No. _____

In the Supreme Court of the United States

_____

SANDCHASE CODY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

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PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether Mr. Cody was denied due process when after the removal of his unlawful ACCA sentencing enhancement, following a 28 U.S.C. § 2255 motion, the district court denied his request for a resentencing hearing.

LIST OF PARTIES

Petitioner, Sandchase Cody, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Sandchase Cody respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of certificate of appealability (COA).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Cody's COA is provided in Appendix A. The district court's amended order granting, in part, Mr. Cody's 28 U.S.C. § 2255 motion is provided in Appendix B.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Cody's case under 18 U.S.C. § 3231. The district court granted, in part, Mr. Cody's 28 U.S.C. § 2255 motion on May 2, 2019. *See* App. B. Mr. Cody subsequently filed a notice of appeal and application for COA in the Eleventh Circuit, which denied the COA on November 14, 2019. See App. A. This petition is timely filed

under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), provides, in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .
>
> (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

28 U.S.C. § 2255 states in relevant part:

> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral

> attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT

In 2010, Mr. Cody was found guilty of all four counts of his superseding indictment, which charged him with: (1) distributing and possessing with intent to distribute a quantity of cocaine, (2) distributing and possessing with intent to distribute a quantity of cocaine, (3) felon in possession of ammunition, and (4) possession with intent to distribute a quantity of cocaine base, cocaine, and marijuana. After trial and before sentencing, Mr. Cody was assigned new counsel and was committed to the custody of the Attorney General for competency treatment and restoration.

After competency restoration, at sentencing, the four counts were grouped, and the district court applied the ACCA enhancement. *See* PSR ¶ 27.[1] Because of the ACCA enhancement, Mr. Cody argued for a downward variance to the ACCA mandatory minimum of 180 months. In imposing the ACCA sentence, the sentencing court stated, "He has *appropriately* been designated as an armed career criminal under the United States Sentencing Guidelines. . . . These offenses carry, as counsel acknowledged, a minimum mandatory term of 15 years." Cr. Doc. 118 at 14-16

[1] Mr. Cody's PSR states, "U.S.S.G. § 3D1.2(c) requires grouping of Counts One, Two, Three, and Four, as Counts One, Two, and Four embody conduct that is treated as a specific offense characteristic in, or other adjustment to, the guidelines application to the firearm count (Count Three)." PSR ¶ 27.

(emphasis supplied). The district court then imposed concurrent sentences of 294 months' imprisonment on all four counts, followed by supervised release. Mr. Cody's appeal was affirmed. In 2014, Mr. Cody filed his first motion to vacate his sentence under 28 U.S.C. § 2255, that was denied a month later as time-barred and procedurally defaulted.

In 2016, the Eleventh Circuit Court of Appeals granted Mr. Cody's Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence under § 2255(h). Mr. Cody filed a Motion to Vacate, Set Aside, or Correct Sentence under § 2255, contending that enhancing his sentence under the ACCA and career offender residual clauses violated due process. Mr. Cody and the government agreed and stipulated that that in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Cody's sentence was erroneously enhanced under the ACCA because his Florida convictions for (1) throwing a missile into an occupied motor vehicle, and (2) shooting at a building no longer qualify as ACCA predicate offenses. However, the parties disagreed on the appropriate relief. Mr. Cody argued for a *de novo* resentencing hearing on all counts, while the government argued the court should only correct the sentence on count three.

On May 2, 2019, after removing the unlawful ACCA sentence enhancement, the district court "corrected" only count three of Mr. Cody's sentence – the sentence for being a felon in possession of ammunition – following the partial grant of his § 2255 motion because the sentence exceeded the lawful statutory maximum. App. B. In doing so, without a hearing or input from Mr. Cody as to the 28 U.S.C. § 3553(a)

factors, *Pepper v. United States*, 131 S. Ct. 1229 (2011) evidence, or otherwise as to the appropriate sentence, the district court reduced Mr. Cody's sentence from 294 months to 120 months (the statutory maximum) to run concurrent to the remaining unchanged three counts. App B. As a result, Mr. Cody's overall 294-month sentence remained the same.

