No. 99-2008

In the Supreme Court of the United States

SAMUEL H. HOUSTON, PETITIONER

v.

JERRY J. KILPATRICK

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Respondent opposes the government's request that the government's petition for a writ of certiorari be held pending this Court's disposition of *Lopez* v. *Davis*, cert. granted, No. 99-7504 (Apr. 24, 2000), and disposed of as appropriate in light of the resolution of that case. The petition should be held, however, because the court of appeals' decision in this case rests on the same legal grounds that the Court will consider in *Lopez*: the validity of the current regulation of the Bureau of Prisons (BOP), 28 C.F.R. 550.58(a)(1)(vi)(B), and BOP's program statements on early release of prisoners from custody under 18 U.S.C. 3621(e)(2)(B). The Court's resolution of that question will likely determine

whether BOP engaged in a lawful exercise of discretion in this case as well.

1. Respondent contends (Br. in Opp. i, 1, 3) that the case is moot because he has been released from BOP custody and is now on supervised release. Respondent is mistaken.

The court of appeals affirmed a district court order granting a writ of habeas corpus that ultimately required respondent's release from BOP's custody approximately six and one-half months before the date on which BOP would otherwise have released him, assuming respondent was entitled to full good conduct credits. Pet. 9 n.2. If the government prevails in *Lopez*, this Court's decision will remove the basis of the lower court's rulings here and expose respondent to the possibility of being returned to the custody of the BOP for service of the approximate six and one-half months that he would otherwise have served if the erroneous lower court rulings had not issued. Accordingly, the case is not moot.

The fact that the BOP may have to seek an order from the court on remand to retake respondent into custody does not render the case moot as respondent suggests (Br. in Opp. 3). And such a request by BOP would not be based on an allegation of a violation of supervised release as respondent claims (*id.* at 4). Rather, BOP would be seeking reinstatement of the original term of imprisonment against respondent. As respondent concedes (*ibid.*), BOP may take back into custody a released inmate when the inmate's sentence is reinstated following a successful government appeal. See *United States* v. *Meyers*, 200 F.3d 715, 721-722 n.3 (10th Cir. 2000) (defendant's completion of sentence does not moot government appeal claiming length of sentence is too short because government still alleges a

remediable injury); cf. *Mabry* v. *Johnson*, 467 U.S. 504, 507 n.3 (1984). Here, a decision in BOP's favor in *Lopez* would entitle BOP to reinstatement of respondent's original sentence, because such a decision would mean that the sentence was unlawfully shortened by the district court's grant of habeas corpus relief.

Respondent implies that BOP is estopped from opposing his mootness argument because, in a motion seeking a stay in a district court in a different case (*Williams* v. *Hood*), the government opposed early release of a prisoner asserting, without elaboration, that his release would render the action moot. Br. in Opp. 3-4 (citing Br. in Opp. App. 4).[1] But the government is

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[1] The district court's order granting the stay motion in that prisoner's case did not elaborate on the rationale underlying the order. See Civil Mins. Doc. No. 18, *Williams* v. *Hood*, No. 99-12HA (D. Or. Mar. 31, 2000). At the hearing on the stay motion, however, the government contended that the stay should be granted to avoid disparity in treatment among prisoners and the court indicated that it was granting the stay to ensure consistency with other pending cases raising the same legal issue in which the court had vacated the judgments in light of the Ninth Circuit's decision in *Bowen* v. *Hood*, 202 F.3d 1211 (2000), petitions for cert. pending, Nos. 99-10159, 99-10221. See Tr. at 8, 16, 19, 23, *Harbaugh* v. *Hood*, No. 99-773-HA (D. Or. Mar. 31, 2000). The *Bowen* decision had recently been issued and stood as circuit precedent, but the mandate had not yet issued.

When that prisoner applied to this Court for an order vacating the stay entered by the district court, the Solicitor General filed a memorandum on behalf of the respondent warden in opposition to his application and similar applications from three other prisoners. Mem. for Resp. in Opp. at 13-14, Nos. 99A852, 99A853, 99A854, 99A855. We contended that vacatur of the stays was not appropriate because there was not a fair prospect that a majority of the Court would reverse the court of appeals' ruling in *Bowen*. *Id.* at 17-19. We also argued that the balancing of equities favored leaving the district court stays in place. *Id.* at 19-24. In that context,

not estopped from opposing respondent's mootness argument. The doctrine of judicial estoppel, which protects against a party's assertion of a position in one legal proceeding that contradicts its position in another, see *United States* v. *Levasseur*, 846 F.2d 786, 792 (1st Cir.), cert. denied, 488 U.S. 894 (1988), is inapplicable here. Even assuming that it could apply against the United States, see *id.* at 793 n.7 (reserving whether it could apply against the government in a criminal case), and extends to issues of law as opposed to fact, see *Pittston Co.* v. *United States*, 199 F.3d 694, 701 n.4 (4th Cir. 1999), there is no showing in this case (see note 1, *supra*) that a court relied on the government's statements. See *Teledyne Indus.* v. *NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990) ("[B]efore the doctrine of judicial estoppel may be invoked, the prior argument must have been accepted by the court."). There is therefore no basis for applying judicial estoppel to bar the United States from asserting before this Court its position on the law of mootness. And even assuming there could ever be a traditional estoppel against the government, see *Office of Personnel Management* v. *Richmond*, 496 U.S. 414, 423 (1990) (reserving that issue), respondent makes no effort to show detrimental reliance on the government's filing in the other case, which is a

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we noted that, if the stays were vacated, "the cases may well become moot, as a practical matter, as to respondent and the BOP, which will be effectively precluded from applying to applicants the Ninth Circuit's resolution of the underlying legal issue." *Id.* at 23. Our reference to the cases becoming "moot, as a practical matter," and to the BOP being "effectively precluded" from applying circuit precedent to the cases referred to the practical realities that would face BOP if the prisoners' release was not stayed pending further litigation of the issue. See p. 5, *infra.*

required element of estoppel. *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 60-61 (1984).

Of course, after a prisoner is released from imprisonment and placed on supervised release, it may well become impractical for BOP later to require him to return to its custody to serve a short period of imprisonment that was erroneously invalidated by a lower court, because the former prisoner may already have successfully completed his transition back to society. If, however, the prisoner has not successfully reintegrated himself into society and a return to BOP custody to complete the term of imprisonment would be appropriate (*e.g.*, return to a halfway house program to facilitate such reintegration), BOP may need to arrange for his retaking and completion of his imprisonment term. The case does not become moot as a legal matter because BOP has the authority in such a case to obtain a court order authorizing the retaking of the prisoner for service of the remainder of his sentence.

2. Respondent also contends (Br. in Opp. 1, 2-3 n.2) that the Court should deny review because, even if this Court were to rule in the government's favor in *Lopez*, the court of appeals could not reverse the district court judgment without addressing two other grounds that respondent claims would support affirmance of the district court judgment—whether BOP's regulations are invalid for failure to comply with the Administrative Procedure Act, and whether BOP incorrectly applied its regulation on carrying or possession of a firearm to respondent because it was his co-conspirator who had actual possession of the firearm.

Although the court of appeals may have to consider alternate grounds of decision if the Court were to rule in the government's favor in *Lopez* and remand this case for further consideration, that is not a reason for

the Court to decline to hold the government's petition pending its decision in *Lopez*. To the contrary, consideration by the lower courts of such alternative grounds is one of the reasons that the Court issues an order granting certiorari, vacating the judgment below, and remanding the case to the lower court for reconsideration in light of an intervening Supreme Court ruling, rather than simply issuing a summary reversal order. See Robert L. Stern et al., *Supreme Court Practice* 249-250 (7th ed. 1993). And that is precisely a situation in which it is appropriate for the certiorari papers in one case to be held by the Court pending its plenary ruling in another case. *Ibid*.[2]

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's disposition of *Lopez* v. *Davis*, No. 99-7504, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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SEPTEMBER 2000

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[2] Respondent's assertion (Br. in Opp. 1, 2) that granting certiorari in this case would constitute a waste of judicial resources disregards the fact that the government has requested that the petition not be granted immediately but, instead, be held pending the Court's decision in *Lopez* to conserve judicial resources and to allow disposition of the petition in light of the Court's decision in *Lopez*.