No. 99-7558

In The

Supreme Court of the United States

Tim Walker,

Petitioner,

v.

Randy Davis,

Respondent.

SUPPLEMENTAL BRIEF OF THE PETITIONER

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SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner Tim Walker, now represented by counsel, respectfully submits this Supplemental Brief to advise the Court of a substantial number of lower court decisions that have rendered the circuit conflict over the question presented intractable and that establish that the issue recurs frequently.

* * * *

1. Although it was only a few months ago that the Eighth Circuit in this case sustained the construction by the Bureau of Prisons (BOP) of 18 U.S.C. § 3621(e)(2)(B), a torrent of more recent authority has rejected that conclusion. On January 19, 2000, the Tenth Circuit expressly "part[ed] company with the Eighth Circuit * * * * [and] join[ed] the Eleventh Circuit and numerous district courts, whose reasoning we find more persuasive." Ward v. Booker, 202 F.3d 1249, 1256-57 (CA10 2000). The Tenth Circuit stood by its earlier construction of the statute in Fristoe v. Thompson, 144 F.3d 627 (CA10 1998), which, it noted, "provided no caveats to our condemnation of the BOP's use of sentencing enhancements to convert nonviolent offenses into violent ones for eligibility purposes under the statute." 202 F.3d at 1254 (emphasis added). The Tenth Circuit also considered and rejected a variety of arguments raised by Respondent in defense of its new policy, including resort to Chevron deference. See generally id. at 1255-57. The Eleventh Circuit has also recently rejected the BOP's construction of 18 U.S.C. § 3621(e)(2)(B), affirming and adopting the decision of the district court in the case. Kilpatrick v. Houston, 197 F.3d 1134, 1135 (CA11 1999), aff'g 36 F. Supp.2d 1328 (N.D. Fla. 1999).

In addition to solidifying the split among the circuits, the months since the Eighth Circuit's decision in this case have produced numerous district court decisions rejecting the Eighth Circuit's holding. These decisions thus demonstrate that the issue recurs frequently, cast

doubt upon the result reached by the Eighth Circuit, and demonstrate that the disagreement among the lower courts likely cannot be resolved without this Court's intervention. The court in Samples v. Scibana, recognized the Eighth Circuit's decision in this case but joined instead the many courts that "have held that the denial of early release to a prisoner under the new regulation and program based solely on a sentencing enhancement for firearm possession conflicts with the plain, unambiguous language of the statute." 74 F. Supp.2d 702, 706-07 (E.D. Mich. 1999) (citing, e.g., Kilpatrick, 36 F. Supp.2d at 1330, Guido v. Booker, 37 F. Supp.2d 1289, 1300-02 (D. Kan. 1999) (subsequently affirmed by Ward v. Booker, 202 F.3d 1249 (CA10 2000)), Hicks v. Brooks, 28 F. Supp.2d 1268, 1273 (D. Colo. 1998), and Gavis v. Crabtree, 28 F. Supp.2d 1264 (D. Ore. 1998) (subsequently reversed by Bowen v. Hood, 202 F.3d 1211 (CA9 2000)). On the heels of Samples, the court in Rodriguez v. Herrera, joined the many courts that "have already undertaken substantive reviews of the revised regulation and have concluded § 550.58 as amended does not correct the flaw identified in [circuit precedent rejecting Respondent's prior Program Statement] and therefore still exceeds the BOP's administrative authority to interpret and implement § 3621(e)(2)(B)." 72 F. Supp.2d 1229, 1230 (D. Colo. 1999) (citing, e.g., Ward v. Booker, 38 F. Supp.2d 1258 (D. Kan. 1999) (subsequently affirmed at 202 F.3d 1249, 1256-57 (CA10 2000)), and Williams v. Clark, 52 F. Supp.2d 1145 (C.D. Cal. 1999)).

The frequency with which this issue arises can be seen not only from the above cases and the district court decisions cited therein, but also from the six decisions out of the single District of Oregon alone since the Eighth Circuit's decision in this case. See Mendiola v. Hood, 1999 WL 1279713 (D. Ore. Dec. 7, 1999) (No. 99-1104-HA); Gunderson v. Hood, 1999 WL 1279654 (D. Ore. Dec. 7, 1999) (No. 99-1233-HA); Rice v. Hood, 1999 WL 1279734 (D. Ore. Nov. 2, 1999) (No. 99-1036-HA); Sloan v. Hood, 1999 WL 1279653 (D. Ore. Oct. 12, 1999) (No. 99-

735-HA); Grassi v. Hood, 1999 WL 1279726 (D. Ore. Oct. 12, 1999) (No. 99-1105-HA); Earls v. Hood, 1999 WL 1279718 (D. Ore. Aug. 17, 1999) (No. 99-1017-HA).

