

No. 99-7558

In The
Supreme Court of the United States

Tim Walker,

Petitioner,

v.

Randy Davis,

Respondent.

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

1. In light of the Solicitor General's acquiescence in No. 99-7504, *Lopez v. Davis*, petitioner here agrees that this case should be held. Petitioner will consider whether to file a merits brief as a respondent in support of petitioner in No. 99-7504 and will consider, if necessary, moving for oral argument time in that case.

2. Regarding the letter from the Federal Public Defender, filed in No. 99-7504, petitioner notes five items. First, the Administrative Procedures Act claim in that case has never been the subject of any appellate decision to the best of petitioner's knowledge. It thus is of doubtful value as an independent question for this Court to anticipate. Second, given the absence of appellate decisions on that separate issue, there is likewise an absence of a split on the issue. There is no particular reason to believe a split will develop on that question or that decision of the APA issue will necessarily resolve the existing and significant split presented by No. 99-7504 and by this petition. Third, the Court can address the APA issue to some extent in its consideration of No. 99-7504. As the Federal Public Defender's letter notes, the failure to comply with normal rulemaking procedures bears upon the existence and extent of any deference the Bureau of Prisons might claim. The issue of deference to administrative determinations is fully presented and preserved in No. 99-7504. Fourth, should this Court prefer not to reach the APA issue in this case, it can merely state as much in the opinion, thereby preserving that issue for future consideration by the Courts of Appeals and, if necessary, by this Court should a subsequent split develop. The mere possibility of some further legal issue involving the BOP program, however, is no reason to put off resolving a split that the government itself has agreed wreaks ongoing havoc with federal prison administration and decisions regarding whether and where to transfer prisoners. Fifth, there is no guarantee that the issue supposedly raised in the

Ninth Circuit was properly presented, that the case constitutes an adequate vehicle, or that the prisoners in that case will even petition for certiorari. Counsel in that case is obviously aware of the government's interest in the pending petitions and has had more than ample time to file his own petition and seek consolidation of the cases. That he has chosen the longer, though unnecessary, route of first seeking en banc consideration from the Ninth Circuit is not an adequate reason to suggest that the Court ignore vehicles that are already ripe and properly presented to the Court. Furthermore, even if the Ninth Circuit takes the issue en banc and decides it favorably to the prisoners in that case, that would not fully resolve the split in any event. Waiting for that process to run its course merely penalizes both the government and those prisoners whose petitions are currently pending and who have raised an issue worthy of this Court's consideration.

3. For the foregoing reasons, the Court should grant No. 99-7504 and hold this petition, allowing the opportunity for petitioner in this case to consider participating as respondent in No. 99-7504.

Respectfully submitted,

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