No. 18-6716

IN THE SUPREME COURT OF THE UNITED STATES

JERRY WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' 1998 order vacating one of petitioner's convictions, which did not include a remand for resentencing on his remaining convictions, entitled petitioner to a full resentencing in 2017 under United States v. Booker, 543 U.S. 220 (2005), where the district court did not formally amend petitioner's judgment to reflect the 1998 order until 2017.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is unreported. The orders of the district court (Pet. App. J1-J2, H1-H3) are unreported. A prior order of the court of appeals (Pet. App. G1-G2) also is unreported.

JURISDICTION

The order of the court of appeals was entered on June 15, 2018. A petition for rehearing was denied on August 8, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed on November 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted in 1996 on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (1994); eight counts of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a); and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (1994). Pet. App. F1-F2. The district court sentenced petitioner to life imprisonment, to be followed by five years of supervised release, as well as a $5000 fine for the conspiracy conviction. Id. at F3-F5. In 1998, the court of appeals vacated petitioner's conviction and sentence for conspiracy. Id. at G1-G2. In October 2017, the district court issued an amended judgment specified as nunc pro tunc to October 19, 1998 that reflected dismissal of the conspiracy conviction and ordered that petitioner's payments toward his criminal fine for that conviction be returned to him. Id. at H1-H3. In February 2018, the court denied petitioner's motion for reconsideration and full resentencing. Id. at J1-J2. The court of appeals affirmed. Id. at A1-A3.

1. Petitioner ran a drug trafficking organization in the 1980s and 1990s that distributed more than 300 kilograms of cocaine in the Milwaukee area. Gov't C.A. Br. 5; Presentence Investigation Report (PSR) ¶¶ 15-53. In March 1996, a federal grand jury in the

Eastern District of Wisconsin charged petitioner with one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (1994); eight counts of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a); and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (1994). Superseding Indictment 1-5.

A jury found petitioner guilty on all counts. Pet. App. F1. The district court determined that the then-mandatory Sentencing Guidelines required a life sentence on petitioner's convictions for conspiracy and engaging in a continuing criminal enterprise. Gov't C.A. Br. 6. The court accordingly sentenced petitioner in April 1997 to life imprisonment for each of those convictions. Pet. App. F3. The court sentenced petitioner to 240 months of imprisonment on each of the other convictions, with all sentences to run concurrently. Ibid. The court also sentenced petitioner to a $5000 fine on the conspiracy conviction. Id. at F5.

2. In September 1998, the court of appeals vacated petitioner's conviction and sentence for conspiracy in light of Rutledge v. United States, 517 U.S. 292, 300 (1996), which had held that conspiracy to distribute narcotics is a lesser included offense of engaging in a continuing criminal enterprise. Pet. App. G1-G2. Petitioner did not challenge any of his other counts of conviction, and the court therefore left those other convictions and sentences undisturbed, including his life sentence for

engaging in a continuing criminal enterprise. See ibid.; id. at A2. Although the district court received the court of appeals' mandate, it did not correct the judgment to reflect the court of appeals' order. Id. at A1-A2.

In 1999, petitioner filed a petition for postconviction relief under 28 U.S.C. 2255, in which he argued that he was actually innocent and had received ineffective assistance of counsel. D. Ct. Doc. 439 (Aug. 30, 1999). The district court denied the petition, D. Ct. Doc. 471 (Oct. 11, 2001), and the court of appeals denied petitioner's request for a certificate of appealability, see D. Ct. Doc. 496 (Oct. 22, 2002).

3. On September 27, 2017, petitioner filed a motion in the district court requesting that the court amend the judgment to reflect the court of appeals' 1998 dismissal of his conviction and sentence for conspiracy to distribute drugs, and resentence him. See Pet. App. H2; D. Ct. Doc. 590.* Petitioner noted that the district court had never entered an amended judgment following the court of appeals' 1998 order, and he argued that his $5000 criminal fine had been imposed only as to the conspiracy conviction, "meaning that it should have been vacated long ago and no funds should have been collected towards the payment thereof." Pet. App. H2.

* Petitioner also filed a petition in the court of appeals for a writ of mandamus on August 28, 2017, seeking the same relief. See Pet. App. H1-H2. That petition was denied due to the pendency of the motion in the district court. See id. at A2.

