No. 11-1177

In the Supreme Court of the United States

DAVID THOMAS RHODES,
PETITIONER

v.

DAN JUDISCAK, REGIONAL VICE PRESIDENT,
DISMAS CHARITIES, INC.
RESPONDENT

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with a membership of more than 10,000 attorneys and 28,000 affiliates in all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of NACDL have a strong interest in assuring that federal prisoners' habeas petitions under 28 U.S.C. § 2241 challenging the length and computation of their sentences are heard. Because most prison inmates are sentenced to terms of supervised release, NACDL has a special interest in ensuring that habeas corpus petitions challenging over-incarceration remain justiciable regardless of

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties received timely notice of this filing, and the parties have consented to this filing.

whether an inmate is incarcerated or has been moved to supervised release. NACDL seeks to avoid unnecessary incarceration and supervised release.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Tenth Circuit held in this case that 28 U.S.C. § 2241 habeas corpus petitions are mooted, as a matter of law, when prisoners are released from physical custody. Therefore, the Court affirmed the district court's dismissal of Petitioner's § 2241 habeas petition, finding that there was no redressable case or controversy. Amicus concurs with petitioner's reasons for granting a writ of *certiorari*: the Courts of Appeals are split about whether a federal prisoner's habeas petition challenging the length of his incarceration remains justiciable while he is serving a term of supervised release, and in joining the minority of circuits, the Tenth Circuit erred in holding that the habeas petition was moot. As this Court held in *United States v. Johnson*, a ruling of over-incarceration is an "equitable consideration[ ]" in a later § 3583(e) motion to shorten a term of supervised release. 529 U.S. 53, 60 (2000). A favorable ruling on Mr. Rhodes's petition would improve his prospects of shortening his term of supervised release, meeting the redressability requirement.

Amicus further urges the Court to grant the writ in order to address the important practical consequences of the Tenth Circuit's rule for its members. The Department of Justice's Federal Bureau of Prisons ("BOP") is responsible for the custody and care of federal offenders. Following

judicial sentencing, the BOP calculates inmate sentences in accordance with Federal statutes and the BOP Sentence Computation Manual. *See* Bureau of Prisons Program Statement 5880.28 at 1 (July 19, 1999). Congress has given the BOP several statutory authorities designed to reduce the amount of time an inmate remains in prison and to ensure that prisoners are not serving more time in actual incarceration than necessary. But despite the BOP's stated missions of preparing inmates for reentry and of reducing overcrowding and the costs of incarceration, the BOP has failed to implement fully the available statutory mechanisms to shorten sentences. Many of the statutory authorities to reduce sentence time have been implemented imperfectly and infrequently. In light of the known problems with the BOP's computation of sentences and application of sentence reduction programs, the availability of § 2241 habeas petitions challenging over-incarceration are of substantial importance. This Court should further grant the writ because the Tenth Circuit's rule would allow the BOP to insulate its sentence computations from review by dragging out litigation until an inmate is released.

ARGUMENT

A. The Tenth Circuit's Rule Limits the Review of the Bureau of Prisons' Sentence Computation and Sentence Reduction Practices.

The Tenth Circuit's rule has significant practical consequences because it will substantially limit review of sentence computations by the Bureau of Prisons, which are frequently challenged on over-incarceration grounds because of failure to award appropriate sentence reduction credits. The Federal Bureau of Prisons ("BOP"), responsible for the administration of the federal prison system, computes federal inmates' prison sentences by determining a prisoner's actual length of custody as well as any period of supervised release. The BOP is a powerful government agency—in fiscal year 2012, the BOP has a budget of about $6.6 billion. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-320, BUREAU OF PRISONS: ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES' TIME IN PRISON, at 5 (2012) ["GAO Report"]. BOP's custodial population has increased by about 50 percent—from about 145,000 in 2000 to about 217,000 at the close of fiscal year 2011. *Id.* at 1.

