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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2255(b), when a district court grants a motion collaterally attacking sentence, the court has the discretion to impose one of four remedies—the court can "discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

This case presents a circuit split over whether a § 2255 movant must obtain a certificate of appealability to appeal a district court's choice of remedy under § 2255(b). The Eleventh Circuit has said yes; the Fourth and Sixth Circuits have said no.

The question presented is:

> Whether an individual must obtain a certificate of appealability to appeal the district court's choice of remedy following the grant of relief under 28 U.S.C. § 2255.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.)

Sandchase Cody v. United States, 8:16-cv-1790

United States v. Sandchase Cody, 8:10-cr-35

United States Court of Appeals (11th Cir.)

United States v. Sandchase Cody, No. 19-11915

Sandchase Cody v. United States, No. 19-12427

Supreme Court of the United States

Sandchase Cody v. United States, No. 19-7677

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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In the Supreme Court of the United States

No.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES 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 published decision of the United States Court of Appeals for the Eleventh Circuit on a jurisdictional issue of first impression for that court, which led to the dismissal of his appeal.

OPINION AND ORDER BELOW

The Eleventh Circuit's dismissal of Mr. Cody's appeal for lack of jurisdiction 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. Mr. Cody's amended criminal judgment is provided in Appendix C.

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 and jurisdiction over his civil proceeding under § 2255. The district court granted, in part, Mr. Cody's § 2255 motion on May 2, 2019. *See* App. B. Mr. Cody then filed a notice of appeal in his criminal case from his new criminal judgment (Eleventh Circuit Appeal No. 19-11915).[1]

The Eleventh Circuit dismissed Mr. Cody's direct appeal for lack of jurisdiction on May 28, 2021. *See* Appendix A. This petition is timely filed under Supreme Court Rule 13.1 and the Court's March 19, 2020 order on filing extensions. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

28 U.S.C. § 2253 states in relevant part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)
>
> > (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

[1] Mr. Cody also filed a notice of appeal in his § 2255 case (Eleventh Circuit Appeal No. 19-12427).

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

28 U.S.C. § 2255(b) 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 OF THE CASE

In 2011, the district court adjudged Mr. Cody 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.

At sentencing, Mr. Cody's four counts were grouped, and the district court sentenced him under the Armed Career Criminal Act (ACCA).[2] Mr. Cody argued for

[2] 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

a downward variance to the ACCA mandatory minimum of 180 months. But the district court 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 sentence under 28 U.S.C. § 2255, that was denied a month later as time-barred and procedurally defaulted.

In 2016, the Eleventh Circuit 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 then moved to vacate his 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 in light of *Johnson v. United States*, 576 U.S. 591 (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—the sentence for being a felon in possession of ammunition.

In 2019, after removing the unlawful ACCA sentence enhancement, the district court only "corrected" count three of Mr. Cody's sentence. App. B. The district court reduced Mr. Cody's sentence on the § 922(g) count from 294 months to 120

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as a specific offense characteristic in, or other adjustment to, the guidelines application to the firearm count (Count Three)." PSR ¶ 27.

months (the statutory maximum) to run concurrent to the unchanged remaining three counts without a hearing or input from Mr. Cody as to the 18 U.S.C. § 3553(a) factors, post-sentencing mitigation evidence under *Pepper v. United States*, 562 U.S. 476 (2011), or the appropriateness of the sentence. *See* App. B, C. As a result, Mr. Cody's overall 294-month sentence remained the same.

In its 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 also 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 also denied Mr. Cody a certificate of appealability.

Mr. Cody filed a timely notice of appeal of his new criminal judgment and sentence. The government moved to dismiss that direct appeal for lack of jurisdiction. Mr. Cody responded to the motion, and the Eleventh Circuit ordered that the government's motion to dismiss the direct appeal for lack of jurisdiction would be carried with the case. After briefing in the direct appeal was complete, the Eleventh Circuit scheduled oral argument.

Following oral argument, the Eleventh Circuit dismissed the criminal appeal for lack of jurisdiction in a published opinion. *See* App. A.

REASONS FOR GRANTING THE WRIT

I. Legal Background.

When a district court grants a § 2255 motion to vacate a sentence, it can select one of four potential remedies: (1) "discharge the prisoner," (2) "grant [the prisoner] a new trial," (3) "re-sentence [the prisoner]," or (4) "correct the [prisoner's] sentence." 28 U.S.C. § 2255(b). Yet the district court's "choice" of remedy is not absolute. Instead, it must be "appropriate." 28 U.S.C. § 2255(b). Further, when a district court grants a § 2255 motion on a sentencing challenge, it must vacate and set aside the entire criminal judgment and impose a new one. *Id.* As this Court concluded in *Andrews v. United States,* 83 S. Ct. 1236 (1963), an order granting relief under § 2255 is *preliminary* to the relief. *Id.* at 340. Thus, the new sentence is firmly on the criminal side of the criminal / collateral dichotomy for purposes of appeal. In other words, to the extent that an order in a § 2255 proceeding "corrects" a sentence, the order is part of the criminal case.

On the other hand, section 2253's certificate of appealability requirement applies when a § 2255 movant wants to appeal the issues raised in the § 2255. Put differently, an appellant needs a certificate of appealability only if he wants to appeal the district court's ruling on the issues raised in the § 2255 motion. 28 U.S.C. § 2253(c)(1)(B).

II. The Circuits are split on the question presented.

As explained, it is well settled that a movant must obtain a certificate of appealability to appeal the dismissal or denial of a motion or claim under § 2255. *See*

Slack v. McDaniel, 529 U.S. 473, 478 (2000) (citing 28 U.S.C. § 2252(c)). But does a movant need a certificate of appealability to appeal a district court's choice of remedy when it grants a § 2255 motion? The federal appellate courts are split on this issue. *Compare United States v. Hadden*, 475 F.3d 652 (4th Cir. 2007) (holding that a movant does not need a certificate of appealability), *and Ajan v. United States*, 731 F.3d 629 (6th Cir. 2013) (same), *with United States v. Cody*, 998 F.3d 912 (11th Cir. 2021) (holding that a movant needs a certificate of appealability). Mr. Cody therefore respectfully suggests that the Court should use this case, which squarely presents this important legal question, to resolve the conflict.

III. In the Fourth and Sixth Circuits, a movant does not need a certificate of appealability to appeal a district court's choice of remedy.

The Fourth and Sixth Circuits have held that a § 2255 movant does not need a certificate of appealability to appeal a district court's choice of remedy when granting a motion or claim under § 2255. In *Hadden*, the district court "removed [an] error from Hadden's original sentence—and thereby made it 'right'—by excising the unlawful 60-month term on the § 924(c) count and re-entering Hadden's original 168 month term on the drug counts." 475 F.3d at 667. The appellant in *Hadden* argued on the merits that "the district court erred by failing to conduct a resentencing hearing once it determined that relief was warranted on his § 2255 petition. . . ." *Id.* at 666-67, 669.

In determining the jurisdictional issue, the Fourth Circuit began by "first pars[ing] the language of § 2255." *Id.* at 660. In doing so, the *Hadden* Court

"examine[d] the implications of the Supreme Court's decision in *Andrews v. United States,* 373 U.S. 334, 83 S. Ct. 1236, 10 L. Ed. 2d 383 (1963), on the meaning of § 2255." *Id.* at 660. The Court in *Hadden* determined that to the extent a § 2255 resentencing or correction order vacates the original sentence and enters a new sentence, it is "part of the prisoner's criminal case." *Id.* at 664. As a result, the Fourth Circuit determined a prisoner's appeal of that aspect of the order, including his "challenging *the relief granted-i.e.*, whether the relief was 'appropriate' under § 2255" is an appeal of the "new criminal sentence and therefore need not obtain a COA." *Id.* at 664. The *Hadden* Court based its decision on Supreme Court precedent, §§ 2253 and 2255, and the policies behind those statutes. The Fourth Circuit determined that requiring a certificate of appealability to appeal a district court's choice of remedy would place a successful § 2255 movant "in a *worse* situation than he would have been had there been no error in the first instance." *Id.* at 665. The *Hadden* Court held that:

