No. 19-7188

IN THE SUPREME COURT OF THE UNITED STATES

JOHN JAY POWERS, PETITIONER

v.

M. L. STANCIL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the denial of petitioner's challenge under 28 U.S.C. 2241 to the Bureau of Prisons' administration of his sentences for criminal contempt and possession of a stolen vehicle as consecutive, rather than concurrent.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Az.):

United States v. Powers, No. 15-cr-647 (Sept. 28, 2015)

United States District Court (D. Col.):

Powers v. Federal Bureau of Prisons, No. 16-cv-134 (Nov. 7, 2016)

United States District Court (M.D. Fla.):

United States v. Powers, No. 89-cr-61 (Feb. 22, 1990)

United States v. Powers, No. 89-cr-61 (Feb. 23, 1990)

United States v. Powers, No. 89-cr-60 (Mar. 9, 1990)

United States District Court (S.D. Ind.):

United States v. Powers, No. 90-cr-145 (May 23, 1991)

United States District Court (D. N.J.):

United States v. Powers, No. 99-cr-253 (Oct. 4, 2001)

United States Court of Appeals (9th Cir.):

United States v. Powers, No. 15-10490 (Mar. 19, 2018)

United States Court of Appeals (10th Cir.):

Powers v. Federal Bureau of Prisons, No. 16-1490 (June 28, 2017)

United States v. Powers, No. 17-15668 (Oct. 3, 2019)

United States Court of Appeals (11th Cir.):

United States v. Powers, No. 90-3212 (Jan. 22, 1996)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9)* is not published in the Federal Reporter but is reprinted at 794 Fed. Appx. 736, and is available at 2019 WL 5960210. The order of the district court (Pet. App. C1-C11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2019. A petition for rehearing was denied on December 10,

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* The petition appendix does not have identification pages for each section. This brief refers to the opinion of the court of appeals as Appendix A, the order denying rehearing as Appendix B, and the order of the district court as Appendix C.

2019 (Pet. App. B1). The petition for a writ of certiorari was filed on December 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possessing a stolen motor vehicle, in violation of 18 U.S.C. 2313 (1988). C.A. App. 290. Following a second jury trial in the Middle District of Florida, petitioner was convicted on two counts of bank robbery, in violation of 18 U.S.C. 2113(a) (1988). C.A. App. 296-300. Based on conduct in those proceedings, petitioner was also convicted in a summary proceeding on one count of criminal contempt, in violation of Fed. R. Crim. P. 42(a) (1987). C.A. App. 294-295. Petitioner was sentenced to 18 months of imprisonment, to be followed by three years of supervised release on the possession of a stolen-vehicle count, id. at 291-292; five and one-half months of imprisonment on the contempt count, id. at 294; and 236 months of imprisonment on each of the bank robbery counts, to be served concurrently with each other and consecutive to the sentences for possession of a stolen-vehicle and criminal contempt, and to be followed by three years of supervised release, id. at 297-298. The court of appeals affirmed. United States v. Powers, 77 F.3d 495, 1996 WL 60567 (11th Cir. 1996) (Tbl.) (unpublished) (per curiam).

Twenty-eight years later, petitioner filed an application under 28 U.S.C. 2241 in the United States District Court for the District of Colorado challenging the administration of his sentences by the Bureau of Prisons (BOP). The court denied the application, Pet. App. C1-C11, and the court of appeals affirmed, Id. at A1-A9.

1. In April, 1989, a federal grand jury in the Middle District of Florida charged petitioner with two counts of bank robbery, in violation of 18 U.S.C. 2113(a) (1988), and one count of possession of a stolen motor vehicle, in violation of 18 U.S.C. 2313 (1988). 89-cr-61 D. Ct. Doc. 1 (Apr. 5, 1989). In October 1989, a jury found petitioner guilty of possessing a stolen vehicle, but failed to reach a verdict on the bank robbery charges. 90-3212 C.A. Op. 1 (Jan. 22, 1996). After a new trial on the bank-robbery charges in December 1989, a jury found petitioner guilty on those counts as well. Id. at 1-2. During the proceedings, petitioner engaged in misconduct that the district court, in further proceedings, found contemptuous. 89-cr-61 Sent. Tr. (Sent. Tr.) Vol. 1; Pet. App. A2.

On February 22, 1990, the district court entered a judgment against petitioner on the stolen-vehicle charge, sentencing him to 18 months of imprisonment, to be followed by three years of supervised release. C.A. App. 291-292; Pet. App. A2. The court also entered a separate judgment against petitioner for criminal

contempt, sentencing him to five and one-half months of imprisonment for that offense. C.A. App. 294; Pet. App. A2. Neither of the judgments specifies whether the sentences should be consecutive or concurrent. C.A. App. 291-292, 294; see Pet. App. A2.

The next day, the district court sentenced petitioner to 236 months of imprisonment, to be followed by three years of supervised release, on each of the two bank-robbery charges. Pet. App. A2; C.A. App. 297-298. The judgment states that the two bank-robbery sentences are "to be served CONCURRENTLY with each other but CONSECUTIVE to sentences imposed on count 3 and Rule 42(A) criminal contempt." C.A. App. 297; see Pet. App. A2.

2. Petitioner later received an additional 15-year sentence -- also from the Middle District of Florida -- arising from a separate case in which he was convicted of nine federal offenses, including possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). C.A. App. 301-305; Pet. App. A2. Over the next 23 years, petitioner was also convicted and sentenced in connection with several offenses he committed while incarcerated, including both escape and assault on a federal officer. Pet. App. A3.

In 2017, the district court vacated petitioner's 15-year sentence in connection with the felon-in-possession charges because that sentence had been enhanced under the Armed Career

Criminal Act (ACCA), 18 U.S.C. 924(e), and -- after this Court's decision in Johnson v. United States, 135 S. Ct. 2251 (2015) -- petitioner no longer had three qualifying ACCA predicate offenses. 16-cv-1911 D. Ct. Doc. 23 (Oct. 5, 2017); Pet. App. A2-A3.

3. After petitioner was resentenced in connection with the felon-in-possession charges in December, 2017, Pet. App. A3, he requested a revised computation of his cumulative sentences from the Bureau of Prisons (BOP), Pet. 4-5. He then filed a motion under 28 U.S.C. 2241 raising multiple challenges to the BOP's administration of his sentences, asserting that -- if his sentences had been correctly calculated -- he would have been released from federal custody on January 2, 2018. Pet. App. C4. As relevant here, petitioner alleged that the BOP had erroneously treated his five and one-half month sentence for criminal contempt as consecutive (rather than concurrent) to his 18-month sentence for possessing a stolen vehicle. Id. at C5-C6.

The parties agreed to disposition by a magistrate judge, who denied petitioner's motion. Pet. App. C1. The magistrate judge observed that, under 18 U.S.C. 3584(a), "[m]ultiple 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[,] [and] [m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." Pet. App. C5 (quoting 18 U.S.C.

3584(a)). The magistrate judge further observed that a BOP Program Statement explains that "[s]entences 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," whether or not they are imposed "on the same date," but sentences imposed "on the same date * * * based on convictions arising out of different trials, are considered to have been imposed at different times." Id. at A5 (quoting Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5880.28, Sentence Computation Manual (CCA of 1984), ch. I, at 32 (Feb. 14, 1997), http://www.bop.gov/policy/progstat/5880_028.pdf) (emphasis omitted).

Looking to the statute and BOP's guidance, the magistrate judge affirmed the BOP's determination that petitioner's sentences for criminal contempt and possessing a stolen vehicle should be consecutive because they were "imposed at different times." Pet. App. C6. The magistrate judge explained that the contempt charge did not arise from the same indictment as the stolen vehicle charge, and that "the conviction and sentence for criminal contempt was part of a separate prosecution that resulted in a separate Judgment." Ibid. The magistrate judge also rejected petitioner's remaining challenges to the BOP's implementation of his sentences. Id. at C7-C11.

4. The court of appeals affirmed in an unpublished decision. It rejected petitioner's argument that BOP's treatment

of his sentences under its guidance was contrary to this Court's decision in Setser v. United States, 566 U.S. 231 (2012). Pet. App. A5. The court of appeals recognized that "Setser reaffirmed [that] the courts -- not the BOP -- have the discretion to impose consecutive or concurrent sentences." Id. at A5-A6. The court explained, however, that the BOP was "not exercising the sentencing discretion reserved to the courts," but was instead "administering the sentence as provided in § 3584(a) and the Program Statement," when it determined that petitioner's sentences should run consecutively. Id. at A6. The court also rejected petitioner's contentions that the Sentencing Guidelines required his sentences to be concurrent, ibid., and that the adjudication of the criminal contempt charge in summary proceedings, rather than a jury trial, foreclosed a determination that it was imposed at a different time, id. at A7. The court further affirmed the magistrate judge's disposition of petitioner's remaining claims. Id. at A7-A9.

ARGUMENT

Petitioner asserts (Pet. 7-9) that the court of appeals should have required the BOP to revise its computation of his sentences to have his sentences for criminal contempt and possessing a stolen vehicle be concurrent rather than consecutive. The court of appeals' decision was correct; petitioner does not allege that it conflicts with the decision of any other court of appeals; and

this case would, in any event, be a poor candidate for further review. The petition for a writ of certiorari should be denied.

1. As this Court recognized in Setser v. United States, 566 U.S. 231 (2012), district courts have the authority to decide whether sentences will run concurrently or consecutively when that determination is not otherwise dictated by statute. Id. at 236-239. When a district court does not specify whether sentences are concurrent or consecutive, 18 U.S.C. 3584(a) provides a default rule: "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." See also S. Rep. No. 225, 98th Cong. 127 (1983) (explaining that Section 3584 was "intended to be used as a rule of construction in the cases in which the court is silent as to whether sentences are consecutive or concurrent, in order to avoid litigation on the subject").

As Setser further observed, it is "ultimately" the BOP that "has to determine how long the District Court's sentence authorizes it to continue [a prisoner's] confinement." 566 U.S. at 244. Here, the BOP permissibly determined that the district court's separate sentences of 18 months for possession of a stolen vehicle and five and one-half months for criminal contempt authorized it

to detain the petitioner for a total of 23 and one-half months. As the court of appeals explained, that determination did not usurp "the sentencing discretion reserved to the courts," but instead simply applied the rule that Congress set out in Section 3584(a), under which sentences "'imposed at different times run consecutively unless the court orders that the terms are to run concurrently.'" Pet. App. A5-A6 (quoting 18 U.S.C. 3584(a)). Contrary to petitioner's suggestion (Pet. 7), the BOP's authority to "determine how long the District Court's sentence authorizes" it to detain a prisoner, Setser, 566 U.S. at 244, inevitably requires the BOP to interpret and apply Section 3584(a) when a district court offers no indication of whether a sentence should run concurrently or consecutively. Cf. Reno v. Koray, 515 U.S. 50, 61 (1995) (stating that BOP Program Statements are entitled to "some deference").

The BOP's determination of petitioner's combined term of imprisonment was correct and does not warrant this Court's review. Petitioner asserts (Pet. 7) that his sentences were imposed "at the same time" because they were imposed in a "consolidated sentencing proceeding." But petitioner provides no support for the proposition that they were, in fact, imposed in a single consolidated sentencing proceeding. The court of appeals simply observed -- and decided this case on the premise that -- they were imposed in separate judgments entered on the "same day." Pet.

App. A2. Petitioner identifies no reason why a judgment for contempt of court, which necessarily reflects a separate summary proceeding, should necessarily be deemed to be imposed "at the same time" as another criminal sentence and run concurrently to it. Nor does he identify any court that has done so or that would have decided this case differently.

2. In any event, this case would be a particularly poor vehicle for further review because, even under petitioner's view of Section 3584(a), his sentence for contempt would run consecutive to his sentence for possession of a stolen vehicle. The transcripts from petitioner's sentencings, which were not before the lower courts, but are part of the public record, make clear that the district court held separate proceedings for the two charges. Sent. Tr. Vols. 1-3.

After adjudicating the contempt charge and sentencing petitioner to five and one-half months of imprisonment for that offense, the judge stated "that does complete the transcript of this." Sent. Tr. Vol. 1, at 18. Then, before beginning the sentencing on the stolen-vehicle charge, the judge reiterated that "[t]his is a separate record now. This is a sentencing, No. 89-61-CR-T, for the trial" on possession of a stolen vehicle. Sent. Tr. Vol. 2, at 3. And, after announcing petitioner's sentence on the stolen-vehicle charge, the district court stated that "[i]f I don't make something concurrent, my understanding is

it is automatic that they be consecutive. I do not make this concurrent." Id. at 46. Because these statements undermine the factual premise of petitioner's argument, they provide an additional reason to deny certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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