Although recent decisions are nearly uniform in their rejection of the Eighth Circuit's holding in this case, there is an important exception that confirms the need for this Court's intervention. A divided panel of the Ninth Circuit has sustained Respondent's construction of § 3621(e)(2)(B), expressly noting that the Eighth Circuit ruling in this case "agree[s] with our position." Bowen v. Hood, 202 F.3d 1211, 1219 (CA9 2000). Judge Thomas, in dissent, "would [have] join[ed] the Tenth and Eleventh Circuits in concluding otherwise," id. at 1225, explaining that "[t]he majority's holding places this Circuit in conflict with the Tenth and Eleventh Circuits, which have relied on [precedents rejecting Respondent's prior Program Statement] to hold that the Bureau exceeded its discretionary authority in amending its regulations," id. at 1226.

Unpublished opinions also make it apparent that other circuits are divided over the validity of Respondent's current policy, as they have found that precedents decided under the predecessor Program Statement are determinative of the issue. The Fourth Circuit in United States v. Trosky rejected an inmate's claim that he was entitled to the benefit of § 3621(e)(2)(B), invoking its precedent concerning the earlier BOP Program Statement. 188 F.3d 505, 1999 WL 651845 (CA4 1999) (unpublished) (citing Pelissero v. Thompson, 170 F.3d 442 (4th Cir. 1997)). By contrast, the Sixth Circuit in Davidson v. Federal Bureau of Prisons vacated and remanded a district court's decision denying an inmate a sentence reduction under the statute in light that circuit's settled precedent that "the Bureau of Prisons may not properly exclude 'mere possessory offenders from consideration for early release' under § 3621(e)(2)(B)." 187 F.3d 635, 1999 WL 617933 (CA6 1999) (unpublished) (citing Orr v. Hawk, 156 F.3d 651 (6th Cir.1998)).

These numerous conflicting decisions are particularly noteworthy in light of the position

taken by Respondent in opposing certiorari in No. 97-7727, Venegas v. Henman, 126 F.3d 760 (CA5 1997). cert. denied, 523 U.S. 1108 (1998), in which the Fourth Circuit had sustained the BOP's predecessor Program Statement. In denying certiorari, the Court seems to have accepted Respondent's view that, although there was a substantial circuit conflict regarding the predecessor Program Statement, it would be more appropriate to defer granting certiorari until it could be determined that the circuit split persisted despite the adoption of the new policy. Now that it is plain that the circuit conflict persists, there is no basis for further deferring review.

2. We are advised that petitions for rehearing en banc have been filed with respect to the decisions of the Tenth and Eleventh Circuits invalidating the BOP's current Program Statement, as well as with respect to the Ninth Circuit's decision sustaining the Program Statement. But any suggestion by Respondent that this petition for certiorari should be denied based on the pendency of these en banc petitions would be erroneous. To avoid certiorari, Respondent must demonstrate that this Court's intervention is unnecessary because (a) the Tenth and Eleventh Circuits will grant rehearing en banc, (b) those courts will reverse their unanimous panel holdings (which rest on settled circuit precedent), and (c) that the Ninth Circuit will not reverse its precedent en banc and rule against the government. Such a concurrence of events is highly unlikely, to say the least, and denying certiorari in this case on the mere possibility of such a combination of events runs contrary to sound principles of judicial economy. While this Court's own time is surely a unique and limited judicial resource, it seems even more profligate to cause the judges of three full circuits to hear this issue en banc when the prospect of resolving the split is fleeting at best. It seems all but certain that this Court's intervention is inevitable in light of the present division in the circuits (which extended the conflict over the Bureau of Prison's predecessor Program Statement) and the numerous district court decisions that reject Respondent's position. Moreover, there is a substantial urgency to resolving this issue sooner

rather than later, given that an eventual ruling invalidating the BOP's Program Statement likely will result in substantial collateral litigation over the right of prisoners whose claims are rejected in the interim to bring successive petitions challenging their continued confinement. At most, Respondent can only suggest that the disposition of this Petition should be stayed pending rulings by the Tenth and Eleventh Circuits on Respondent's petitions for rehearing en banc.

Respectfully submitted,

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