> [A]n order either correcting the prisoner's sentence or entering the result of a resentencing is a hybrid order that is both part of the petitioner's § 2255 proceeding and part of his criminal case. If the petitioner seeks to appeal the order by raising arguments relating to the district court's decision whether to grant relief on his § 2255 petition, he is appealing "the final order in a proceeding under § 2255" and therefore must obtain a COA under § 2253. If, on the other hand, the petitioner seeks to appeal matters relating to the propriety of the *relief* granted, he is appealing a new criminal sentence and therefore need not comply with § 2253's COA requirement.

Id. at 665-66. Thus, in the Fourth Circuit, a § 2255 movant does not need a certificate of appealability to appeal a district court's choice of remedy when granting a § 2255 motion. *Id.* at 660 (citing *United States v. Allen,* 446 F.3d 522, 527 (4th Cir. 2006)

(holding that jurisdiction exists over defendant's appeal of his sentence under §§ 3742(a) and 1291)).

The Sixth Circuit is in the same camp as the Fourth Circuit. In *Ajan*, the appellant challenged the relief granted—specifically, he challenged whether the relief was appropriate under § 2255 when following the partial grant of his § 2255 motion, the district court entered an Amended Judgment and new sentence without conducting a resentencing hearing. 731 F.3d at 630. The appellant in *Ajan* argued that he did "not need a COA because the Amended Judgment he is appealing punishes him for his criminal conduct and is a previously unreviewed aspect of his criminal case." *Id.* at 630. The government argued "that a COA is necessary because the Amended Judgment was entered as a result of Ajan's collateral § 2255 proceedings." *Id.* at 630. Consistent with the Fourth Circuit, the Sixth Circuit held that "a COA is not required because Ajan is appealing a previously unreviewed aspect of his criminal case." *Id.* Thus, the appeal was permitted without a certificate of appealability. *Id.; see also United States v. Augustin*, No. 20-5454, 2021 WL 4891726 (6th Cir. Oct. 20, 2021) (reviewing the district court's choice of remedy under § 2255 on direct criminal appeal).

In reaching its conclusion, the Sixth Circuit in *Ajan* relied heavily on *Magwood v. Patterson,* 130 S. Ct. 2788 (2010). *Id.* at 631. In *Magwood,* the Court held that a successful § 2254 petition led to "a new judgment, and [the] first application

challenging that new judgment cannot be 'second or successive.'" *Id.* at 2796.[3] Based on *Magwood*, the Sixth Circuit determined that "Ajan's successful § 2255 petition led to a new judgment—the Amended Judgment—which did not exist at the time his § 2255 petition was brought. It is the Amended Judgment that Ajan appeals." *Ajan*, 731 F.3d at 631. Because the appellant in *Ajan* sought to "challeng[e] *the relief granted—i.e.,* whether the relief was 'appropriate' under § 2255, whether the new sentence was in conformity with the Constitution or Sentencing Guidelines, etc.—he is appealing a new criminal sentence and therefore need not obtain a COA . . . ." *Id.* (citing *Hadden,* 475 F.3d at 664). The Sixth Circuit noted that other Circuits have "utilized similar reasoning to hold that a COA is not required to appeal the relief granted after a successful § 2255 motion." *Ajan* at 631-32 (citing *United States v. Futch,* 518 F.3d 887, 895 (2008); *Hadden,* 475 F.3d at 663–66; *United States v. Lafayette,* 337 F.3d 1043, 1046 (D.C. Cir. 2003)). Thus, the Fourth and Sixth Circuits have both held that a § 2255 movant does not need a certificate of appealability to appeal a district court's choice of remedy when granting a § 2255 motion.

