NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2019

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GARY GIOVON LYNN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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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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## QUESTIONS PRESENTED

I. When the district court failed to follow the Court's ruling in *Setser v. United States*, 566 U.S. 231 (2012) at sentencing did it engage in an impermissible delegation of authority to the Federal Bureau of Prisons to make *nunc pro tunc* rulings on a federal sentence's concurrent or consecutive nature with respect to a probable future state term of imprisonment for related conduct by making the Bureau of Prisons responsible for making the *nunc pro tunc* ruling, therefore violating the fundamental constitutional principle of the separation of powers between branches?

II. Did the court's failure to apply U.S.S.G. § 5G1.3(c) and *Setser* at sentencing constitute reversible procedural error for failure to follow appropriate sentencing procedure?

## TABLE OF CONTENTS

Congress April 30, 2014, effective Nov. 1, 2014, at 38

## TABLE OF AUTHORITIES

Cases



Statutes



Guidelines



Miscellaneous

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Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit decided in his case on January 7, 2019.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit from which review is sought is *United States v. Lynn*, Case No. 17-4232, 912 F.3d 212 (4th Cir. 2019). The mandate was issued on March 6, 2019. The original sentencing decision from the Middle District of North Carolina is *United States v. Lynn*, No. 1:16-cr-00287-WO-1 (M.D.N.C. Feb. 28, 2017).

## JURISDICTIONAL GROUNDS

The opinion was issued in the United States Court of Appeals for the Fourth Circuit on January 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), under which the Fourth Circuit held appellate jurisdiction, and the original jurisdiction of the District Court for the Middle District of North Carolina, which heard it originally as a federal criminal case.

## INTRODUCTION

Mr. Lynn requested that the district court run his sentence concurrently to any future term imposed by the State of North Carolina for his then-pending charges. Mr. Lynn's state charges were relevant conduct for the federal sentence under the sentencing guidelines. The sentencing court considered the governing statute, 18 U.S.C. § 3553(a)(4), which provides the court may run the sentence consecutively, concurrently, or partially concurrently to the state sentence; the district court also heard arguments from counsel under U.S.S.G. § 5G1.3(c). The district court declined altogether to rule on the concurrent/consecutive issue, citing lack of sufficient available information to determine how much of the terms of imprisonment to run concurrently. This failure to rule created an inadvertent but impermissible delegation of exclusive judicial authority to the Executive Branch (the Bureau of Prisons in this case) and formed the focus of Mr. Lynn's appeal to the Fourth Circuit, from which he now seeks a writ of certiorari.

To decide if terms of imprisonment run concurrently or consecutively, the sentencing court considers the factors set forth in § 3553(a) for each offense for which a term of imprisonment is being imposed. 18 U.S.C. § 3584 (2017). The law also expressly requires the sentencing court to apply all applicable guidelines in the defendant's case. 18 U.S.C. § 3553(a)(4) (emphasis added). The applicable guideline instructs courts that, if the other sentence is relevant conduct for the federal sentence being imposed, "the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment." § 5G1.3(c).

The fact that sentencing courts are granted broad discretion in fashioning

appropriate sentences in criminal cases does not excuse the district court from deciding an issue, however. While the district court correctly noted in this case that the Bureau of Prisons can act retroactively to account for subsequent state court sentencing, it is incorrect to place the actual responsibility and/or decision making authority in the hands of executive department officials at the Bureau of Prisons.

*Nunc pro tunc* designations are sometimes necessary to carry out the net effect of state and federal court decisions. But the court must, in the first instance, make the record plain as to that intended effect. Otherwise the BOP is not making a *nunc pro tunc* computation squaring two courts' sentencing orders, but is instead fully responsible for a discretionary judicial decision on how the two sentences should be applied. Both the statute and the guidelines are unambiguous on this point: the authority to decide which portions of the federal sentence will be concurrent to a related state sentence rests with the court. This does not change if the court feels it lacks sufficient information to make that determination at the time of sentencing (even if the district court is correct that additional information is optimal).

The Fourth Circuit disagreed, holding that "it was not unreasonable at the time of imposing sentence for the district court to have justified doubts as to the scope of that state sentence. As noted by the Court in *Setser*, the fact that the later state sentence may be unexpected, 'does not establish that the District Court abused its discretion by imposing an unreasonable sentence.'" *United States v. Lynn*, 912 F.3d 212, 218 (4th Cir. 2019) (citing *Setser*, 566 U.S. at 244).

However, Judge Floyd dissented, finding it problematic that the "district court

in this case relied upon the BOP's ongoing practice of making concurrency determinations" to justify its refusal to decide whether § 5G1.3(c) should apply to Lynn's sentence. *Lynn*, 912 F.3d at 222 (Floyd, J. dissenting). As Judge Floyd put it,

> Criminal sentencing has been entrusted to the judicial branch, and deciding whether multiple sentences should run concurrently is intrinsically a determination of the length of imprisonment. Such decisions should be made by the district court just like any other determination about the number of months that a defendant will serve. Therefore, the district court's failure to rule on § 5G1.3(c)'s applicability to Lynn's sentence punts the determination on the length of his sentence to the BOP. That result is an inappropriate delegation of the courts' judicial power, and I must dissent.

*Lynn*, 912 F.3d at 224 (Floyd, J. dissenting).

The district court's failure to apply the guidelines constituted reversible procedural error; that combined with the Court of Appeals' approval of the delegation of judicial authority to the BOP undermines the fundamental architecture of the Constitution—the separation of power between the branches of the federal government. A federal court must consider and apply the sentencing statutes, guidelines, and policies—not the Bureau of Prisons. Mr. Lynn asks the Court to grant the writ and hear his case on the merits to decide this issue because of the importance of the separation of powers issue at stake, and because it will apply in a host of cases across every federal judicial district in the United States.

## PROCEEDINGS BELOW

Gary Giovon Lynn ("Mr. Lynn" or the "Defendant") was indicted by a grand jury for the Middle District of North Carolina on August 29, 2016, for a single count in violation of 18 U.S.C. §§ 922(g)(1) & 924 (a)(2), possession of a firearm by a felon. On December 5, 2016, Mr. Lynn pled guilty. At sentencing, Mr. Lynn presented objections to the Presentence Report. *United States v. Lynn*, No. 1:16-cr-00287-WO-1 (M.D.N.C. Feb. 28, 2017) (sentencing transcript) at 3-4.

At sentencing, on February 28, 2017, Mr. Lynn made guideline objections to the cross-reference applied to attempted murder under U.S.S.G. § 2A2.1 and the two level enhancement for obstructing by fleeing law enforcement under U.S.S.G. § 3C1.2. *Id.* Mr. Lynn also objected to the application of an enhancement under section 2K2.1 for a crime of violence (common law robbery). *Id.*

The district court ultimately rejected all of Mr. Lynn's objections and found a total offense level of 28 and a criminal history category of III. *Id.* at 84 - 91. Mr. Lynn's guideline range was calculated at 97-121 months. *Id.* at 91. Due to the statutory maximum penalty, his guideline range became 97-120 months. The court imposed a sentence within Mr. Lynn's applicable range but at the statutory maximum of 120 months imprisonment, followed by three years of supervised release. *Id.* at 102.

However, the district court declined to rule on whether or not Mr. Lynn's federal sentence would run concurrently or consecutively to any possible sentence for the pending state court charge for attempted murder. The sentencing court noted, after the Government expressly raised U.S.S.G. § 5G1.3, that there will be some overlap if Mr.

Lynn was ultimately convicted in state court of an offense, but refused at that time to do a calculation reflecting what portion of the sentence should be run concurrently with a future sentence to be imposed. *Id.* at 98 – 101.

The Court indicated that it would likely impose at least partially overlapping sentences "to the extent Mr. Lynn was ultimately found guilty or pled guilty to an attempted second-degree murder," but in the event Mr. Lynn was convicted of "a 922(g)(1) offense or some other offense, I would not be inclined to run any of this sentence concurrent to the sentence that may be imposed in state court." *Id.* at 104.[1]

The court speculated that "I think either the state court can take this sentence into account in fashioning a sentence, and then, ultimately, the Bureau of Prisons has the authority to come back in and handle it through one of those retroactive designations." *Id.* at 98 (emphasis added) The court then gave counsel for both sides the opportunity to argue the 5G1.3(c) issue, but finally held that "I am not able to make a determination as to how much of this sentence should be imposed to run concurrently with the state prosecution that is now pending." *Id.* at 104.

On appeal to the Fourth Circuit, Mr. Lynn argued that the district court's failure to apply the applicable guideline was both procedural and substantive error. The Fourth Circuit issued a split opinion, with the majority of the panel rejecting Mr.

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1 Mr. Lynn was ultimately convicted in North Carolina of assault with a deadly weapon inflicting serious injury with intent to kill as well as possession of a firearm by a felon, an outcome which was not addressed by the sentencing court, and received a consolidated sentence of 11 years, 5 months, plus an additional 8 to 19 months consecutive state time for a fleeing to elude conviction.

Lynn's appellate argument, 912 F.3d at 214, and the dissenting opinion that effectively adopted Mr. Lynn's position. *Id.* at 219.

## REASONS FOR GRANTING THE WRIT

### I. The sentencing court's failure to apply the guidelines and the Court's prior ruling creates an impermissible delegation of judicial power to the executive branch, an issue that could arise in every judicial district in the United States.

