No. 17-8746

IN THE

Supreme Court of the United States

CARLOS ANDRE WILSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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SEPTEMBER 6TH, 2018

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1. In its brief in opposition, the government acknowledges that "a circuit disagreement exists on the viability of a claim like petitioner's." BIO 8. The government nonetheless argues that this admitted circuit conflict "may soon resolve itself without the need for this Court's intervention," because the government filed a petition for rehearing en banc in *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018). BIO 8. But that argument has been proven wrong: the Seventh Circuit has since denied the government's petition (without noted dissent or even a poll). Case No. 17-2282, DE 44 (7th Cir. Aug. 31, 2018). Accordingly, the circuit conflict is now intractable. Geography alone will determine whether federal prisoners may obtain relief from their career-offender sentences imposed before *United States v. Booker*, 543 U.S. 220 (2005). Only this Court can resolve that untenable disparity.

Seeking to shield that conflict from review, the government argues that the questions presented are of "limited importance" because they affect only a "closed-set of cases." *Gipson* BIO 16. But, as Petitioner explained, there are literally *thousands* of pre-*Booker* career offenders who remain incarcerated, many of whom are in the Eleventh Circuit. Pet. 21–22. The government does not dispute the numerical estimates supplied in petition. And the multiple pending petitions presenting related questions confirm that those questions do indeed affect numerous federal prisoners. The government fails to explain why this Court's review is not warranted to resolve a circuit conflict that will determine whether numerous federal prisoners are serving illegal sentences.

2. Clearly the mandatory Guidelines questions must be resolved, and there are numerous pending petitions in which the Court may do so. *See* BIO 7 n.1. The government is correct, however, that this is not the case. That is so because, after filing the petition, Petitioner was released from custody, thus presenting a threshold jurisdictional question about whether there is a live case or controversy under Article III. *See United States v. Sanchez-Gomez*, 584 U.S. __, 138 S. Ct. 1532, 1537 (2018). But it does not follow that the Court should deny the petition. To the contrary: in the event that the Court grants review in another case to decide the mandatory Guidelines issues, the Court should also grant review in this case in order to decide the mootness question. *See Sibron v. New York*, 392 U.S. 40, 50 n.8 (1968) (deciding mootness question—even though it first arose at oral argument and the benefitting party urged the Court to "ignore the problem"—because it "goes to the very existence of a controversy for us to adjudicate").

In *United States v. Johnson*, 529 U.S. 53 (2000), the Court recognized "that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term," and "[t]he statutory structure provides a means to address these concerns in large part." *Id.* at 60. Specifically, "[t]he trial court, as it sees fit, may modify an individual's condition of supervised release" under 18 U.S.C. § 3583(e)(2). *Id.* And, after serving one year of supervised release, the defendant may seek early termination of supervised release under 18 U.S.C. § 3583(e)(1). *Id.* In light of the statement in *Johnson* and the prospect of such relief, the question arose whether a prisoner's release from custody moots a

pending challenge to the length of imprisonment where the prisoner remains on supervised release. As the government acknowledges, the courts of appeals are divided on that question. BIO 10 n.4.

a. The Second, Fifth, Seventh, Ninth, and D.C. Circuits have "held that where the district court has the statutory discretion to modify a defendant's term of supervised release following a successful sentencing challenge, the possibility that the district court may exercise such discretion following this court's decision is sufficient to prevent an appeal from becoming moot." *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007) (citing *Mujahid v. Daniels*, 413 F.3d 991, 994–95 (9th Cir. 2005)); *accord In re Sealed Case*, 809 F.3d 672, 674–75 (D.C. Cir. 2016) ("follow[ing] the approach set out in *United States v. Epps*, 707 F.3d 337 (D.C. Cir. 2013) . . . that the reduction of [a] term of imprisonment would enhance his prospect for securing a similar reduction in his term of supervised release") (quotation and alternations omitted)); *United States v. Kleiner*, 765 F.3d 155, 156 n.1 (2d Cir. 2014) ("Although Kleiner was released from prison . . . , his appeal is not moot because a favorable appellate decision might prompt the district court to reduce Kleiner's three-year term of supervised release.") (citing *Levine v. Apker*, 455 F.3d 71, 77 (2d Cir. 2006)); *Johnson v. Pettiford*, 442 F.3d 917, 918 & n.7 (5th Cir. 2006) ("the possibility that the district court may alter Johnson's period of supervised release pursuant to 18 U.S.C. § 3583(e)(2), if it determines that he has served excess prison time, prevents Johnson's petition from being moot"); *Pope v. Perdue*, 889 F.3d 410, 414 (7th Cir. 2018) ("It is true that a finding that Pope spent too much time in

prison would not automatically entitle him to less supervised release. Nevertheless, such a finding would carry great weight in a § 3583(e) motion to reduce Pope's term. This is enough.") (quotation omitted).

b. By contrast, the Third and Tenth Circuits have held that "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release under 18 U.S.C. § 3583(e) . . . is so speculative" that any judicial decision about the length of imprisonment "would be merely advisory and not in keeping with Article III's restriction of power." *Burkey v. Marberry*, 556 F.3d 142, 149 (3d Cir. 2009); *accord Rhodes v. Judiscak*, 676 F.3d 931, 933–35 (10th Cir. 2012) ("As Rhodes concedes, the best this court could do for him would be to declare that he spent longer in prison than he should have. It is merely speculative, however, that such a declaration could redress Rhodes' injury. Rhodes' ability to obtain modification under the supervised release statute remains wholly within the discretion of the sentencing court. In making this discretionary determination, a sentencing court considers a variety of factors under § 3553(a).").

c. In so holding, those two circuits have expressly disagreed with the majority view. *See Burkey*, 556 F.3d at 149–50 ("While our sister courts of appeals have found a live case or controversy where a 'possibility' exists that a court would reduce a term of supervised release in situations similar to this, we are unwilling to do so.") (internal citations omitted); *Rhodes*, 676 F.3d at 934 (embracing the Third Circuit's *Burkey* standard over that of other circuits). And several courts of appeals have recognized that the circuits are divided on this question. *See, e.g.*, *Rhodes*, 676

F.3d at 934 ("our sister circuits are split on whether such an argument defeats mootness"); *United States v. Brown*, 631 F.3d 573, 580–81 & n.6 (1st Cir. 2011) ("there is a conflict"); *Townes v. Jarvis*, 577 F.3d 543, 549 n.3 (4th Cir. 2009) ("The dissent relies on one circuit's holding that *Johnson* renders such attacks on supervised release moot. Not only does *Burkey* constitute out-of-circuit precedent interpreting the very different federal supervised release scheme, but it also represents a minority interpretation of *Johnson*. Two other circuits have held *Johnson* does not render such claims moot.") (internal citation omitted).

3. As the cases cited above reflect, the mootness question has recurred frequently since this Court's 2000 *Johnson* decision. Indeed, it is not uncommon for federal prisoners to complete their term of imprisonment before courts can resolve their legal challenge to that term of imprisonment. That happens in a variety contexts. Some defendants receive very short sentences that are completed before their direct appeal can be resolved. Or, as this case demonstrates, some federal prisoners will receive long sentences that become subject to collateral challenge only at the end of the term. Regardless of the context, Article III's case-or-controversy requirement must be uniform. Geography alone should not determine whether a federal court rules on a sentencing challenge or dismisses it for lack of jurisdiction.

Moreover, the mootness question here implicates important interests on top of Article III's case-or-controversy requirement. Federal prisoners who have served more time in prison than otherwise permitted by law have suffered a grievous deprivation of liberty. As this Court has recently explained: "To a prisoner, this

prospect of additional time behind bars is not some theoretical or mathematical concept. Any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles*, 585 U.S. __, 138 S. Ct. 1897, 1907 (2018) (internal citations and alterations omitted). Even the "risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1908. Yet the mootness question here arises only after the defendant has already completed a term of imprisonment that he claims is unlawful. The strict mootness standard adopted by the Third and Tenth Circuits, and advocated by the government here, would preclude federal courts from acknowledging an erroneous deprivation of liberty that would facilitate prospective relief from the additional, ongoing deprivation imposed by supervised release. Again, "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. As a result, there is every reason to believe that, in the typical case, courts will exercise their discretion to modify the defendant's term of supervised release to mitigate the damage already done. That strong likelihood of relief from that continuing deprivation of liberty is sufficient to satisfy Article III.

4. This case provides a clean vehicle to resolve the mootness question. In 2001, Petitioner received a sentence of 235 months' imprisonment, the high end of the then-mandatory guideline range. Were Petitioner to prevail on his 28 U.S.C. § 2255 motion challenging his career-offender enhancement, his guideline range

would be no more than 70–87 months' imprisonment. *See* Pet. 6–7 & n.3. Because there would be no legal basis (or practical reason) for the court to impose a 12-year upward variance back to the original 235-month sentence, prevailing on the § 2255 motion would establish that Petitioner over-served his sentence. And because he is still in the first year of his five-year term of supervised release, he could (and would) then use that declaration to seek a discretionary reduction or early-termination of his supervised release under § 3583(e). Thus, the facts of this case squarely present the mootness question on which the circuits have long divided.

Moreover, that question has arisen frequently in the specific context of challenges to the mandatory Guidelines. It is not uncommon for federal prisoners' career-offender sentences to expire at some point during their § 2255 proceeding, at which point they commence their period of supervised release. *See, e.g.*, BIO 8 (describing this as a common "obstacle[ ]"); BIO 9–11, *Greer v. United States* (U.S. 17-8775) (distributed for conference of Sept. 24, 2018); BIO 16–18, *Gates v. United States* (U.S. No. 17-6262) (cert. denied May 21, 2018). Given that the mootness question frequently arises in this specific context, it would make good sense to grant review to address that question here if the Court also grants review to address the mandatory Guidelines questions in another case. Were the Court to conclude that this case became moot in light of Petitioner's release from custody, it would simply dismiss the case for lack of jurisdiction. On the other hand, were the Court to conclude that this case is not moot, it would simply dispose of the case in light of its ruling in the companion case addressing the mandatory Guidelines questions.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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