No. 08-___

IN THE

Supreme Court of the United States

JOHN BURKEY,

Petitioner,

v.

HELEN J. MARBERRY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was sentenced to a term of imprisonment, followed by a term of supervised release. He filed a petition for habeas corpus under 28 U.S.C. § 2241, alleging that he was being held in prison beyond his proper release date. A magistrate judge agreed. But before petitioner's case was finally adjudicated, the Bureau of Prisons released him. Petitioner continued to pursue his claim that he had been imprisoned too long in order to support an application to reduce his period of supervised release. The Third Circuit, in acknowledged conflict with decisions of other circuits, dismissed the petition as moot.

The Question Presented is:

Whether a prisoner's challenge to his continued detention is mooted by his release when a judgment in his favor would establish that he was incarcerated beyond the proper expiration of his prison term, thereby supporting a claim for reduction in his term of supervised release.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Burkey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-17a) is published at 556 F.3d 142. The district court's opinion (Pet. App. 18a-26a) is unreported. The magistrate judge's opinion (Pet. App. 27a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the U.S. Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party."

18 U.S.C. § 3583(e) provides, in relevant part:

> **(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)--

> (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.

STATEMENT OF THE CASE

Petitioner sought post-conviction relief, alleging that the government was improperly denying him early release from prison. A magistrate judge agreed, but – before the case was finally adjudicated – the government released petitioner from prison. Petitioner continued to pursue his claim to support an application for a reduction in his term of supervised release. The Third Circuit held that his post-conviction application was moot, acknowledging a square circuit split on that question.

1. In 1996, petitioner John Burkey, who was convicted and serving a sentence for a controlled substances crime, was found eligible to participate in the Bureau of Prisons' residential drug abuse program ("RDAP"). Upon completing the RDAP, petitioner was granted early release pursuant to 18 U.S.C. § 3621(e)(2)(B).

While on supervised release, petitioner was convicted of a new controlled substance crime and

sentenced to 57 months' imprisonment.[1] Originally, the Bureau of Prisons (BOP) informed petitioner that he was eligible to re-enroll in its RDAP, and that completion of the program would again render him eligible for early release. Pet. App. 34a. But after petitioner was transferred to a different facility to begin the RDAP, the BOP changed its position, telling petitioner that although he was qualified to participate in the program, completion would not result in early release. The BOP relied on its intervening issuance of Program Statement 5331.01(5)(c), in October 2003, which provides in pertinent part that "[i]nmates may earn an early release for successful RDAP completion only once." FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT NO. 5331.01 (2003), *available at* http://www.bop.gov/policy/progstat/5331_001.pdf.

After completing the RDAP and exhausting all of his administrative remedies, petitioner filed a petition for habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the Western District of Pennsylvania. Petitioner challenged the BOP's determination that he was not eligible for early release, arguing that the BOP's issuance of Program Statement 5331.01(5)(c) violated the Administrative Procedure Act, 5 U.S.C. § 553.

2. On August 31, 2007, a magistrate judge recommended that the district court grant petitioner's application. The magistrate judge agreed

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[1] The sentencing court also ordered petitioner to serve, concurrent to his 57-month prison term, a three-month term for violating the terms of his supervised release.

that the BOP had violated the APA in promulgating the Program Statement. Pet. App. 39a. In reaching that conclusion, the magistrate judge called BOP's defense of the rulemaking process "patently wrong," "unsupportable," and "unconvincing." Pet. App. 39a-40a.

The BOP declined to challenge the magistrate judge's findings. Pet. App. 19a. Instead, just seven days after the magistrate judge issued her recommendation, the BOP voluntarily released petitioner from prison and filed a Notice of Suggestion of Mootness. Pet. App. 5a.

Petitioner continued to pursue his application, arguing that a finding that he had been unlawfully held in prison beyond his release date would be the basis for his application to reduce his term of supervised release. Under 18 U.S.C. § 3583(e), a district judge who entered a defendant's sentence of imprisonment may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release." In *United States v. Johnson*, 529 U.S. 53, 60 (2000), this Court held that, although a sentencing judge is not *required* to reduce a term of supervised release, "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term." Petitioner accordingly argued that a ruling in his favor would likely cause the sentencing court to reduce his term of supervised release.

The district court nonetheless dismissed petitioner's habeas petition, finding that it could no longer "provide him with effective relief." Pet. App. 26a. Because the district court could not "predict

what weight, if any, the sentencing court [would] accord to a determination" that petitioner had been unlawfully over-incarcerated, the court was "not persuaded that a favorable decision . . . likely [would] result in his sentencing court shortening his supervised release term." Pet. App. 21a-22a. The court acknowledged that it was rejecting contrary decisions in the Second, Fifth, and Ninth Circuits. Pet. App. 25a.

3. The Third Circuit affirmed. Pet. App. 10a-12a. Dismissing the language from this Court's decision in *Johnson* as "nothing more or less than an appropriate reference to the discretion of a sentencing court to modify a term of supervised release" (Pet. App. 16a), the Third Circuit reasoned that petitioner's supervised release term was not a sufficient "collateral consequence" to satisfy Article III because the likelihood that a ruling in his favor would cause a reduction in his term of supervised release was too speculative (Pet. App. 12a-13a).

The Third Circuit acknowledged that its holding squarely conflicted with *Levine v. Apkar*, 455 F.3d 71, 77 (2d Cir. 2006), and *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005). Pet. App. 14-15. In those rulings, the Second and Ninth Circuits held that a post-conviction application is not moot when a judgment in the petitioner's favor would support a reduction in his term of supervised release.

REASONS FOR GRANTING THE WRIT

Petitioner seeks relief under 28 U.S.C. § 2241 because his sentencing court will give a determination that he was improperly denied release from prison at the proper time "great weight" in

deciding whether to reduce his term of supervised release. *United States v. Johnson*, 529 U.S. 53, 60 (2000). The Third Circuit nonetheless held that petitioner's application is moot, exacerbating an acknowledged division of authority over whether a petitioner's release from prison terminates his ability to challenge the legality of his detention beyond a certain date. This question arises frequently in the federal courts, and the split of authority on the issue is both entrenched and untenable. This case presents an ideal vehicle for resolving this conflict.

I. The Federal Courts Of Appeals Are Divided Over Whether A Post-Conviction Challenge To A Petitioner's Length Of Incarceration Becomes Moot When The Petitioner Is Released From Prison, But Still Seeks To Shorten His Term Of Supervised Release.

The federal circuits are irreconcilably fractured over whether an individual's release from prison moots an action when he intends to pursue a reduction in his term of supervised release. The conflict is widely recognized, and confusion over the question presented has led to divisions not only between, but within, the circuits. The federal courts have thoroughly ventilated the arguments on both sides of the issue, and continue to reach conflicting decisions despite repeatedly considering the question. The conflict in the lower courts is thus entrenched and ripe for this Court's intervention.

1. Three courts of appeals, including the Third Circuit, hold that a Section 2241 petition is moot once the petitioner has been released from prison,

notwithstanding the petitioner's intention to seek a reduction in his term of supervised release.

In this case, the Third Circuit concluded that petitioner's claim failed to raise a live controversy because he did not assert an injury redressable by the court. Pet. App. 9a (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)). In the Third Circuit's view, the possibility that the sentencing judge would subsequently modify petitioner's supervised release term based on a favorable decision on his habeas claim was "so speculative that any decision on the merits . . . would be merely advisory and not in keeping with Article III's restriction of power." Pet. App. 13a. The court's holding has been followed in several district court decisions,[2] and is consistent with prior Third Circuit rulings.[3]

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[2] *See Klein v. Hogson*, No. Civ. 3:CV-07-0701, 2009 WL 1044593, at *1 (M.D. Pa. Apr. 17, 2009); *Razzolli v. U.S. Parole Comm'n*, No. 3:CV-08-272, 2009 WL 1034483, at *2 (M.D. Pa. Apr. 16, 2009); *Cunningham v. Williamson*, No. CIV 3:CV-07-0977, 2009 WL 1044592, at *1 (M.D. Pa. Apr. 15, 2009).

[3] *See Scott v. Schuykill F.C.I*, 298 F. App'x 202 (3d Cir. 2008) (per curiam) ("[Petitioner's] § 2241 petition is moot because it is not redressable by a favorable judicial decision. . . . [Petitioner's] sentence ha[s] ended and his supervised release ha[s] begun."); *Williams v. Sherman*, 214 F. App'x 264 (3d Cir. 2007) (per curiam) ("A delayed commencement of supervised release due to an alleged wrongful calculation of good-conduct time cannot be redressed by a favorable judicial decision." (citing *United States v. Johnson*, 529 U.S. 53, 60 (2000)); *Hinton v. Minor*, 138 F. App'x 484 (3d Cir. 2005) (per curiam) ("[A]ny additional credit toward the custodial portion of [petitioner's] sentence would not shorten his period of supervised release. . . .

