

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CODY GOBER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

BELL & HOBBS

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QUESTION PRESENTED FOR REVIEW

Whether the due process rights of the Petitioner were violated by the failure of the trial court to address, first at sentencing and then in a post-sentencing motion made pursuant to Fed. R. Crim. P. 35(a), a specific request that a remaining state sentence run concurrently with the Petitioner's federal sentence?

LIST OF PARTIES

All parties 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:

Cody Gober, Petitioner

United States of America, Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to this Petition and can be found at *United States v. Gober*, No. 21-5624 (6th Cir. 2022).

JURISDICTION

On May 9, 2022, the Court of Appeals for the Sixth Circuit entered its ruling affirming the district court. *United States v. Gober* (21-5624 6th Cir. 2022). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West).

STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Statutes:

1. 18 U.S.C.A. § 3553(a)
2. 18 U.S.C.A. § 3584
3. 21 U.S.C.A. § 841(a)(1), (b)(1)(A), and 846
4. 28 U.S.C. § 1320a

Regulations/Guidelines

1. Fed. R. Crim. P. 35
2. Fed. R. Crim. P. 35(a)
3. U.S.S.G. 5G1.3

STATEMENT OF THE CASE

A. Procedural History

The indictment in this case charged the Petitioner with violations of 21 U.S.C.A. § 841(a)(1), (b)(1)(A), and 846. On May 20, 2020, a Plea Agreement and sealed Plea Agreement Supplement, previously executed by the government and the Petitioner, were filed with the district court. The Petitioner was rearraigned and entered a plea of guilty to Count 1 of the Indictment.

The sealed Presentence Investigation Report (“PSR”) was filed on January 26, 2021. The PSR specifically referenced the fact that the Petitioner was serving a prison sentence in the Georgia Department of Corrections. The PSR also specifically noted that U.S.S.G. 5G1.3 compels the sentencing judge to direct, in sum, that the federal sentence be run consecutively to an undischarged term or imprisonment or concurrently with such a prior sentence. These matters were within the contemplation of both the government and the Petitioner in the proceedings that followed.

The Petitioner filed a motion relative to sentencing departure and variance from the Sentencing Guidelines which requested the trial court to allow his federal sentence to run concurrent with pending state sanctions without objection or comment from the government.

B. Sentencing Hearing of May 26, 2021, and Subsequent Motion

Without any objection from the government, the trial court granted the Petitioner’s motion for both a downward departure and a sentencing variance. The trial court also granted a separate downward departure motion filed by the government. Meanwhile, at the outset of the hearing, the Petitioner requested the trial court, as part of his request for a departure and

variance, to order that his federal sentence run concurrently with his remaining state sentence. No opposition was raised by the government.

Without addressing this request in any regard, however, the trial judge entered a sentence of a term of imprisonment of 132 months with five years of supervised release and charging a special assessment fee of \$100.00. Also, the Petitioner was sentenced to a drug treatment program of five hundred hours.

Because the trial court did not address the Petitioner's express request for the federal and remaining state sentences to run concurrently, he timely filed on June 8, 2021, a motion pursuant to Fed. R. Crim. P. 35(a) as a means of having the trial judge rule on this request. The government was aware of his request and again made no objection to the relief he was seeking under Fed. R. Crim. P. 35(a). This was the second time that the Petitioner expressly requested clarification and a ruling from the trial court that the sentences run together; however, no ruling was made on the motion. The motion was literally ignored.

REASONS FOR GRANTING THE PETITION

This Court recognized in Setser v. United States, 566 U.S. 231, 240, 132 S. Ct. 1463, 182 L. Ed. 2d 455 (2012), that the "concurrent vs. consecutive decision" has been addressed by § 212(a) of the Sentencing Reform Act of 1984, 18 U.S.C.A. § 3584. "The first sentence in § 3584(a) addresses the most common situations in which the decision between concurrent and consecutive sentences must be made: where two sentences are imposed at the same time, and where a sentence is imposed after a prior sentence that has not yet been fully served. It says that the district court has discretion whether to make the sentences concurrent or consecutive, *except that* it may not make consecutive a sentence for 'an attempt' and a sentence for an 'offense that was the sole objective of the attempt.'" *Id.*

The circumstances of this case were such that the trial court determined it was appropriate to grant both a downward departure from the Sentencing Guidelines and a variance from the applicable guideline range. Both the government and the Petitioner had moved the sentencing court for such relief. Meanwhile, the government raised no objection to the request that the Petitioner's federal sentence run concurrently with any remaining state sanction pending against him. More than just a plea for an additional reduction in the actual term he would serve, the Petitioner's request was made because the very same conduct that had resulted in a revocation of his probation had also formed the basis of the federal charge against him in this case. This was a consideration that the Petitioner attempted to make known to the trial court, but it was not addressed at all by that court.

Judges have traditionally had broad discretion in selecting whether the sentences 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, *see Setser*, 566 U.S. at 236; *Oregon v. Ice*, 555 U.S. 160, 168–169, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). It has long been recognized that nothing in the Sentencing Guidelines or 18 U.S.C.A. § 3553 forecloses the exercise of a district court of this discretion. *Id.*

Unfortunately, in this case the sentencing judge simply failed to address Mr. Gober's unopposed request, good or bad. The request was made twice – during the hearing and after sentencing through a Fed. R. Crim. P. 35 Motion. The request was not addressed. It is respectfully asserted that the Court of Appeals found that a “denial” of the request was “generally clear” based on the statements of the court, the content of the presentence report, and the statements made by the parties during argument. This record does not support this assumption in any regard.

Review by this Court is necessary to address an obvious failure to afford due process rights to the Petitioner. It is averred that this failure is not limited to these particular facts but often occurs in sentencing hearings. It is error to conclude that the trial court “must have” considered and denied the Petitioner’s request when it was never addressed whatsoever during the sentencing hearing. The case law referenced by the Sixth Circuit appears to relate to circumstances where the trial court denied such relief after acknowledging that a request for relief had been made. Here, in contrast, there is no showing that the trial court even considered the Petitioner’s request.

Upon receipt and review of both the Judgment and the statement of reasons, each filed on June 1, 2021, it was apparent that the Petitioner’s request for a concurrent sentence had not been addressed. The Petitioner attempted to address this failure by timely filing pursuant to Fed. R. Crim. P. 35(a) a motion to correct the judgment.

In the motion, it was noted that the trial court had not addressed whether the sentence was concurrent to the state punishment. It was noted that the wrongful conduct for which the Petitioner had just been convicted was part of why he faced a pending state sanction in Georgia.

Fed. R. Crim. P. 35(a) provides that a court within 14 days after sentencing make corrections that resulted from “...technical, or other clear error.” In this instance, the presentence report had reminded the sentencing court that a determination of the “concurrent or consecutive” issue *shall* be addressed as required by U.S.S.G. 5G1.3.

There is substantial case law in each Circuit which recognizes that the authority conferred by Fed. R. Crim. P. 35 to correct clear error is “extremely limited”. In fact, it is long recognized that the rule is not intended to afford a trial court the opportunity to “change its mind” about the appropriateness of the sentence or to reopen issues previously resolved at the sentencing hearing

through the exercise of the court's discretion. See, United States v. Arroyo, 434 F.3d 835, 838 (6th Cir. 2006). That is not the case in this circumstance – the Petitioner is not seeking any review of the length of the judgment imposed on him. Rather, it was necessary for the trial court to direct whether a sentence is being imposed concurrently or consecutively to a pending state sentence. He did neither. The failure of the sentencing judge in this case, then, is an omission of a “technical” or “clear error” nature which can be amended under Fed. R. Crim. P. 35.

This case is unlike United States v. Sadiq, 579 F. App'x 485 (6th Cir. 2014), in which a Fed. R. Crim. P. 35 motion was timely made but denied after the appellant had filed a notice of appeal. This Court, in sum, stated that under those facts it had no jurisdiction to review a subsequent *disposition* by the trial court denying the motion. On the other hand, in this case the trial court has not disposed of or even addressed what Mr. Gober asserts is required – a ruling on whether his sentence runs concurrently or consecutively to his state punishment.

In short, the failure of the sentencing court to address what should have been addressed requires technical correction, or else it is clear error. A clear deprivation of the most basic of due process rights was the result, making review by this Court appropriate under these circumstances.

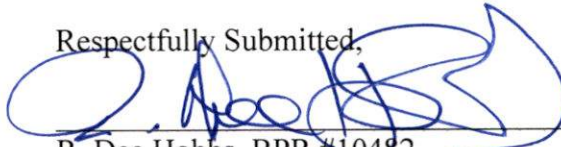
This case presents an important question of federal law that should be addressed by this Court. The issue has broad implications for any defendant who faces a federal criminal sanction while subject to a state sanction as well.

CONCLUSION

For the foregoing reasons, Petitioner Cody Gober respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit in his case.

DATED: 29th day of July, 2022.

Respectfully Submitted,



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**IN THE
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CODY GOBER

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, R. Dee Hobbs, do swear or declare that on this date, July ²⁹, 2022, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Elizabeth Barchas Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

With a courtesy copy also e-mailed this same date to the Solicitor General at:

SUPREMECTBRIEFS@USDOJ.GOV

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29 day of July, 2022.