IV. In the Eleventh Circuit, a movant needs a certificate of appealability to appeal a district court's choice of remedy.

In this case, the Eleventh Circuit expressly created a circuit split on whether a movant needs a certificate of appealability to appeal a district court's choice of remedy when granting a § 2255 motion. *Cody*, 998 F.3d at 916 (expressly disagreeing with *Hadden*). The Eleventh Circuit relied on § 2253(c)(1)(B), which states that a

[3] Although the rule in *Magwood* was announced in the context of § 2254, the rule applies with equal force to § 2255. *Magwood*, 130 S. Ct. at 2796.

certificate of appealability is needed to appeal "the final order in a proceeding under section 2255." *Id.* at 915–16. According to the Eleventh Circuit, the term "proceeding" in § 2253(c)(1)(B) is best read to include a district court's choice of remedy under § 2255(b). *Id.* Because the Eleventh Circuit held that § 2253(c)(1)(B)'s text controlled the issue, it did not feel the need to address "*Hadden*'s contrary holding." *Id.* at 916.

V. The Eleventh Circuit's ruling is wrong.

While the decisions of the Fourth and Sixth Circuits explored this Court's precedent, the relevant statutory text, and the policies underlying AEDPA, the Eleventh Circuit overlooked all of those considerations based on its short-circuited analysis of the word "proceeding" in § 2253(c)(1)(B). But that word cannot bear the burden the Eleventh Circuit placed on it. To the contrary, the Fourth and Sixth Circuits' thoughtful analysis arrived at the right result.

When a district court grants a movant's § 2255 motion, it vacates the original judgment under § 2255(b). That act destroys the finality of the original criminal judgment. The court *then* determines whether to discharge, retry, correct, or resentence the movant. But whether the new sentence differs from that originally imposed, *that choice* is a new exercise of the court's sentencing discretion, never before subject to appellate review. For that reason, review of that choice is not subject to § 2253's certificate of appealability requirement.

The "final order" under § 2253(c)(1)(B) as it relates to § 2255 is the order granting or denying the collateral § 2255 claims on the merits, in whole or in part, and there is no question that a certificate of appealability is needed to appeal from

that final order. But an amended criminal judgment imposing sentence through a correction or resentencing is not the final order in a § 2255 proceeding.

Mr. Cody never sought to appeal the grant or denial of the merits of his § 2255 *Johnson* claims—he sought to appeal a new sentencing issue—specifically, the manner in which the district court imposed his new criminal sentence. Mr. Cody thus sought to appeal his new judgment *imposing* punishment, not the claims or order in his § 2255 collateral proceeding *seeking relief from* punishment.

Thus, consistent with the holdings of the Fourth and Sixth Circuits, when a movant seeks to appeal matters relating to the propriety of relief resulting in an amended criminal judgment, he is appealing a new criminal sentence and need not obtain a certificate of appealability.

VI. The question presented is vital because it involves the supervisory powers of federal appellate courts.

The jurisdictional question here involves the supervisory powers of the federal appellate courts and will continue to affect the rights of all successful § 2255 movants now and in the future. It is therefore imperative that this Court resolve the circuit split here and clarify whether an individual must obtain a certificate of appealability to appeal a district court's choice of remedy following the grant of relief under § 2255.

VII. This case is an excellent vehicle to resolve the conflict.

This case provides an excellent opportunity to resolve the entrenched disagreement among the circuits on the question presented. First, the parties fully litigated the question here on appeal, and the Eleventh Circuit clearly decided it and

recognized that its decision conflicts with the Fourth Circuit's decision in *Hadden*. Second, the split on the question presented is squarely implicated here, and this case does not involve unique or disputed factual findings. Finally, if this Court adopts the Fourth and Sixth Circuits' position, Mr. Cody will be permitted to pursue his appeal. This Court's intervention is needed.

CONCLUSION

For the above reasons, Mr. Cody respectfully requests that this court grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDIX