

No. 19-7188

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

JOHN JAY POWERS,
Petitioner,

-vs-

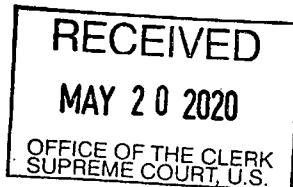
M.L. STANCIL,
Respondent.

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

PETITIONER'S REPLY BRIEF

Submitted by:

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MAY IT PLEASE THE COURT:

ARGUMENT

Powers respectfully replies to new matters asserted in the Executive's response and shows:

I. CONTRARY TO THE EXECUTIVE'S RESPONSE, POWERS WAS SENTENCED TO CONSECUTIVE TERMS OF IMPRISONMENT BY THE FEDERAL BUREAU OF PRISONS, AND NOT BY THE DISTRICT COURT.

The Federal Bureau of Prisons (FBOP) is an agency of the Executive Branch and, pursuant to the structural protections of Article III., has no authority to unilaterally determine whether Powers sentences are either consecutive or concurrent. Yet that is exactly what has been going on for some years now, and it needs to be stopped. The FBOP's brazen usurpation of proper power has deprived Powers of due process and has resulted in Powers having served more time imprisoned than the courts ordered.* In its response, the Executive seeks to reconfigure the facts and law of the case, and this signals its essential concession to certiorari being granted.

* Powers brought two claims in the lower courts that involve nearly identical legal issues pertaining to the FBOP's authority to determine whether sentences are consecutive or concurrent under §3584(a) of title 18. To wit, the court in USA v. Powers, No. 1:99-cr-253 (D. N.J.) imposed a 45-month sentence to be served consecutive to only 2 of 3 undischarged sentences. The FBOP made the decision to run the 45-month sentence consecutive to the 3rd undischarged sentence as well. (Appendix A., pages 6-8) Any kind of ruling or remand by the Court will necessarily involve the premises of that claim, and Powers has not intended to forego or to waive that claim by honing in on the first claim.

The Executive argues two things: (1) that the sentencing on the criminal contempt was made separate from the stolen vehicle sentencing, and (2) that "the BOP's authority to 'determine how long the District Court's sentence authorizes' it to detain a prisoner...inevitably requires the BOP to interpret and apply Section 3584(a)." The question before the Court is this:

Does the Federal Bureau of Prisons
have sentencing authority under §3584(a)?

Therefore, whether the sentences were consolidated is not germane to the question, for if the FBOP has no sentencing discretion, it has no authority to promulgate policy that interprets §3584(a) in the first place. And since the Executive continues to contend that it does have what amounts to sentencing discretion under §3584(a), certiorari is appropriate.

The Executive admits that the district courts did not impose consecutive sentences and that the decision to make Powers' sentences consecutive was rendered by the FBOP pursuant to §3584. The Executive implies that these decisions were made under the so-called "default rule," but this was not the holding of the lower courts.* The lower courts held that the FBOP had properly exercised its authority under §3584(a) and its policy statements that interpret the statute.

* This so-called default rule under §3584(a) is particularly troubling because (1) it allows the Legislative Branch to determine the outcome of Judicial Branch functions in individual cases, (2) it deprives defendants of their due process rights (that would be applicable during judicial proceedings), and (3) the review of the §3553(a) factors mandated by §3584(b) is impossible. Congress has no judicial powers to render a sentencing decision by default; nor can Congress authorize the Executive to make sentencing decisions under any "default rule" in order to accomplish an indirect exercise of judicial power. United States v. Sioux Nation, 448 U.S. 371, 198 (1980).

The Executive avoids mentioning any separation of powers concerns. We can only imagine the Venerable James Madison standing with his hands on his hips at the Constitutional Convention and saying, "What's that? You have an agent of the Executive Branch exercising Judicial Branch powers with respect to penal laws and when the decisions of the Executive are challenged under the Law of the Land, you are deferring to the Executive? Come again?" The Framers certainly understood that one branch's loss is another branch's gain. So they "established high walls and clear distinctions because low walls and vague distinctions [don't cut it]."

The structural protections of Article III are absolutely indispensable to the Republican form of government guaranteed by the Constitution. Nevertheless, those protections are only as strong as the Court's will to enforce them. The lower courts have become lazy in their will to prevent the FBOP from exercising the sentencing discretion that they themselves ought to be exercising, and this is a dangerous proposition at best. To cede sentencing discretion under §3584(a) to the FBOP in any way, shape or form is a bad idea that should be rejected here and now.

II. POWERS HAS A LIBERTY INTEREST UNDER THE FIFTH AMENDMENT THAT CANNOT BE BRUSHED ASIDE OR IGNORED.

If, according to the Executive, the FBOP has the authority to determine whether Powers' sentences are concurrent or consecutive under §3584(a), then Powers has the right to standard Due Process Clause protections including notice, impartial tribunal, counsel, allocution, and de novo review. None of these procedural

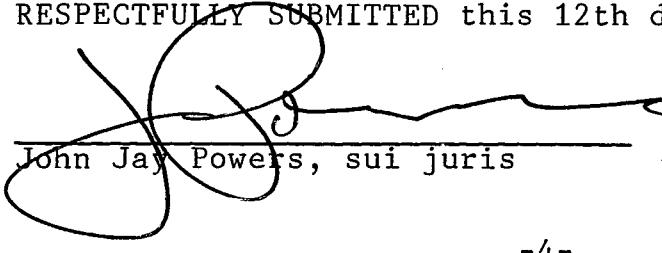
protections were supplied to Powers. In fact, the FBOP's sentencing decisions were made unilaterally and in secret. Powers says that the same due process considerations that apply to trials and sentencing also apply when prison officials interpret and implement the sentence. Powers most certainly has a liberty interest in being released from confinement upon the completion of the sentences imposed by the courts--or by the FBOP.

But then there is another problem: how does the FBOP comply with the requirement of §3584(a) that mandates review and consideration of the §3553(a) factors prior to the imposition of concurrent or consecutive sentences? Would §3584(b) be mere surplusage? And what about the presupposition to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment? What happens to that principle under the FBOP's abbreviated processes of determining the scope of a sentence? Powers says it is untenable and absurd. Powers says the Due Process Clause of the Fifth Amendment prevents the FBOP from making any interpretation of what his sentences are under §3584(a).

CONCLUSION

Powers' claims are properly before the Court and are ready to be heard. The Court ought to grant certiorari and schedule further briefing. Powers thanks the Court for whatever decision it comes to.

RESPECTFULLY SUBMITTED this 12th day of May 2020 by:



John Jay Powers, *sui juris*