No. 17-6349

in the

Supreme Court
of the
United States

Term,

JOHN PEROTTI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION

DEBORAH L. WILLIAMS
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

No. 17-6349

in the

Supreme Court

of the

United States

Term,

JOHN PEROTTI,
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari from the
United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

None of the Government's arguments should dissuade this Court from granting certiorari review to correct the illegally imposed sentence in this case. Perotti's sentence is not moot as a matter of law as he still faces a term of supervised release which is subject to revision by the district court. Contrary to the Government's assertion, there is a conflict among the circuits as to how to handle the correction of an illegally imposed sentence. Finally, the Solicitor General's claim that they are instructing line AUSAs to ask for a "definite sentence" does not resolve the matter.

1. The Government's brief in opposition does not contest that the sentence

imposed was illegal. "An illegal sentence—one 'where the term of incarceration exceeds the statutory maximum'—'trigger[s] per se, reversible, plain error.'" *United States v. Titties*, 852 F.3d 1257, 1264 (10th Cir. 2017). Instead, the Government chooses to solely rely on the Sixth Circuit's flawed reasoning that the imposition of a time served sentence serves to moot any possible appeal. In doing so, the Government argues that none of the consequences of the illegally imposed sentence are sufficient to confer Article III standing.

2. The Government first contends that the fact that the district court could impose a lesser term of supervised release is not enough to create a justiciable case or controversy. But, as set forth in the certiorari petition (at page 8), a sentencing error relating to the length incarceration does not become moot due to the release of a defendant from incarceration, so long as the term of supervised release can be lowered on remand. Accord *United States v. Hulen*, 879 F.3d 1015, 1018 (9th Cir. 2018).1 The fact that the district court can consider the erroneous length of incarceration in determining the length of supervised release creates a justiciable harm that is capable of relief. In addition, the circuits have held that a defendant may challenge the length of supervised release term itself as being substantively

---

1 To the extent that the Government relies on the Second Circuit case of *United States v. Blackburn*, 461 F.3d 259 (2d Cir. 2006) for the contrary position, this too would create a conflict amongst the circuits which provides an additional basis for certiorari review in this case.

unreasonable. See, for example, *United States v. Fulk*, 879 F.3d 859, 861 (8th Cir. 2018); *United States v. Trailer*, 827 F.3d 933 (11th Cir. 2016). If the ability of the district court to correct sentencing errors such as the above on remand prevents a finding of mootness, then this case, in which the district court could provide similar substantive relief, presented the Sixth Circuit with an Article III controversy.

3. The Government also confuses this Court's holding in *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). The Government argues that Perotti must prove that his requested relief is "likely to be redressed", not merely that relief is "conceptually possible." (Brief in Opposition [hereafter BIO] 8). But the requested relief in the instant case is clearly within the scope of power of the district court – the court is actually required to impose a legal sentence, and could clearly do so on remand. Further, *Spencer* does not go as far as the Government suggests. The quote the Government relies on in *Spencer* is actually taken from this Court's decision in *Lewis v. Cont'l Bank Corp.* 494 U.S. 472, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). The quoted language stands for the mere proposition that a litigant must have the possibility of relief, not a probability. 494 U.S. at 477-78. Thus, any argument that Perotti must prove a likely favorable decision is flawed. Indeed, such a rule would change appellate review altogether – creating an additional hurdle for appellants to clear (the likelihood of success) before the appellate court would even entertain jurisdiction in the case. Finally, the Government's argument that, because the district court did in fact lower Perotti's supervised release term by one

year at resentencing, there is little likelihood that the district court would grant any substantive relief on remand, misses the point entirely. That the district court may or may not choose to exercise its discretion on remand does not prevent the Sixth Circuit from error correction. The Sixth Circuit was therefore in error in finding the appeal moot.

4. The Government further suggests that, despite the Eleventh Circuit's holding in *United States v. Bragg*, 694 F. App'x 767 (11th Cir. 2017) there is no conflict among the circuits, as that case is unpublished, and not actually contrary to the Sixth Circuit's ruling. But *Bragg* could not be more on point, and contrary to the Sixth Circuit's ruling. Bragg obtained habeas relief relying on *Johnson v. United States*, --- U.S. ---, 135 S.Ct. 2551 (2015), the same as Perotti. Bragg also had served more than the statutory maximum, the same as Perotti. Bragg also received a sentence of time served, the same as Perotti. Bragg also appealed the illegally imposed sentence. Interestingly, the Government in the Eleventh Circuit did not argue that the matter was moot, but instead agreed with Braggs that the sentence was illegally imposed, and that a remand for resentencing was proper. *United States of America v. Bragg*, Appellee Brief, 2017 WL 2627512 (11th Cir. 2017). The cases are in conflict, as they treat the issue of time served differently.

The fact that a case is listed in the Federal Appendix, as opposed to the Federal Reporter, does not dissuade this Court from review. This Court need look no further than the current slate of arguments before it for argument to belie the claim that cases listed the Federal Appendix are unworthy of review. Between January and March of this year, this Court will hear no less than three cases whose opinions below were published only in the Federal Appendix. *Byrd v. United States*, 16-1371, 138 S.Ct. 54 (2017); *Hall v. Hall*,16-1150, 138 S.Ct. 54 (2017); *Lozman v. Riviera Beach*, 17-21, 138 S.Ct. 447 (2017). In addition, the line between an "unpublished" case and a "published" one is increasingly blurred. Both the Sixth and Eleventh Circuits consider decisions located in the Federal Appendix to be "persuasive" authority. See *United States v. House*, 872 F.3d 748, 753 (6th Cir. 2017); *United States v. Rodriguez*, 751 F.3d 1244, 1251 (11th Cir. 2014). Thus, there is every reason to believe that each of these circuits will follow their holdings in *Perotti* and *Bragg* for future similar cases.

A circuit conflict on this issue does exist. And this issue will repeat in other forums. The resolution of this matter is ripe before the Court, and should be addressed.

5. Finally, the Government suggests that they are solving this problem for the Court by "instructing federal prosecutors to seek determinate sentences within the statutory range" in future cases. (BIO 13). But this does not resolve the matter. Even if prosecutors follow this directive, this would not prevent a district court from imposing a sentence similar to that at issue in the instant case. Indeed, in *United States v. Bragg*, 694 F. App'x 767 (11th Cir. 2017), "[t]he government told the district court that a sentence of time served (i.e., 198 months) would be illegal because it

would exceed the 10-year maximum." *Id.* at 768. This did not stop the district court from imposing an illegal "time served" sentence. Thus, instruction from the Department of Justice to its line AUSAs does not solve this issue. Nor does it solve the issue for Petitioner Perotti. Perotti still remains affected by the district court's decision in this case. No instruction based upon future cases will assist Perotti or those similarly situated who have already been sentenced to an illegal time served sentence.

The Sixth Circuit erred in finding this matter moot, as Perotti still has yet to serve a term of supervised release which can be altered by the district court, both upon remand and after serving one year after release. The Sixth Circuit and the Eleventh are in direct conflict as to how to correct an illegally imposed sentence under these circumstances. For these reasons, as well as those set forth in the Petition, Perotti requests that this Court grant certiorari review.

CONCLUSION

For the foregoing reasons, as well as those presented in the Petition for Certiorari, this Court should grant certiorari review and reverse the Sixth Circuit's ruling on this matter.

Respectfully submitted,

DEBORAH L. WILLIAMS
Federal Public Defender

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner