No. 17-8775

IN THE
SUPREME COURT OF THE UNITED STATES

JASON GREER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Respectfully submitted,

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REPLY ARGUMENT

This case is an appropriate vehicle for resolving the two questions presented, which the Government admits have divided the circuits. In the alternative, this Court could either grant, vacate, and remand in light of *Sessions v. Dimaya*, or hold this case pending its resolution of one of the numerous other petitions presenting the same questions.

I. The Circuits Are Divided on the Questions Presented.

The Government admits that the questions presented have split the circuits. Regarding Question 1, the Seventh Circuit has held that the mandatory guidelines' residual clause is unconstitutionally vague under *Johnson*, *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), while the Eleventh Circuit has held that it is not, *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016). As to Question 2, the Seventh Circuit held in *Cross* that 28 U.S.C. § 2255(f)(3) authorizes otherwise untimely *Johnson* challenges to the mandatory guidelines' residual clause, while the Third, Fourth, Sixth, and Tenth Circuit have held that § 2255(f)(3) does not apply, *United States v. Green*, ___ F.3d ___, 2018 WL 3717064 (3d Cir. Aug. 6, 2018), *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017). *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017), *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018). Within circuits that have not yet decided the issues, district courts have reached conflicting conclusions. *Compare, e.g.*, *United States v. Gray*, No. 2:95-CR-00324, 2018 WL 3058868 (D. Nev. June 20, 2018) (holding that § 2255(f)(3) applies), *with Caldaron-Bruno v. United States*, No.

3:00-CR-266-K-23, 2018 WL 3046251 (N.D. Tex. June 20, 2018) (holding that § 2255(f)(3) does not apply).

Because numerous prisoners remain incarcerated under the mandatory career offender guideline, *see* Pet. at 8–9, and the one-year deadline for filing a § 2255 motion in the wake of *Johnson* expired on June 26, 2016, more courts of appeals are likely to decide the questions presented over the next several months. In light of the Seventh Circuit's persuasive reasoning in *Cross*, the circuit split is likely to deepen. *Cf. Moore v. United States*, 871 F.3d 72, 82–83 (1st Cir. 2017) (holding that a § 2255 movant challenging the mandatory guidelines' residual clause made a *prima facie* showing that § 2255(f)(3) applies to such claims).

Based on the foregoing, the Government's assertion that the circuit split is "shallow" and does not warrant this Court's attention cannot be credited. The validity of hundreds, if not thousands, of lengthy prison sentences depends on the answer to the questions presented. Without this Court's intervention, prisoners will get relief from, or be forced to serve out, these sentences arbitrarily—based on nothing more than the lower courts' disagreement over a pure question of federal law.

In light of the Seventh Circuit's decision in *Cross*, Mr. Greer's certiorari petition is distinguishable from similar petitions that this Court has denied. BIO at 7–8. At the time that this Court denied certiorari in those cases, there was no circuit split. Now, there is a split.

II. This Case Is an Appropriate Vehicle for Resolving the Questions Presented.

The Government cites a number of reasons why it believes this case provides a poor vehicle for considering the question presented. On closer inspection, however, these supposed vehicle problems turn out to be illusory.

A. There Is No Mootness Problem.

First, this case is not moot. Mr. Greer is challenging his sentence, and the term of supervised release that he is currently serving is part of that sentence. If Mr. Greer's § 2255 motion is granted, he will receive a resentencing *de novo*. *See United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir. 1991). The district court will have to decide anew how much supervised release to impose, as well as what conditions to impose. *See generally Pepper v. United States*, 562 U.S. 476, 505–08 (2011) (discussing *de novo* resentencing). And, in deciding the length and conditions of Mr. Greer's supervised release, the district court would be entitled to consider as a mitigating factor that Mr. Greer was required to serve too much time in prison. *See* 18 U.S.C. § 3661; *Pepper*, 562 U.S. at 490–91. Because Mr. Greer might receive a shorter term of supervised release, or less onerous conditions, his appeal is not moot.[1]

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[1] *See, e.g.*, *In re Sealed Case*, 809 F.3d 672, 675 (D.C. Cir. 2016); *United States v. Molak*, 276 F.3d 45, 49 (1st Cir. 2002); *Levine v. Apker*, 455 F.3d 71, 77 (2d Cir. 2006); *United States v. Larez-Meras*, 452 F.3d 352, 355 (5th Cir. 2006); *United States v. Albaani*, 863 F.3d 496, 502–03 (6th Cir. 2017); *United States v. Rash*, 840 F.3d 462, 464 (7th Cir. 2016); *United States v. Strong*, 489 F.3d 1055, 1060 (9th Cir. 2007); *United States v. Montgomery*, 550 F.3d 1229, 1331 n.1 (10th Cir. 2008); *United States v. Duckworth*, 618 F. App'x 631, 632 n.1 (11th Cir. 2015) (unpublished).

It makes no difference that the *reason* Mr. Greer would receive a resentencing is unrelated to the sentencing court's calculation of the supervised release term; the district court would still have to revisit the supervised release issue. *See, e.g.*, *United States v. West*, 646 F.3d 745, 748–51 (10th Cir. 2011) (district court erred by failing to revisit amount of restitution after court of appeals vacated and remanded for resentencing based on an issue entirely unrelated to restitution). Just as a defendant may be acquitted after a retrial ordered on grounds unrelated to his factual guilt, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 100 (1986), Mr. Greer may have his supervised release reduced after a resentencing ordered on grounds unrelated to supervised release.

The Government's contrary position stems from the mistaken premise that, were Mr. Greer to prevail, he would have to file a separate motion to shorten his term of supervised release pursuant to 18 U.S.C. § 3583(e)(1). This is wrong. Were Mr. Greer to prevail, he would begin resentencing with no term of supervised release at all. His sentence, including his term of supervised release, would have been vacated—"nullif[ied] or cancel[led]; ma[d]e void; invalidate[d]." *Vacate*, Black's Law Dictionary (10th ed. 2014). Mr. Greer would only receive the same terms and conditions of supervised release if, after conducting a *de novo* resentencing, the district court decided to reimpose an identical sentence as to supervised release. The Government cannot show that it inevitably would do so. Indeed, it would seem highly dubious to suppose

that "the history and characteristics of [Mr. Greer]," 18 U.S.C. § 3553(a), are so unchanged in the sixteen years since his original sentencing that no recalibration, in any direction, of the length or conditions of supervision is warranted.

Relatedly, the Government misreads *Rhodes v. Judiscak*, 676 F.3d 931 (10th Cir. 2012), and *Burkey v. Marberry*, 556 F.3d 142 (3d Cir. 2009), as supporting its mootness argument. Those cases did not involve a challenge to a sentence. Rather, they involved only challenges to how the Bureau of Prisons had *implemented* the defendants' sentences. Because the relief granted on those claims would *not* include a resentencing at which the district court would revisit the term of supervised release, the defendants in those cases *would* have to file a separate motion to shorten the term of supervised release pursuant to § 3583(e)(1). The connection between the Bureau of Prison's erroneous implementation of a sentence and a separate § 3583(e)(1) motion is tenuous, so the defendant's suits in *Rhodes* and *Burkey* were mooted by their release from prison. But because Mr. Greer's relief *would* include a *de novo* resentencing, *Rhodes* and *Burkey* do not apply here.

The Government cites no authority for the proposition that a case like this is moot, and there is no reason to suppose that the Government's spurious mootness argument would prevent the Court from deciding the questions presented.

B. If Certiorari Is Granted, the Court Would Not Need to Consider the Government's Other Arguments.

The Court would not need to address the Government's remaining arguments, which are not jurisdictional. The Tenth Circuit decided Mr. Greer's case solely and exclusively on Question 2—based on its view, contrary to the Seventh Circuit, that

§ 2255(f)(3) does not apply to *Johnson* challenges to the mandatory guidelines' residual clause. Whether § 2255(f)(3) applies is a threshold question. *See Day v. McDonough*, 547 U.S. 198, 205 (2006). The Court could answer that question and leave for the Tenth Circuit to address on remand the Government's other, non-jurisdictional arguments. *See Zivotofsky v. Clinton*, 566 U.S. 189, 201–02 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below. In particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.") (internal citation and quotation marks omitted).[2]

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[2] At the risk of indulging the Government's effort to overcomplicate this case, Mr. Greer would, on remand, answer the Government's non-jurisdictional contentions as follows:

> (1) Mr. Greer's post-conviction motion "contain[s] . . . a new rule of constitutional law, made retroactive . . . by the Supreme Court," under 28 U.S.C. § 2255(h)(2), because it asserts a violation of *Johnson*, which this Court made retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016). *See* Greer Supplemental Reply Br. at 5–6, *United States v. Greer*, No. 16-1282 (10th Cir. June 2, 2017).
>
> (2) Section 4B1.2(a)(1) (2002) doesn't capture Mr. Greer's Colorado assault-on-a-peace-officer conviction because that offense "does not require the infliction of either injury or pain," *People v. Schoondermark*, 699 P.2d 411, 414 (Colo. 1985) (en banc), which distinguishes assault on a peace officer from the entirely different assault offense addressed by the Tenth Circuit in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017)—an offense that fell under § 4B1.2(a)(1) precisely because it did require the infliction of injury. *See* Greer Opening Br. at 16–17, *United States v. Greer*, No. 16-1282 (10th Cir. Sept. 12, 2016).

III. Recent Developments Support Mr. Greer's Alternative Contention That a GVR in Light of *Dimaya* Would Be an Appropriate Disposition.

As an alternative to plenary review, Mr. Greer's Petition suggested at p. 9 that this Court could grant, vacate, and remand (GVR) for further proceedings in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). As argued in Mr. Greer's Petition at p. 7, the Tenth Circuit's decision below is inconsistent with *Dimaya*. Recent developments in the lower courts provide strong support for this argument.

Most significantly, the Tenth Circuit has granted rehearing in a different case on the question of whether its ruling in Mr. Greer's case survives *Dimaya*. Before this Court decided *Dimaya*, the Tenth Circuit relied upon *Greer* to summarily affirm the denial of relief in *United States v. Ward*, 718 F. App'x 757 (10th Cir. Apr. 11, 2018), another mandatory guidelines *Johnson* case. Mr. Ward petitioned for rehearing, citing *Dimaya* and the Seventh Circuit's decision in *Cross* as grounds for revisiting *Greer.* The Tenth Circuit granted panel rehearing, explaining that "[b]oth Supreme Court and circuit court decisions have issued" that may warrant a different outcome. *See United States v. Ward*, No. 17-3182 (10th Cir. Aug. 6, 2018). This, without more, warrants a GVR. *See Lawrence v. Charter*, 516 U.S. 163, 167–68 (1996).

But there is more. The Seventh Circuit's decision in *Cross* relied on *Dimaya*. *See Cross*, 892 F.3d at 299–304 (7th Cir. 2018). And a district court sitting within the Tenth Circuit recently opined that "*Greer* may have been called into question by the Supreme Court's subsequent decision in *Sessions v. Dimaya*." *Wiseman v. United States*, No. 96-CR-72, 2018 WL 3621022, *2 n.3 (D. N.M. July 27, 2018). (That court

ultimately did not have to reach whether *Greer* remained good law after *Dimaya* because it concluded that "the United States has waived any argument for untimeliness." *Id.*) In addition, two different district judges in Montana have explicitly held that *Greer* is inconsistent with *Dimaya*. *See United States v. Canfield*, ___ F. Supp. 3d ___, 2018 WL 3208501, *6 (D. Mont. June 28, 2018) (Watters, J.); *United States v. Meza*, No. 11-CR-133, 2018 WL 2048899, *5 (D. Mont. May 2, 2018) (Christensen, J). Finally, a district court in Kansas recently authorized on appeal[3] in a post-conviction case on the ground that "reasonable jurists would find it debatable whether *Dimaya* sufficiently undermines the Circuit's rationale in *Greer* . . . to warrant a retreat from the holding in th[at] case[] such that [the prisoner's] petition would be timely filed for purposes of § 2255(f)(3)." *United States v. Bronson*, No. 88-CR-20075, 2018 WL 2020765, *2 (D. Kan. May 1, 2018).

Taken together, these cases show that *Dimaya* is an "intervening development[]" that supports "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Charter*, 516 U.S. at 167–68. "[A] redetermination" of the § 2255(f)(3) issue "may determine the ultimate outcome of the litigation," *see supra*, at n. 2, so if this Court decides not to grant plenary review, a GVR may be appropriate. *Charter*, 516 U.S. at 167–68.

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[3] *See generally Slack v. McDaniel*, 529 U.S. 473 (2000) (explaining the standards for authorizing an appeal in a post-conviction case).

IV. Should the Court Conclude That Another Petition Presents a Superior Vehicle, It Should Hold This Case Pending Its Resolution of the Questions Presented.

For the reasons explained in Section II, *supra*, this case is an appropriate vehicle for resolving the questions presented. However, there are numerous other pending petitions raising similar issues. *See* BIO at 8 n.1. Should this Court decide that one of those petitions presents a superior vehicle, it should hold Mr. Greer's petition pending its ultimate resolution of the questions presented.

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