There is some, though not extensive, support for the Third Circuit's view in other circuits. The Eighth Circuit adopted the same rule, expressly overruling prior circuit precedent. *See Hohn v. United States*, 262 F.3d 811 (8th Cir. 2001) (overruling *Sesler v. Pitzer*, 110 F.3d 569 (8th Cir. 1997)). Although this Court vacated that decision on other grounds (*see Hohn v. United States*, 537 U.S. 801 (2002)),[4] the Eighth Circuit subsequently embraced the same conclusion in an unpublished opinion (*James v. Outlaw*, 142 F. App'x 274 (8th Cir. 2005) (per curiam) (finding Section 2241 petition moot because the petitioner "was released from prison while the appeal was pending, [and] return of the good-time credits at issue would have no effect on his . . . term of supervised release")).

Unpublished opinions of the Tenth Circuit also are consistent with the Third Circuit's holding in this case.[5] Similarly, a district court in the Fourth Circuit

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[G]iven [petitioner's] release from prison, we . . . dismiss his appeal as moot.").

[4] The Solicitor General confessed error in response to the petition for certiorari in *Hohn*, recognizing that the case was not moot for other reasons – for example, the petitioner's right to recover a special assessment imposed as a result of his conviction and the prospect that the conviction would be used to enhance a sentence if the petitioner were later convicted of another offense. *See* U.S. Br. 9-11, *Hohn v. United States*, 537 U.S. 801 (2002) (No. 01-1340). This Court, in turn, vacated and remanded the case for further consideration in light of the Solicitor General's brief. *Hohn v. United States*, 537 U.S. 801 (2002).

[5] *See Crawford v. Booker*, No. 99-3121, 2000 WL 1179782, at *2 (10th Cir. Aug. 21, 2000) (unpublished) (holding habeas

has recently held that a petitioner's release from prison moots his claim. *See Fulton v. Felt*, No. 5:06-cv-0010, 2009 WL 151084, at *2 (S.D. W. Va. Jan. 20, 2009) (mem.) ("[A]ssuming that Petitioner is correct and he actually did serve more time in custody than he should have, there would be no collateral consequence as he serves [a] term of supervised release . . . . [that] cannot be reduced.").

2. As the Third Circuit acknowledged, its ruling squarely conflicts with decisions of other courts of appeals. Pet. App. 12a. The Second, Ninth, and Eleventh Circuits would hold that this case is not moot.

In *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005), the Ninth Circuit held that a Section 2241 petition is not mooted by the petitioner's release from prison when he remains on supervised release. As here, the petitioner in *Mujahid* challenged the BOP's execution of his sentence, arguing that the Bureau had miscalculated his good-time credits and

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petition moot because court "could not shorten the length of [petitioner's] supervised release term . . . even if [his] legal argument was successful"), *followed in Fields v. Wiley*, No. 07-cv-01934-LTB-MEH, 2008 WL 1840725, at *4 (D. Colo. Apr. 23, 2008) (dismissing claim as moot because petitioner was released); *see also Wilcox v. Aleman*, 43 F. App'x 210 (10th Cir. 2002) (finding mootness where petitioner challenging release date had been released to supervised release). *But see Peterson v. Lappin*, No. 07-cv-00774-DME, 2007 WL 2332083, at *1 (D. Colo. Aug. 14, 2007) (rejecting mootness argument "[b]ecause the duration of supervised release could be affected by a favorable decision on the merits of [petitioner's] Habeas Application").

prolonged his incarceration. *Id.* In the view of the Ninth Circuit, "[t]he '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 petition from being moot." *Id.* at 995 (citing *Gunderson v. Hood*, 268 F.3d 1149, 1153 (9th Cir. 2001)).

Mujahid has been repeatedly applied in the Ninth Circuit. *See Tablada v. Thomas*, 533 F.3d 800, 802 n.1 (9th Cir. 2008) (refusing to dismiss as moot petitioner's Section 2241 petition because he remained on supervised release); *Arrington v. Daniels*, 516 F.3d 1106, 1111 n.4 (9th Cir. 2008) (finding that for petitioners already released from prison, "relief may still be available in the form of modification, amendment, or termination of their supervised release"); *Serrato v. Clark*, 486 F.3d 560, 565 (9th Cir. 2007) ("Because 18 U.S.C. § 3583(e)(2) gives the sentencing court the power to reduce a term of supervised relief . . . [petitioner's] appeal is not moot.").

The Second Circuit has also held that a "case or controversy exists" so long as a petitioner remains on supervised release. In *Levine v. Apkar*, 455 F.3d 71, 77 (2d Cir. 2006), the petitioner challenged the BOP's refusal to transfer him to a community correction center until he had completed ninety percent of his sentence. *Id.* While the case was pending on appeal, he was released. The Second Circuit held that his petition was not moot because the district court could

modify his term of supervised release in light of its holding. *Id.*[6]

The Eleventh Circuit reached the same conclusion in *Dawson v. Scott*, 50 F.3d 884, 886 (11th Cir. 1995). The court recognized that "supervised release . . . is part of [a] sentence and involves some restrictions upon . . . liberty," and held that "[b]ecause success in [a Section 2241 petition] could alter the supervised release portion of [a] sentence, [a petitioner's] claim is not moot." *Id.* Contrary to the Third Circuit, the Eleventh Circuit has reaffirmed that precedent in the wake of this Court's ruling in *Johnson*. *See Mitchell v. Middlebrooks*, 287 F. App'x

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[6] Petitioner's case is *a fortiori* under the Second Circuit's holding in *Levine*. A judgment that petitioner was not timely released from prison into society would present a substantial equitable basis for a reduction in his term of supervised release. The petitioner in *Levine*, by contrast, alleged that he had not been timely released from prison into "community confinement," a status that involves significantly greater governmental oversight and that, as a consequence, presents a less substantial equitable ground for a reduction in the term of supervised release.

Of note, by granting this petition, the Court would help to resolve the related circuit conflict over whether a claim of improper denial of release to community confinement is saved from mootness by the prospect of a reduction in the petitioner's term of supervised release. Three circuits hold, in conflict with the Second Circuit, that such a claim is moot because a reduction in supervised release will not remedy "foregone 'opportunities to transition into the community.'" *Demis v. Sniezek*, 558 F.3d 508, 515 (6th Cir. 2009); *see also Semulka v. Bureau of Prisons*, No. 08-3404, 2009 WL 641217 (3d Cir. Mar. 13, 2009) (per curiam); *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008).

772, 775 (11th Cir. 2008) ("[*Johnson*] recognized that sentencing courts have the authority both to modify conditions of supervised release and to terminate supervised release . . . . *Johnson* did not, therefore alter our holding in *Dawson* that an appeal is not moot where a former prisoner is still serving a term of supervised release.").

3. Several circuits have issued inconsistent opinions on the question presented. In *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006), the Fifth Circuit held that an application like petitioner's is not moot, reasoning that "the possibility that the district court may alter [the 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 [his] petition from being moot." *Id.* Multiple district court rulings in the Fifth Circuit follow that rule.[7]

Another Fifth Circuit panel reached a contrary result, however. In *Lawson v. Berkebile*, 308 F. App'x 750 (5th Cir. 2009) (per curiam), the court dismissed as moot a Section 2241 petition challenging the BOP's refusal to grant an inmate early release. The

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[7] *See, e.g.*, *Whitehurst v. Burks*, No. H-08-2473, 2009 WL 926995, at *4 (S.D. Tex. Apr. 1, 2009); *Floyd v. Berkebile*, No. 3:05-CV-2489-M, 2008 WL 153494, at *1 (N.D. Tex. Jan. 15, 2008) ("The Court declines to dismiss the case as moot" because "[t]he credit against the federal sentence that the court has determined Petitioner is entitled to could support an alteration of the term of his supervised release."); *Alford v. Reece*, No. 5:06cv95DCB-MTP, 2007 WL 3124541, at *2 n.1 (S.D. Miss. Oct. 19, 2007) ("If . . . petitioner is on supervised release, then his petition might not be moot.").

court distinguished that court's prior ruling in *Pettiford* on the supposed ground that the district court reviewing Lawson's habeas petition was "without jurisdiction to determine, under 18 U.S.C. § 3583, whether he served excess prison time; that determination [was] to be made by the sentencing court." *Id.* at 752. But that is a false distinction because the same was true in *Pettiford*. *See* Report and Recommendation of the Magistrate Judge, *Johnson v. Pettiford*, No. 06708097 (S.D. Miss. July 17, 2007) (noting that petitioner was not sentenced in the same district court that was reviewing his habeas claim).

One district court in the Fifth Circuit has similarly declined to follow *Pettiford*. In *Nolan v. Reece*, No. 03198-095, 2006 WL 1674287 (S.D. Miss. June 13, 2007), the court expressed disagreement with the decision, finding that "the relevant statutes and rules for modification of a term of supervised release are directed toward the sentencing court or the court conferred with jurisdiction over the prisoner's term of supervised release, not the court in which the Petitioner chooses to file a section 2241 habeas petition." *Id.* at *1.

Citing *Johnson*, the Sixth Circuit has similarly noted in unpublished opinions that a challenge to an expired term of incarceration would be moot despite the defendant's ongoing supervised release term. *United States v. Wilson*, 87 F. App'x 553, 556 (6th Cir. 2004), *followed in United States v. Lewis*, 166 F. App'x 193 (6th Cir. 2006). But previous published circuit precedent suggested that continued post-release supervision *could* preclude a finding of

mootness. *See Diaz v. Kinkela*, 253 F.3d 241 (6th Cir. 2001).[8]

4. The division of authority over the question presented is intolerable. As the law stands now, identically situated petitioners have their habeas petitions decided or dismissed purely based on the happenstance of the circuit in which the case arises. Indeed, because a petitioner's motion for a reduction in the term of his supervised release must be filed in the sentencing court (*see* 18 U.S.C. § 3583(a), (e)), individuals within a single courthouse (or even courtroom) may receive disparate treatment depending on the court that resolved the antecedent habeas petition.

This case is also an ideal vehicle in which to resolve the recurring circuit conflict raised by the question presented. The issue was squarely presented to the Third Circuit, which resolved the

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[8] In *Diaz*, the Sixth Circuit held moot a habeas petition challenging the imposition of "bad acts" time by a defendant on post-release restriction. But the court premised its holding on the fact that the state statute at issue had already been declared unconstitutional. Though it found that the petitioner had not properly raised the question, the court noted that the "[p]etitioner's claim that he continues to suffer collateral consequences of the 'bad acts' time" – namely that he remained on post-release restriction – "may have afforded him standing" had the statute at issue not been previously invalidated. *Diaz*, 253 F.3d at 244. Additionally, in *Demis* (*see supra* at 10 n.5), the Sixth Circuit noted that "shortening the term of supervised release may well be appropriate for a petitioner who challenges the *length* of his sentence" (558 F.3d at 515), thereby suggesting that it would be inclined to follow the Ninth, Second and Eleventh Circuits on the question presented.

case based only on this ground. The magistrate's recommendation moreover demonstrates that petitioner's underlying Section 2241 application is meritorious. *See* Pet. App. 48a-49a.

II. The Third Circuit's Ruling Is Erroneous.

Certiorari also is warranted because the ruling below conflicts with this Court's precedents. A case presents a justiciable controversy so long as the plaintiff suffers an "'actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). Therefore, a case is moot only when the parties no longer have "a 'personal stake in the outcome' of the lawsuit" (*Lewis*, 494 U.S. at 478 (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983))), or when the court can no longer "grant 'any effectual relief whatever'" (*Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895))).

Based on these well-established principles, petitioner's habeas claim presents a live controversy. The restrictions on liberty attendant to petitioner's term of supervised release, which petitioner claims is too long, constitute an "actual injury traceable to the defendant." *Spencer*, 523 U.S. at 7. Further, because the habeas court can fashion "*some* form of meaningful relief" (*Church of Scientology*, 506 U.S. at 12 (emphasis in original)) – namely, a favorable judgment that will aid petitioner in his § 3583(e)(1) motion for a reduction in his term of supervised release – petitioner's injury is redressable. Lest there be any doubt, petitioner's claim should be justiciable

because a decision to the contrary would insulate the BOP's "patently wrong" policymaking decisions (Pet. App. 39a) from judicial review.

A. Petitioner Is Suffering An Actual Injury Traceable To The Defendant.

1. In *Spencer v. Kemna*, this Court observed that "[a]n incarcerated convict's (or a parolee's) challenge to the validity of his conviction *always* satisfies the case-or-controversy requirement, because the incarceration (or the restriction imposed by the terms of . . . parole) constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." 523 U.S. at 7 (emphasis added). The "restriction imposed" by petitioner's supervised release term constitutes a "concrete injury" for two reasons.

First, as this Court has recognized, supervised release is a replacement for parole. *See Johnson v. United States*, 529 U.S. 694, 696-97 (2000); *Gozlon-Peretz v. United States*, 498 U.S. 395, 400-01 (1991). The primary difference between supervised release and parole is merely that with the former, "the sentencing court, rather than the Parole Commission, . . . oversee[s] the defendant's postconfinement monitoring." *Gozlon-Peretz*, 498 U.S. at 401. Indeed, like inmates on parole, inmates on supervised release must "abide by certain conditions, some specified by statute and some imposable at the court's discretion." *Johnson*, 529 U.S. at 697. Petitioner is living a life under constant supervision, including restrictions on his ability to travel outside of the district of his sentencing. Pet. App. 55a-57a.

Second, petitioner's current service of his supervised release term is "traceable to" his unlawful incarceration. *Spencer*, 523 U.S. at 7. Had the BOP granted petitioner early release upon completion of his second drug treatment program, he would be a year closer to completing his term of supervised release. But because the BOP denied early release based on an invalid rule, petitioner will continue to serve his term of supervised release for that full year.

2. None of the Third Circuit's reasons for failing to follow this straightforward reasoning withstands scrutiny.

a. The Third Circuit concluded that petitioner's overly long supervised release term could not constitute an "actual injury" because it does not constitute a "continuing injury, or collateral consequence," of his excessive prison term. Pet. App. 9a. But as the Third Circuit itself recognized, a habeas petitioner needs to rely on collateral consequences only "once [his or her] sentence has *expired*." *See* Pet. App. 9a (emphasis added). When a person is still on supervised release, his sentence has not yet expired. Indeed, this Court has defined collateral consequences as distinct from the concrete injuries posed by incarceration and parole: "Once the convict's sentence has expired, . . . some concrete and continuing injury *other than* the now-ended incarceration or parole – some 'collateral consequence' . . . must exist." *Spencer*, 523 U.S. at 7. Accordingly, when, as here, a habeas petitioner is still serving a term of supervised release, he is suffering a "concrete injury" that renders collateral consequences unnecessary. *See United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001); *see also*

United States v. Blackburn, 461 F.3d 259, 269 (2d Cir. 2006) (Sotomayor, J., dissenting) ("*Spencer* does not control the resolution of this case because [petitioner's] entire sentence has not expired.").[9]

b. Even if petitioner were required to show a collateral consequence of his unlawful incarceration, he has done so. A collateral consequence is nothing more than a "concrete and continuing injury other than the now-ended incarceration." *Spencer*, 523 U.S. at 7. Thus, the Court has held that a petitioner whose term of incarceration has expired may challenge his or her conviction because it renders the petitioner incapable of, among other things, "engag[ing] in certain businesses" and "serv[ing] as a juror." *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968). *See also Fiswick v. United States*, 329 U.S. 211, 221-23 (1946) (deeming the possibility of deportation a collateral consequence).

Petitioner's supervised release term imposes such "concrete disadvantages or disabilities." *Spencer*, 532 U.S. at 8. For example, petitioner must submit to periodic drug testing and restrictions on his travel. *See* Pet. App. 55a-56a; *Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981) (live controversy exists where petitioner's "release is conditioned upon . . . compliance with terms that significantly restrict his

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[9] The Third Circuit also noted that petitioner's habeas petition "d[oes] not challenge the validity" of his term of supervised release. Pet. App. 10a. This is, of course, true, but it also is irrelevant. Petitioner cannot challenge his supervised release term in this Section 2241 petition because the Bureau of Prisons is not his custodian on supervised release.

freedom," such as receiving "written permission before changing his residence, changing his job, or traveling out of state"); *see also Cavins v. Lockyer*, 232 F. App'x 655 (9th Cir. 2007) (habeas petition not moot because of potential collateral consequences from petitioner's exercise of his right to travel). These restrictions will continue for an extra year because of petitioner's unlawful incarceration. The Third Circuit's view that these "disadvantages and disabilities" are not collateral consequences of that unlawful incarceration because of the allegedly low "'likelihood' that a favorable decision would redress" them (Pet. App. 11a) confuses the distinct issues of injury and redressability.

B. Petitioner's Injury Is Redressable By A Favorable Habeas Ruling.

Under longstanding principles of mootness, petitioner's claims are redressable by a favorable ruling.

1. Petitioner satisfies the redressability requirement that he continue to assert a "legally cognizable interest in the outcome" of the case. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979)). It is sufficient, as is the case with declaratory actions, that the remedy he seeks will be useful only in future litigation. *Cf. Powell v. McCormack*, 395 U.S. 486, 499 (1969). Only when it becomes "impossible for the court to grant 'any effectual relief whatever to the prevailing party'" does a ruling become advisory and thus moot. *Church of Scientology*, 506 U.S. at 12 (quoting *Mills*, 159 U.S. at 653).

Such is not the case here. A favorable ruling on petitioner's habeas corpus petition would significantly increase petitioner's chances of shortening his term of supervised release. That is so because this Court has recognized that "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term," and a sentencing court should take that fact into consideration in deciding whether it will modify or terminate an individual's term of supervised release. *United States v. Johnson*, 529 U.S. 53, 60 (2000). A favorable ruling under Section 2241 will allow petitioner to prove indisputably to the sentencing court that he was unlawfully over-incarcerated. *See Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006); *Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir. 2005).

2. It is irrelevant, as the Third Circuit held, that the sentencing court is not *required* to change petitioner's sentence in the event of a favorable ruling on his Section 2241 petition. *See* Pet. App. 12a-13a. In the analogous situation of deciding whether to remand a case to the sentencing court, appellate courts have uniformly held that a live controversy persists as long as the lower court retains the power to modify the sentence on remand.[10] That is, in fact,

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[10] *See, e.g.*, *United States v. Trotter*, 270 F.3d 1150, 1152-53 (7th Cir. 2001) (recognizing that although this Court held in *Johnson* that "a person held too long in prison" is not automatically "given credit against his term of supervised release," the fact that a "district judge would have discretion to shorten the term of supervised release" is enough to keep the controversy live); *see also, e.g.*, *United States v. Cruzado-*

Laureano, 527 F.3d 231, 234 n.1 (1st Cir. 2008) ("Although [the defendant] has completed serving his term of imprisonment, this appeal has not become moot . . . . [I]f [the defendant] were to succeed with a claim that his sentence was improperly calculated, his three-year period of supervised release could be reduced on remand."); *United States v. Maken*, 510 F.3d 654, 656 n.3 (6th Cir. 2007); *United States v. Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007); *Serrato v. Clark*, 486 F.3d 560, 565 (9th Cir. 2007) (holding habeas corpus petition not moot "[b]ecause 18 U.S.C. § 3583(e)(2) gives the sentencing court the power to reduce a term of supervised release" (footnote omitted)); *United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006); *United States v. Larson*, 417 F.3d 741, 747 (7th Cir. 2005) ("[T]he case is not moot if the judge on remand would have discretion to shorten [the defendant's] supervised release."); *United States v. McCoy*, 313 F.3d 561, 564 (D.C. Cir. 2002) (finding petitioner's action not mooted by her release from prison because resentencing was "relevant to [defendant's] supervised release" and "clearly could benefit [her]," even though it may not); *United States v. Verdin*, 243 F.3d 1174, 1178-79 (9th Cir. 2001) ("Verdin . . . is in the first year of a three-year term of supervised release, which could be affected upon resentencing. If he were to prevail, in decreasing his total offense level, he *could* be resentenced to a shorter period of supervised release. . . . Thus, Verdin has a 'personal stake in the outcome' of this appeal, and it is not moot." (emphasis added)); *Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir. 1995) ("Because success for Dawson *could* alter the supervised release portion of his sentence, his appeal is not moot." (emphasis added)); *cf. United States v. Blackburn*, 461 F.3d 259 & n.2 (2d Cir. 2006) (holding to the contrary, but noting that "we may assume that in the typical case . . . an appellate court could fairly deem it likely enough that, if the merits issue were decided in favor of the defendant, the district court would use its discretion on remand to modify the length of a term of supervised release" and that the holding in the case "is quite narrow"); *Swaby v. Ashcroft*, 357 F.3d 156, 161 (2d Cir. 2004) ("[W]ere we to rule in petitioner's favor, he would have a *chance* at reentering the United States. This chance is sufficient to give petitioner a

the prevailing rule in the Third Circuit. *See United States v. Jackson*, 523 F.3d 234, 241 (3d Cir. 2008) ("[T]he possibility of a credit for improper imprisonment against a term of supervised release is sufficient to give [the court] jurisdiction."); *see also United States v. Cottman*, 142 F.3d 160 (3d Cir. 1998) (rejecting assertion of mootness because over-incarceration "would likely merit a credit against [petitioner's] period of supervised release").

