 (Norman J. Singer ed., 6th ed. 2000) ("There is a presumption that the same words used twice in the same act have the same meaning")). As such, the court read the term "concurrently" in Section 5G1.3(c) as "capable of meaning fully or retroactively concurrently" so as to permit a sentencing court to run a sentence fully concurrently with the entire duration of a prior undischarged sentence. *Id.* at 130-31. It noted that to hold otherwise would undermine the purpose of Section 5G1.3 to "approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time." *Id.* at 127 (quoting *Witte v. United States*, 515 U.S. 389, 404-05 (1995)).

Furthermore, the Third Circuit determined that the prohibition on BOP under 18 U.S.C. § 3585(b) to issue credit for time already served on a pre-existing sentence does not preclude a sentencing court's authority to impose a fully concurrent sentence under Section 5G1.3(c). *See id.* at 121, 127, 132-33. That is because § 3585(b)'s credit restriction on BOP is distinct from a sentencing court's Section 5G1.3(c) authority:

> The type of "credit" awarded by the sentencing court to Ruggiano, however, was completely different from the type of "credit" discussed in § 3585(b). While the latter is within the exclusive authority of the BOP to award, credit for time served on a pre-existing state sentence is within the exclusive power of the sentencing court.

Id. at 132; *see also Rios v. Wiley*, 201 F.3d 257, 270 (3rd Cir. 2000) (noting that a fully concurrent sentence under the 1994 version of Section 5G1.3(c) "may result in the

same benefit to the defendant" as an award of sentencing credit under § 3585(b), but the fact that "the same outcome may be obtained either way does not alter the fact that the two benefits bestowed are distinct"). Thus, highlighting the distinction between § 3585(b) BOP credits versus a § 3584 concurrent award by the sentencing court, the Third Circuit concluded that a sentencing court's role in imposing a fully concurrent sentence does not conflict with BOP's exclusive role with respect to § 3585(b) credits. *Ruggiano*, 307 F.3d at 132-33.

2. The Second and Fourth Circuits have held that Section 5G1.3(c) does not permit a sentencing court to run a fully concurrent sentence from the start of the pre-existing sentence.

The Second and Fourth Circuits have held that sentencing courts may only impose "concurrent" sentences going forward from the date of the later sentence. *United States v. Fermin*, 252 F.3d 102, 110 (2d Cir. 2001); *Barnes v. Masters*, No. 17-6073 (4th Cir. May 10, 2018).

a. The Second Circuit: *United States v. Fermin*

In *United States v. Fermin*, the Second Circuit held that Section 5G1.3(c) authorizes sentencing courts to impose sentences that run concurrently going forward from the date of the later sentence, but does not allow courts to impose sentences that are fully concurrent from the date of an earlier sentence. 252 F.3d at 109-10. It refused to consider the language of Application Note 2 to interpret the meaning of "concurrently" in subsection (c), explaining that the text of the note indicates that it applies only to subsection (b). *Id.* at 108-09. Instead, the court concluded that a "concurrent" sentence under Section 5G1.3(c) can only be "concurrent with the entire *undischarged portion* of the defendant's previous sentence." *Id.* at 109 (emphasis

added). The sentencing court thus lacked authority under Section 5G1.3(c) to run a sentence concurrently from the start of the pre-existing sentence; rather, a Section 5G1.3(c) concurrent sentence was only permitted to run concurrently going forward with the "time remaining on the preexisting sentence." *Id.* at 109.

b. The Fourth Circuit: *Barnes v. Masters*

In direct conflict with the Third Circuit's decision in *Ruggiano*, the Fourth Circuit in its decision below held that "Section 5G1.3(c) does not permit the imposition of a fully retroactively concurrent sentence." App. 9a. The Fourth Circuit reached the same conclusion as the Second Circuit that the term "concurrently" in Section 5G1.3(c) permits sentencing courts to order sentences that run concurrently only with the "undischarged portion" of a defendant's earlier sentence. App. 9a.

Relatedly, the Fourth Circuit found that neither the sentencing court (nor the Fourth Circuit) could order BOP to award credit for time served because § 3585(b) prohibits BOP from issuing credit for time already served on a pre-existing sentence. App. 10a-11a. Thus, the court concluded (in direct conflict with *Ruggiano*) that § 3585(b)'s credit restriction on BOP precludes a sentencing court's authority under Section 5G1.3(c) to impose a fully concurrent sentence. App. 10a-11a.

B. The Circuit Split Will Remain Without Supreme Court Action.

This split among the circuits about the meaning of "concurrently" in Section 5G1.3(c) is unlikely to be resolved without action by this Court. The Third Circuit recognized its split from the Second Circuit's earlier decision in *Fermin*, but explicitly declined to adopt the Second Circuit's reasoning or result. *Ruggiano*, 307 F.3d at 129. The Fourth Circuit failed to address (or even recognize) the Third Circuit's contrary

holding in *Ruggiano*. Absent this Court's consideration of the question presented, this split is likely to continue, resulting in inconsistent application of the Sentencing Guidelines across jurisdictions.

Although the Sentencing Commission amended Section 5G1.3 after Mr. Barnes' sentencing, the amended Guidelines do not resolve the circuit split for defendants sentenced under the language of Section 5G1.3(c) in effect from November 1, 1995 until November 1, 2003. Furthermore, the amended Guidelines continue to make explicit the authority of a sentencing court under Section 5G1.3(c) to include time already served on a prior undischarged state sentence, albeit in more limited circumstances than the version applicable to Mr. Barnes at the time of his sentencing. U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(c) app. n.4(e) (U.S. SENTENCING COMM'N 2016), (permitting departure to "ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings"). It is important for this Court, therefore, to resolve the conflict for those affected by the circuit split and to align its interpretation of the then-operative guidelines with the current authority of the amended guidelines.

C. It Is Important that This Court Resolve This Circuit Split in Order to Maintain Consistent and Fair Interpretation of Sentences Across Jurisdictions.

This Court should resolve this circuit split because it is important to maintain consistent application of the Sentencing Guidelines across jurisdictions. A principal goal of the Guidelines is to promote uniformity in sentencing across all federal courts. *See, e.g.*, *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016). Without clear guidance from the Court directing which construction of "concurrently" is

correct, defendants may face disparate sentences because BOP could calculate and interpret sentences differently depending upon the jurisdiction in which the sentences were imposed. Under the current circuit split, BOP lacks clarity around the scope of their authority to include time served in its sentencing calculations.

Moreover, this Court's consideration of the question presented is necessary to properly fulfill the purpose of Section 5G1.3: to "mitigate[e] the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence." *Witte v. United States*, 515 U.S. 389, 405 (1995). The timing and nature of Mr. Barnes' state and federal charges illustrate the very scenario that *Witte* envisioned Section 5G1.3 could mitigate. If Mr. Barnes' federal sentencing date had been closer to the date of his state sentencing, his federal sentence would have run from that earlier point, reducing his overall time in prison. Instead, under the Fourth Circuit holding, the overall time Mr. Barnes will spend in prison is directly impacted by the scheduling of his second sentencing, an arbitrary issue of timing which bears no relation to the offense or the severity of the sentence warranted. *See Ruggiano*, 307 F.3d at 127 (citing *Witte* in acknowledging equitable purpose of Section 5G1.3*)*. This Court should grant this petition to resolve the question presented to ensure consistent and fair calculation of sentences and to align the interpretation of Section 5G1.3(c) with its equitable purpose.

D. This Case Fairly and Squarely Presents the Legal Question Over Which There Is a Conflict Among the Circuits.

As set forth above, the Fourth Circuit's decision squarely presents the question over which the circuit conflict pertains, namely, whether the version of Section

5G1.3(c) relevant to Mr. Barnes provides a sentencing court with authority to run a sentence fully concurrently from the start of the pre-existing sentence. The facts and procedural posture in this case are analogous for all relevant purposes to those in *Ruggiano* and *Fermin*.

