

No. 17-6556

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IN THE SUPREME COURT OF THE UNITED STATES

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AVNIEL AWAN ANTHONY, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES

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1. Petitioner contends (Pet. 6-9) that the court of appeals erred in exercising its discretion under the fourth prong of the plain-error standard to decline to address an alleged error in calculating his advisory Sentencing Guidelines range. The question that petitioner presents implicates the issue currently before this Court in Rosales-Mireles v. United States, cert. granted, No. 16-9493 (oral argument scheduled for Feb. 21, 2018), in which this Court will address the application of the fourth prong of the plain-error standard to Guidelines miscalculations. Because the proper disposition of the petition for a writ of certiorari may be affected by the Court's resolution of Rosales-

Mireles, the petition should be held pending the decision in that case, and then disposed of as appropriate in light of that decision.

2. Petitioner also argues (Pet. 10-13) that the court of appeals erred by rejecting his due process claim based on an alleged discrepancy between the oral pronouncement of his sentence and the written judgment. Specifically, petitioner asserts (Pet. 12-13) that his due process rights were violated when the written judgment in his case clarified that his federal sentence would run consecutive to his previously imposed state sentences on unrelated charges. The court correctly rejected that claim and it does not warrant further review.

Petitioner observes (Pet. 10-11) that when a written judgment conflicts with an orally pronounced sentence, the oral pronouncement controls. See, e.g., United States v. Daddino, 5 F.3d 262, 266 (7th Cir. 1993) (per curiam) (collecting cases); see id. at 266 n.5 ("This rule is recognized in nearly every circuit."). Petitioner acknowledges (Pet. 11), however, that when a written judgment merely clarifies an ambiguity in the oral pronouncement, the written judgment may be enforced. See Daddino, 5 F.3d at 266 & n.6 (collecting cases). In petitioner's case, the oral pronouncement did not indicate whether petitioner's federal sentence would be served concurrent with or consecutive to his state sentences. 10/3/16 Sent. Tr. 9-11. The Statement of Reasons, incorporated into the written judgment, clarified the

ambiguity by indicating that the federal sentence should be served consecutive to his state sentences. Pet. App. A3. The court of appeals thus correctly enforced the written judgment by its terms.

Petitioner contends that, in so doing, the court of appeals' decision conflicts with the Tenth Circuit's decision in United States v. Earley, 816 F.2d 1428 (1987) (en banc). But, as petitioner acknowledges, the Tenth Circuit's decision was predicated on a presumption of concurrent service that Congress has since reversed. Compare id. at 1431 ("The federal courts have adopted a presumption that federal sentences imposed at different times run concurrently, absent an express statement to the contrary."), with 18 U.S.C. 3584(a) ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."). Further review of the second question presented is therefore unwarranted.\*

Respectfully submitted.

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Solicitor General  
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JANUARY 2018

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\* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.