R. Dee Hobbs, Appointed Counsel

APPENDIX

Opinion of the Court of Appeals for the Sixth Circuit in *United States v. Gober*, 22-5624 (6th Cir. 2022).

NOT RECOMMENDED FOR PUBLICATION

No. 21-5624

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 9, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

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CODY GOBER,

Defendant-Appellant.

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)
)
) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE EASTERN DISTRICT OF
) TENNESSEE
)
)
)

ORDER

Before: GUY, DONALD, and BUSH, Circuit Judges.

Cody Gober, a federal prisoner proceeding through counsel, appeals the 132-month sentence imposed following his plea of guilty to a drug trafficking offense. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In January 2020, Gober was indicted in the United States District Court for the Eastern District of Tennessee on charges of conspiracy to distribute methamphetamine and related offenses. At the time, he was in the custody of the Georgia Department of Corrections on a probation revocation and undischarged sentences for selling methamphetamine and possessing marijuana.

Gober subsequently pleaded guilty in federal court to conspiracy to distribute and to possess with intent to distribute at least 50 grams of methamphetamine and at least 500 grams of a mixture containing methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A). A presentence report calculated Gober's guidelines sentencing range as 188 to 235 months of imprisonment. The report also noted that Gober was serving a sentence in Georgia and that, if the

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district court determined that the existing state sentence constituted relevant conduct for the instant federal offense, it should adjust Gober's federal sentence accordingly, which could include imposing "the sentence for the instant offense . . . to run concurrently to the anticipated term of [undischarged state] imprisonment." See USSG § 5G1.3. Neither party objected to the report.

At the sentencing hearing, the district court determined that a downward departure was warranted and that the appropriate guidelines range was 121 to 151 months. Gober asked the court to impose a sentence that was sufficient but not greater than necessary and to "take into consideration how a federal sentence can be crafted around [his] state sentence." The district court ultimately imposed a term of imprisonment of 132 months. Both parties stated that they had no objections to the sentence that were not previously raised. The district court entered judgment on June 1, 2021. Gober filed a notice of appeal from that judgment.

On June 8, 2021, prior to filing his notice of appeal, Gober filed a Federal Rule of Criminal Procedure 35(a) motion, asserting that he had argued at the sentencing hearing that the district court should run his sentence concurrently with his Georgia state sentences but that the court's judgment did not indicate whether the district court had granted that request. Gober therefore requested clarification of the sentence imposed. The district court did not rule on the motion.

On appeal, Gober argues that the district court abused its discretion by failing to address at sentencing the issue of whether his federal sentence would run concurrently or consecutively to his undischarged Georgia state sentences. In addition, he argues that the trial court abused its discretion by failing to address his Rule 35 motion made after sentencing. He states that he is "*raising no issue* regarding the length of his term of imprisonment, the term of supervised release, or the special assessment fee; rather he is seeking clarification as to how the calculation of his sentence will be carried out." He requests remand to address the issue of consecutive or concurrent sentences or, alternatively, for this court to order the way in which the sentences are to be served.

When a defendant is serving an undischarged prior sentence, the district court may impose a consecutive or concurrent sentence. 18 U.S.C. § 3584. Gober's undischarged state sentences were for a probation revocation in connection with a July 2017 offense, selling methamphetamine in November 2017, and possessing marijuana in December 2017. These offenses were unrelated

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to Gober's federal offense of conspiracy to distribute and possess with intent to distribute methamphetamine in February 2019 through January 2020, and Gober has not argued that the undischarged state sentences involved relevant conduct for purposes of his federal conviction. For unrelated offenses, USSG § 5G1.3(d) provides that "the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment." To determine a reasonable punishment, Application Note 4 to § 5G1.3 requires the sentencing court to consider the factors listed in 18 U.S.C. § 3553(a), the length of the undischarged sentence, time served on the undischarged sentence, and any other appropriate circumstances. USSG § 5G1.3, comment. n.4. Unless the court orders that "[m]ultiple terms of imprisonment imposed at different times" are to run concurrently, the terms will run consecutively. 18 U.S.C. § 3584(a).

In general, we evaluate a sentence for reasonableness under an abuse of discretion standard. *United States v. Rayyan*, 885 F.3d 436, 440 (6th Cir. 2018) (citing *United States v. Bolds*, 511 F.3d 568, 579 (6th Cir. 2007)). Where a defendant has failed to preserve a sentencing argument below, however, we review for plain error. *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc). This requires a defendant to show (1) error (2) that "was obvious or clear," (3) that "affected defendant's substantial rights," and (4) that "affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (citing *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006)).

Gober failed to preserve his argument here, so we review for plain error. In the district court, Gober did not cite § 5G1.3 in his sentencing memorandum or in his arguments at sentencing. Despite his assertions on appeal, he also did not ask the district court to order that his state and federal sentences run concurrently. And, after the district court imposed the sentence, Gober did not raise any objections or ask the court to clarify whether the sentence would be concurrent or consecutive to his state sentence. Given these circumstances, Gober did not preserve his challenge to the district court's decision to run his federal sentence consecutively to his state sentence.

Moreover, the district court did not plainly err in doing so. A district court is not required to refer to the § 5G1.3 factors expressly, so long as its rationale for imposing a consecutive

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sentence is “generally clear” based on its own statements, the content of the presentence report, and the parties’ arguments before the court. *See United States v. Potts*, 947 F.3d 357, 369 (6th Cir. 2020); *United States v. Harmon*, 607 F.3d 233, 237, 239 (6th Cir. 2010). Additionally, the district court’s explanation for the length of the defendant’s sentence, including its § 3553(a) analysis, may be “intertwined” with its explanation for imposing a consecutive sentence. *United States v. King*, 914 F.3d 1021, 1026 (6th Cir. 2019) (quoting *United States v. Johnson*, 640 F.3d 195, 208 (6th Cir. 2011)).

Contrary to Gober’s arguments, the district court’s imposition of sentence does not require clarification. The district court did not order Gober’s federal sentence to run concurrently to his undischarged state sentences; as a result, the sentences are to run consecutively. 18 U.S.C. § 3584(a). Moreover, the district court did not plainly err by ordering consecutive sentences because its rationale was generally clear. The record establishes that the district court considered the sentencing factors of § 3553(a), including Gober’s history and characteristics, the nature of his offense, and the advisory guidelines range. The court explained that it had taken into account everything that the parties had argued, noting that it considered Gober’s history and that he was a young person who came from a troubled background. The court also recognized that Gober was involved in the serious offense of selling and brokering sales of kilogram quantities of methamphetamine, which is a drug that has destroyed lives and communities.

The record also demonstrates that the district court considered the other Application Note 4 factors. The district court stated that it had reviewed the presentence report, which advised the court that, under § 5G1.3(d), it could impose a sentence concurrent with defendant’s undischarged state sentence if it determined that the state sentence involved “relevant conduct” to the federal offense. And while not arguing specifically for concurrent sentences, Gober requested at sentencing that the court consider his state sentence when imposing his federal sentence, and the district court stated that it had considered all of the parties’ arguments. Further, the district court granted Gober’s request for a downward variance, “which suggests that the court factored in the additional state punishment when fashioning defendant’s sentence.” *United States v. Pablo-Ramos*, 817 F. App’x 112, 116 (6th Cir. 2020). We have recognized that “[s]uch an approach is

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permissible in order to achieve ‘an appropriate incremental penalty for the instant offense.’” *Id.* (quoting *United States v. Simons*, 752 F. App’x 291, 297 (6th Cir. 2018)). Given the evidence of record, the district court did not plainly err by imposing consecutive sentences.

Finally, Gober challenges the district court’s failure to address his Rule 35 motion. Rule 35, in relevant part, allows district courts to correct a sentence that resulted from “arithmetical, technical, or other clear error” provided it does so within the time set forth in the rule. Fed. R. Civ. P. 35(a). A district court lacks jurisdiction to correct a sentence under Rule 35(a) if the court fails to rule on the motion within the 14-day window. *See United States v. Hall*, 661 F.3d 320, 322 & n.1 (6th Cir. 2011); *United States v. Vicol*, 460 F.3d 693, 695 (6th Cir. 2006) (citing *United States v. Green*, 405 F.3d 1180 (10th Cir. 2005), *United States v. Penna*, 319 F.3d 509 (9th Cir. 2003), and *United States v. Wisch*, 275 F.3d 620, 626 (7th Cir. 2001)). “[A] court’s failure to rule is functionally equivalent to an outright denial on the merits, thus making the judgment final on the date the district judge’s power to alter the sentence expired.” *Wisch*, 275 F.3d at 626.

Here, the district court failed to rule on Gober’s Rule 35(a) motion within 14 days after sentencing, effectively denying the motion. But Gober’s notice of appeal designated only his final judgment as the order being appealed, and he did not amend his notice of appeal to include the Rule 35(a) motion or file a new notice of appeal following the denial of the motion. *See* Fed. R. App. P. 3(c)(1)(B). Absent a notice of appeal, we lack jurisdiction to review the denial of the Rule 35(a) motion.

The judgment of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk