No. _____

IN THE
Supreme Court of the United States

MONTGOMERY LEBEAU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the federal offense of conviction, the Federal Sentencing Guidelines provide that a defendant's federal sentence "shall be imposed to run concurrently to the anticipated term of imprisonment" under USSG § 5G1.3(c).

The question presented is:

Whether a pending state charge arising out of the same incident as the federal case plainly qualifies as "anticipated" under USSG § 5G1.3(c)?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

United States v. Lebeau, No. 5:22-cr-50007-JLV, United States District Court for the District of South Dakota. Judgment entered July 18, 2022.

United States v. Lebeau, No. 22-2604, United States Court of Appeals for the Eighth Circuit. Judgment entered August 10, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Montgomery Lebeau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is reported at 76 F.4th 1102. The district court's relevant rulings are unreported.

JURISDICTION

The court of appeals entered judgment on August 10, 2023. Mr. Lebeau received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on September 27, 2023. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISION INVOLVED

USSG § 5G1.3 provides:

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) If subsection (a) does not apply, and 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 subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, 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 for the instant offense.

INTRODUCTION

This petition presents the issue of whether a pending state charge arising out of the same incident as the federal case plainly qualifies as "anticipated" under USSG § 5G1.3(c). The current version of § 5G1.3(c) was created in response to *Setser v. United States*, 566 U.S. 231 (2012). In *Setser*, this Court found that federal courts, as opposed to the Bureau of Prisons ("BOP"), retained discretion to determine whether a federal sentence should be imposed concurrently or consecutively to a state sentence that had yet to be imposed. 566 U.S. at 239.

Before *Setser*, § 5G1.3 only instructed federal courts on the imposition of a federal sentence for a defendant subjected to an *undischarged* term of imprisonment. But in response to *Setser*, the United States Sentencing Commission amended § 5G1.3 to instruct courts on how to impose sentences in relation to *anticipated* terms of imprisonment:

> 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 . . . . 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.

USSG Supp. to App. C., Amend. 787, Reason for Amendment.

Several circuits have considered whether a pending state charge is sufficient to be "anticipated" under § 5G1.3(c), and the courts that have found a pending state charge to be sufficient align more with the intent behind the significant changes

that led to the current version of USSG § 5G1.3(c). Specifically, the intent of the Sentencing Commission was to reduce sentencing disparities between defendants who were awaiting state sentences and defendants who have had their state sentences imposed. Deciding that the term "anticipated" is defined in this way also permits judges to retain more authority to decide whether a federal sentence should be imposed concurrently or consecutively as *Setser* had instructed, rather than to relinquish this decision to the BOP in the absence of judicial direction.

In contrast to its sister circuits, the Eighth Circuit's decision to require defendants to meet a higher threshold to demonstrate a state sentence is "anticipated" before defendants can access the benefits of USSG § 5G1.3(c) frustrates the Sentencing Commission's intent to reduce sentencing disparities between defendants, as well as *Setser*'s intent to retain judicial determination on the imposition of concurrent or consecutive sentencing.

Like Mr. Lebeau, many defendants face criminal charges in state and federal court arising out of the same incident. Resolving this issue ensures that defendants are treated uniformly across the circuits.

STATEMENT OF THE CASE

Mr. Lebeau faced state and federal charges arising out of an alleged domestic dispute on October 31, 2021. PSR ¶ 47.[1] On that date, he was arrested, charged with five counts related to firearm possession and domestic assault in Pennington

[1] Citations to "PSR" are to the Presentence Investigation Report at Dkt. 53 followed by the applicable paragraph number.

County, South Dakota, and taken into state custody. *Id.* On January 20, 2022, he was charged with possession of a firearm by a prohibited person in federal court. Dkt. 1.[2] On January 28, 2022, he appeared in federal court via a Writ of Habeas Corpus ad Prosequendum. PSR ¶ 4; Dkt. 10. Mr. Lebeau was convicted of the federal charge at trial. Dkt. 45. His federal sentencing was held on July 18, 2022. Dkt. 55. At the time of his federal sentencing, the state case was still pending. PSR ¶ 47. It was undisputed the pending state charges were relevant conduct to the federal offense. *Id*. at ¶ 4. Mr. Lebeau was sentenced to 60 months imprisonment in his federal case. Dkt. 55, at 2. Neither the parties nor the district court addressed whether the court should order Mr. Lebeau's federal sentence to run concurrently with the anticipated term of imprisonment on the state case under § 5G1.3(c). One month later, Mr. Lebeau was sentenced to 289 days of time served in his state case. *United States v. Lebeau*, 76 F.4th 1102, 1106 (8th Cir. 2023); App. 5a. Despite being sentenced in federal court on July 18, 2022, Mr. Lebeau's federal sentence did not begin until August 16, 2022. *See* Supp. Rec. at 3,[3] *United States v. Lebeau*, No. 22-2604 (8th Cir. Aug. 10, 2023).

On appeal Mr. Lebeau argued that the court plainly erred in failing to address § 5G1.3(c), and in failing to order the federal sentence to run concurrently

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[2] All citations to "Dkt." are to the docket in *United States v. Lebeau*, No. 5:22-cr-50007-JLV (D.S.D.).

[3] Mr. Lebeau will refer to the supplement to the appellate record titled "Document Filed – Public Information inmate Data filed by Montgomery Lebeau" as "Supp. Rec." followed by the applicable page number and by the case number.

with the anticipated state sentence. Appellant's Brief at 16-20, *United States v. Lebeau*, No. 22-2604 (8th Cir. Dec. 7, 2022); Appellant's Reply Brief at 8-12, *United States v. Lebeau*, No. 22-2604 (8th Cir. Mar. 17, 2023). He argued that because the state case was "pending" at the time of the federal sentencing, this was enough to be "anticipated" under § 5G1.3(c), and the court's failure to address § 5G1.3(c) at the sentencing hearing under these circumstances was an error that was plain. Appellant's Reply Brief at 8-10. Mr. Lebeau argued this error affected his substantial rights because he was serving a longer sentence than he would have had § 5G1.3(c) been properly applied. Appellant's Brief at 18-20; Appellant's Reply Brief at 11-12. And he argued that this is the type of error – the possibility of additional jail time – that appellate courts should correct to protect the fairness and integrity of the judicial system. *Id.*

The court of appeals affirmed, finding that any error was not plain:

> We conclude that there is no plain error warranting relief, because it is not obvious under current law that Lebeau's state term of imprisonment was "anticipated." Section 5G1.3(c) does not define "anticipated," and Lebeau cites no authority from this court. . . .
>
> Given the absence of a definition in the guidelines, and the limited authority on the issue, we think it is at least subject to reasonable dispute whether the filing of a state charge, by itself, makes a future state sentence "anticipated" within the meaning of § 5G1.3(c). . . . If Lebeau had raised the issue, then a district court reasonably could have agreed with him and treated a future state sentence as "anticipated." But it is not obviously incorrect under existing law for a district court to conclude that an "anticipated" state sentence under § 5G1.3(c) requires a greater degree of likelihood than is inherent in the mere filing of a state criminal charge.

Lebeau, 76 F.4th at 1106-07 (8th Cir. 2023); App. 6a-7a.

Mr. Lebeau timely filed a petition for rehearing *en banc*. The court of appeals denied his petition in a summary order. App. 9a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

Like Mr. Lebeau, many defendants face criminal charges in state and federal court arising out of the same incident. The meaning of the word "anticipated" in § 5G1.3(c) is the subject of current circuit disagreement. Five circuits have now weighed in on whether pending state charges qualify as "anticipated" within the meaning of § 5G1.3(c). The Second, Sixth, and Eleventh Circuits have held that "anticipated" means, at a minimum, that a state charge for relevant conduct is pending at the time of the defendant's federal sentencing. *United States v. Olmeda*, 894 F.3d 89, 92-94 (2d. Cir. 2018) (per curiam); *United States v. Jackson*, 764 F. App'x 506, 509-10 (6th Cir. 2019) (unpublished); *United States v. Ward*, 796 F. App'x 591, 598 n.1, 598-99 (11th Cir. 2019) (per curiam) (unpublished).

The Fifth Circuit appears to have aligned with these circuits on the meaning of the term "anticipated" in the context of pending state charges, but has declined to extend the definition of "anticipated" to circumstances where state charges were believed to be forthcoming but were not actually pending. *Compare United States v. Looney*, 606 F. App'x 744, 748 (5th Cir. 2015) (per curiam) (unpublished); *United States v. Ochoa*, 977 F.3d 354, 356-57 (5th Cir. 2020) *with United States v. Johnson*, 760 F. App'x 261, 265-66 (5th Cir. 2019) (per curiam) (unpublished); *United States v. McCowan*, 763 F. App'x 369, 371 (5th Cir. 2019) (per curiam) (unpublished).

By contrast, the Eighth Circuit held that it is subject to reasonable dispute whether the simple fact of a pending state charge plainly makes a future state sentence "anticipated" under § 5G1.3(c). *Lebeau*, 76 F.4th at 1106; App. 7a. This case presents the ideal opportunity for this Court to provide clear direction on this important question of federal law.

I. The opinion below creates a conflict among the circuits on the question presented.

The Second, Sixth, and Eleventh Circuits have held that "anticipated" means, at a minimum, that a state charge for relevant conduct was pending at the time of a defendant's federal sentencing. *See Olmeda*, 894 F.3d at 92-94; *Jackson*, 764 F. App'x at 509-10; *Ward*, 796 F. App'x at 598 n.1, 598-99.

In *Olmeda*, the Second Circuit noted that this Court in *Setser* presumed that a state charge for relevant conduct pending at the time of the federal sentencing was "anticipated." 894 F.3d at 93. Indeed, *Setser* held that district courts had authority to order a federal sentence to run consecutively or concurrently, "where a federal judge *anticipates* a state sentence that has not yet been imposed." 566 U.S. at 236 (emphasis added). In *Setser*, the defendant had a state charge for relevant conduct pending at the time of his federal sentencing which was presumed to be anticipated and later catalyzed the formulation of § 5G1.3(c). *Id.* at 233-34; USSG Supp. to App. C., Amend. 787, Reason for Amendment. The Second Circuit determined that under § 5G1.3(c) courts should similarly understand the term "anticipated" to bear the same meaning as relied upon in *Setser*. "Although Section 5G1.3(c) does not define the word 'anticipated,' we understand this term to bear the

same meaning it had in *Setser*, the genesis for the amendment." *Olmeda*, 894 F.3d at 93. "It follows that an 'anticipated' state sentence must, at minimum, encompass sentences associated with state charges for relevant conduct that are pending at the time of a defendant's federal sentencing." *Id.*

In *Jackson*, the Sixth Circuit found, "[O]ne of Jackson's pending state charges was for relevant conduct, and the district court was aware of that charge. Therefore, § 5G1.3(c) applies, and the district court needed to expressly consider it." 764 F. App'x at 509 (internal citations omitted). And in *Ward*, the Eleventh Circuit found plain error where state charges for relevant conduct were pending, but the district court had failed to consider § 5G1.3(c), and thus plainly failed to correctly calculate the guideline range. 796 F. App'x at 598 n.1, 598-99. Even though the government suggested that a state sentence must be "imminent" for § 5G1.3(c) to apply, the Eleventh Circuit found no authority suggesting that to be true. *Id.* at 598 n.1 ("The government vaguely suggests that a state sentence must be 'imminent' for § 5G1.3(c) to apply, but it points to no supporting authority.").

The Fifth Circuit appears to have aligned with the other circuits on the meaning of the term "anticipated" in the context of pending state charges but has declined to extend the definition of "anticipated" to circumstances where state charges were *not* pending. Specifically, the Fifth Circuit first held in *Looney*, an unpublished opinion from 2015, that a future state sentence is "anticipated" when state charges were pending at the time of the federal sentencing. 606 F. App'x at 748.

But a few years later, the Fifth Circuit considered the meaning of the term "anticipated" in two unpublished opinions where state charges were *not* pending. First, in *Johnson*, state charges had not yet been filed at the time of the defendant's federal sentencing, though the defendant argued on plain error review the court should consider the *likely filing* of state charges as an "anticipated" sentence under § 5G1.3(c). 760 F. App'x at 265-66. The Fifth Circuit stated that because this question was one of first impression in the circuit, it could not pass plain error review because there was no past precedent to inform the court's decision. *Id.* at 266.