In accordance with one of the primary goals of the Sentencing Reform Act, to impose "a sentence sufficient but not greater then necessary," Congress has given the BOP several statutory means designed to reduce the amount of time an inmate remains incarcerated or subject to supervised release. *See* 18 U.S.C. § 3553(a). These programs and authorities "are primarily intended to rehabilitate inmates and

prepare them for reentry into society, and encourage good behavior while in BOP custody." GAO Report, at 2. Effective BOP use of the sentence reduction authorities "has the potential to help reduce overcrowding and the associated costs of incarceration." *Id.* A February 12, 2012 U.S. Government Accountability Office Report reviewed the BOP's sentence computation practices, and in particular, the use of those sentence reduction authorities. *See* GAO Report. That report makes clear that the BOP has engaged in imperfect sentence computation practices and has failed to utilize many sentence reduction programs, resulting in potential over-incarceration of inmates. Many of these programs have been at issue in habeas corpus petitions alleging that an inmate has been over-incarcerated. In light of the known problems with the BOP's computation of sentences and application of sentence reduction programs, § 2241 habeas petitions challenging over-incarceration are of substantial importance.

Two of the most commonly used sentence computation and reduction mechanisms, the Residential Drug Abuse Treatment Program and Good Conduct Time credit, were found in the GAO Report to have significant problems.

The Residential Drug Abuse Treatment Program ("RDAP"), 18 U.S.C. § 3621(e), provides that the BOP is required to provide substance abuse treatment for each inmate it determines has a treatable condition of substance abuse. GAO Report, at 8. The BOP must, subject to the availability of appropriations, provide residential substance abuse treatment for all eligible inmates. Following successful completion of

RDAP, an inmate may receive a sentence reduction of anywhere from 6 months to 12 months. According to the GAO findings, while the BOP has reported that all eligible and interested inmates are able to complete RDAP before their release from BOP custody, those eligible for a sentence reduction incentive are generally unable to complete the program in time to benefit from the maximum allowable reduction. GAO Report, at 13. Between 2009 and 2011, 15,302 RDAP participants completed the program and were eligible to receive a reduction. Of those, 14,034 inmates were eligible for a minimum sentence reduction of 12 months, 596 were eligible for 9 months, and 672 were eligible for 6 months. However, during those three years, only 2,846 (approximately 19 percent) of those inmates received the maximum sentence reduction. 190 of those inmates received no reduction in sentence at all, despite having earned the reduction by completing the RDAP program. *Id.*

As to Good Conduct Time credit, under 18 U.S.C. § 3624(b), the BOP is authorized to award credit toward the service of an inmate's sentence, of up to 54 days per year of sentence served if the inmate has "displayed exemplary compliance with institutional disciplinary regulations." *Id.* Inmates serving a term of imprisonment of more than 1 year, other than a term of life imprisonment, may earn Good Conduct Time credit. And while the GAO Report found that "most" eligible inmates receive some Good Conduct Time credit for compliance with institutional disciplinary measures, it emphasized that, as applied by the BOP, inmates can receive a maximum of only 47 days of credit per year under the system, even

though the statute was designed to provide a maximum of 54 days per year. That is because as the statute is currently applied by the BOP, inmates do not earn credit for years they do not ultimately serve as a result of separate early release programs. GAO Report, at 22-23.

In addition to reviewing the RDAP and Good Time credit sentence reduction authorities, the GAO reviewed other means given to the BOP intended to reduce periods of incarceration. Overall, the Report concluded that other programs are used significantly "less frequently," and some programs are not used at all. *Id.* at 25.