The fact that petitioner will file his motion under 18 U.S.C. § 3583(e)(2) in his sentencing court, rather than the case being directly remanded to the sentencing court, should make no difference. The likelihood that a favorable decision will redress petitioner's injuries cannot turn solely on the "fortuitous occurrence" of whether his sentencing court is also his habeas court. *Mujahid*, 413 F.3d 991.

3. The Third Circuit also erred in opining that the prospect that petitioner's sentencing court will reduce his term of supervised release is too speculative to give rise to a live case or controversy. *See* Pet. App. 11a-12a. The Third Circuit correctly noted that *Spencer* requires that an asserted injury be "likely to be redressed by a favorable judicial decision." *Spencer*, 523 U.S. at 7 (quoting *Lewis*, 494 U.S. at 477). But the Third Circuit dramatically misapplied that test to the situation here.

This Court in *Spencer* rejected four potential collateral consequences as too remote to avoid a

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personal stake in the litigation that presents a live case or controversy." (emphasis added and quotations omitted)).

finding of mootness. *See Spencer*, 523 U.S. at 14-16. These injuries, however, were far less likely to be redressed by a favorable ruling than petitioner's continuing, excessive term of supervised release. Two of the four harms were hypothetical and contingent on Spencer committing a crime in the future; another was based on the exceedingly unlikely possibility that he would be called as a witness in a future criminal trial. *See id.* at 15-16. And although Spencer was going to face a parole proceeding (he had already been convicted of another crime), an analysis of the relevant Missouri parole laws made clear that the final asserted injury – revocation of parole in the case before this Court – would likely have no effect whatsoever on a future parole proceeding. *Id.* at 14.

By contrast, petitioner's ability to receive redress through a § 3583(e) motion based on a holding that he was in fact unlawfully incarcerated for too long is not a mere "possibility," but a probability. Recognizing that "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term," this Court has admonished sentencing courts to take these considerations into account when making sentencing determinations, *Johnson*, 529 U.S. at 60 – which they have done, *see, e.g.*, *United States v. Norgaard*, 357 F. Supp. 2d 1274, 1276-77 (W.D. Wash. 2005) (factoring in equitable considerations in deciding to shorten term of supervised release).

Moreover, the circumstances specific to this case make petitioner an ideal candidate for early release. He is in perfect compliance with the terms of his supervised release. Given the length of his illegal overstay in prison, a favorable ruling on his Section

2241 petition would make it likely that a sentencing court would find, based on his model behavior and the equitable considerations outlined in *Johnson*, that petitioner's term of supervised release should be shortened.

C. Dismissing The Case In This Posture As Moot Would Insulate The BOP's "Patently Wrong" Arguments From Judicial Review.

Almost immediately after the magistrate judge recommended that petitioner's habeas claims be granted, the BOP released petitioner and filed a Notice of Suggestion of Mootness. Pet. App. 5a. By granting the BOP's motion and deeming petitioner's habeas petition moot, the district court and court of appeals permitted BOP effectively to shield what the magistrate judge believed were "patently wrong" actions from an adverse judgment. Pet. App. 39a.

This case is not the only instance of the BOP taking actions that insulate its policies from judicial scrutiny. For example, in January 2005, the BOP unilaterally terminated the federal boot camp program, one of only two programs providing for sentence reductions. DIST. OF OR., FED. PUB. DEFENDER, UPDATE ON BOP ISSUES AFFECTING CLIENTS BEFORE AND AFTER SENTENCING 5 (2007), *available at* http://fd.org/pdf_lib/SAW%20Bureau.pdf. Almost immediately, a district court enjoined the termination, finding a likely violation of both the APA and the Ex Post Facto Clause. *See Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005). In response, the BOP began a "concerted policy of mooting cases" by transferring prisoners who filed

suits to state boot camps. *See* DIST. OF OR., *supra*, at 6. Similarly, in *Demis v. Sniezek*, the BOP attempted to dismiss a habeas petition challenging the BOP's refusal to transfer a prisoner to a CCC. 558 F.3d 508, 511 (2009). After the magistrate judge recommended denying the BOP's motion on grounds that the applicable BOP regulations "'contradict or ignore the will of Congress,'" the BOP transferred the petitioner to a CCC, purportedly mooting the case. *Id.*

Whatever the BOP's motivations for voluntarily granting relief in these cases, the effects are clear, if the Third Circuit's decision here is correct. The BOP's actions manufacture mootness, shield the BOP from adverse judgments, and leave the BOP free "'to return to [its] old ways.'" *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982)); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). This Court should not tolerate such manipulations of the federal courts' Article III authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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