The district court granted petitioner's motion "to correct this long-standing error." Pet. App. H2. The court stated that it "w[ould] issue an amendment to the judgment and commitment order of April 4, 1997, reflecting the dismissal of [the conspiracy count] by the Court of Appeals on October 19, 1998." Ibid. "This amended judgment," the district court ordered, "shall be nunc pro tunc to October 19, 1998," ibid. -- the date that the court received the mandate from the court of appeals, see id. at A2. See also id. at I1 (amended judgment specified as "Nunc pro tunc October 19, 1998"). The district court further ordered that "the Clerk of the Court refund to [petitioner] any amounts which were collected pursuant to his financial obligations under the [conspiracy conviction] sentence, namely his special assessment and fine." Id. at H2.

On October 27, 2017, petitioner moved for reconsideration of the district court's order, "arguing that the Court must conduct a full resentencing in this case." Pet. App. J1; see D. Ct. Doc. 596. Petitioner argued that his original judgment was not final in 1998 in light of the court of appeals' vacatur of his conspiracy conviction, and therefore that United States v. Booker, 543 U.S. 220 (2005) -- under which the Sentencing Guidelines are advisory, not mandatory -- applied to his case. D. Ct. Doc. 596, at 1-3; see Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that new rules of criminal procedure apply to cases pending on direct review or that are not yet final). Petitioner argued that the

district court should resentence him under the advisory Guidelines "in accordance with 18 U.S.C. § 3553 and * * * any instructions given by the Seventh Circuit" in its 1998 order. D. Ct. Doc. 596, at 2 (emphasis omitted).

The district court denied the motion, stating that "a full resentencing" is "not what the Court of Appeals directed [in its 1998 order], and this Court is not at liberty to do more." Pet. App. J1. The district court stated that where, as here, the court of appeals directs a lower court to correct a discrete error, a full sentencing by the district court is improper. Ibid. (citing United States v. Gibbs, 403 Fed. Appx. 82, 83 (7th Cir. 2010)).

4. The court of appeals affirmed. Pet. App. A1-A3. The court found that "[t]he district court acted appropriately when it vacated [petitioner's] conviction and sentence on the drug conspiracy count, leaving undisturbed the remainder of [petitioner's] sentence." Id. at A2. "That is precisely what the district court should have done twenty years ago," the court of appeals explained, when its "decision of September 21, 1998, vacated the conviction and sentence on the drug conspiracy count, nothing more." Ibid. The court stated that its 1998 order had "vacated the conviction and sentence on the drug conspiracy count, without a remand for resentencing, pursuant to the latitude afforded the court of appeals under 28 U.S.C. § 2106, and the district court's nunc pro tunc judgment merely cleaned up an oversight in its records." Id. at A2-A3. The court of appeals

stated that "[petitioner's] insistence on a full resentencing should have been brought up much earlier -- back in 1998 when jurisdiction returned to the district court." Id. at A3.

ARGUMENT

Petitioner contends (Pet. 10-14) that he is entitled to a full resentencing, under United States v. Booker, 543 U.S. 220 (2005), because in 1998 the district court failed to execute the ministerial task of issuing an amended judgment in his case upon receiving the mandate from the court of appeals. He contends (Pet. 11-12) that the court of appeals erred by failing "to conduct any analysis" under Griffith v. Kentucky, 479 U.S. 314 (1987) to determine whether the judgment in his case was final, and that this case "squarely addresses a question of finality that has divided the Courts of Appeals." Petitioner's arguments lack merit. The court of appeals correctly determined that he is not entitled to a full new sentencing, and its decision does not squarely implicate any circuit conflict on the question of a judgment's finality. In any event, this case would be a poor vehicle for review, because petitioner has not attempted to show that, even if he were resentenced today, the district court would impose anything less than the term of life imprisonment recommended by the advisory Sentencing Guidelines. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner was not entitled to be resentenced on the counts of his

conviction that were not affected by the court of appeals' 1998 vacatur order.

a. "Nunc pro tunc, Latin for 'now for then,' refers to a court's inherent power to enter an order having retroactive effect." Iouri v. Ashcroft, 487 F.3d 76, 87 (2d Cir. 2007) (citation omitted), cert denied, 554 U.S. 917 (2008). "The purpose of an order entered nunc pro tunc is to correct mistakes or omissions in the record." Glynne v. Wilmed Healthcare, 699 F.3d 380, 383 (4th Cir. 2012).

