No. 20-

IN THE

Supreme Court of the United States

DAWN HERNDON,

Petitioner,

v.

JODY R. UPTON, WARDEN, FMC CARSWELL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A defendant in a federal criminal case receives a paradigmatic sentence -- a term of imprisonment, to be followed by a term of supervised release. While in prison, she files a petition for a writ of habeas corpus, alleging that the Bureau of Prisons miscalculated her prison-release date, and will therefore over-incarcerate her. Before the court adjudicates that case, however, she completes her term of imprisonment and commences her term of supervised release.

Is her habeas case moot, even though the sentencing court can terminate or reduce her term of supervised release, and the over-incarceration, established in the habeas case, would constitute an "equitable consideration[] of great weight[]" in the sentencing court? Johnson v. United States, 529 U.S. 53, 60 (2000).

LIST OF ALL PROCEEDINGS DIRECTLY RELATED TO THIS CASE

- Herndon v. Upton, No. 19-11156, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Jan. 13, 2021.

- Herndon v. Upton, No. 18-cv-120, U.S. District Court for the Northern District of Texas. Judgment entered Sept. 25, 2019.

- United States v. Herndon, No. 17-12373, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered Aug. 10, 2018.

- Herndon v. United States, No. 17-12597, U.S. Court of Appeals for the Eleventh Circuit. Order Denying Motion for Certificate of Appealability entered Sept. 20, 2017; Order Denying Motion for Reconsideration entered Nov. 3, 2017.

- Herndon v. United States, No. 17-cv-80501, U.S. District Court for the Southern District of Florida. Report and Recommendation entered May 1, 2017; Order Adopting Report and Recommendation entered May 24, 2017; Order Denying Motion for Reconsideration entered Jun. 21, 2017.

- United States v Herndon, No. 12-cr-80172, U.S. District Court for the Southern District of Florida. Judgment entered Mar. 25, 2013.

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STATUTES AND OTHER AUTHORITIES

Dawn Herndon respectfully submits this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 985 F.3d 443 (5th Cir. 2021); Appendix ("A")-1a. The order of the District Court for the Northern District of Texas is unreported; A-15a.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment on January 13, 2021. This petition is timely in that this Court, on March 19, 2020, ordered that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment[.]" This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2241 and 18 U.S.C. § 3583(e), which are set out in the Appendix at A-19a-30a.

STATEMENT OF THE CASE

Herndon was sentenced to 60 months in prison, to be followed by a three-year term of supervised release. The sentencing court ordered Herndon to surrender to a designated Bureau of Prisons ("BOP") facility one year later, and to spend the intervening year in home confinement, with electronic monitoring, so that she could

continue treatments for cancer. The court stated clearly that the sentence "does give credit for the time she's going to spend in home confinement."

Later, however, while in prison, Herndon learned that the BOP had calculated her term of imprisonment, and her release date, so as to deny her credit for the time that she served in home confinement, and to extend her term of imprisonment beyond the term imposed by the sentencing court. Herndon commenced this habeas corpus case in the district in which she was then confined, alleging over-incarceration.

More than 17 months later, however, with no decision by the district court, the BOP released Herndon, and she began serving her three-year term of supervised release. The court then dismissed Herndon's case as moot. The Fifth Circuit affirmed.

* * * *

Herndon pleaded guilty in the United States District Court for the Southern District of Florida (the "S.D. Fla.") to an Information charging her with five counts of bank fraud. Herndon thereafter learned that she had colon cancer. She underwent surgery, followed by eight months of chemotherapy.

On March 25, 2013, Herndon appeared in the district court for sentencing. The court imposed a sentence of 60 months on each count, the sentence on each to run concurrently, to be followed by a three-year term of supervised release. The court ordered Herndon to surrender to a designated BOP facility one year later,

and to spend the intervening year in home confinement, with electronic monitoring, so that she could continue her medical treatments. The court stated clearly that the sentence "does give credit for the time she's going to spend in home confinement."

Herndon then spent approximately two years in home confinement, following court-ordered extensions of the surrender date to allow continued medical treatments. On April 6, 2015, Herndon entered a BOP facility.

While in prison, Herndon learned that the BOP had calculated her term of imprisonment not from the date of her sentencing and home confinement, March 25, 2013, but from the date of her surrender to a BOP facility, April 6, 2015, in effect denying Herndon credit for the two-plus years that she served in home confinement, and extending her term of imprisonment beyond the term imposed by the sentencing court. Herndon, pro se, challenged that calculation in the sentencing court,[1] which held that the

1. Specifically, Herndon made a motion in the S.D. Fla., the sentencing court, to amend the Judgment of Conviction so as to reflect the oral pronouncement of sentence, which, in the words of the sentencing court, gave "credit for the time she's going to spend in home confinement." The court denied that motion. A-2a-3a. Herndon appealed but the Eleventh Circuit dismissed that appeal on the ground that Herndon, while a pro se litigant in prison, failed timely to file a notice of appeal. A-3a n.1.

Meanwhile, Herndon, still pro se, filed a motion in S.D. Fla., the sentencing court, under 28 U.S.C. § 2255. The court denied the motion, holding, among other things, that the issue of credit for time served in home confinement must be raised under 28 U.S.C. § 2241, in the district in which Herndon was in custody. A-3a.

The district court later denied reconsideration, stating, among other things, "I confirm that I reduced the period of imprisonment

issue of credit for time served in home confinement must be raised under 28 U.S.C. § 2241, in the district in which Herndon was in custody. A-3a.

Accordingly, Herndon, represented by counsel, commenced this habeas corpus case in the United States District Court for the Northern District of Texas, the district in which she was confined. Her petition invoked federal-question jurisdiction under 28 U.S.C. § 1331, and alleged that the BOP had denied credit for the time served in home confinement. More specifically, her petition alleged that she was confined past the release date mandated by her statutory good-time credits (December 2017), see 18 U.S.C. § 3624(b)(1) (providing for good-time credits), and that she would continue to be confined even after her

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from the guidelines range to a lesser amount based on the period of future house arrest." A-3a. That statement, however, has no issue-preclusive effect here because the district court and the Eleventh Circuit both denied a certificate of appealability. A-3a n.2. See Kircher v. Putnam Funds Trust, 547 U.S. 633, 647 (2006) (holding that "principles of collateral estoppel . . . strongly militat[e] against giving an [unreviewable judgment] preclusive effect") (brackets in original; internal quotation marks omitted); see generally Bravo-Fernandez v. United States, 137 S. Ct. 352, 358 (2016). Eleventh Circuit precedent, furthermore, had long rejected that sort of judicial statement, seeking "to conform[]" a sentence to the supposed "original intention of the trial judge[,]" pronounced in retrospect and "contrary to the meaning of the words used[]" when the judge actually imposed the sentence at issue. Chandler v. United States, 468 F.2d 834, 836 (5th Cir. 1970) (quoting United States v. Welty, 426 F.2d 615, 618 (3d Cir. 1970)), abrogated on other grounds by United States v. DiFrancesco, 449 U.S. 117 (1980); see Bonner v. City of Pritchard, 681 F.2d 1206, 1207 (11th Cir. 1981) (holding that Fifth Circuit decisions "shall be binding as precedent in the Eleventh Circuit[]").

five-year sentence expired (on March 24, 2018, five years from the date of her sentencing and home confinement), in violation of 18 U.S.C. § 3624(a) and the Due Process Clause of the Fifth Amendment to the Constitution.[2] A-3a-4a.

More than 17 months later, on July 19, 2019, with no adjudication by the district court, the BOP released Herndon and she began serving her three-year term of supervised release. A-4a. The district court then, sua sponte, dismissed Herndon's case as moot. A-15a. The Fifth Circuit later affirmed. A-1a.

REASONS FOR GRANTING THE PETITION

This case presents the following circumstances, which, as shown below, recur regularly in federal habeas corpus cases: A federal prisoner files a petition for a writ of habeas corpus, under 28 U.S.C. § 2241, alleging that the BOP miscalculated her prison-release date, and will therefore over-incarcerate her. Before the court adjudicates that case, however, the prisoner completes her term of imprisonment and commences her term of supervised release.

In those recurring circumstances, the following question recurs: Is the habeas case moot, even though the sentencing court can terminate or reduce the petitioner's

2. See, e.g., Francis v. Fiacco, 942 F.3d 126, 142 (2d Cir. 2019) ("[A]n inmate has a liberty interest in being released upon the expiration of his maximum term of imprisonment.") (internal quotation marks omitted); Douthit v. Jones, 619 F.2d 527, 532 (5th Cir. 1980) ("Detention of a prisoner . . . beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process.").

term of supervised release, and the over-incarceration, established in the habeas case, would constitute an "equitable consideration[] of great weight[]" in the sentencing court? Johnson v. United States, 529 U.S. 53, 60 (2000).