The Court ruled in *Setser v. United States* that a sentencing court can order a federal sentence to run concurrently, consecutively, or partially concurrently to sentences not yet imposed in state court. 566 U.S. 231 (2012). This decision resolved a circuit split and effected a change in previous Fourth Circuit law, and it was subsequently inscribed in the guidelines under § 5G1.3(c).

The authority to decide whether sentences should run concurrently or consecutively rests with the courts. *See* 18 U.S.C. § 3584; *Setser*, 566 U.S. at 236 ("Judges have long been understood to have discretion to select whether the sentence they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.").

Calculations of the precise details of a defendant's incarceration—for example where the sentence is served and how much jail credit is due—are conferred by statute on the Bureau of Prisons. The Attorney General, through the BOP, has the sole authority to determine the place and manner of imprisonment and make credit determinations pursuant to 18 U.S.C. §§ 3621(b) and 3585(b). *See Setser*, 566 U.S. at 235; *United States v. Wilson*, 503 U.S. 329, 333, 335 (1992). This reflects the split between basic judiciary function—balancing sentencing factors to arrive at a sentence that is "sufficient but not greater than necessary" under 18 U.S.C. § 3553(a)—and the

executive function of carrying out the judge-made sentence. The language of § 3584 does not clarify the issue by itself. The statute commands only that the court "in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a)." 18 U.S.C. § 3584 (2017). The district court in this case fulfilled this mandate by considering the issue at sentencing.

The statute has also been interpreted by the courts in ways not entirely obvious from the text. For example, in *Setser*, the Court clarified that the statute was a limit on judicial power, not a grant. 566 U.S. at 238. In other words, just because the statute only specifies what courts are to do when sentences are imposed at the same time (or when another sentence is undischarged at the time of sentencing), this did not limit the courts' power to rule on the consecutive-vs.-concurrent issue in other scenarios (such as an expected state sentence not yet imposed). *Id.* Clarifying the statutory delegation of power issue, the Court ruled that when "3584(a) specifically addresses decisions about concurrent and consecutive sentences, and makes no mention of the Bureau's role in the process, the implication is that no such role exists." *Id.* at 239.

The guidelines are also instructive on this issue. For example, the language of the statute does not mandate that the courts make a decision on the consecutive-vs.-concurrent issue, but the guidelines do. The guidelines are advisory, of course, but the language of § 5G1.3 is mandatory: "If ... a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of ... 1B1.3 (Relevant Conduct), the sentence for the instant

offense shall be imposed to run concurrently to the anticipated term of imprisonment."[2] (Emphasis added.)

The district court retains the power to vary if it finds that concurrent sentences would not achieve the goals of incremental punishment—a sentence sufficient but not greater than necessary under 18 U.S.C. § 3553(a). But if the court seeks to follow the guidelines, it must impose concurrent sentences in an instance where, as in Mr. Lynn's case, the anticipated sentence is relevant conduct incorporated into the federal sentence imposed.

The fact that the guidelines are worded this way blunts the dictum in *Setser*, found in a footnote, that "a court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a district court may have inadequate information and may forebear, but in other situations, that will not be the case." 566 U.S. at 243, n6. After *Setser*, the Sentencing Commission rewrote 5G1.3 to incorporate the mandatory language, directly encouraging courts to make such decisions in order to reduce disparities in sentencing and bring the guideline more fully in line with the Setser decision:

> This amendment reflects the Commission's determination that the concurrent sentence benefits of subsection (b) of §5G1.3 should be available not only in cases in which the state sentence has already been imposed at the time of federal sentencing (as subsection (b) provides), but also in cases in which the state sentence is anticipated but has not yet been imposed, as long as the other criteria in subsection (b) are satisfied (i.e., the state offense is relevant conduct

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2 The application note for § 5G1.3(c) is the same: "where the offense is relevant conduct to the instant offense of conviction under ... § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment."

> under subsections (a)(1), (a)(2), or (a)(3) of §1B1.3, and subsection (a) of §5G1.3 does not apply). By requiring courts to impose a concurrent sentence in these cases, the amendment reduces disparities between defendants whose state sentences have already been imposed and those whose state sentences have not yet been imposed. The amendment also promotes certainty and consistency.

UNITED STATES SENTENCING COMMISSION, Amendments to U.S. Sentencing Guidelines Manual submitted to Congress April 30, 2014, effective Nov. 1, 2014 at 38, *avail. at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20140430_Amendments_0.pdf.

However, it appears that the normal division of constitutional roles in sentencing has now been blurred. Mr. Lynn's request for an extraordinary writ is located precisely at the boundary between judicial and executive function. Despite considering the issue of concurrent versus consecutive sentences under 18 U.S.C. § 3584, which gives the court the power to run the sentence consecutively, concurrently, or partially concurrently to the state sentence, and hearing arguments from counsel on both sides under U.S.S.G. § 5G1.3(c) for Mr. Lynn's federal and anticipated state sentence, the trial court simply left undecided whether Mr. Lynn's federal sentence would run concurrently, consecutively, or partially concurrently.

The Fourth Circuit reviewed this issue and the majority of the panel held that the trial court's discretion included the discretion to simply not apply the guidelines. *Lynn*, 912 F.3d at 214. If that decision is allowed to stand, it will give judicial sanction to an informal system whereby district court judges delegate the inherently judicial decision of the concurrent or consecutive nature of a sentence to the Executive.

Allowing the BOP to make this decision raises concrete separation of powers

concerns. *Abdul–Malik v. Hawk–Sawyer*, 403 F.3d 72, 76 (2d Cir.2005) ("A separation of powers issue arises when the same branch of government that prosecutes federal prisoners determines concurrency in lieu of the judge."). There is no check on the delegation of this power, no guarantee that the BOP will actually consult with a judge when the time comes to make the *nunc pro tunc* decision on state time. The Fourth Circuit majority has blessed a system whereby federal judges who decline to rule in these circumstances simply hope that the BOP will follow up with them at a later date, asking for their input now that the state term of imprisonment has been imposed and run its course.

There is no current circuit split, but that is only because the issue has not been litigated at the circuit level. There are *nunc pro tunc*, post-conviction cases, but they mainly deal with the ongoing validity of state convictions vacated *nunc pro tunc*. *See, e.g. Keller v. United States*, 657 F.3d 675 (7th Cir. 2011); *United States v. Padilla*, 387 F.3d 1087 (9th Cir. 2004).

The fact that the process in Mr. Lynn's case is so informal – with the courts simply relying on the BOP's practice of requesting input for *nunc pro tunc* designations – makes the need for the Court's intervention even greater, because such an informal system is likelier to escape review, with no real statutory or guidelines underpinnings to challenge. The Court of Appeals' blessing for this informal system means the issue will be even more likely to recur, potentially in every district court in the federal system.

If this flawed system persists, it will have a profound impact on federal

sentencing, leaving decisions on additional months or years of time to the Executive Branch. Even though § 5G1.3 does not impact the length of the federal term, the de facto impact is still to add (potentially significant) time to the total sentence. This directly implicates the courts' mission to find a sentence "sufficient but not greater than necessary" under § 3553(a) by functionally removing the responsibility to do so from the judge.

Determining a sentence is in the exclusive province of the judicial branch. When a defendant is likely to receive a state sentence after the imposition of the federal sentence, and the conduct for the state sentence is related to the conduct for which the defendant receives a federal sentence, the district court must make a determination of whether the federal sentence will be run consecutively, concurrently, or partially concurrently with the to-be-imposed state sentence. In the rare case where the district court, as here, has inadequate information to make such a decision, the district court must retain jurisdiction until it has adequate information by, for instance, delaying the imposition of the federal sentence until the related state case is resolved.[3]

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3 Defendants will not be prejudiced by such a delay because in all relevant cases, defendants will be in primary state custody and the execution of their federal sentences will not be delayed. Where a defendant

> starts in state custody, serves his state sentence, and then moves to federal custody, it will always be the Federal Government—whether the district court or the Bureau of Prisons—that decides whether he will receive credit for the time served in state custody. And if he serves his federal sentence first, the State will decide whether to give him credit against his state sentences without being bound by what the district court or the Bureau said on the matter.

*Setser*, 566 U.S. at 241.

Mr. Lynn, therefore, requests the Court find that the federal courts are the only body authorized to determine a sentence and it is error to allow that decision to fall to an executive branch agency.

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

This the 24th day of May, 2019.

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ENTRY OF APPEARANCE AND CERTIFICATE OF SERVICE

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I, John A. Duberstein, Assistant Federal Public Defender, Middle District of North Carolina, having been admitted to practice before the state and federal courts situated in North Carolina and before this Court, and the Office of the Federal Public Defender for the Middle District of North Carolina having been appointed to represent the Petitioner, Gary Giovon Lynn, in the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, hereby enter my appearance in this Court with respect to this Petition for Writ of Certiorari.

I further certify that today, as counsel for Petitioner, I have served one copy of the Petition for Writ of Certiorari (complete with Appendix) and Petitioner's Request

to Proceed in *Forma Pauperis* in the above-entitled case upon Kimberly F. Davis, AUSA, and the Solicitor General for the United States Department of Justice, 950 Pennsylvania Avenue, NW, as well as all others required to be served.

This the 24th day of May, 2019.

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# APPENDICES