The district court here properly exercised its inherent authority to amend petitioner's judgment nunc pro tunc to accurately reflect the court of appeals' 1998 order, which stated that "IT IS ORDERED that the conviction and sentence of [petitioner] for conspiracy to possess with intent to distribute cocaine * * * are VACATED." Pet. App. G2 (emphasis omitted). The court of appeals in 1998 did not disturb petitioner's other convictions or sentences, which petitioner had not challenged. See ibid. (noting that petitioner's original appeal "raise[d] only one argument" concerning his conviction and sentence for conspiracy). As the court of appeals itself explained in the decision below, the only authority conferred on the district court by the court of appeals' limited mandate in 1998 was to "correct the judgment to reflect [the court of appeals'] order, which should have been a purely ministerial act." Id. at A2; see Burrell v. United States, 467 F.3d 160, 166 (2d Cir. 2006) (explaining that

the court of appeals' mandate in a particular case did not "permit[ ] the district court to undertake any action other than the ministerial correction explicitly set forth" in the court of appeals' order), cert. denied, 549 U.S. 1344 (2007).

The district court undertook that ministerial act through its 2017 amended judgment, which simply gave effect to the court of appeals' 1998 order vacating petitioner's conspiracy conviction. The court of appeals had the power to issue its 1998 order under 28 U.S.C. 2106, which grants courts of appeals the wide remedial latitude to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review." The particular order that the court entered in 1998 did not include a remand for a full resentencing, see Pet. App. G2, and the court's most recent decision confirmed that no such resentencing was required, see id. at A2. Thus, when the district court issued its amended judgment vacating petitioner's conspiracy conviction nunc pro tunc to October 19, 1998 -- the date that it received the mandate from the court of appeals -- it performed every task that the court of appeals' 1998 order had required.

Petitioner suggests (Pet. 12 n.1) that, under 18 U.S.C. 3742(f)(1) and (g), the court of appeals was required to remand the case for a new sentencing. That assertion of error in a 1998 order lacks merit. Section 3742(f)(1) provides that, if the court of appeals determines that a sentence was imposed in violation of law, it "shall remand the case for further sentencing proceedings

with such instructions as the court considers appropriate." The court of appeals' 1998 order instructed the district court only to vacate petitioner's conviction and sentence for conspiracy -- nothing more. See Pet. App. A2, G2.

b. Because the court of appeals' 1998 order provided no authority for the district court to go beyond the ministerial act of amending the judgment and fully resentence petitioner, petitioner's contention (Pet. 11) that the court of appeals in 2018 "failed to conduct any analysis under Griffith * * * to determine when, and if ever, [petitioner's] conviction became final following the Seventh Circuit's issuance of its 1998 Mandate," is misplaced. In the absence of any basis for resentencing petitioner, it is irrelevant what law might govern one. But even if the court of appeals had analyzed finality "under Griffith," Pet. 11, petitioner's conviction became final in 1998, and finality was not affected by the district court's nunc pro tunc order nearly twenty years later.

In Griffith, this Court explained that a "final" case is one in which "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. at 321 n.6; see Teague v. Lane, 489 U.S. 288, 295 (1989). Petitioner's ability to challenge his convictions on appeal expired in 1998, when he prevailed in the court of appeals with respect to the single conviction he had challenged and the time to

file a petition for certiorari had expired. Indeed, petitioner appears to have recognized that his conviction became final in 1998: in 1999, he filed a motion for postconviction relief under 28 U.S.C. 2255, which would be available only if his conviction were final. See D. Ct. Doc. 439; cf. Clay v. United States, 537 U.S. 522, 532 (2003) (holding that Section 2255's one-year limitation period starts to run when the time for filing a petition for certiorari on direct review expires). Petitioner's judgment was final under Griffith in 1998, and therefore not subject to retroactive application of Booker. See United States v. Price, 400 F.3d 844 845-849 (10th Cir.) (holding that the rule of Booker is not retroactive to cases that were final at the time Booker was decided), cert. denied, 546 U.S. 1030 (2005); see also Lloyd v. United States, 407 F.3d 608, 614 (3d Cir.) ("Every federal court of appeals to have considered" the issue "has held that Booker does not apply retroactively to cases on collateral review."), cert. denied, 546 U.S. 916 (2005).

The fact that the district court in petitioner's case did not "correct the judgment to reflect" the court of appeals' order in 1998, Pet. App. A2, did not alter the finality of his judgment. A judgment is "final" when nothing more than a ministerial task remains to be done after an appellate decision. This Court has held, for example, in addressing the finality of state-court judgments for purposes of the Court's review under 28 U.S.C. 1257, that a state appellate court's judgment was "final,"

notwithstanding its remand in a case, because the remand was "only for a ministerial purpose." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 216 n.8 (1977), overruled on other grounds by Janus v. American Fed'n of State, Cnty, & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 (1948) ("[I]f nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable.").

Applying that principle, courts have recognized that a judgment of conviction is final in circumstances similar to those presented here. In Burrell, for example, the Second Circuit vacated the defendant's continuing criminal enterprise conviction under Rutledge and remanded for the district court to enter an amended judgment reflecting the dismissal of that conviction. 467 F.3d at 162. Although the district court did not enter the amended judgment until after Booker, the Second Circuit rejected the defendant's argument that Booker was retroactively applicable, because the remand was "strictly ministerial" and therefore did not delay the judgment's finality. Id. at 166; see also United States v. Dodson, 291 F.3d 268, 275 (4th Cir. 2002) ("[F]inality is not delayed if an appellate court disposes of all counts in a judgment of conviction but remands for a ministerial purpose that could not result in a valid second appeal."); Richardson v. Gramley, 998 F.2d 463, 465 (7th Cir. 1993) ("A judgment is not

final if the appellate court has remanded the case to the lower court for further proceedings, unless the remand is for a purely 'ministerial' purpose, involving no discretion, such as recomputing prejudgment interest according to a set formula."), cert. denied, 510 U.S. 1119 (1994). The district court's issuance of its amended judgment nunc pro tunc in petitioner's case likewise carried out only the "strictly ministerial" act of dismissing petitioner's conspiracy count, Burrell, 467 F.3d at 166, and thus did not affect finality.

2. This Court has repeatedly declined to review the "finality question" that the petition here purports to present. See, e.g., Clark v. United States, 137 S. Ct. 121 (2016) (No. 15-9699); Burrell v. United States, 549 U.S. 1344 (2007) (No. 06-8813); Wilson v. United States, 534 U.S. 1086 (2002) (No. 01-6549). Petitioner identifies no reason for a different result here. Even setting aside that no resentencing is warranted here because one was never ordered, and that the unpublished opinion below accordingly did not address finality, it is far from clear that any circuit would have treated the 1998 judgment in this case as nonfinal for purposes of a request to be resentenced under Booker.

The majority of courts to address the issue have held that, when the court of appeals remands a case to the district court for ministerial purposes involving no exercise of discretion, a criminal judgment is final after the time to petition for

certiorari has expired. See Burrell, 467 F.3d at 164 (finality for purposes of retroactive application of new procedural rule); Richardson, 998 F.2d at 465 (same); Dodson, 291 F.3d at 275 (finality for purposes of timeliness under Section 2255); see also Najera v. Murphy, 462 Fed. Appx. 827, 829 (10th Cir.) ("Appeals can arise from resentencing unless the resentencing is purely ministerial, such that the district court is limited on remand."), cert. denied, 568 U.S. 863 (2012); United States v. Rodriguez, 259 Fed. Appx. 270 279 (11th Cir. 2007) (per curiam) (defendant cannot argue on remand that intervening law requires resentencing because the "remand did not concern sentencing" which is "law of the case and will not be disturbed"), cert. denied, 555 U.S. 853 (2008).

The Ninth Circuit took a different view in United States v. Colvin, 204 F.3d 1221 (2000), on the theory that, even in a case in which a remand is asserted to be "ministerial," the defendant "at the very least * * * could have appealed the district court's determination of whether the mandate left it any discretion." Id. at 1224. But Colvin addressed whether a conviction was "final" for purposes of determining whether a Section 2255 motion challenging that conviction was timely filed, see id. at 1223, not, as here, for purposes of determining whether a subsequent procedural decision of this Court was retroactively applicable. The Ninth Circuit has since indicated that Colvin does not apply outside the context of timeliness for purposes of Section 2255.

See Leavitt v. Arave, 383 F.3d 809, 816 (2004) (per curiam) (declining to apply Colvin in evaluating when a state-court conviction became final for purposes of determining whether a later rule of law was "new" under Teague), cert. denied, 545 U.S. 1105 (2005).

3. In any event, this case is a poor vehicle for further review, because petitioner has not demonstrated that the question presented would be likely to affect the outcome of his case. Petitioner received two concurrent life sentences: one for his (vacated) conspiracy conviction, and another for his continuing criminal enterprise conviction. Even if petitioner were resentenced today, the present advisory Guidelines would recommend a life sentence. See Guidelines §§ 2D1.5(a) (2018) (offense level for conviction for participating in a continuing criminal enterprise, cross referencing offense level for drug trafficking), 2D1.1(c)(2) (offense level for trafficking at least 150 kg of cocaine), 2D1.1(b)(1) (enhancement for possession of a dangerous weapon), 3C1.1 (enhancement for obstruction of justice); PSR ¶¶ 68-69, 72, 74. Petitioner has offered no reason to believe that, were he resentenced, the district court would decline to impose that within-Guidelines sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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