No. 08-1428

IN THE

Supreme Court of the United States

JOHN BURKEY,

Petitioner,

v.

HELEN J. MARBERRY,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In *Johnson v. United States*, this Court concluded that "[t]here can be no doubt that equitable considerations of great weight exist when an individual [who] is incarcerated beyond the proper expiration of his prison term" seeks a reduction in his supervised release term. 529 U.S. 53, 60 (2000). On that basis, the Second, Ninth, and Eleventh Circuits hold that a prisoner's challenge to his continued detention is not mooted by his release when the judgment he seeks would establish that the government imprisoned him for too long. Those courts recognize that, under *Johnson*, a favorable judgment would, as a matter of law, support a reduction in his term of supervised release. The Third Circuit reached the opposite conclusion, squarely acknowledging the circuit split. The upshot is that individuals like petitioner who happen to be incarcerated in the Second, Ninth, or Eleventh Circuit stand a dramatically better chance of receiving a supervised release reduction than individuals incarcerated in the Third Circuit. This disparity is both untenable and inequitable.

The government does not dispute the importance of the question presented or seriously challenge the widely acknowledged circuit split. Its assertion that this court should not resolve the conflict because circuits rejecting its view are wrong on the merits is not a serious reason to deny certiorari. Its further claim that this case presents a poor vehicle to decide the issue rests on a misstatement of the majority view in the circuits. Finally, the government's uncon-

vincing preview of its merits arguments provides no basis for denying review.

I. The government has no substantial response to the petition's showing that certiorari is warranted to resolve the acknowledged conflict between the ruling below and decisions of three other circuits. *See also Townes v. Jarvis*, 577 F.3d 543, 2009 WL 2525553, at *5 n.3 (4th Cir. 2009) (recently noting the circuit conflict).

The Third Circuit recognized a square conflict between its ruling and *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005) (*see* Pet. App. 12a-15a), which the Ninth Circuit has applied in an uninterrupted line of decisions (*see* Pet. 10 (collecting cases)). The government is unable to deny the conflict or to suggest that there is any prospect that the Ninth Circuit will reverse its position.

The government suggests that the Ninth Circuit has failed to "properly analyze[] the mootness issue in light of *Spencer* [*v. Kemna*, 523 U.S. 1 (1998)]." BIO 16. The assertion that there is no conflict because the Ninth Circuit's decision is wrong on the merits is a *non sequitur*, however.

Next, the government contends that review should be denied because petitioner supposedly does not support the Ninth Circuit's ruling. BIO 17. That is inaccurate: petitioner explicitly endorsed the Ninth Circuit's rule in both the petition (at 20, 22) and his briefing on appeal (Pet. C.A. Br. 23-24). The government's argument rests on a mischaracterization of *Mujahid* as holding that a case is never moot so long as there is a mere "possibility" that a ruling will later facilitate relief in another forum.

BIO 17. In fact, *Mujahid* recognized that *Spencer* requires a litigant to "have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." 413 F.3d at 994 (quoting *Spencer*, 523 U.S. at 7). It then concluded that the prospect that a defendant will receive a shortened term of supervised release satisfies the redressability standard established in *Spencer*. *See id.* at 994-95; Pet. 9.

There is an equally clear conflict between the ruling below and the Eleventh Circuit. As the government notes, *Dawson v. Scott*, 50 F.3d 884 (11th Cir. 1995), predated this Court's decision in *Johnson*, BIO 17-18, but the government has no persuasive answer to the fact that the Eleventh Circuit subsequently adhered to its rule in the wake of *Johnson* in *Mitchell v. Middlebrooks*, 287 Fed. Appx. 772 (11th Cir. 2008). The government acknowledges that *Mitchell* found "that the reasoning of *Dawson* is not inconsistent with *Johnson*," but complains that *Mitchell* did not specifically state that "*Dawson*'s standard for determining collateral consequences comports with *Spencer*." BIO 18. This is literary criticism; the Eleventh Circuit squarely considered and resolved the question presented.