For example, the BOP has statutory authority to move the court to reduce an inmate's sentence in certain statutorily authorized circumstances. *See* 18 U.S.C. § 3553(a). But that authority is "implemented infrequently, if at all." GAO Report, at 25. The BOP has historically interpreted the statutory language requiring "extraordinary and compelling reasons" to warrant such a reduction as limited to cases where the inmate has a terminal illness with a life expectancy of 1 year or less, or has a profoundly debilitating medical condition. *Id.* The United States Sentencing Commission has issued guidance, listing a number of additional circumstances, such as the death or incapacitation of the inmate's only family member capable of caring for the inmate's minor child or children. *Id.* However, the BOP has not revised its written policy to include those circumstances. Additionally, the BOP may reduce a prison term where an inmate meets the following criteria: the inmate is over 70 years old, the inmate has served at least 30 years in prison pursuant to

certain sentences imposed by statute, a determination has been made by the BOP Director that the inmate is not a danger to the safety of any other person, and such a reduction is consistent with Sentencing Commission policy statements. *See* 18 U.S.C. §§ 3559(c), 3142(g), and 3582(c). However, since that authority was enacted, BOP has not released any inmates under this provision. GAO Report, at 25.

Further, although the BOP has been given the authority to operate a Shock Incarceration Program, it has chosen not to operate any such program. *See* 18 U.S.C. § 4046. Under the Congressional authorization for Shock Incarceration, after successful completion of the program, inmates are to receive a 6 month sentence reduction, and are eligible to serve the remainder of their sentences in community correction locations. GAO Report, at 27. However, as of 2005, the BOP no longer operates any such program. *Id.* at 28.

The GAO report discusses even more sentence reduction authorities that the BOP has failed to implement. In light of these known sentence computation problems, the Tenth Circuit's rule will have the significant effect of prohibiting review of habeas petitions as soon as the inmate is placed in supervised release.

B. The Tenth Circuit's rule allows the BOP to Insulate its Sentencing Computations by Dragging out Litigation until an Inmate is Released.

Additionally, this Court should grant the petition for a writ of *certiorari* because the Tenth Circuit's rule would allow the BOP to insulate its sentence computation practices from review. NACDL members have represented prisoners in cases challenging BOP policies and practices, many of which have resulted in vindication of the prisoners' rights. Because most federal prison inmates are sentenced to terms of supervised release, the Tenth Circuit's rule would allow the BOP to insulate itself from effective review of most of the practices that directly affect a prisoner's time in custody by dragging out litigation until after an inmate is released, which would immediately moot the prisoner's claims. *See* U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 49-50 (2010) (reporting that 95% of imprisoned felons and class A misdemeanants are sentenced to supervised release).

Because the Tenth Circuit's rule effectively precludes this Court from reviewing these cases, this Court should grant the petition and reverse the Tenth Circuit.

C. The Decision Warrants Review Because It is Inconsistent with this Court's Jurisprudence.

The Tenth Circuit erred in this case by joining a minority of Circuits that hold § 2241 petitions are moot when the inmate is serving supervised release. The Third Circuit created the split in 2009 when it decided *Burkey v. Marberry*, 556 F.3d 142 (3d Cir.), *cert. denied*, 130 S.Ct. 458 (2009), and has since been joined by the District of Columbia Circuit, *see United States v. Bundy*, 391 F. App'x 886, 887 (D.C. Cir. 2010) (unpublished per curiam) (quoting *Burkey*, 556 F.3d at 149), and the Tenth Circuit in this case.

As the Second, Fifth, Ninth, and Eleventh Circuits have held, a habeas petition challenging the length of incarceration remains justiciable once the petitioner is placed on supervised release because it may lead to later reductions of supervised-release terms. *See Levin v. Apker,* 455 F.3d 71 (2d Cir. 2006); *Johnson v. Pettiford*, 442 F.3d 917 (5th Cir. 2006) (per curiam); *Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005); *Dawson v. Scott*, 50 F.3d 884 (11th Cir. 1995). Those courts have adhered to the majority rule even after the split was created amongst the circuits. *See Reynolds v. Thomas*, 603 F.3d 1133, 1148 (9th Cir. 2010).

The minority rule is inconsistent with this Court's jurisprudence, and therefore this Court should grant the petition and reverse the Tenth Circuit. In *United States v. Johnson*, this Court held that excess prison time served deserved substantial consideration in decisions to modify supervised-release terms: "There can be no doubt that equitable

considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term. . . . The trial court, as it sees fit, may "modify" or "terminate" supervised release where "'warranted by the conduct of the defendant released and the interest of justice.'" 529 U.S. at 60 (quoting 18 U.S.C. § 3583(e)(1)). Therefore, as the majority of Circuits have held, under *Johnson*, "[t]he 'possibility' that the sentencing court would use its discretion to reduce a term of supervised release [in ruling on a later motion] under 18 U.S.C. § 3583(e)(2)" is sufficient to prevent the habeas petition from being moot. *Mujahid*, 413 F.3d at 995 (internal citations omitted). A favorable ruling on Mr. Rhodes's petition would improve his prospects of shortening his term of supervised release, meeting the redressability requirement.

Further, this Court has recognized that a habeas petitioner, while being monitored after release, is still in the "custody" of the government. *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963) (holding that a state prisoner who has been placed on parole is in "custody" within the meaning of 28 U.S.C. § 2241); *see also Matus-Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002) (concluding that an inmate under "supervised release" is still in "custody" of the United States government). In *Cunningham*, this Court considered whether a paroled prisoner remained in the "custody" of the government within the meaning of a habeas corpus petition. In concluding that, while "parole releases [petitioner] from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in 'custody' . . . within the

meaning of the habeas corpus statute," 371 U.S. at 243, this Court emphasized that the parolee must report to a parole officer, live in accordance with conditions and restrictions, and fear violation of those restrictions and a return to prison. *Id.*

While *Cunningham* involved the consideration of whether a prisoner placed on parole remained in "custody," Congress eliminated federal parole in 1984 and replaced that system with supervised release. *See* Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984). There are many similarities between parole and supervised release: in particular, the offenders on supervised release are "subject to the jurisdiction of the federal courts, are monitored by federal probation officers, and they are also typically subject to the same types of conditions." U.S. SENTENCING COMMISSION, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE, at 2 (July 2010). While on supervised release, if an offender "violates a condition, a court is authorized (and in some cases, required) to revoke" the supervised release term and require the defendant to serve the remainder of the supervised release term in prison. *Id.* at 1-2. The essential difference between parole and supervised release is that supervised release "is not a punishment in lieu of incarceration," but rather seeks to "fulfill rehabilitative ends." *Id.* at 2.

Therefore, because Mr. Rhodes remains in the "custody" of the United States government while on supervised release, and because that custody may be shortened by a finding that Mr. Rhodes was over-incarcerated, this Court should reject the Tenth Circuit's rationale that Mr. Rhodes's § 2241 petition is moot. The possibility that a sentencing court will

use its discretion to reduce a term of supervised release under 18 U.S.C. § 3583(e)(2) is enough to meet the redressability requirement.

D. This Case is the Right Vehicle for Review of this Important and Recurring Issue.

Finally, this Court should grant the writ of *certiorari* because this case is an excellent vehicle for deciding the question presented. This case exemplifies the arbitrariness of the Circuit split on this issue. The split has had a significant impact on the petitioner. Mr. Rhodes originally filed his *pro se* § 2241 habeas petition challenging his over-incarceration in Arizona, in the Ninth Circuit where the habeas petition would be heard. The BOP subsequently transferred Mr. Rhodes to New Mexico, and he opted to re-file his habeas petition in that state. There, the Tenth Circuit held that the petition is moot.

Further, unlike in other habeas petition cases which risk being mooted by the expiration of short supervised released terms, Petitioner's supervised release term is ten years and will not expire prior to this Court's resolution of the issue. Therefore, this case presents a clean vehicle for this Court's resolution of this issue.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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