

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PEROTTI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed as moot petitioner's appeal of his time-served sentence.

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No. 17-6349

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 702 Fed. Appx. 322.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2017. The petition for a writ of certiorari was filed on October 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of being a felon in possession of ammunition, in violation of 18 U.S.C. 922(g)(1), 924(e). Judgment 1. The district court sentenced petitioner to 210 months of imprisonment, to be followed by three years of supervised release. Pet. App. 2. The court of appeals affirmed, 226 Fed. Appx. 516, and this Court denied a petition for a writ of certiorari, 552 U.S. 1006.

Petitioner then filed an initial motion to vacate his sentence under 28 U.S.C. 2255. The district court denied that motion, 2011 WL 2174988, and the court of appeals affirmed, 12-3414 Doc. 62-1 (Apr. 16, 2013). After this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), the court of appeals authorized petitioner to file a successive Section 2255 motion. Pet. App. 2. The district court granted that motion and sentenced petitioner to "time served," to be followed by two years of supervised release. Ibid. The court of appeals dismissed petitioner's appeal as moot. Ibid.

1. In 2003, petitioner -- a convicted felon who had been released on parole -- was arrested for drunk driving. Officers found cartridges and a high-powered rifle in his vehicle. 226 Fed. Appx. at 517-518. A federal grand jury sitting in the

Northern District of Ohio indicted petitioner for possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. After a jury trial, petitioner was convicted of possessing ammunition. 226 Fed. Appx. at 518.

The default statutory sentencing range for violating Section 922(g)(1) is zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," however, the Armed Career Criminal Act of 1984 (ACCA) requires a sentence of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). As relevant here, the ACCA defines the term "violent felony" to include any offense punishable by more than one year of imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The final clause in that definition ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is known as "the residual clause." Johnson, 135 S. Ct. at 2557.

The jury found that petitioner had three prior convictions that qualified as violent felonies under the ACCA, including an Ohio conviction for aggravated robbery. Pet. App. 2. Petitioner

contended that his Ohio aggravated robbery conviction did not qualify as an ACCA predicate, but the district court held that it came within the residual clause. See ibid. The court then sentenced petitioner to 210 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed, 226 Fed. Appx. at 518-519, and this Court denied a petition for a writ of certiorari, 552 U.S. 1006.

2. In 2008, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255 on various grounds not at issue here. The district court denied the motion, 2011 WL 2174988, and the court of appeals affirmed, 12-3414 Doc. 62-1.

3. a. In 2015, this Court held in Johnson that the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2563. The court of appeals subsequently granted authorization for petitioner to file a successive motion under 28 U.S.C. 2255. Pet. App. 2. Petitioner, who had served nearly 12 years in prison for his conviction under Section 922(g)(1), contended that he was no longer subject to the ACCA and was instead subject to the statutory maximum of ten years in prison. Ibid. The government agreed, stating that petitioner should be sentenced to "time served" and immediately released from federal custody. D. Ct. Doc. 255, at 5 (Apr. 4, 2016).

Petitioner's counsel requested a determinate sentence below the statutory maximum and within the advisory Sentencing Guidelines range of 92 to 115 months. Resent. Tr. 5, 8. The district court sentenced petitioner to "time served," to be followed by two years of supervised release. Id. at 7. The court added that it would reconsider the supervised-release term if petitioner were successful on release for one year. Ibid. Petitioner was transferred to state custody. Id. at 6, 9-10.

b. The court of appeals dismissed petitioner's appeal as moot. Pet. App. 1-6. The court explained that none of the harms that petitioner suggested would follow from his time-served sentence sufficed to create Article III jurisdiction.

First, the court of appeals rejected petitioner's claim that his sentence of time served would diminish his "opportunity to have his over-time served credited to him should his supervised release be revoked." Pet. App. 3. The court noted that any harm to petitioner at a hypothetical future revocation hearing depended on numerous events that had not yet occurred, including petitioner's violating his supervised release, "something [the court] cannot assume will occur and do[es] not wish to encourage." Id. at 4.

Second, the court of appeals rejected petitioner's claim that his sentence of time served would prevent the district court from

fully considering his time spent in custody "should it consider shortening" his term of supervised release. Pet. App. 4. The court explained that "[t]here is no reason why, in such a future proceeding," the district court could not consider that petitioner "spent nearly twelve years in prison," regardless of whether his sentence was expressed as a term of months or time served. Ibid.

Third, the court of appeals rejected petitioner's claim that his sentence of time served would adversely affect his state parole opportunities. The court explained that Ohio parole authorities "must consider a myriad of factors (none of which is dispositive)." Pet. App. 5. In light of the "discretion vested in" the parole authorities and the "uncertainty as to the grounds on which it will base its decision," the court concluded that "this alleged harm is also insufficient to confer appellate jurisdiction." Ibid.

ARGUMENT

The court of appeals correctly held that petitioner's challenge to his sentence is moot because any adverse consequences resulting from his sentence of time served, as opposed to a definite term of months, are too speculative to constitute a cognizable Article III injury. That decision does not conflict with any decision of another circuit. In addition, federal prosecutors are being instructed to ask courts to impose determinate sentences within the statutory range, rather than

sentences of time served, in future cases like this one. The question presented is accordingly unlikely to arise frequently. Further review is not warranted.

1. A federal court may exercise jurisdiction only over "an actual controversy" that is "extant at all stages of review." Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (citation omitted). A defendant's challenge to his conviction will usually satisfy this requirement even if the defendant has completed his sentence because a criminal conviction typically has "continuing collateral consequences" after the defendant is released from confinement. Spencer v. Kemna, 523 U.S. 1, 8, 12 (1998). When a defendant challenges only his sentence, however, no such presumption applies. See id. at 7-8, 12. A defendant contesting a completed sentence must show ongoing harm "traceable to the" challenged action and "likely to be redressed by a favorable judicial decision." Id. at 7 (citation omitted). Otherwise, the appeal is moot. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

a. Petitioner contends (Pet. 7-8) that his appeal is not moot "so long as [he] faces a term of supervised release," because "the length of supervised release can be modified by the sentencing

court.” But Article III requires a federal-court litigant to demonstrate that his asserted injury is “likely to be redressed by a favorable judicial decision,” not merely that relief is conceptually possible. Spencer, 523 U.S. at 7 (citation omitted). Petitioner cannot make that showing here.

The district court was aware that petitioner had served 12 years in prison for an offense that had a statutory maximum of ten years. See Resent. Tr. 4-7. In apparent recognition of that fact, the court reduced petitioner’s supervised release from three years to two years and further stated that it would consider terminating supervised release after one year. Id. at 7. Petitioner identifies no reason to believe that the district court’s decision would change if his sentence were described as a term of months rather than “time served.” Imprisonment and supervised release are not “interchangeable,” and a defendant who overserves a prison sentence has no entitlement to any reduction in supervised release, let alone a reduction corresponding precisely to the amount of time overserved. United States v. Johnson, 529 U.S. 53, 59-60 (2000). Because petitioner cannot show that his asserted injury is “likely to be redressed by a favorable judicial decision,” his claim is moot. Spencer, 523 U.S. at 7 (citation omitted).

Petitioner cites (Pet. 8) decisions from other courts of appeals holding that challenges to completed sentences were not

moot in part because a district court could modify the terms of supervised release. See United States v. Montoya-De La Cruz, 861 F.3d 600, 603 n.2 (5th Cir. 2017); United States v. Rhone, 647 F.3d 777, 779 n.2 (8th Cir. 2011); United States v. Trammell, 220 Fed. Appx. 945, 946-947 (11th Cir. 2007) (per curiam); United States v. McCoy, 313 F.3d 561, 564 (D.C. Cir. 2002) (en banc); United States v. Trotter, 270 F.3d 1150, 1152 (7th Cir. 2001), cert. denied, 534 U.S. 1166 (2002). None of those cases, however, involved a time-served sentence, much less one imposed in response to a retroactive change in law and after the district court had fully considered the amount of prison time overserved. Nor do any of petitioner's cited cases purport to establish a categorical rule that challenges to completed sentences always present a live controversy if the defendant remains subject to supervised release. To the contrary, courts have found appeals of completed sentences moot where, as here, "the possibility of the district court's imposing a reduced term of supervised release on remand is * * * remote and speculative." United States v. Blackburn, 461 F.3d 259, 262 (2d Cir. 2006), cert. denied, 550 U.S. 969 (2007).

b. Petitioner contends (Pet. 9) that "a definite sentence is necessary in this case to allow [him] the benefit of this Court's" decision in Johnson, 529 U.S. at 53, addressing a court's

authority to alter terms of supervised release. That argument lacks merit.

The Johnson Court explained that a court may exercise discretion under 18 U.S.C. 3583(e) to shorten a term of supervised release for a defendant who has overserved his sentence of imprisonment. 529 U.S. at 60; see Burkey v. Marberry, 556 F.3d 142, 150 (3d Cir.), cert. denied, 558 U.S. 969 (2009). But nothing in Johnson suggests that a district court may exercise that discretion only if a sentence is expressed as a term of months, rather than as time served. Indeed, the district court here exercised its discretion to reduce petitioner's term of supervised release despite his sentence of "time served," Resent. Tr. 7, and "[t]here is no reason why" it could not do so again in the future, Pet. App. 4.¹

c. Petitioner additionally asserts that he suffers a "continuing injury" because his time-served sentence "directly impacts the State of Ohio's parole decision-making process." Pet.

¹ Petitioner does not press his earlier contention that he suffers continuing injury because "he will lose the opportunity to have his over-time served credited to him should his supervised release be revoked." Pet. App. 3. The court of appeals correctly held that petitioner could not base his claim of a live controversy on such a contingent, future event. Id. at 3-4. That is especially true where petitioner is "able -- and indeed required by law -- to prevent such" an event "from occurring." Spencer, 523 U.S. at 15 (quoting Lane, 455 U.S. at 633 n.13); accord O'Shea v. Littleton, 414 U.S. 488, 497 (1974).

10. Under applicable state law, however, Ohio parole authorities “must consider a myriad of factors (none of which is dispositive), in reaching” their determinations. Pet. App. 5 (citing Ohio Admin. Code 5120:1-1-07 (2013)). Petitioner’s time-served sentence does not prevent Ohio parole authorities from considering the fact that he served 12 years in federal prison for an offense with a statutory maximum of ten years. And there is no reason to think that the weight Ohio parole authorities ultimately attach to that fact will depend on whether petitioner’s federal sentence is to time served or to a term of months. The court of appeals was accordingly correct to reject potential state parole decisions as a ground for finding a continuing live controversy. Ibid.

d. Petitioner raises several additional arguments that the court of appeals did not address. None is persuasive. Petitioner contends (Pet. 11-12) that finding his claim moot conflicts with 18 U.S.C. 3742, which permits an appeal of a sentence imposed in violation of law. That grant of statutory jurisdiction, however, does not supplant the mootness doctrine, which is grounded in Article III. See Spencer, 523 U.S. at 7. Likewise, petitioner’s contention (Pet. 14-15) that his sentence violates his jury trial rights under Apprendi v. New Jersey, 530 U.S. 466 (2000), cannot overcome the mootness obstacle.

Petitioner also invokes (Pet. 12-13) the exception to the mootness doctrine for “disputes that are ‘capable of repetition, yet evad[e] review.’” United States v. Juvenile Male, 564 U.S. 932, 938 (2011) (per curiam) (citation omitted). Petitioner contends (Pet. 13) that other “defendant[s] in the Sixth Circuit” who receive similar sentences “will be prevented from redress.” But the exception to mootness for claims capable of repetition yet evading review requires that the “same complaining party will be subject to the same action again.” Juvenile Male, 564 U.S. at 938 (brackets and citation omitted). Petitioner’s assertion “that other persons may litigate a similar claim * * * does not save this case from mootness.” Lane, 455 U.S. at 634.

2. Petitioner contends (Pet. 13-14) that review is needed to resolve a conflict between the decision below and decisions of the Fourth and Eleventh Circuits. See United States v. Bragg, 694 Fed. Appx. 767 (11th Cir. 2017) (per curiam); United States v. Major, 693 Fed. Appx. 267 (4th Cir. 2017) (per curiam). As an initial matter, the decision below and the decisions cited by petitioner are unpublished dispositions that lack precedential effect.² That fact alone is a sufficient reason to deny review.

² The decision in United States v. Watkins, 692 Fed. Appx. 307 (8th Cir. 2017) (per curiam), which reached a conclusion similar to the decision below, likewise is unpublished and nonprecedential.

In any event, there is no conflict among the decisions that petitioner cites. The Eleventh Circuit's decision in Bragg, supra, did not address mootness. Cf. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (decisions in which a federal court resolves the merits without addressing a potential jurisdictional objection are not precedential on the jurisdictional question). The Fourth Circuit's decision in Major did not involve a defendant sentenced to time served after serving prison time in excess of the statutory maximum. Rather, the court of appeals in Major reversed the district court's determination that petitioner was subject to the ACCA and remanded for the district court to consider, inter alia, adjusting supervised release. 693 Fed. Appx. at 268. The Fourth Circuit did not address the application of mootness principles to a case like this one, where the district court had already taken the correct sentencing range into account.

3. In conjunction with the filing of this brief, the Department of Justice is instructing federal prosecutors to seek determinate sentences within the statutory sentencing range, rather than sentences of time served, in future cases like this one. When a criminal defendant serves more time in prison than the applicable statute allows (often as a result of an intervening legal development, such as this Court's invalidation of the ACCA residual clause), imposing a determinate sentence within the

statutory sentencing range ensures that the defendant receives a lawful sentence. Because federal prosecutors in circumstances like these will no longer seek sentences of the kind that petitioner received, the question presented is unlikely to arise with significant frequency. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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