In any event, *Mitchell* necessarily rejected the government's argument. The government's precise contention in that case was that under *Spencer* the defendant's "petition became moot upon his release because he could not demonstrate some 'collateral consequence' . . . 'likely to be redressed by a favorable judicial decision,'" given that *Johnson* supposedly established that "[a] delayed commencement of supervised release . . . cannot be redressed by a

favorable judicial decision." U.S. C.A. Br. 6-7, *Mitchell v. Middlebrooks*, 287 Fed. Appx. 772 (11th Cir. 2008) (No. 07-15047) (quoting *Spencer*, 523 U.S. at 7). The government candidly acknowledged that its position conflicted with the precedent of the Fifth and Ninth Circuits. *Id.* at 7. The Eleventh Circuit obviously rejected the government's position when it adhered to its prior rule. *Accord Nash v. Middlebrooks*, No. 5:08cv39-RH/AK, 2009 WL 2255547, at *1 (N.D. Fla. July 24, 2009) (citing *Mitchell* as precedent for not dismissing as moot a habeas claim by a petitioner on supervised release).

Like the Third Circuit (*see* Pet. App. 14a), the government also recognizes a conflict with the Second Circuit's decision in *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006). But the government complains that *Levine* decided the issue "in the absence of any briefing on mootness." BIO 16. Regardless, Judge Calabresi's opinion for the Second Circuit carefully studied this Court's precedents and found that "a case or controversy . . . exist[ed]" because a district court could modify the petitioner's term of supervised release as a result of its ruling. *Levine*, 455 F.3d at 77.

Any hypothetical prospect that the Second Circuit would reverse course was later extinguished by *United States v. Blackburn*, 461 F.3d 259 (2d Cir. 2006), which the government reduces to a "Cf." citation. BIO 16. *Blackburn* did not, as the government would like, merely "rely[] on [the] record" to deem a case moot. *Id.* Instead, it expressly adhered to *Levine* and merely identified a "quite narrow" class of cases that become moot when it is incontrovertible based on the sentencing judge's

statements that the defendant's supervised release will not be lifted. 461 F.3d at 262 n.2. ("[T]he district court's clear expression of a design to keep as close an eye on [the defendant] as possible for as long as possible . . . . distinguish[es] the case from others in which the record does not provide such vivid insight into the sentencing court's concerns."). *Blackburn* explained that in the "typical" case in which there is no such direct evidence of the sentencing judge's intentions – such as petitioner Burkey's case – a *Johnson* compels the conclusion that "an appellate court could fairly deem it likely enough that . . . the [sentencing] district court would use its discretion on remand to modify the length of a term of supervised release." *Id.*[1]

Not surprisingly, district courts in the Second Circuit continue to apply *Levine* as controlling precedent. *See, e.g.*, *Aguire v. Killiam*, No. 07 Civ. 10392(LTS)(THK), 2009 WL 2876259, at *1 n.1 (S.D.N.Y. Sept. 8, 2009) (citing *Levine* for its conclusion that "the [p]etition is not moot as the sentence imposed . . . included a term of supervised release that has not expired"); *Castellar v. Fed. Bureau of Prisons*, No. 07-CV-3952(SLT)(CLP), 2009 WL 1515750, at *1 (E.D.N.Y. May 29, 2009) (same).

The government also does not dispute that the precedents of the Fifth Circuit are internally divided

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[1] Even this narrow exception was controversial, drawing a dissent from then-Judge Sotomayor, who would have adhered to the view of "[e]very federal court of appeals that has considered the issue." *Blackburn*, 461 F.3d at 268 n.4 (Sotomayor, J., dissenting).

(*see* Pet. 12-13), but states that "any such conflict would not warrant this Court's review" (BIO 18). In support, the government cites *Wisiniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam), which declined to resolve a division exclusively *within* the Fifth Circuit. This is of course a very different case. The government acknowledges a conflict between the ruling below and decisions of the Second, Ninth, and Eleventh Circuits, with the consequence that identically situated defendants receive significantly disparate treatment when they move to reduce their terms of supervised release. The fact that conflicting decisions also control indistinguishable cases within the Fifth Circuit further illustrates that the law is hopelessly confused on this issue.

Finally, the government does not dispute that granting certiorari would help to resolve the related conflict over whether a claim that the defendant was improperly denied transfer to community confinement (as opposed to imprisoned beyond his correct term) is moot upon the defendant's release from prison. *See* Pet. 11 n.6 (describing the three-to-one conflict).

II. This case presents an ideal vehicle for resolving the question presented. Pet. 14.

A. The government's assertion that the conflict is "fact-specific" rests on a misstatement of both the majority rule in the circuits and the minority position of the Third Circuit. The Ninth and Eleventh Circuits hold that an appeal in this posture is *not* moot as a matter of law, following *Johnson*'s suggestion that a sentencing judge would likely revisit a supervised release term; they do not undertake a case-by-case analysis of the merits of the individual's

claim to supervised release reduction. *See Mitchell*, 287 Fed. Appx. at 775; *Mujahid*, 413 F.3d at 994-95. The Second Circuit considers the facts only when there is clear evidence that the sentencing judge had already determined to maintain the full period of supervised release. *See supra* at 4-5.

In any event, the "facts" demonstrate that petitioner is an ideal candidate for supervised release reduction. *See* Pet. 23. Most important, the magistrate judge's ruling proves that petitioner's underlying claims of excessive incarceration are meritorious. Pet. 3-4. Thus, if the government had acted lawfully, petitioner's supervised release term would have ended significantly earlier.

The government nonetheless argues that petitioner will not receive a reduced term of supervised release because he was merely illegally "deni[ed] early release" from prison, as opposed to wrongfully convicted or sentenced in the first instance. BIO 18. But there is no relevant equitable difference between one defendant who is improperly sentenced to an extra year of imprisonment and another who is improperly denied release for a year. The bottom line in both cases is that the government kept petitioner in prison for significantly longer than was lawful.

Finally, the government asserts that petitioner "previously violated the terms of his supervised release." BIO 18. That is true, but the legal system accounted for that fact by returning him to prison. Since then, petitioner completed a rehabilitation program and has been in perfect compliance with his terms of supervised release. As the magistrate judge

concluded, federal law reflects a judgment that petitioner was at that point entitled to be released.

B. The government also argues that the habeas court could not have "directed the Bureau to grant petitioner an early release under Section 3621(e)(2)(B)," but instead had only the power to "order the Bureau to reconsider its early-release decision without considering" the invalidly promulgated Program Statement at issue here. BIO 12. This argument lacks merit for four independent reasons.

First, it has been waived: the government did not make this claim in the Third Circuit.

Second, it has no consequence in the context of the case in its present posture: even the government agrees that petitioner could secure a judgment that the Bureau of Prisons' decision was improper. BIO 9.

Third, the BOP has no reason to continue to hold petitioner and no mechanism for reconsidering its decision. The premise of the government's argument is thus that the BOP would have some *other* reason to continue to hold petitioner, but the government does not contend that one exists, and petitioner is aware of none. To the contrary, the BOP's initial and amended regulations establish categorical rules regarding early release eligibility with no mechanism for reconsideration. *See Lopez v. Davis*, 531 U.S. 230, 243-44 (2001) (upholding the BOP's categorical approach as necessary to avoid "favoritism, disunity, and inconsistency").

Fourth, the government significantly understates the power of habeas courts, which have plenary jurisdiction to grant relief "as law and justice

require." 28 U.S.C. § 2243; *see Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (habeas is the traditionally accepted "'specific instrument to obtain release from [unlawful] confinement'" (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973))). The cases the government cites, by contrast, involve immigration law and do not arise under the habeas statute. *See Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam); *INS v. Ventura*, 537 U.S. 12 (2002). Moreover, those cases rest on the principle that "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *Ventura*, 537 U.S. at 16. The habeas statute, by contrast, places the determination of whether an individual should be released from incarceration in the hands of reviewing courts – not administrative agencies.

III. The government's unpersuasive merits arguments provide no basis for denying review.

A. The government's primary argument is that petitioner's injury is not "'likely to be redressed by a favorable judicial decision'" because a ruling in his favor is unlikely to persuade the sentencing court to reduce his term of supervised release. BIO 9 (quoting *Spencer*, 523 U.S. at 7). But that argument depends on significantly misstating this Court's decision in *Johnson* as holding that "the 'equitable considerations' were of 'great weight' because Johnson was incarcerated for a conviction that was subsequently vacated." BIO 11-12. *Johnson* actually concludes that "equitable considerations of great weight exist when an individual is incarcerated *beyond the proper expiration of his prison term*." *Johnson*, 529 U.S. at

60 (emphasis added). That of course perfectly describes petitioner's case.

The government's argument also substantially overstates the degree of certainty of relief required in order to preclude mootness. A case is moot only if it is "impossible" for the court to grant "effectual relief." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). Here, a habeas order conclusively establishing a fact that the sentencing court must give "great weight" makes relief a realistic possibility.[2]

The implausibility of the government's position is apparent from its contention that petitioner should instead be proceeding before a different Article III court. The government proposes that petitioner withdraw this appeal and institute proceedings under Section 3583(e) in the sentencing court, where he would relitigate the *identical* substantive claim regarding his illegal confinement. The United States thus concedes that petitioner is entitled to pursue his claim before an Article III court – *i.e.*, that the federal

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[2] A further example is that, in agency appeals, the petitioners regularly seek remand for the agency to exercise its discretion based on appropriate legal decisions. In such cases, there is every prospect that on remand the agency will adhere to its ruling. But that possibility does not render such cases moot. *See, e.g.*, *King Broad. Co. v. FCC*, 860 F.2d 465, 471 (D.C. Cir. 1988) (remanding case to FCC for reconsideration of statutory question without "urg[ing] the FCC to exercise its discretion . . . in any particular way").

courts have the power (indeed, the obligation) to resolve his claim.[3]

The government's view of mootness is also inconsistent with established law. For example, defendants are often released while *direct* appeals of their sentences of incarceration are pending. The circuits uniformly agree – and the government does not dispute (BIO 14) – that such an appeal is not moot so long as the lower court retains the power to modify the supervised release term on remand. Pet. 20-21 & n.10; *e.g.*, *United States v. Cruzado-Laureano*, 527 F.3d 231, 234 n.1 (1st Cir. 2008). Contrary to the government's assertion (BIO 14), those cases are indistinguishable from petitioner's. In both contexts, the defendant challenges the same injury (excessive incarceration), seeks the same relief (a reduction in supervised release), and requests that relief in the same forum (the sentencing court). The only difference is that in the direct appeal cases, the appellate court can remand the case directly to the

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[3] The government specifically suggests, after taking three extensions of time, that petitioner abandon this appeal and "file the motion [before the sentencing court] while he still has time before his three-year term of supervised release expires." BIO 19. There is no prospect that petitioner's term of supervised release will end during the proceedings in this Court, and the government's advice seems less than entirely benevolent. Its proposal opens the door for it to argue before the sentencing court that, contrary to the magistrate judge's ruling in this case, the BOP's program statement was lawful and petitioner was not improperly imprisoned. Petitioner previously offered to *dismiss* this appeal if the government would merely stipulate that petitioner had been improperly denied release. C.A. Oral Arg. at 04:25. The government refused the stipulation. *Id.* at 15:51.

sentencing court, whereas here petitioner must file a separate Section 3583(e) petition in the sentencing court. But redressability cannot turn solely on the "fortuitous occurrence" of the particular venue in which that petition must be filed. *Mujahid*, 413 F.3d at 995.

B. The government also lacks any persuasive answer to the serious concern that its position permits the BOP to shield its "patently wrong" actions from judicial review. *See* Pet. 23-24. The government notes that the BOP fixed the invalid Program Statement. But that ignores the other contexts in which the BOP does not change its policy (*see* Pet. 23) and in any event misses petitioner's point: the BOP is evading a judgment applicable to prisoners it failed to release before it changed the Program Statement.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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