In the order, the district court found that the "*Johnson* remedy is not to vacate the sentence on Count Three, but rather to correct it." App. B. at 3-4. The court further stated that "[a]lthough Petitioner is no longer an armed career criminal under the ACCA, a new sentencing hearing is not required. The *Johnson* error in Count Three does not impact his sentences on Counts One, Two and Four, because the counts of conviction are not interrelated" and "Petitioner's armed career criminal designation had no impact on the sentences imposed on Counts One, Two and Four." App. B. at 4, 5. The district court denied a COA. Mr. Cody filed a timely notice of appeal and sought a COA in the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals denied Mr. Cody's request for COA on November 14, 2019 finding that reasonable jurists would not debate whether the district court abused its discretion by correcting Mr. Cody's sentence without a full resentencing hearing because (1) the ACCA enhancement did not undermine the sentence as a whole, and (2) after removing the ACCA enhancement, the § 922(g) count was subject to a maximum sentence far below his Guidelines range, and thus,

there was no reason for the district court to exercise significant discretion in modifying the sentence.[2] App. A. at 3.

REASONS FOR GRANTING THE WRIT

While the district court has discretion following the grant of a 28 U.S.C. § 2255 motion to vacate, that discretion is not limitless as "the Due Process Clause places a limit on that discretion." *United States v. Thomason*, 940 F.3d 1166, 1171 (11th Cir. 2019) (citing U.S. Const. amend. V.). In this context, that limit demanded a resentencing hearing.

AFTER THE UNCONTESTED REMOVAL OF HIS UNLAWFUL SENTENCE ENHANCEMENT, MR. CODY WAS ERRONEOUSLY DEPRIVED OF HIS DUE PROCESS RIGHT TO A RESENTENCING HEARING.

Because Mr. Cody's four-count, grouped sentence was a sentencing "package," it was error not to vacate Mr. Cody's entire sentencing package, and thus, it was error not to hold a resentencing hearing at which Mr. Cody would be present with counsel.[3]

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[2] Mr. Cody appealed the amended order in his § 2255 case and the amended judgment in his criminal case. The appeal of his amended judgment remains pending in the Eleventh Circuit. Case No. 19-11915 (11th Cir. 2019). On November 20, 2019, the government moved to dismiss that appeal for lack of jurisdiction arguing this issue may only be raised when appealing the denial of a § 2255 motion. The Eleventh Circuit has not yet ruled on that motion.

[3] Counts grouped together pursuant to the sentencing guidelines are interdependent. *See United States v. Rozier*, 485 F. App'x 352, 356 (11th Cir. 2012) (holding that counts were interdependent where they were grouped together); *United States v. Miller*, 594 F.3d 172, 181-82 (3d Cir. 2010) ("[C]ounts that were grouped pursuant to the Sentencing Guidelines at the original sentencing are interdependent . . . ."); *United States v. Bass*, 104 F. App'x 997, 999–1000 (5th Cir. 2004) (applying the sentencing package doctrine where counts were grouped under the sentencing guidelines); *see also United States v. Fowler*, 749 F.3d 1010, 1014-15 (11th Cir. 2014) ("The notion is that, especially in the guidelines era, sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence . . . ."). This makes eminent sense as counts that are

See United States v. Jackson, 923 F.2d 1494, 1497 (11th Cir. 1991) (holding that, when a sentencing package has been vacated on appeal, the defendant's presence at a hearing is necessary). The right to be present at sentencing applies when the entire sentence package was vacated, as it should have been here. *See Adams v. United States*, 338 F. App'x 799, 800 (11th Cir. 2009) ("The prisoner's *right* to a resentencing hearing depends on whether his original sentencing package was vacated in its entirety.") (emphasis added); *United States v. Stevenson*, 162 F. App'x 907, 907–08 (11th Cir. 2006) ("Because Stevenson's original sentence was vacated in its entirety, the district court erred by not granting him a hearing and affording him the opportunity to allocute at resentencing."); *see also United States v. Taylor*, 11 F.3d 149, 151–52 (11th Cir. 1994) (stating that "[T]here is a distinction between modifications of sentences and proceedings that impose a new sentence after vacation of the original sentence. In the former instance, the defendant's presence is not required, but in the latter, the defendant has a right to be present and allocute at resentencing.").

The Eleventh Circuit Court of Appeals recently held in *Thomason*, 940 F.3d at 1172, "the defendant has a right to be present only if the modification to the sentence constitutes a critical stage where 'his presence would contribute to the fairness of the

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grouped together are, in essence, "treated as constituting a single offense for purposes of the guidelines." U.S.S.G. ch. 3, pt. D, intro. comment. Indeed, the *Fowler* Court described the Eleventh Circuit's routine practice of vacating entire sentences and remanding for resentencing on all counts after vacating a "conviction or sentence" on appeal. *Fowler*, 749 F.3d at 1016.

procedure,'" *Id.* (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 2658 (1987)). The Eleventh Circuit stated in *Thomason:*

> To determine if a sentence correction is a critical stage requiring a hearing with the defendant present, we have identified two fact-intensive inquiries "to guide our consideration." *Brown*, 879 F.3d at 1239–40. First, we ask whether "the errors [that required] the grant of habeas relief undermine[d] the sentence as a whole." *Id.* at 1239. Second, we ask whether "the sentencing court exercise[d] significant discretion in modifying the defendant's sentence, perhaps on questions the court was not called upon to consider at the original sentencing." *Id.* at 1239–40. If these factors are present, the district court may not modify the defendant's sentence without holding a hearing with the defendant present. *Id.* at 1240.

Thomason, 940 F.3d at 1172.

Applying the two *United States v. Brown,* 879 F.3d 1231 (11th Cir. 2018), factors used by the Eleventh Circuit in *Thomason*, first, the *Johnson* errors in Mr. Cody's case did undermine the sentence as a whole. The errors included an increased statutory range from 10 years to life without parole, as well as an increased guideline range.[4] Thus, the district court had originally, erroneously believed it had the

[4] At his original sentencing, Mr. Cody was sentenced in error as an Armed Career Criminal to an enhanced sentence with a total offense level of 34 under U.S.S.G. § 4B1.4. PSR ¶¶ 37-41. If granted a resentencing hearing, his offense level would be reduced by six levels. (The current guidelines manual in effect November 1, 2018, would be used in determining how vacating the sentence would impact the advisory guidelines range. *See* 18 U.S.C. § 3553(a)(ii).) Mr. Cody's new base offense level would be 22 pursuant to U.S.S.G. § 2K1.2 because he did not commit the "instant offense subsequent to sustaining at least two felony convictions for either a crime of violence of controlled substance offense." *See* PSR ¶ 28 (emphasis supplied); U.S.S.G. § 2K21(a)(2). He would receive the same four level increase for possessing ammunition while in possession of a controlled substance. *See* PSR ¶ 29; U.S.S.G. § 2K2.1(b)(6). And the two level adjustment for obstruction of justice. *See* PSR ¶ 32; U.S.S.G. § 3C1.1. This would bring him to a total offense level of 28 at resentencing.

authority to punish Mr. Cody by sentencing him to prison for life without parole. His sentence of 24.5 years, as compared to life without parole in prison, may appear a merciful sentence – but it is another thing when he should only have faced a maximum statutory range on any count of 30 years.

In another case, *David Johnson v. United States*, 619 F.2d 366 (5th Cir. 1980),[5] the court remanded a case for resentencing when the district court errantly believed the defendant could be sentenced to 55 years (it was actually 25 years), and imposed 20 years. *Id.* at 368. The court reasoned that, "Perhaps, after realizing that the maximum sentence is only 25 years, the District Court may conclude that a 20 year sentence is too harsh." *Id.* In the instant case, the fact that the *Johnson* error was the basis for the district court's errant belief at sentencing that it had the authority to sentence Mr. Cody to life without parole in prison, on just one of four counts he was facing, when in actuality, the longest statutory maximum on a single count was 30 years, "undermines the sentence as a whole." *See Brown,* 879 F.3d at 1238. And that belief affected the case as a whole. And the removal of that unlawful enhancement, and the possibility of life without parole in prison, affects the view of the case as a whole. Further, due to the *Johnson* error the district court believed it must impose a mandatory minimum sentence on the case of 15 years, when in fact, there was *no* mandatory minimum on any count.

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[5] All decisions of the Fifth Circuit, handed down before close of business on September 30, 1981, are binding as precedent within the Eleventh Circuit. *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981).

As to the second factor, the sentencing court did exercise significant discretion in modifying the defendant's sentence, including on questions the court was not called on to consider at the original sentencing. The district court did not have to reinstate the exact same sentence on the three other counts – the court had discretion. The sentencing guidelines are advisory, and the court failed to consider any *Pepper* evidence, on a defendant with known, documented mental health issues (given the former adjudication of incompetency). The court went from a floor of 180 months with the unlawful ACCA enhancement at the original sentencing, to *no* floor under the advisory guidelines. As the Eleventh Circuit said in *Brown*, 879 F.3d at 1239:

> A resentencing hearing is also needed when a court must exercise its discretion in modifying a sentence in ways it was not called upon to do at the initial sentencing. For example, if the original sentencing court imposed a mandatory minimum sentence that no longer applies, then a defendant's resentencing hearing may be the first opportunity he has to meaningfully "challenge the accuracy of information the sentencing judge may rely on, to argue about its reliability and the weight the information should be given, and to present any evidence in mitigation he may have." *Id.* at 1496–97. In a case like this, the defendant's presence is required at a resentencing hearing to "contribute to the fairness of the procedure." [*Kentucky v.*] *Stincer*, 482 U.S. [730] at 745, 107 S. Ct. at 2667 [(1987)].

Brown, 879 F.3d at 1239. Mr. Cody finds himself in this exact scenario. The court in *Thomason* said,

> A resentencing hearing may be necessary "when a court must exercise its discretion in modifying a sentence in ways it was not called upon to do at the initial sentencing." *Brown*, 879 F.3d at 1239. That exercise may occur, for example, if the district court vacates a mandatory-minimum sentence and then is able to consider the statutory sentencing factors for the first time. *Id.*

Thomason, 940 F.3d at 1173. As discussed below, Mr. Cody's counsel at his original sentencing made his sentencing arguments in compliance with the unlawful mandatory minimum. And the sentencing judge discussed them in imposing sentence. *Id.* at 14-16 (stating "[Mr. Cody] has *appropriately* been designated as an armed career criminal under the United States Sentencing Guidelines. . . . These offenses carry, as counsel acknowledged, a minimum mandatory term of 15 years." (emphasis supplied).

Instead, the district court "corrected" Mr. Cody's felon in possession count – to the new statutory maximum penalty, without hearing any *Pepper* or other evidence. Previously, at Mr. Cody's original sentencing, his attorney argued for a downward variance to 180 months, the mandatory minimum given the ACCA enhancement.[6] Mr. Cody's attorney was *unable* to argue for less than the unlawful ACCA enhanced mandatory minimum, despite that no other count of conviction carried a mandatory minimum. *See* 21 U.S.C. § 841(b)(1)(B). In *Thomason*, where the Eleventh Circuit expressly considered due process, the court stressed that "the district court invited the parties to 'submit any additional written materials that they wish the court to consider in fashioning a just and reasonable sentence.' Thomason submitted a sentencing memorandum with exhibits detailing his post-sentencing conduct." *Thomason*, 940 F.3d at 1170.

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[6] Normally, a § 922(g) offense carries a maximum term of 10 years' imprisonment. *See* 18 U.S.C. § 924(a).

Thus, considering the two factors and Mr. Cody's arguments, it is clear that due process demanded a resentencing hearing. The court in *Thomason* noted that the district court in that case exercised its discretion in favor of due process because "the district court imposed a less onerous total sentence." *Id.* at 1174. But not so in Mr. Cody's case. While Mr. Thomason received an overall 34-month sentence reduction, Mr. Cody received none. *See id. at* 1170. And in considering due process, the *Thomason* court noted that the "district court first exercised its discretion by considering evidence of Thomason's post-sentencing rehabilitative conduct." *Id.* at 1174. Again, not so with Mr. Cody. Despite Mr. Cody's specific requests to present *Pepper* evidence to the district court, he was not given that opportunity and the district court did not consider any § 3553(a) factors or mitigating evidence. Due process demanded a resentencing hearing.

Mr. Cody is no longer an armed career criminal. No longer does any mandatory minimum apply. Mr. Cody is no longer facing a possible sentence of life in prison. Mr. Cody was not presented with an opportunity to present mitigating evidence or challenge the accuracy of information that the sentencing judge may rely on, to dispute its reliability and the weight the information should be given. Mr. Cody was not presented with an opportunity to allocute. Reasonable jurists would debate whether it was error not to grant a resentencing hearing following the correction of Mr. Cody's unlawful sentence enhancement, causing a denial of due process. *See Jackson*, 923 F.2d at 1497; *United States v. Parrish,* 427 F.3d 1345, 1348 (11th Cir. 2005) (citing *United States v. Novaton,* 271 F.3d 968, 998 (11th Cir. 2001)) ("Under

the Due Process Clause, 'a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.'"); *see also Spencer v. United States*, 773 F.3d 1132, 1140 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2836 (2015) (describing the right as "constitutionally based").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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