The Court, for three main reasons, should grant this Petition, and should hold that this case is not moot:

First, decisions of the Circuits on the question presented here stand deeply conflicted, as shown below. On one side, six Circuits answer the question in the negative; the case is not moot. On the other side, five Circuits answer the question in the affirmative; the case is moot. And in the middle, one Circuit -- the Fifth Circuit, in this very case -- holds that mootness depends on whether the BOP housed the petitioner in a prison within the same judicial district as the sentencing court; a case is therefore moot where, as in this case, the BOP housed the petitioner in the Northern District of Texas but she was sentenced in the S.D. Fla.

The Circuit conflict is wide and deep, involving all twelve of the Circuits that exercise jurisdiction in habeas corpus cases. Further percolation, therefore, will not resolve the conflict; only this Court can do so.

Second, the Circuit conflict impacts the lives of tens of thousands of prisoners nationwide, in that the conflict yields a stark disparity in access to a federal habeas forum. Thus, approximately half of the federal prison population has a federal habeas forum in a case like this, while the other half of the population (or at least, a percentage approaching the other half of the population) does not.

Such disparity is intolerable -- or at least, it should be intolerable. Federal law should not vary around the country on a question as important and recurrent as that presented here -- whether an over-incarcerated prisoner has a federal habeas forum that can lead him or her to a shorter term of supervised release. The Court should grant this Petition, and should settle -- with a holding of nationally-uniform application -- the question whether a case like this one is moot.

Third, the Fifth Circuit in this case, and the other Circuits that hold a case like this moot, mis-applied relevant decisions of this Court. "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Chafin v. Chafin, 568 U.S. 165, 172 (2013). Here, however, it is by no means "impossible" for a court to grant effectual relief to Herndon. If she prevails, a court may terminate or reduce her term of supervised release, thereby providing relief available under 18 U.S.C. § 3583(e).

The Fifth Circuit held this case moot because the habeas court has no "authority" to grant such relief under section 3583(e); only the sentencing court has such authority. That holding, however, "confuses mootness with the merits[,]" in conflict with Chafin, 568 U.S. at 172, which reversed precisely such a holding.

Other Circuits hold cases like this moot on the ground that the petitioner must, but cannot, demonstrate the existence of collateral consequences that rise to a more-than-speculative level. Those Circuits, however, rely on inapplicable decisions of this Court -- Spencer v. Kemna, 523 U.S. 1 (1998), and United States v. Juvenile Male,

564 U.S. 932 (2011). Those cases apply only where the petitioner has served his or her entire sentence and is therefore not in custody at all. Those cases do not apply, and the petitioner need not show collateral consequences, where, as here, the petitioner remains in custody, serving a term of supervised release.

Finally, the Circuits in question erred by examining the supposed "speculative" or "discretionary" nature of the available relief. Under Chafin, the habeas petitioner's "prospects of success are . . . not pertinent to the mootness analysis." 568 U.S. at 174.

A motion seeking the relief available here -- termination or reduction of a term of supervised release under 18 U.S.C. § 3583(e) -- is a motion to the sentencing court's discretion. "[A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1931-32 (2016) (citation omitted). Here, sound legal principles will obligate the sentencing court to consider various factors, one of which -- over-incarceration, established in the habeas case -- would carry "great weight" in the sentencing court's discretionary balance. Johnson, 529 U.S. at 60. It is, in sum, not "impossible for a court to grant [Herndon] any effectual relief whatever[.]" Chafin, 568 U.S. at 172.

I. The Circuits Conflict On The Question Whether A Habeas Corpus Case Is Moot Where (A) The Petition Alleges That The BOP Will Over-Incarcerate The Petitioner, (B) The BOP Later Releases The Petitioner To Serve A Term Of Supervised Release And (C) The Sentencing Court Can, In Light Of The Over-Incarceration, Terminate Or Reduce The Term Of Supervised Release.

A. The Legal Background

1. The Paradigmatic, Two-Part Federal Sentence

The paradigmatic federal sentence has, as relevant here, two parts -- a term of imprisonment, followed by a term of supervised release. Indeed, district courts around the country impose such a two-part sentence in more than 85 percent of the cases that result in conviction, excluding immigration cases.[3]

2. United States v. Johnson -- And Its Door, Open To Termination Or To Reduction Of A Term Of Supervised Release

The defendant in United States v. Johnson, 529 U.S. 53 (2000), received the paradigmatic sentence described above; the district court convicted Johnson on five counts

3. U.S. Sentencing Commission, Overview of Federal Criminal Cases—Fiscal Year 2020 10 (April 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf ("Supervised release was imposed in 85.8 percent of all cases not involving immigration.").

involving narcotics and firearms offenses, and sentenced him to a term of 111 months in prison, to be followed by a three-year term of supervised release. Id. at 55.

Later, however, with Johnson in prison, "two of his convictions were declared invalid. As a result, he had served too much prison time and was at once set free," id. at 54, to begin service of his term of supervised release. Johnson then filed a motion in the district court, asking that court to reduce the term of supervised release by "2.5 years, the extra time served on the vacated . . . convictions." Id. at 55. The district court denied the motion but the Court of Appeals reversed, granting the requested relief. Id.

On the Government's appeal, this Court reversed. The Court held that the prison term and the supervised-release term are "interrelated" but "not interchangeable." Id. at 58-59. Under the governing statute, 18 U.S.C. § 3624(e), the term of supervised release begins "on the day the person is released," not on the "earlier day when he should have been released." Id. at 57 (internal quotation marks omitted). The lower courts therefore lacked authority to credit, automatically, or day-for-day, the service of the excess prison term to the service of the term of supervised release.

The Court, however, left the door open for a court to grant another form of relief to an over-incarcerated defendant. Thus:

> There can be no doubt that equitable considerations of great weight exist when an individual is incarcerated beyond the

> expiration of his prison term. The statutory structure provides a means to address these concerns in large part. The trial court, as it sees fit, may modify an individual's conditions of supervised release. 18 U.S.C. § 3583(e)(2). Furthermore, the court may terminate an individual's supervised release obligations "at any time after the expiration of one year . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice."

Id. at 60 (quoting 18 U.S.C. § 3583(e)(1)).

Post-Johnson cases, including this case, involve prisoners -- released after over-incarceration, and serving a term of supervised release -- who seek to walk through the door left open in Johnson. The question arising repeatedly in such cases, including this case, is whether the prisoner's release from prison moots his or her claim of over-incarceration, even though he or she is serving the supervised-release term of the sentence, and may, therefore, as recognized in Johnson, win relief in the sentencing court, which has discretion to terminate or reduce that term based on the over-incarceration -- an "equitable consideration[] of great weight[.]" Id. at 60.

As shown below, however, the decisions of the Circuits conflict on that question.

B. The Circuit Conflict Develops

1. Seven Circuits Hold That A Case Is Not Moot (Before The Fifth Circuit, In This Case, Retreats From That Holding)

Analysis begins with Mujahid v. Daniels, 413 F.3d 991 (9th Cir. 2005). In that case, the District Court for the District of Alaska sentenced Mujahid to a term of ten years in prison, to be followed by a term of three years of supervised release. Id. at 993.

The BOP then imprisoned Mujahid in Oregon. Id. While imprisoned, Mujahid filed, in the District Court for the District of Oregon, a petition for a writ of habeas corpus, under 28 U.S.C. § 2241, challenging the BOP's interpretation of the statute that governed the amount of good-time credits available to a prisoner. Id.

The district court denied Mujahid's petition on the merits, and Mujahid appealed to the Ninth Circuit. Id. With the appeal pending, however, the BOP released Mujahid, and he began to serve his term of supervised release. Id. at 994.

The Government then sought dismissal of the appeal on the ground of mootness, noting that Mujahid had "completed his term of imprisonment and was placed on supervised release." Id. The Government conceded that Mujahid, while on supervised release, "remain[ed] in the custody of the United States[]" for habeas purposes. Id. The Government contended, however, citing Johnson, "that Mujahid's placement on supervised release prevents [the Ninth Circuit] from providing any relief." Mujahid, 413 F.3d at 993.

The Ninth Circuit "disagree[d]." Id. Citing Johnson, the Ninth Circuit acknowledged that "a prisoner who wrongfully served excess prison time is not entitled to an automatic reduction in his term of release." Id. at 994. Nevertheless, the court reasoned, "there 'is a possibility' that Mujahid could receive a reduction in his term of supervised release under 18 U.S.C. § 3583(e)(2)." Id. at 995 (quoting Gunderson v. Hood, 268 F.3d 1149, 1153 (9th Cir. 2001)). The Ninth Circuit continued:

> We addressed this very issue in Gunderson. . . . [Gundersons's] sentence included a term of supervised release. The 'possibility' that the sentencing court would use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) was enough to prevent the [Gunderson] petition from being moot.

Id. at 994-95 (quoting Gunderson, 268 F.3d at 1153).

The Ninth Circuit concluded: "Gunderson controls our mootness inquiry here. There 'is a possibility' that Mujahid could receive a reduction in his term of supervised release under 18 USC § 3583(e)(2)." Id. at 995. The case, therefore, was not moot.

In sum, Mujahid held as follows: A federal habeas case, commenced under section 2241 in the district of imprisonment, and alleging over-incarceration, is not mooted by the petitioner's release from prison to supervised release. The sentencing court can grant that petitioner some relief, even after release from prison -- through Johnson's open door -- in that the court can terminate or reduce the petitioner's term of supervised release.

The Fifth Circuit soon followed the Ninth Circuit. See Johnson v. Pettiford, 442 F.3d 917, 918 (5th Cir. 2006) (per curiam) (citing Mujahid and holding that "the possibility that the district court may alter [the petitioner's] period of supervised release . . . if it determines that he has served excess prison time, prevents [the petitioner's] petition from being moot"). (As shown below, however, the Fifth Circuit, in this case, retreated from this holding.)

Next, the Second Circuit agreed with, and followed, Mujahid. See Levine v. Apker, 455 F.3d 71, 76-77 (2d Cir. 2006) (citing Mujahid and holding "the fact that the district court might, because of our ruling, modify the length of Levine's supervised release would constitute effectual relief") (internal quotation marks omitted).

The Eleventh Circuit then cited and followed the Ninth, the Fifth and the Second Circuits. See Mitchell v. Middlebrooks, 287 Fed. App'x 772, 774-75 (11th Cir. 2008). Middlebrooks re-affirmed a pre-Johnson case, Dawson v. Scott, 50 F.3d 884, 886 n.2 (11th Cir. 1995), which had announced and applied the same rule: "Because success for Dawson[,]" released from prison but serving a term of supervised release, "could alter the supervised release portion of his sentence, his appeal is not moot." Middlebrooks concluded: "Johnson did not . . . alter our holding in Dawson that an appeal is not moot where a former prisoner is still serving a term of supervised release . . . . [I]t is possible he could receive a reduced or modified term of supervised release from the sentencing court if he succeeds in this habeas proceeding." 287 F. App'x at 775.

The District of Columbia Circuit next agreed with "the logic of" the Ninth Circuit's decision in Mujahid and the Second Circuit's decision in Levine, and treated "the enhanced prospects for a reduced term of supervised release under § 3583 as adequate to hold non-moot a released prisoner's claim to a lesser period of incarceration[.]" United States v. Epps, 707 F.3d 337, 345 (D.C. Cir. 2013). The D.C. Circuit noted that this Court in Johnson "identified relief under § 3583(e)(1) or (e)(2) as potential means for addressing the injustice of a prisoner's being incarcerated beyond the proper expiration of his prison term." Id. The court held: "Our conclusion that Epps is eligible for a reduced sentence under § 3582(c)(2), if it led to an actual sentence reduction, would necessarily inform the district court's evaluation of a motion for termination or reduction of his term of supervised release[.]" Id.[4]

The Seventh Circuit next agreed that release from prison to a term of supervised release did not moot a case, commenced under section 2241, alleging over-incarceration. See Pope v. Perdue, 889 F.3d 410 (7th Cir. 2018). "Pope can benefit from success on appeal. . . . [A] finding that Pope spent too much time in prison . . . . would carry 'great weight' in a § 3583(e) motion to reduce Pope's term[]" of supervised release. Id. at 414 (quoting Johnson, 529 U.S. at 60). "This is enough[]" to avoid mootness." Id. (citing the D.C. Circuit in Epps and the Ninth Circuit in Mujahid).

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4. Epps did not involve a habeas corpus petition under section 2241. Rather, in Epps, the defendant made a motion in the sentencing court for a reduction of sentence under 18 U.S.C. § 3582(c)(2), which the sentencing court denied.

Most recently, the Fourth Circuit agreed, in a case under section 2255, that release from prison to supervised release does not moot a case alleging over-incarceration. In United States v. Ketter, 908 F.3d 61, 65-66 (4th Cir. 2018), the Fourth Circuit held: "[B]ecause of the reciprocal relationship between a prison sentence and a term of supervised release, even when a prison term has ceased, a defendant serving a term of supervised release has a 'legally cognizable interest in the outcome' of a challenge to his sentence. . . . Although the underlying prison sentence has been served, a case is not moot when an associated term of supervised release is ongoing, because on remand a district court could grant relief to the prevailing party in the form of a shorter period of supervised release." Id.

Subsequent unpublished Fourth Circuit decisions have applied Ketter in section 2241 cases. See Williams v. Wilson, 747 F. App'x 170, 170 n.* (4th Cir. 2019) (citing Ketter, the Second Circuit's Levine decision, and Reynolds v. Thomas, 603 F.3d 1144, 1148 (9th Cir. 2010), which follows Mujahid); Kornegay v. Warden, 748 F. App'x 513, 514 n.* (4th Cir. 2019) (citing Ketter); but see Palacio v. Sullivan, 814 F. App'x 774, 775 (4th Cir. 2020) (holding § 2241 petition moot).

2. Five Circuits, By Contrast, Hold That A Case Is Moot

Other Circuits disagree with the decisions discussed above. Thus:

The Third Circuit began the Circuit split with Burkey v. Marberry, 556 F.3d 142 (3rd Cir. 2009). In that case, the petitioner filed a habeas petition, which "challenged the

BOP's failure to grant him early release[.]" Id. at 144. The district court held that the petitioner's release from prison mooted the case, even though the petitioner remained on supervised release and could have "argue[d] to the sentencing court in Ohio that his supervised release term should be shortened in light of his having been improperly denied early release from prison." Id. at 145-46.

The Third Circuit affirmed, explicitly holding that it was "unwilling" to follow Mujahid and Levine, which, as the Third Circuit summarized, "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[.]" Id. at 149-50. The Third Circuit "d[id] not believe the reasoning of these case[s] is supportable[.]" Id. at 150.

The Third Circuit then announced and applied its own rule: "[T]he [petitioner's] injury must be 'likely' to be redressed by the [future] judicial decision [by the sentencing court]. A 'possibility' of redress, which is all that Levine and Mujahid require, is not adequate to survive a mootness challenge." Id. That "possibility . . . is so speculative that any decision on the merits by the District Court would be merely advisory and not in keeping with Article III's restriction of power." Id. at 149. The Third Circuit therefore affirmed the mootness dismissal: "The 'likely' outcome here is not that the District Court's order will cause the sentencing court in Ohio to reduce Burkey's term of supervised release." Id. at 148.

The Sixth Circuit next held a habeas case under section 2241 moot where the petition challenged BOP regulations prohibiting a transfer to a "community correctional center ('CCC')[,]" but the petitioner, "[w]hile his petition . . . was

pending before the district court . . . was transferred to a CCC." Demis v. Sniezek, 558 F.3d 508, 510, 512 (6th Cir. 2009). The Sixth Circuit expressly declined to follow Mujahid and Levine, "find[ing] the reasoning of [those decisions] to be too tenuous." Id. at 514.

The Tenth Circuit later explicitly followed the Third Circuit's Burkey decision. See Rhodes v. Judiscak, 676 F.3d 931(10th Cir. 2011). The Tenth Circuit -- through a panel that included then-Judge Gorsuch -- recognized that "our sister circuits are split on" the mootness issue, id. at 934, and "agree[d] with the result suggested by the Third . . . Circuit[]." Id. at 935. The Tenth Circuit affirmed the mootness dismissal: "[A]t this point, it is entirely speculative whether a declaration from this court stating that Rhodes' sentence was excessive will aid him in the future." Id.

The First Circuit next held a section 2241 case moot where the BOP released the petitioner after he "over-serve[d]" his prison sentence and "began serving his term of supervised release." Francis v. Maloney, 798 F.3d 33, 34-35 (1st Cir. 2015). Francis, however, is arguably distinguishable from the other cases discussed here in that the petitioner in Francis filed his petition "after he was released from federal custody[,]" id. at 34, and sought not a shorter term of supervised release but rather "an order back-dating his release from confinement[,]" relief that Francis (correctly) held "foreclosed" by this Court's Johnson decision. Id. at 39.

Finally, the Eighth Circuit held, in unpublished decisions, that release from prison moots a habeas case commenced under section 2241. See Blakeney v. Huetter,

795 Fed. App'x 493, 494 (8th Cir. 2020) (per curiam) ("[T] his case has become moot because [the petitioner] has already been released from prison. A ruling that his early-release date was improperly changed would not affect his current term of supervised release, nor have we identified any potential collateral consequences."); Leiter v. Nickrenz, 697 Fed. App'x 470, 470 (8th Cir. 2017) (per curiam) (same).

C. The Fifth Circuit, In This Case, Retreats To A Middle Ground

So stood the law, and the Circuit conflict, when the Fifth Circuit decided this case -- and threw the law into even greater disarray. Thus:

Herndon was sentenced in the S.D. Fla. The BOP imprisoned her in the Northern District of Texas, where she filed this section 2241 case, alleging over-incarceration, in that the BOP had miscalculated the start-date of her sentence, and therefore, had miscalculated her release date. A-2a.

Seventeen months later, however, with her Petition pending, and with no decision by the district court, the BOP released Herndon from prison, and she began her term of supervised release. A-4a. The district court then dismissed Herndon's petition as moot. A-15a. Herndon appealed, asking the Fifth Circuit to reverse in accordance with Pettiford, 442 F.3d 917, in which the Fifth Circuit had followed the Ninth Circuit's Mujahid decision, and had held that release from prison to supervised release did not moot a case under section 2241 seeking relief for over-incarceration. A-6a-7a.

The Fifth Circuit, however, did not follow Pettiford in this case. Thus:

Judge Oldham filed a concurring opinion, which explicitly recognized that Pettiford "sits at the center of a circuit split." A-13a (citing the holdings of the Third and Tenth Circuits, discussed above, as well as an unpublished decision from the D.C. Circuit that predated Epps). Judge Oldham continued: "Pettiford . . . held 'the possibility that the district court may later alter the [section 2241 petitioner's] period of supervised release . . . if it determines that he has served excess prison time, prevents [the] petition from being moot.'" A-12a (brackets and internal quotation marks omitted). Characterizing that "approach to mootness" as inconsistent with Supreme Court precedent, A-12a, Judge Oldham concluded: "At some point, we should overrule Johnson v. Pettiford and follow the Supreme Court's approach to mootness." A-14a.

The panel majority, however, did not go that far. Rather, the majority affirmed the district court's mootness dismissal, and did so by giving Pettiford a limited reading. Specifically, according to the majority, in a holding joined by Judge Oldham, Pettiford applies only as follows: "[A] n appeal of a district court's order is not mooted by a prisoner's release from custody so long as that court has authority to modify an ongoing term of supervised release." A-9a. But, "[a]bsent a transfer of jurisdiction over a prisoner's term of supervised release . . . only the sentencing court has authority to modify the terms of a prisoner's supervised release. Thus, the Northern District of Texas -- unlike the sentencing court [the S.D. Fla.] -- cannot offer Herndon any further relief." A-8a.

In so holding, and in so limiting Pettiford, the Fifth Circuit held that habeas relief and mootness under section 2241 turn on a fortuitous occurrence -- the happenstance that the BOP housed the petitioner in a prison located within the same judicial district as the sentencing court. If the BOP did happen to house the prisoner within the same district as the sentencing court, then the case is not moot. But if the BOP did not house the prisoner within the same district as the sentencing court, then the case is moot.

D. The Circuit Conflict, As It Currently Stands

In sum, at this time:

Six Circuits (the Ninth, the Second, the Eleventh, the D.C., the Seventh and the Fourth) hold that release from prison to a term of supervised release does not moot a habeas case that alleges over-incarceration (although, as noted, the D.C. Circuit decision involved a motion under 18 U.S.C. § 3582(c)(2), not a petition under section 2241, and the Fourth Circuit decision involved a petition under section 2255, not under section 2241).

Five Circuits (the Third, the Sixth, the Tenth, the First and the Eighth) hold the opposite (although, as noted, the First Circuit decision is arguably distinguishable from the others, and the Eighth Circuit has decided the question in unpublished decisions).

One Circuit (the Fifth) holds that mootness depends on whether the BOP housed the petitioner in a prison located within the same judicial district as the sentencing court.

At least six Circuits, finally, have expressly recognized the existence of the Circuit conflict at issue here.[5]

II. The Circuit Conflict Yields A Stark, Nationwide Disparity In Access To A Federal Habeas Forum, Which Adversely Affects Tens Of Thousands Of Prisoners, Approximately Half Of The Federal Prison Population.

As shown above, the question presented here has deeply divided the twelve Circuits that exercise jurisdiction in habeas corpus cases, all of which have decided the question presented, or a closely related question, by precedential decisions (or, in the case of the Eighth Circuit, by unpublished decisions). Accordingly, further percolation of the question presented will not resolve the Circuit conflict or eliminate its inconsistent impact on the federal prison population.

The importance of the question presented here, furthermore, lies in its impact on the lives of tens of thousands of prisoners nationwide, who may -- or may not -- have a federal habeas forum, depending on where the BOP houses the prisoner. Thus, as shown below, the Circuit conflict yields a stark disparity regarding access to a federal habeas forum.

As to the Circuits in which a case like this is not moot: The BOP houses approximately 48 percent of the federal

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5. Burkey, 556 F.3d at 149-50; Demis, 558 F.3d at 514-15; Townes v. Jarvis, 577 F.3d 543, 549 n.3 (4th Cir. 2009); Rhodes, 676 F.3d at 934-35; Epps, 707 F.3d at 345; Herndon, A-12a (Oldham, J., concurring).

prison population (66,635 men and women) in prisons located within those Circuits.[6] As to the Circuits in which a case like this is moot: The BOP houses approximately 29.25 percent of that population (40,128 men and women) in prisons located within those Circuits.

That substantial disparity in access to a federal habeas forum (48 percent to 29.25 percent) grows to approximately 50-50 when the Court considers the Fifth Circuit, in which the BOP houses the remaining approximately 22 percent of the population (30,699 men and women). In the Fifth Circuit, as held in this case, mootness depends on whether the BOP housed the petitioner in a prison located within the same judicial district as the sentencing court. Publicly-available data does not disclose how many prisoners are so housed but relevant reported decisions provide reason to conclude that the BOP usually does not house a prisoner in a prison located within the same judicial district as the prisoner's sentencing court.

Thus, for example, this Petition cites 21 relevant cases in Point I above. In only two of those cases did the BOP house the prisoner within the district of the sentencing court.[7] In at least ten of those cases, by contrast, including this case, the BOP housed the prisoner outside the district of the sentencing court.[8] (Of the remaining nine cases,

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6. Federal Bureau of Prisons, Population Statistics (February 24, 2021), https://www.bop.gov/mobile/about/population_statistics.jsp (listing the population and location of each BOP facility).

7. Levine, 455 F.3d 71; Francis, 798 F.3d 33.

8. Dawson, 50 F.3d 884; Mujahid, 413 F.3d 991; Pettiford, 442 F.3d 917; Middlebrooks, 287 F. App'x 772; Burkey, 556 F.3d 142; Reynolds, 603 F.3d 1144; Epps, 707 F.3d 337; Pope, 889 F.3d

eight decisions did not specify the sentencing district, and one involved a prisoner in state custody.[9])

Accordingly, as a practical matter, and subject to contrary data that the Government may disclose in a Brief in Opposition to this Petition, the Court should add substantially all of the Fifth Circuit's 22 percent of the federal prison population to the 29.25 percent housed in the Circuits that hold a case like this moot. The result of such an addition: a nearly perfect -- or, Herndon submits, a nearly perfectly unacceptable -- 50-50 disparity in access to a federal habeas forum.

It is intolerable -- or at least, it should be intolerable -- that approximately half of the federal prison population has a federal habeas forum in a case like this, while the other half of the population (or at least, a percentage approaching the other half of the population) does not. Federal law should not vary around the country on a question as important and recurrent as that presented here -- whether an over-incarcerated prisoner has a federal habeas forum that can lead him or her, through the door left open in Johnson, to a shorter term of supervised release.

The Court should therefore grant this Petition, which presents a Circuit conflict on "an important question of federal law that has not been, but should be, settled by this Court[.]" S. Ct. Rule 10(c). The Circuit conflict here yields a stark, nationwide disparity in access to a federal habeas forum, a disparity that adversely affects as much

410; Williams, 747 F. App'x 170; Herndon, A-8a.

9. Townes, 577 F.3d 543.

as half of the prison population. That Circuit conflict is wide and deep, involving all twelve relevant Circuits. Further percolation will therefore not resolve the conflict; only this Court can do so. Accordingly, the Court should grant this Petition and should settle -- with a holding of nationally-uniform application -- the question whether a case like this one is moot.

III. The Court Should Review This Case, And Should Reverse On The Merits, Because The Fifth Circuit, And The Other Circuits That Hold A Case Like This Moot, Mis-Applied Relevant Decisions Of This Court.

A. This Case Is Not Moot.

Under this Court's applicable precedents, this case is not moot. "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Chafin, 568 U.S. at 172. Here, however, it is by no means "impossible" for a court to grant effectual relief to Herndon. On the contrary, if she prevails in this habeas case, a court may terminate or reduce her term of supervised release, thereby providing relief available under 18 U.S.C. § 3583(e), as this Court recognized in Johnson. "That potential benefit keeps [Herndon's] case alive." Pope, 889 F.3d at 415. See Mujahid, 413 F.3d at 995 (holding that "[t]he possibility that the sentencing court would use its discretion to reduce a term of supervised release . . . was enough to prevent the petition from being moot") (internal quotation marks omitted).

B. The Fifth Circuit's Decision In This Case Conflicts With Decisions Of This Court And Establishes Unsound Public Policy.

1. The Fifth Circuit's Decision In This Case Conflicts With This Court's Decisions In Chafin And Powell.

The Fifth Circuit's decision in this case -- holding this case moot -- conflicts with this Court's precedents; in particular, with Chafin, 568 U.S. 165, and Powell v. McCormack, 395 U.S. 486 (1969). Thus:

The Fifth Circuit held this case moot because the habeas court, the Northern District of Texas, has no "authority" to grant the relief that Herndon seeks. A-8a. Specifically, the Fifth Circuit held, the habeas court has no such "authority" because "only the sentencing court [the S.D. Fla.] has authority to modify the terms of a prisoner's supervised release." Id.

In so holding, however, the Fifth Circuit erred by "confus[ing] mootness with the merits." Chafin, 568 U.S. at 174. Thus, in Chafin, the petitioner sought an order for the "re-return" of a child from Scotland to the United States. The respondent "argue[d] that the[e] case [wa]s moot because the District Court lack[ed] the authority to issue a re-return order either under the [relevant Hague] Convention or pursuant to its inherent equitable powers." Id. The Court rejected the argument, "which goes to the meaning of the Convention and the legal availability of a certain kind of relief[,]" and thereby "confuses mootness with the merits." Id. See also Powell, 395 U.S. at 500, which Chafin summarized as follows: "[A] claim for backpay

saved the case from mootness, even though . . . the backpay claim had been brought in the wrong court and therefore could not result in relief. . . . [T]his argument . . . confuses mootness with whether [the plaintiff] has established a right to recover[.]" 568 U.S. at 174 (internal quotation marks omitted).

Similarly, here, the case is not moot merely because the habeas court lacks the authority to issue an order under 18 U.S.C. § 3583(e) affecting Herndon's term of supervised release. That lack of authority goes to the legal availability of a certain kind of relief; it goes to the question whether Herndon has established a right to recover. The Fifth Circuit's holding therefore confuses mootness with the merits. Herndon's case may be in the "wrong" court for a certain kind of relief -- termination or reduction of her term of supervised release -- but her "prospects of success are . . . not pertinent to the mootness inquiry." Chafin, 568 U.S. at 174.

2. The Fifth Circuit's Decision Establishes Unsound Public Policy.

The Fifth Circuit's decision in this case establishes unsound public policy, for the two following reasons.

First, under the Fifth Circuit's rule, habeas relief and mootness under section 2241 turn on a fortuitous occurrence -- the happenstance that the BOP housed the petitioner in a prison located within the same judicial district as the sentencing court. The Ninth Circuit and the Seventh Circuit have rejected precisely such a rule. See Mujahid, 413 F.3d at 995 (holding that Gunderson, on which Mujahid relied, "does not state that the petitioner

was seeking habeas relief before the same court in which he was sentenced, and there is no indication that [Gunderson's] mootness analysis turned on such a fortuitous occurrence."); Pope, 889 F.3d at 415.

Second, the Fifth Circuit's holding in this case renders thousands of prisoners categorically ineligible for a habeas forum in a case like this, because the BOP has no prisons in 39 of the nation's 94 federal districts. Men and women convicted in those 39 districts therefore can never be housed in a prison located within the sentencing district. Accordingly, under the Fifth Circuit's rule, cases like this brought by prisoners sentenced in those districts -- in which approximately 22.5 percent of federal prison sentences were imposed -- can never survive a mootness challenge.[10]

C. The Decisions Of Other Circuits, Holding Cases Like This Moot, Conflict With Decisions Of This Court.

1. The Circuits In Question Rely On Inapplicable Decisions Of This Court.

The decisions of other Circuits, holding cases like this moot, are erroneous because those Circuits rely on an inapplicable line of this Court's decisions. Specifically, those Circuits rely on Spencer v. Kemna, 523 U.S. 1 (1998), and United States v. Juvenile Male, 564 U.S. 932 (2011), to hold that the habeas petitioner in Herndon's position can

10. United States Sentencing Commission, 2019 Federal Sentencing Statistics (April 2020), https://www.ussc.gov/research/data-reports/geography/2019-federal-sentencing-statistics.

stave off mootness only by demonstrating the existence of "collateral consequences" that rise to a more-than-speculative level. Thus, for example, the Third Circuit in Burkey, relying on Spencer, held that a habeas petitioner serving a term of supervised release "must demonstrate that collateral consequences exist;" otherwise, the case is moot. And, according to Burkey, such a petitioner, to demonstrate the requisite collateral consequences, must show the "likelihood that a favorable decision would redress the injury or wrong. . . . [A] possibility" is insufficient to satisfy Spencer's requirements. Burkey, 556 F.3d at 148.

In Rhodes, 676 F.3d at 933-35, the Tenth Circuit, relying on Burkey and Juvenile Male, reached the same conclusion, as did the First Circuit in Demis, 558 F.3d at 515-16 (citing Spencer and holding that the petitioner "can point to no collateral consequences") (internal quotation marks omitted).

In reaching those decisions, however, those Circuits erred. The Spencer/Juvenile Male line of cases does not apply here; reliance on that line of cases was misplaced.

In Spencer and in Juvenile Male, the petitioners were no longer in custody at all. Thus, Spencer had served both his prison sentence and his parole term; see 523 U.S. at 7; the Juvenile Male had turned 21 years of age and had therefore served his entire term of juvenile supervision; see 564 U.S. at 937. In such circumstances, the Court required a showing of collateral consequences to avoid mootness. See Spencer, 523 U.S. at 7 ("Once the convict's sentence has expired . . . some concrete and continuing injury other than the now-ended incarceration or parole

-- some collateral consequence of the conviction -- must exist if the suit is to be maintained.") (internal quotation marks omitted); Juvenile Male, 564 U.S. at 936 ("when a defendant challenges only an expired sentence . . . the defendant must bear the burden of identifying some ongoing collateral consequence . . . that is likely to be redressed by a favorable judicial decision") (internal quotation marks omitted).

Here, by contrast, Herndon remains in custody, serving her term of supervised release. It is not impossible for a court to give her relief -- relief authorized by this Court's Johnson decision. Accordingly, this case is not moot, see Pope, 889 F.3d at 414 n.1 (distinguishing Spencer on this ground), and Herndon need not show collateral consequences.

2. The Circuits In Question Incorrectly Examine The Discretionary Nature Of The Relief, And The Prospects Of Success, Which, Under Chafin, Are Not Pertinent To The Mootness Analysis.

The Third Circuit in Burkey, and the Tenth Circuit in Rhodes, also held that the relief sought by the petitioners in those cases -- modification of the term of supervised release -- was too "speculative" to avoid mootness, because that relief lies within the "discretion" of the sentencing court. See Burkey, 556 F.3d at 148-49; Rhodes, 676 F.3d at 934-35. Those courts so held, however, based on their antecedent holdings that the Spencer/Juvenile Male line of cases applies, holdings that, as shown above, were error. The Spencer/Juvenile Male cases do not apply where, as here, the petitioner remains in custody, serving a term of supervised release.

Where, as here, the Spencer/Juvenile Male cases do not apply, the supposed "speculative" or "discretionary" nature of the relief "[is] not pertinent to the mootness analysis." Chafin, 568 U.S. at 174. Thus, in Chafin, the petitioner sought an order directing the "re-return" of a child from Scotland to the United States. The respondent urged mootness on the ground that "Scotland would simply ignore" such an order. Id. The Court rejected the contention, holding that "uncertainty" regarding enforcement of the order in the second forum did not make the case moot. "Courts often adjudicate disputes where the practical impact of any decision is not assured." Id. at 175.

Chafin applies here a fortiori. If a case seeking a particular order is not moot where, as in Chafin, a second forum would ignore that order, then a case seeking a particular order is not moot where, as here, the second forum would necessarily weigh the order in the balance when asked to terminate or reduce the petitioner's term of supervised release. See, e.g., Epps, 707 F.3d at 345 ("Our conclusion . . . would necessarily inform the district court's [later] evaluation of a motion for termination or reduction of [Epps'] term of supervised release[.]").

The habeas court, in sum, has no warrant to predict the outcome in the sentencing court, much less to inject that prediction into the mootness analysis, as the Third and Tenth Circuits did. See Burkey, 556 F.3d at 148 (holding that "[t]he likely outcome here is not that the [habeas] Court's order will cause the sentencing court . . . to reduce Berkey's term of supervised release"); Rhodes, 676 F.3d at 935 (holding that "it is entirely speculative whether a declaration from this court stating that Rhodes' sentence was excessive will aid him in the future.")

A motion under 18 U.S.C. § 3583(e), asking the sentencing court to terminate or reduce a term of supervised release, is a motion addressed to that court's discretion. "[A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." Halo, 136 S. Ct. at 1932 (internal quotation marks and citation omitted).

Here, sound legal principles will obligate the sentencing court to "consider[] a variety of factors" under section 3583(e), Rhodes, 676 F.3d at 935. And one of those factors -- over-incarceration, established in the habeas case -- "would carry 'great weight'" in the sentencing court's discretionary balance of factors. Pope, 889 F.3d at 414, quoting Johnson, 529 U.S. at 60; see Epps, 707 F.3d at 344 (holding "that Epps over-served his sentence . . . is of paramount importance to whether he should continue under supervised release for [his full term]"). Cf. Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018) ("[A]ny amount of actual jail time is significant[.]") (internal quotation marks omitted).

Accordingly, in this case, if the sentencing court does it job properly, by exercising judgment guided by sound legal principles -- and, of course, the habeas court must assume that the sentencing court will do precisely that -- then it is not "impossible for a court to grant [Herndon] any effectual relief whatever[.]" Chafin, 568 U.S. at 172. As some cases put it, mootness turns on whether the plaintiff or the petitioner retains "a concrete interest, however small, in the outcome of the litigation." Knox v. SEIU, Local 1000, 567 U.S. 298, 307-08 (2012). And here, Herndon certainly retains an interest in the outcome of this litigation -- however small (or large) her likelihood of

success may be "due to potential difficulties" in a second forum (here, the sentencing court). Chafin, 568 U.S. at 176. Herndon's "prospects of success are therefore not pertinent to the mootness analysis." Id. at 174.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-11156

DAWN HERNDON,

Petitioner-Appellant,

versus

JODY R. UPTON, WARDEN, FMC CARSWELL,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas.
USDC No. 4:18-CV-120.

January 13, 2021, Filed

Before HAYNES, HIGGINSON, and OLDHAM, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge*:

Dawn Herndon appeals the dismissal of her petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. This is the latest installment in Herndon's challenge to an alleged dissonance between the oral pronouncement and

written judgment from her 2013 conviction and sentence in the Southern District of Florida. The only issue before us, however, is whether the Northern District of Texas erred in dismissing as moot her § 2241 petition following her release from prison. Finding no error, we AFFIRM.

I.

Herndon pleaded guilty in 2012 to five counts of bank fraud with an agreed loss amount of over $3 million in the Southern District of Florida. Prior to sentencing, Herndon was diagnosed with cancer and underwent extensive medical treatment. On March 25, 2013, she was sentenced below the advisory guidelines range of 78-97 months to concurrent terms of 60 months of imprisonment, three years of supervised release, and $3,008,437 in restitution. Because Herndon needed additional medical treatment, the district court agreed to allow her to voluntarily surrender one year later; during that period, Herndon was released to home confinement with electronic monitoring. The district court granted several extensions of Herndon's surrender date until March 27, 2015. Ultimately, a warrant was issued for her arrest and Herndon was taken into custody on April 6, 2015.

While in prison, Herndon learned that the Bureau of Prisons (BOP) calculated her sentence from the date she had entered custody in April 2015, rather than the date she had been sentenced in March 2013. Consequently, the BOP calculated her anticipated release date, after accounting for good-time credit pursuant to 18 U.S.C. § 3624(b), to be August 13, 2019. In March 2017, Herndon filed an

unsuccessful pro se motion in the Southern District of Florida asking the district court to amend the judgment to reflect its oral pronouncement, which she asserted had awarded her credit against her 60-month sentence for the time she would spend on home confinement.[1]

Herndon then filed a pro se 28 U.S.C. § 2255 motion in the Southern District of Florida, which the district court dismissed, in relevant part, because any sentencing credit issue must be raised in a § 2241 petition filed in the district of Herndon's incarceration. In denying Herndon's subsequent motion for reconsideration, the district court added:

> Having reviewed the transcript, I confirm that I reduced the period of imprisonment from the guideline range to a lesser amount based on the period of future house arrest. In other words, in fashioning a sentence of 60 months' imprisonment, I considered her surrender date and the fact that she would spend approximately one year on home confinement.[2]

In February 2018, Herndon, now represented by counsel, filed this § 2241 motion in the Northern District

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1. The Eleventh Circuit dismissed Herndon's subsequent appeal as untimely. *United States v. Herndon*, 733 F. App'x 1008, 1010 (11th Cir. 2018).

2. The Eleventh Circuit also declined Herndon's subsequent requests for a certificate of appealability as to her § 2255 motion. Order, *United States v. Herndon*, No. 17-12597-B (11th Cir. Sept. 20, 2017), *reconsideration denied* (11th Cir. Nov. 3, 2017).

of Texas. She alleged that the BOP improperly denied her credit for her time spent on home confinement. Herndon asserted that her correct release date—calculated from her March 2013 sentencing date and accounting for good-time credit—lapsed in December 2017. Alternatively, she argued that she would exceed even her full 60-month sentence on March 24, 2018. She petitioned the district court to grant a writ of habeas corpus and, as her sole request for relief, to be released from custody.

While her § 2241 petition was pending, the BOP released Herndon on July 19, 2019. Her three-year term of supervised release commenced the same day.[3] In September 2019, the Northern District of Texas sua sponte dismissed Herndon's petition as moot because she was no longer incarcerated. Herndon timely appealed.

II.

"Whether an appeal is moot is a jurisdictional matter, since it implicates the Article III requirement that there be a live case or controversy." *United States v. Heredia-Holguin*, 823 F.3d 337, 340 (5th Cir. 2016) (en banc) (quoting *Bailey v. Southerland*, 821 F.2d 277, 278 (5th Cir. 1987)). We review the district court's determination of mootness de novo. *United States v. Vega*, 960 F.3d 669, 672 (5th Cir. 2020).

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3. According to the district court, "Herndon is now on supervised release reporting to the West Palm Beach, Florida Probation Office."

III.

It is undisputed that Herndon satisfied the jurisdictional "in custody" requirement for purposes of pursuing relief under § 2241 at the time she filed her petition. *See* 28 U.S.C. § 2241(c)(3); *Maleng v. Cook*, 490 U.S. 488, 490-91, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). However, Herndon must separately satisfy the case-or-controversy requirement of Article III, Section 2 of the Constitution. *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). Our jurisdiction is thus constrained to adjudicating "actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199, 108 S. Ct. 523, 98 L. Ed. 2d 529 (1988). "In order to maintain jurisdiction, the court must have before it an actual case or controversy at all stages of the judicial proceedings." *Vega*, 960 F.3d at 672 (citing *Spencer*, 523 U.S. at 7). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000, Loc. 1000*, 567 U.S. 298, 307, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) (internal quotation marks and citation omitted).

We agree with the district court that Herndon's release mooted her § 2241 petition, notwithstanding her continued supervision, because there was no longer a live case or controversy for which any relief could be granted. Herndon had already received the sole relief sought in her petition: release from confinement. *See Bailey*, 821 F.2d at 278 (dismissing a § 2241 petition as moot following release where "the thrust of [the] petition

is to be released from his confinement").[4] Herndon's § 2241 petition did not seek any corresponding modification of her term of supervised release. Nor would such modification automatically follow. *See United States v. Johnson*, 529 U.S. 53, 57-58, 120 S. Ct. 1114, 146 L. Ed. 2d 39 (2000). Even if Herndon served a longer custodial sentence than she was supposed to, she is not entitled to "automatic credit' as a means of compensation." *United States v. Jeanes*, 150 F.3d 483, 485 (5th Cir. 1998); *see also Johnson*, 529 U.S. at 58-59 ("Though interrelated, the terms are not interchangeable.").

Herndon asserts that her appeal is not moot because her term of supervised release can still be modified or terminated by the sentencing court. *See* 18 U.S.C. § 3583(e).[5] She argues that this case is controlled by our

4. We have reached the same conclusion in recent unpublished cases. *See, e.g., Aldaco v. Nash*, 693 F. App'x 336, 337 (5th Cir. 2017) (per curiam) (unpublished) (§ 2241 petition seeking immediate release because BOP failed to properly credit petitioner's sentence was mooted by his release (citing *Bailey*, 821 F.2d at 278-79)); *United States v. Boston*, 419 F. App'x 505, 506 (5th Cir. 2011) (per curiam) (unpublished) ("If the only relief sought by an appellant cannot be granted, the case is moot.").

5. Section 3583(e) provides, in relevant part:

> The court may, after considering the factors set forth in [18 U.S.C. § 3553]—
>
> > (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice; [or]

court's decision in *Johnson v. Pettiford*, 442 F.3d 917 (5th Cir. 2006) (per curiam), and thus not moot.

In *Pettiford*, the petitioner filed a pro se § 2241 petition challenging the BOP's determination that he was ineligible for a sentencing credit following his completion of a substance abuse treatment program while in custody. *Id.* at 917. The petitioner was subsequently released from prison and began serving a term of supervised release, and the respondent moved to dismiss the petition as moot. *Id.* at 918. The district court dismissed the petition because the petitioner failed to timely respond in contravention of the local rules. *Id.* at 917-18. This court reversed. *Id.* at 919. In first considering whether the case was moot, we emphasized that under the Supreme Court's decision in *Johnson*, "a district court may exercise its discretion to modify an individual's term of supervised release, taking into account that an individual has been 'incarcerated beyond the proper expiration of his prison term.'" *Id.* at 918 (quoting *Johnson*, 529 U.S. at 60). Consequently, we held "the possibility that the district court may alter [the petitioner's] period of supervised release pursuant to 18 U.S.C. § 3582(e)(2), if it determines that he has served excess prison time, prevents [his] petition from being moot." *Pettiford*, 442 F.3d at 918.

> (2) . . . modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release.

18 U.S.C. § 3583(e)(1)-(2).

The government argues that *Pettiford* is distinguishable here because the Northern District of Texas does not have jurisdiction to modify Herndon's term of supervised release. We agree. Absent a transfer of jurisdiction over a prisoner's term of supervised release, *see* 18 U.S.C. § 3605, only the sentencing court has authority to modify the terms of a prisoner's supervised release. Thus, the Northern District of Texas—unlike the sentencing court—cannot offer Herndon any further relief.

We have reached this same conclusion in unpublished decisions following *Pettiford*. For example, in *Lawson v. Berkebile*, we held that a pro se § 2241 petition challenging the BOP's denial of early release was mooted by the petitioner's release from custody. 308 F. App'x 750, 752 (5th Cir. 2009) (per curiam) (unpublished). Distinguishing *Pettiford*, we held that even though the petitioner was still serving a term of supervised release, "the district court that denied [petitioner's] § 2241 petition is without jurisdiction to determine, under 18 U.S.C. § 3583, whether he served excess prison time; that determination is to be made by the sentencing court." *Id.* at 752. Consequently, we held that any "pronouncement by this court . . . would not result in 'specific relief through a decree of a conclusive character' with regard to modification of the sentence." *Id.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971)); *see also Purviance v. Maye*, 439 F. App'x 377, 378 (5th Cir. 2011) (per curiam) (unpublished) (holding that a § 2241 petition was moot where the petitioner had been released from prison and the district court lacked jurisdiction to alter his term of supervised release because it was not the sentencing court).

More recently, in *United States v. Vega*, we echoed this interpretation of *Pettiford* in concluding that a defendant's direct appeal of his sentence was *not* mooted by his release from prison. 960 F.3d at 673-74. Even though the defendant in *Vega* only challenged his term of imprisonment and not his supervised release, we emphasized that "[i]f the district court determined that [the defendant] had been improperly sentenced, it would 'have the authority to modify [the] conditions of supervised release . . . or the authority to terminate obligations of supervised release.'" *Id.* at 673 (quoting *United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006)). We cited *Pettiford* as an example of this same proposition: the appeal was not moot "because there remained a 'possibility that the district court may alter [his] period of supervised release . . . if it determines that he has served excess prison time.'" *Id.* (alteration in original) (quoting *Pettiford*, 442 F.3d at 918).

Both *Vega* and *Lawson* thus apply *Pettiford* in the same way we do here: an appeal of a district court's order is not mooted by a prisoner's release from custody so long as that court has authority to modify an ongoing term of supervised release.

To overcome mootness, Herndon attempts to elide the distinction between the sentencing and habeas courts. Essentially, she argues that under *Pettiford* a § 2241 petition is not moot so long as the petitioner's term of supervised release may be altered by *any* district court with the authority to do so. Herndon reads *Pettiford* too broadly. As we have repeatedly held since, *Pettiford* does

not salvage from mootness a petition that neither this court nor the district court below has authority to grant.[6]

Moreover, Herndon's interpretation is belied by the remedy she seeks on appeal. Herndon asserts that either this court or the habeas court "can, after on-the-merits adjudication of Herndon's petition, transfer this case" to the sentencing court in the Southern District of Florida. Herndon does not elaborate on what our "on-the-merits adjudication" would produce other than a declaration that an *out-of-circuit* sentencing court could consider under *its* authority whether to modify Herndon's term of supervised release. That we cannot do. *See Golden v. Zwickler*, 394 U.S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969) ("[F]ederal courts . . . do not render advisory opinions." (internal citation and quotation marks omitted)). That "a favorable decision in this case might serve as a useful precedent for [Herndon] in a hypothetical lawsuit . . . cannot save this case from mootness." *United States v. Juvenile Male*, 564 U.S. 932, 937, 131 S. Ct. 2860, 180 L. Ed. 2d 811 (2011).[7]

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6. Herndon also argues that *Pettiford* is factually analogous to her case because both involved a sentencing court and a habeas court in different districts. In *Pettiford*, the petitioner was sentenced in the Eastern District of California, but the § 2241 petition was filed in the district of confinement in the Southern District of Mississippi. However, neither this distinction nor which of these courts had authority to modify the petitioner's supervised release was discussed in *Pettiford*. In light of the liberal construction of *Pettiford*'s pro se petition, and the omission of any discussion of these facts as bearing on the opinion's outcome, we need not presume that the *Pettiford* court spoke in such absolutes. Our subsequent cases interpreting *Pettiford* have similarly declined to do so.

7. We express no opinion as to the merits of Herndon's underlying claim.

IV.

For the forgoing reasons, the district court's order dismissing Herndon's § 2241 petition as moot is AFFIRMED.

ANDREW S. OLDHAM, *Circuit Judge*, concurring.

I agree with the majority that this case is moot. I further agree that *Johnson v. Pettiford*, 442 F.3d 917 (5th Cir. 2006) (per curiam), is distinguishable.

I write to emphasize that, in an appropriate case, our en banc court should overrule *Johnson v. Pettiford*. There we held "the *possibility* that the district court may alter [the § 2241 petitioner'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 [the] petition from being moot." 442 F.3d at 918 (emphasis added). The panel did not explain how such a mere possibility could save a case from mootness.

Nor could it. As the Supreme Court recently emphasized, mootness is a function of a party's requested relief—not the theoretical possibility that a party *could* request or receive something. *See N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526, 206 L. Ed. 2d 798 (2020) (per curiam) (holding petitioners' claims for declaratory and injunctive relief became moot after legislative amendments achieved "the precise relief that petitioners requested in the prayer for relief in their complaint"); *id.* at 1533-35 (Alito, J., dissenting) ("[T]his case is not moot because the amended City ordinance and new State law do not give petitioners all the . . . relief they seek." (emphasis omitted)).

The Supreme Court's approach to mootness makes sense because "[o]ur lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power

depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3, 84 S. Ct. 391, 11 L. Ed. 2d 347 (1964); *accord DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974). And when it comes to determining the existence of a case or controversy, we look *only* to the claims the plaintiff made; it's irrelevant that the plaintiff could've requested something else. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494-95, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009). It's impossible to reconcile the Supreme Court's approach with *Johnson v. Pettiford*'s decision to rescue a habeas petition based on the mere possibility of a supervised-release modification the petitioner did not request.

Moreover, *Johnson v. Pettiford* sits at the center of a circuit split. *Compare Rhodes v. Judiscak*, 676 F.3d 931, 933-35 (10th Cir. 2012) (expressly disagreeing with our decision and holding that a released prisoner's § 2241 petition was moot because "it is entirely speculative whether a declaration from this court stating that [the prisoner's] sentence was excessive will aid him in the future"), *Burkey v. Marberry*, 556 F.3d 142, 149 (3d Cir. 2009) ("The possibility that the sentencing court will use its discretion to modify the length of Burkey's term of supervised release under 18 U.S.C. 3583(e) . . . is so speculative that any decision on the merits by the District Court would be merely advisory and not in keeping with Article III's restriction of power." (citation and footnote omitted)), *and United States v. Bundy*, 391 F. App'x 886, 887 (D.C. Cir. 2010) (per curiam) (same) (quoting *Burkey*), *with Reynolds v. Thomas*, 603 F.3d 1144, 1148 (9th Cir. 2010) (asserting without analysis that a § 2241 allegation of "over-incarceration" was not moot because a district court "could consider [the excess prison time] under 18 U.S.C. §

3583(e) as a factor weighing in favor of reducing the term of supervised release"), *abrogated on other grounds by Setser v. United States*, 566 U.S. 231, 132 S. Ct. 1463, 182 L. Ed. 2d 455 (2012).

At some point, we should overrule *Johnson v. Pettiford* and follow the Supreme Court's approach to mootness.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, DATED SEPTEMBER 25, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:18-CV-120-P

DAWN HERNDON,

Petitioner,

v.

JODY UPTON, WARDEN, FMC-FORT WORTH,

Respondent.

ORDER OF DISMISSAL

Dawn Herndon, through counsel, filed in this case a "Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241." Pet. ECF No. 1. At the time, Herndon was housed in the Bureau of Prisons FMC-Carswell facility in Fort Worth, Texas. Pet 1, ECF No. 1. Herndon was then serving a sentence of imprisonment imposed in the United States District Court for the Southern District of Florida in *United States v. Herndon*, No. 9:12-CR-80172-CR-1. Resp. App. 15–20, ECF No. 15–1. She asserted under 28 U.S.C. § 2241 claims challenging the calculation of her sentence by the Bureau of Prisons. Pet. 2–4, ECF No. 1. The

Respondent has now filed a document entitled "Notice to the Court of Petitioner's Release from Custody" informing the Court that Herndon was released from the custody of the Bureau of Prisons on July 19, 2019. Notice Release 1, ECF No. 20. Thus, Herndon is no longer imprisoned.[1]

Under Article III of the Constitution, federal courts may adjudicate only "actual, ongoing cases or controversies." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Alwan v. Ashcroft*, 388 F.3d 507, 511 (5th Cir. 2004). "An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citations omitted). "If a dispute has been resolved or if it has evanesced because of changed circumstances, including the passage of time, it is considered moot." *AMA v. Bowen*, 857 F.2d 267, 270 (5th Cir. 1988) (quoting *Matter of S.L.E., Inc.* 674 F.2d 359, 364 (5th Cir. 1982)). Where the question of mootness arises, the Court must resolve it before it can assume jurisdiction. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

An action is rendered moot "when the court cannot grant the relief requested by the moving party." *Salgado v. Federal Bureau of Prisons*, 220 F. App'x 256, 2007 WL 627580, at *1 (5th Cir. Feb. 22, 2007) (citing *Bailey v. Southerland*, 821 F.2d 277, 278 (5th Cir. 1987) (holding appeal from denial of § 2241 petition seeking release from confinement was moot afer Petitioner's release)).

1. Court staff contact with the Office of the U.S. Marshal confirms that Herndon is now on supervised release reporting to the West Palm Beach, Florida Probation Office.

If a controversy is moot, the court lacks subject matter jurisdiction. *Carr v. Saucier*, 582 F.2d 14, 15-16 (5th Cir. 1978).

As Petitioner's is no longer incarcerated her challenges to her prior detention in this § 2241 petition are moot. *See Ibrahim v. INS*, No. 3:02-CV-0770-M, 2003 WL 292172, *1 (N.D. Tex. Feb. 7, 2003) (release moots habeas petition challenging legality of extended detention) (citing *Riley v. INS*, 310 F.3d 1253, 1257 (10th Cir. 2002)); *see also Alhamdani v. Attorney General*, 3:02-CV-2362-P, 2003 WL 21448784, at *1 (N.D. Tex. Apr. 28, 2003) (Petitioner's release from custody on Order of Supervision pending removal renders habeas petition moot); *Jackson v. Atkinson*, CA No.8:13-01179-JMC, 2013 WL 5890231, at *4–5 (D. S.C. Nov. 1, 2013) (expressly dismissing claim for credit for home detention as moot once Petitioner was released from confinement in prison).

That Herndon is now serving a term of supervised release does not change the fact that her challenge to the calculation of her term of imprisonment is now moot. *See Rhine v. Watkins*, No. 3:13-CV-014-D-BH, 2014 WL 1295297, at *2 (N.D. Tex. Mar. 7, 2014) ("the issue of [good time credits] is moot because she has since been released from custody, and any lost good-time credits cannot be used to shorten either her period of supervised release or her current sentence for violating the conditions of supervised release") (citing *Bowler v. Ashcroft*, 46 F. App'x 731, *1 (5th Cir. July 31, 2002), *R and R adopted*, 2014 WL 1295490 (N.D. Tex. Mar. 31, 2014) (internal and other citations omitted); *see also Castro-Frias v. Laughlin*,

No.5:11-CV-174-DCB-RHW, 2012 WL 4339102, at *2 (S.D. Miss. July 13, 2012) (noting that sentencing credit "is not applicable to the post-release supervision period of [a prisoner's] sentence. As the [United States Supreme] Court recognized in *United States v. Johnson*, 529 U.S. 53, 59 (2000), '[t]he objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release'"), *R and R adopted*, 2012 WL 4339216 (S.D. Miss. Sep. 20, 2012).

For all of these reasons, it is **ORDERED** that Dawn Herndon's petition for relief under 28 U.S.C. § 2241 is **DISMISSED** as moot.

SO ORDERED on this **25th day** of **September, 2019.**

/s/ Mark T. Pittman
Mark T. Pittman
UNITED STATES DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3583

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)].

(b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are—

> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. The court, in determining whether

to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)].

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)] that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act [34 USCS §§ 20901 et seq.], that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if

the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a]. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) [18 USCS § 3583(g)] when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

> (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)];
>
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)]; and
>
> (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) [18 USCS § 3563(b)] and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) [28 USCS § 3563(b)(10)] shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) [18 USCS § 3583(e)(2)] and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act [34 USCS §§ 20901 et seq.], that the person submit his person, and any property, house,

residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions

applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. The court shall direct that the probation officer provide the defendant

with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. If the defendant—

> (1) possesses a controlled substance in violation of the condition set forth in subsection (d);
>
> (2) possesses a firearm, as such term is defined in section 921 of this title [18 USCS § 921], in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;
>
> (3) refuses to comply with drug testing imposed as a condition of supervised release; or
>
> (4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. When a term of supervised release is revoked and the defendant is

required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [18 USCS § 1201] involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [18 USCS § 1591, 1594(c), 2241, 2242, 2244(a)

(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [18 USCS §§ 2241 et seq., 2251 et seq., 2421 et seq., 1201, or 1591], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

Appendix C

28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

> **(1)** He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> **(2)** He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> **(3)** He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Appendix C

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.