Relatedly, the Fourth Circuit's decision to affirm the district court's dismissal of Mr. Barnes § 2241 habeas petition relied squarely upon its corresponding legal determination that "Section 5G1.3(c) does not authorize the sentencing court to impose a fully retroactively concurrent sentence." App. 7a; *see Mathias v. Worldcom Techs., Inc.*, 535 U.S. 682, 684 (2002) (dismissing petition seeking review of "findings not essential to the judgment"). The Fourth Circuit's determination was explicitly based upon its interpretation of "concurrently" under Section 5G1.3(c). That is precisely the question presented in the circuit split. *See supra* at p. 13.

There are no alternative grounds upon which the Fourth Circuit relied in rendering its decision here. The Fourth Circuit did note the possibility that, in this particular case, a federal sentence fully retroactively concurrent from the start of Mr. Barnes' state sentence could have resulted in "at least some portion" of Mr. Barnes' sentence on the firearms offense being concurrent with his state sentence in violation of the prohibition on concurrent sentences under 18 U.S.C. § 924(c). App. 9a-10a. But that would not provide a sufficient, independent ground to support the Fourth Circuit's broad holding that "concurrently" under Section 5G1.3(c) can only mean "concurrently with the remaining portion of the undischarged term of imprisonment." App. 9a. The government never raised this argument under § 924(c), the issue was

never briefed by the parties, and the panel does not appear to have relied upon it as dispositive.[7]

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THIS QUESTION PRESENTED BECAUSE THE FOURTH CIRCUIT'S INTERPRETATION OF "CONCURRENTLY" UNDER SECTION 5G1.3(C) IS INCORRECT.

A. The Fourth Circuit's Flawed Statutory Construction Resulted in an Incorrect Interpretation of Section 5G1.3(c).

The Fourth Circuit incorrectly concluded that Section 5G1.3(c) permits sentencing courts to impose "concurrent" sentences only going forward from the date of the later sentence. App. 9a. The court misinterpreted the plain meaning of the word "concurrently," misapplied the Sentencing Commission's application note, and failed to consider the distinct roles of the sentencing court and BOP in formulating and applying sentences. Because the court's reasoning was flawed, it produced an untenable construction of the word "concurrently."

Contrary to the Fourth Circuit's conclusion, nothing in Section 5G1.3(c)'s text or application notes prohibit the sentencing court from ordering a "fully" concurrent sentence dating back to the start of the earlier sentence. Although the text of Section 5G1.3 does not explicitly define "concurrently," the plain meaning of "concurrent sentence" permits a sentence that is concurrent from the start of the pre-existing

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[7] The record, moreover, demonstrates that the full 84-month term for the § 924(c) offense could be completed without running concurrent to any other term of imprisonment. Mr. Barnes completed his state sentence on May 3, 2011. App. 4a. If the full seven-year (84-month) sentence for the § 924(c) offense were calculated to run consecutively to his state sentence, that § 924(c) offense would begin on May 3, 2011, and would have terminated on May 3, 2018. Thus, the section 924(c) prohibition does not preclude the relief Mr. Barnes seeks here.

sentence. *See Concurrent Sentences*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Two or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified"); *see also United States v. Ashford*, 718 F.3d 377, 382 (4th Cir. 2013) (noting that courts must interpret the Sentencing Guidelines according to "ordinary rules of statutory construction" by first analyzing the meaning of the text). The Fourth Circuit did not consider this plain meaning in its opinion.

Also, the Fourth Circuit misinterpreted Application Note 2 to preclude fully concurrent sentences under Section 5G1.3(c). *See Ashford*, 718 F.3d at 382 (explaining that courts may rely on the application notes provided by the Sentencing Commission to elucidate the meaning of a guideline). Rather than precluding retroactively concurrent sentences, the hypothetical example in Application Note 2 demonstrates that a "concurrently" run sentence could be one in which the court accounts for time served on a prior sentence in imposing a new sentence. As the Third Circuit suggested in *Ruggiano*, this explanation of "concurrently" makes it clear that the term means "fully or retroactively concurrently," not just concurrently going forward. 307 F.3d at 128.

Finally, the Fourth Circuit concluded that sentencing courts imposing sentences pursuant to Section 5G1.3(c) may not "overrule BOP's exclusive authority" under 18 U.S.C. § 3585(b) to calculate the "prior custody credit" a defendant may receive. App. 10a-11a. The court declined to consider the explanation provided by the Third Circuit in *Ruggiano* that the type of "credit" that BOP can calculate is

distinct from the type of "credit" a sentencing court can impose by ordering a fully retroactively concurrent sentence. *Ruggiano*, 307 F.3d at 124, 132-33 (holding that the type of "credit" granted to the defendant by the imposition of a retroactively concurrent sentence was "of a fundamentally different character" than § 3585(b) "credits"). The latter type of "credit" is squarely within the authority of the sentencing court under Section 5G1.3(c). *Id.* at 124.

B. The Fourth Circuit's Decision Thwarts the Purpose of Section 5G1.3(c).

The text of Section 5G1.3(c) directs sentencing courts to select a concurrent, partially concurrent, or consecutive sentence "*to achieve a reasonable punishment* for the instant offense." U.S.S.G. § 5G1.3(c) (emphasis added). The Fourth Circuit's narrow interpretation of "concurrently" precludes a fully concurrent sentence appropriate to the circumstances and timing of a particular defendant's multiple prosecutions.

It is important to note that although sentencing courts are no longer sentencing defendants under this version of Section 5G1.3(c), this issue will continue to arise. That is because BOP performs the sentencing calculations around prior custody credits when a prisoner serving a state sentence is turned over to BOP custody. For defendants sentenced in the Fourth Circuit under this Guideline (unlike those sentenced in the Third Circuit), BOP's calculation of prior custody credits now cannot implement the fully concurrent sentence that the sentencing court imposed years earlier. The Fourth Circuit's restriction on BOP ultimately results in curtailing the well-established discretion of sentencing courts to impose concurrent sentences.

See, e.g., *Setser v. United States*, 566 U.S. 231, 236 (2012) ("Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences . . . that have been imposed in other proceedings, including state proceedings.").

The Fourth Circuit's decision also undermines the purpose of concurrent sentencing under Section 5G1.3(c), namely, to safeguard against the possibility that multiple prosecutions "will grossly increase a defendant's sentence." *Witte*, 515 U.S. at 405. If BOP cannot interpret a sentence to include time already served on a prior sentence, notwithstanding the fact that the sentencing court imposed a fully concurrent sentence in its sentencing order, defendants could be unduly punished for any delays in a second prosecution. That is exactly what happened to Mr. Barnes: the Fourth Circuit, by holding that Section 3585(b) precluded BOP from calculating the sentencing court's fully concurrent sentence, punished Mr. Barnes with an extra nineteen months of incarceration.

Finally, the Commission amended the language of Section 5G1.3(c) after Mr. Barnes' sentencing, acknowledging the circuit split and recognizing the need to clarify any possible uncertainty in the meaning of the term. U.S. SENTENCING GUIDELINES MANUAL, APP'X C, HIST. NOTE TO AMEND. 660 (U.S. SENTENCING COMM'N 2003) (effective Nov. 1, 2003). To the extent that the circuit split creates a potential uncertainty in the interpretation of the version of Section 5G1.3(c) under which Mr. Barnes was sentenced, the rule of lenity should apply in Mr. Barnes' favor. *See United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and

history fail to establish that the Government's position is unambiguously correct, we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."); *see also United States v. Cutler*, 36 F.3d 406, 408 (4th Cir. 1994) (noting that the rule of lenity may be applied in the context of the Sentencing Guidelines where there is "ambiguity" or "uncertainty in the language" of a provision).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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