

10-71886

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN JAY POWERS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOHN JAY POWERS #03220-028

(Your Name)

USP-Allenwood, POB 3000

(Address)

White Deer, PA 17887

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

FOR THE FIRST TIME IN ANY OF THE CIRCUITS, THE TENTH CIRCUIT HELD THE LANGUAGE OF 18 U.S.C. 3584(a)'S PHRASE "AT THE SAME TIME" TO BE AMBIGUOUS. THE TENTH CIRCUIT THEN DEFERRED TO THE FEDERAL BUREAU OF PRISON'S INTERPRETATION OF THE MEANING OF SAID PHRASE CONTAINED IN A PRE-SETSER POLICY STATEMENT.

1. IS THE LANGUAGE OF 18 U.S.C. 3584(a)'S PHRASE "AT THE SAME TIME" AMBIGUOUS.
2. IS IT PROPER FOR THE FEDERAL COURTS TO DEFER TO POLICY STATEMENTS THAT INTERPRET THE MEANING AND APPLICATION OF 18 U.S.C. §3584(a) BY THE FEDERAL BUREAU OF PRISONS.
3. WHAT IS THE FEDERAL BUREAU OF PRISONS' ROLE IN ADMINISTERING SENTENCES WITH RESPECT TO 18 U.S.C. §3584(a).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[] For cases from state courts: N/A

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 13, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10 December 2019, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. III

U.S. Const. Fifth Amendment

U.S. Const. Sixth Amendment

Title 18 U.S.C. §3584(a)

STATEMENT OF THE CASE

On 22 February 1990, Powers was sentenced in case no. 89-61-cr-T-13(08) (M.D. Fla.) to an 18-month term of imprisonment. During the same proceeding, on that day, and before the same judge, Powers was also sentenced to 5 months and 15 days. The sentencing judge did not order these sentences to be served consecutively. (Appendix A)

On 14 February 1997, the Federal Bureau of Prisons issued Policy Statement 5880.28, which included the following:

Sentences that are imposed as the result of a single trial on the counts within a single indictment are considered to have been imposed at the same time [for purposes of 18 U.S.C. § 3584(a)], regardless of whether they are imposed at different times on the same date or on a later date.

Sentences that are imposed on the same date, or on different dates, based on convictions arising out of different trials, are considered to have been imposed at different times even if the trials arose out of the same indictment.

(Appendix D)(Emphasis made by FBOP)

After being resentenced in the companion case no. 89-60-cr-T-15 (M.D. Fla.) on 18 December 2017, Powers noticed that his revised sentence computation rendered the 5 months and 15 days for the criminal contempt to be served consecutive to the 18

months sentence for possession of a stolen vehicle. Powers exhausted his administrative remedies and brought a section 2241 petition for a writ of habeas corpus challenging the interpretation of his sentence, *inter alia*.

On 20 February 2019, the district court's magistrate issued an order denying relief. The court stated in pertinent part:

As noted above, the Middle District of Florida entered separate Judgments of Conviction on the same day in case number 89-61-cr-T-13(08) for possession of a stolen motor vehicle and criminal contempt. The Judgments do not specify whether the sentences should be concurrent or consecutive. Thus, the relevant question under [18 U.S.C.] § 3584(a) is whether the sentences were imposed at the same time or at different times, but §3584(a) does not provide any guidance to determine whether separate judgments in the same case are entered at the same time or at different times.

(Appendix B, page 5)

Powers pursued a timely appeal to the United States Court of Appeals for the Tenth Circuit. On 13 November 2019, the Tenth Circuit issued its opinion the court stated in pertinent part:

[W]hen the BOP determined the sentences imposed by the court on February 22, 1990, for motor vehicle theft and criminal contempt in case number 89-61-cr-T-13(08) were imposed at different

times, it was not exercising sentencing discretion reserved to the courts; rather, the BOP was administering the sentence as provided in § 3584 (a) and the Program Statement.

(Appendix A, page 6)

Powers filed a motion for a panel rehearing, which was subsequently denied. (Appendix C)

Powers now brings this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

1. No other U.S. Circuit Court has upheld a finding that 18 U.S.C. §3584(a)'s phrase "at the same time" is ambiguous, and it is a clearly erroneous finding. The phrase "at the same time" simply means what it says: a consolidated sentencing proceeding.
2. The FBOP policy statement that interprets the phrase "at the same time" was promulgated years after Powers was sentenced under §3584(a) and at a time when the FBOP believed the FBOP possessed the authority to interpret §3584(a). The Court rejected that proposition in Setser v. United States, 566 U.S. 231 (2012), but the FBOP has never redacted its policy statements and continues to exert the same assumed authority for interpreting the language of §3584(a) that it exerted pre-Setser. Policy Statement 5880.28 (14 February 1997).
3. The lower courts gave Chevron deference to the FBOP without the application of a Chevron-analysis. This constitutes a stark reflexive deference that is exceedingly troubling--particularly due to the agency's interpretation of the statutory provisions that concern the scope of its own authority. The proper rules for interpreting statutes and determining agency jurisdiction, as well as substantive agency powers, should accord with constitutional separation-of-powers principles and the province and function of the Judiciary. Arlington v. FCC, 569 U.S. 290, 312-316 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge").

4. The FBOP policy statement at issue clearly violates the bedrock rule that an agency can never rewrite clear statutory terms to suit its own sense of how the statute should operate. (citations omitted) Further, agency policy does not warrant Chevron-style deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000). Here, the FBOP interpreted the provisions of §3584(a) per its policy statements and is now using those policy statements to say the FBOP is only administering the sentence.
5. The Court would do right to use this case to clarify the premises of §3584(a), to strike down all FBOP policy statements that interpret the meaning and applications of §3584(a), and to examine the process of FBOP administration of sentences under §3584(a) that may be ambiguous per the statutory language itself. Certiorari in Setser was granted to examine the FBOP's authority under 18 U.S.C. §3624 et seq. as well as a district court's authority under §3584(a). The Court has an opportunity to extend Its Setser jurisprudence to address an ongoing defect concerning the constitutional implementation of §3584(a).
6. Powers would suggest that the FBOP has the authority to administer a sentence per the terms of the judgment and commitment order(s) without reference to §3584(a). When a genuine ambiguity arises, the FBOP must bring its concerns to the attention of the sentencing court via the U.S. Attorneys offices. There may be a need to amend Rule 35 of the Criminal Rules to allow for a timely review procedure.

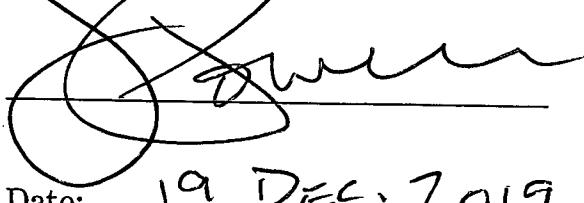
7. The constitution and law underlying §3584(a)'s implementation of a sentence has a fairly profound import. As it is in this case, the FBOP was able to effectively extend Powers' sentence by at least 5 months and 15 days pursuant to a policy statement that overrides the plain meaning of the statute. Moreover, the FBOP was able to modify Powers' sentence in opposition to the intent of the sentencing court. This type of agency action has broad implications regarding separation-of-powers, proper administration of executive authority in administering sentences, and fundamental fairness under the Fifth and Sixth Amend.'s.

CONCLUSION

Powers asks for certiorari to be granted and the cause either heard by the Court or summarily remanded.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature, appearing to read "John Doe", is written over a horizontal line. A large, roughly circular mark is drawn over the signature.

Date: 19 Dec. 2019