Similarly in that same year the Fifth Circuit considered the definition of "anticipated" in another factually distinct case. In *McCowan*, the Fifth Circuit found that the defendant's anticipated state revocation proceedings were not "anticipated" in the defendant's federal revocation proceedings. 763 F. App'x at 371. But revocation proceedings are distinct as Chapter 7 policy considerations apply to revocation proceedings and Chapter 7 policies favor the imposition of consecutive sentences to another sentence, which stands in contrast to § 5G1.3(c)'s policy of imposing the federal sentence to run concurrently with an anticipated state sentence that involves relevant conduct. *Id.* at 371; *Compare* USSG Ch. 7, Pt. B, intro. comment.; USSG § 7B1.3(f), comment. (n.4) *with* § 5G1.3(c). The defendant in *McCowan* had no pending motions in state court at the time of his federal revocation proceedings, and the conduct underlying the state revocation proceedings differed from the conduct underlying his federal revocation proceedings. *McCowan*,

763 F. App'x at 371. Thus, the Fifth Circuit found that it was wholly speculative under § 5G1.3(c) that a state sentence was "anticipated." *Id.* Both *Johnson* and *McCowan* involved circumstances where no state charges were pending at the time of the federal proceedings.

Most recently, in 2020 the Fifth Circuit assumed without deciding that a state sentence was "anticipated" where state charges were pending at the time of the defendant's federal sentencing. *Ochoa*, 977 F.3d at 356-57. Put succinctly, the Fifth Circuit appears to consider a term of imprisonment to be "anticipated" under § 5G1.3(c) where the state charges were pending at the time of their federal sentencing, but not where the state charges had not yet been filed.

Here, the Eighth Circuit departed from its sister circuits by finding that a state term of imprisonment was not plainly "anticipated" where there was a pending state charge for relevant conduct, because it was "subject to reasonable dispute whether the filing of a state charge, by itself, makes a future state sentence "anticipated" within the meaning of § 5G1.3(c)." *Lebeau*, 76 F.4th at 1106; App. 7a. The Eighth Circuit offered no alternative workable definition of "anticipated" within the context of § 5G1.3(c), making it unclear what *does* qualify as "anticipated" under § 5G1.3(c).

Further, in the absence of a clear directive from the sentencing court, the BOP became the arbiter of whether Mr. Lebeau's federal sentence was imposed concurrently or consecutively to his time served state sentence, which was contrary to the spirit of this Court's determination in *Setser* that sentencing authority rests

with judges, not with the BOP. *Setser*, 566 U.S. at 239. Judicial silence is one of the most common ways a defendant's sentence is lengthened:

> One of the most common causes of a significantly lengthened sentence computation involves a simple oversight on the part of the district court during the sentencing hearing. These errors occur when the sentencing court fails to put on the record whether a yet-to-be-imposed state sentence is to run concurrently or consecutively to the instant federal sentence. Where the district court is silent regarding an anticipated but not-yet-imposed state sentence, the BOP presumes the sentences run consecutively, regardless of the explicit intent and order of the state judge in the later sentencing. . . . This presumption of consecutive sentences seems strange, given that the current version of the United States Sentencing Guidelines § 5G1.3 provides that, for the same relevant conduct, "the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment." But, as these guideline statements are no longer binding, the BOP is at liberty to presume the opposite and compute the sentence as consecutive.

Max Abrahamson, Note, *Silent Sentences: The Procedural Tragedy of the Bureau of Prisons' Sentence Computation Policy*, 58 Ga L. Rev. 341, 347-48 (2023) (footnotes omitted). This outcome is incongruous with the rationale of *Setser* which found that concurrent versus consecutive sentencing was subject to judicial discretion rather than BOP authority.

Like Mr. Lebeau, many defendants face criminal charges in state and federal court arising out of the same incident. The Court should act to resolve the division of authority among the courts of appeals and to ensure that defendants do not face dramatically different sentences because circuits have inconsistent definitions of whether a state term of imprisonment is "anticipated" under § 5G1.3(c).

II. This case is an ideal vehicle for the question presented.

This case squarely presents the issue of whether a pending state charge arising out of the same incident as the federal case is an "anticipated" state sentence within the context of § 5G1.3(c). The Eighth Circuit's finding that a state term of imprisonment was not plainly "anticipated" negatively impacted Mr. Lebeau. Specifically, Mr. Lebeau is serving approximately one month longer in prison because he did not receive the intended benefit of USSG § 5G1.3(c). Appellant's Brief at 20, *United States v. Lebeau*, No. 22-2604. Had Mr. Lebeau been sentenced under the same circumstances in another circuit, he may have received more favorable consideration under § 5G1.3(c). This case is an ideal vehicle for the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 22nd day of December, 2023.

Respectfully submitted,

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