No. 21-6099

IN THE SUPREME COURT OF THE UNITED STATES

SANDCHASE CODY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's challenge to the remedy ordered by the district court in his motion for collateral relief under 28 U.S.C. 2255 is subject to the requirement that a federal prisoner obtain a certificate of appealability in order to appeal "the final order in a proceeding under section 2255," 28 U.S.C. 2253(c)(1)(B).

ADDITIONAL RELEATED PROCEEDINGS

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

Cody v. United States, 14-cv-976 (Sept. 17, 2014)

United States Court of Appeals (11th Cir.):

In re Cody, 16-11937 (May 17, 2016)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 998 F.3d 912. A prior opinion of the court of appeals is not published in the Federal Reporter but is available at 2019 WL 7207043. An additional prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 460 Fed. Appx. 825. The order of the district court is not published in the Federal Supplement but is available at 2019 WL 1931986. The amended order of the district court (Pet. App. B1-B7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2021. The petition for a writ of certiorari was filed on October 25, 2021. 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 Middle District of Florida, petitioner was convicted on two counts of distributing and possessing with intent to distribute cocaine, and one count of possessing with intent to distribute cocaine base, cocaine, and marijuana, all in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing ammunition as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. The district court sentenced him to concurrent 294-month terms of imprisonment on each of the four counts, to be followed by six years of supervised release. Judgment 2-3. The court of appeals affirmed. 460 Fed. Appx. 825.

After dismissing a motion to vacate petitioner's sentence under 28 U.S.C. 2255, 14-cv-976 D. Ct. Doc. 4 (May 28, 2014), the district court ultimately granted an authorized second Section 2255 motion in part, reduced petitioner's sentence to 120 months on the Section 922(g) count, and ordered the sentence on that count to run concurrently with the previously imposed 294-month sentences on the three drug counts. Pet. App. B1-B7. The court

denied petitioner's application for a certificate of appealability (COA). Id. at B6-B7. The court of appeals likewise denied a COA, and this Court denied a petition for a writ of certiorari seeking review of that denial. 2019 WL 7207043, cert. denied, 140 S. Ct. 2549. The court of appeals thereafter dismissed petitioner's appeal for lack of jurisdiction. Pet. App. A1-A9.

1. In October 2009, state law-enforcement agents learned that petitioner was selling large amounts of cocaine from his residence in Haines City, Florida. Presentence Investigation Report (PSR) ¶ 13. The next month, a confidential informant purchased cocaine from petitioner at his residence on multiple occasions. PSR ¶ 14. Police subsequently executed a search warrant at the residence and seized cocaine, cannabis, drug paraphernalia, ammunition, and a picture of petitioner holding a firearm. PSR ¶¶ 15-19.

A federal grand jury charged petitioner with two counts of distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possessing with intent to distribute cocaine base, cocaine, and marijuana, also in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing ammunition as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). C.A. App. 18-22. The jury found petitioner guilty on all four counts. See Judgment 1.

The Probation Office prepared a presentence report and calculated an advisory Sentencing Guidelines range of 262-327 months. PSR ¶ 135. The Probation Office also stated that because of petitioner's prior felony convictions for the sale of cocaine in 1994, shooting at a building in 2000, and throwing a missile into an occupied motor vehicle in 1994, petitioner's Section 922(g) conviction was subject to an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), ranging from a minimum term of 15 years up to a maximum term of life imprisonment, instead of the ten-year statutory-maximum sentence that would otherwise have applied to that conviction. PSR ¶¶ 37, 134. The district court sentenced petitioner to concurrent terms of imprisonment of 294 months on each count, including an ACCA-enhanced sentence on the Section 922(g) count, to be followed by six years of supervised release. Judgment 2-3.

2. In 2014, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. 14-cv-976 D. Ct. Doc. 1 (Apr. 23, 2014). The district court dismissed the motion as untimely. 14-cv-976 D. Ct. Doc. 4, at 1.

In 2016, petitioner sought leave from the court of appeals to file a second or successive Section 2255 motion. 16-11937 Pet. C.A. Appl. The court of appeals authorized the filing, stating that petitioner's sentence on the Section 922(g) conviction might be affected by this Court's decision in Johnson v. United States,

576 U.S. 591 (2015), which held that the residual clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), was unconstitutionally vague. 16-11937 C.A. Order 3-4.

In the ensuing district-court proceedings on the successive motion, petitioner and the government agreed that, following Johnson, petitioner's prior convictions for shooting at a building and throwing a missile into an occupied motor vehicle no longer qualified as predicates for a sentence enhancement under the ACCA, and that petitioner's sentence on his Section 922(g) conviction was accordingly improper. See Pet. App. A3; C.A. App. 86-87. The parties disagreed, however, about the appropriate relief under Section 2255(b), which provides that where a district court determines that a sentence is open 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." 28 U.S.C. 2255(b). Petitioner took the position that the court should vacate the judgment, schedule a new sentencing hearing, and resentence him on all counts. Pet. App. A3. The government took the position that the court should, at most, correct the Section 922(g) sentence by removing the ACCA sentence enhancement, while leaving his concurrent sentences on the other counts intact. Ibid.; see C.A. App. 101-110.

3. The district court granted petitioner's Section 2255 motion in part and ordered correction of petitioner's sentence on the Section 922(g) count to 120 months of imprisonment, to run concurrently with the 294-month sentences previously imposed on the other counts. Pet. App. B1-B7.

The district court rejected petitioner's argument that the "sentencing package" doctrine required resentencing on all counts. Pet. App. B3-B4. The court observed that the removal of petitioner's designation as an armed career criminal under the ACCA did not invalidate his Section 922(g) conviction, but simply removed a sentence enhancement applicable to that specific conviction. Ibid. The court further observed that petitioner's advisory Sentencing Guidelines range did not depend on his ACCA eligibility, but was instead controlled by his career-offender classification under the Guidelines and his possession of ammunition in connection with a controlled-substance offense. Id. at B4; see PSR ¶¶ 38, 68-69. And because petitioner's ACCA enhancement had "no impact" on his sentences on the other (drug-related) counts, the court determined that the "appropriate relief" was to "correct" petitioner's sentence on the Section 922(g) count (Count 3), "leaving his concurrent sentences on Counts One, Two and Four undisturbed." Pet. App. B5.

The district court accordingly entered an amended judgment on the docket for petitioner's criminal case reflecting a corrected

sentence on Count 3. See Pet. App. C1-C6 (amended judgment). It denied petitioner's motion for a COA. Id. at B6-B7.

4. Petitioner filed a notice of appeal, designating the district court's amended judgment as the basis for appeal. D. Ct. Doc. 149 (May 15, 2019). The court of appeals thereafter directed petitioner to clarify whether the designation "reflects an intent to appeal the final judgment in the criminal case, the final judgment in the [Section] 2255 proceedings, or both." C.A. Jurisdictional Question. Petitioner then filed a notice of appeal from the final order in the Section 2255 proceeding, 16-cv-1790 D. Ct. Doc. 20 (June 25, 2019), and subsequently filed an application for a COA with the court of appeals, see 19-12427 Pet. C.A. Appl. for COA.

The court of appeals denied a COA. See 2019 WL 7207043. It explained that in order to obtain a COA, "[t]he movant must show that jurists of reason would find debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling." Id. at *1 (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). The court determined that petitioner had not made the second showing here, because "reasonable jurists would not debate whether the district court abused its discretion by correcting [petitioner's] sentence without a full resentencing hearing." Id. at *2. The court emphasized that "the ACCA

enhancement did not undermine the sentence as a whole, as it pertained only to one count and did not control [petitioner's] Guidelines range calculation." Ibid.

This Court declined to review that decision. 140 S. Ct. 2549.

5. Following the denial of a COA, the government moved to dismiss petitioner's appeal. Gov't C.A. Mot. to Dismiss. The court of appeals granted the government's motion and dismissed the appeal for lack of jurisdiction. Pet. App. A1-A9.

The court of appeals observed that under Section 2253(c)(1)(B), "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1)(B); see Pet. App. A4-A5. The court explained that, under that provision, its "jurisdiction over [petitioner's] appeal turns on the extent to which [petitioner] challenges errors in his new sentence as opposed to aspects of his proceeding under section 2255." Pet. App. A5.

The court of appeals stated that "'direct appeal matters' that arise after the proceeding under section 2255," such as an argument "that the district court misapplied the sentencing guidelines at [the petitioner's] resentencing," "do not require a certificate of appealability." Pet. App. A5 (brackets and citation omitted). But it determined that, in this case, the only issue petitioner sought to raise on appeal was the district court's

choice of remedy under Section 2255. Id. at A5-A6. And it explained that the choice between correcting a sentence and ordering resentencing is a part of the "proceeding under section 2255," 28 U.S.C. 2253(c)(1)(B), such that a COA is a necessary prerequisite to an appeal. Pet. App. A6.

The court of appeals observed that "a 'proceeding' is '[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.'" Pet. App. A6 (quoting proceeding, Black's Law Dictionary 1221 (7th ed. 1999)) (brackets in original). Applying that dictionary definition to Section 2255, the court reasoned that the Section 2255 "proceeding" includes "the series of steps outlined in section 2255(a) and (b)," which "provide[] a mechanism by which a prisoner may commence a proceeding to correct his sentence" and then "provide[] a clear outline of what that proceeding entails." Ibid. And the court observed that among those steps are the district court's vacatur of an unlawful sentence and the district court's selection of "one of four remedies" under Section 2255(b): "'discharge the prisoner,' 'resentence him,' 'grant a new trial,' or 'correct the sentence.'" Id. at A7 (quoting 28 U.S.C. 2255(b)).

The court of appeals accordingly found it "unreasonable to read sections 2253 and 2255 to exclude the choice of remedy from the scope of a proceeding under section 2255." Pet. App. A7. The

court observed that doing so would require a reading under which the statutory phrase "a proceeding under section 2255," 28 U.S.C. 2253(c)(1)(B), "consists of the steps in section 2255(b), except that the proceeding ends halfway through the two-part remedial process in the final sentence, at a point that is not even set apart with a comma." Pet. App. A7-A8. "That is not," the court continued, "a natural reading of the text." Id. at A8.

ARGUMENT

Petitioner contends (Pet. 6-13) that the court of appeals erred in dismissing his appeal after both it and the district court denied his application for a COA. The court of appeals' dismissal reflected a correct application of 28 U.S.C. 2255(c)(1)(B) to the circumstances of this case, and petitioner would not be entitled to a different remedy on his Section 2255 motion in any circuit. No further review is warranted.

1. A federal prisoner may not appeal from "the final order in a proceeding under section 2255" unless a circuit justice or judge issues a COA. 28 U.S.C. 2253(c)(1)(B). As the court of appeals correctly explained, the "proceeding under section 2255" includes the filing of a motion as authorized by Section 2255(a) and each of the procedural steps that Section 2255(b) directs the district court to take with respect to such a motion. See Pet. App. A5-A8. One of those steps is the court's selection from among the four possible remedies that the final sentence of Section

2255(b) makes available: "discharge the prisoner," "resentence him," "grant a new trial," or "correct the sentence as may appear appropriate." 28 U.S.C. 2255(b). Accordingly, if a prisoner seeks to appeal a final order that selects one of those four remedies at the conclusion of the Section 2255 proceeding, Section 2253(c)(1)(B) requires that the prisoner first obtain a COA.

Petitioner contends (Pet. 12) that "he sought to appeal a new sentencing issue -- specifically, the manner in which the district court imposed his new criminal sentence." Proceeding from that premise, he further contends (ibid.) that Section 2253(c)(1)(B) is inapplicable because his appeal related to a "new judgment imposing punishment, not the claims or order in his [Section] 2255 collateral proceeding seeking relief from punishment." Those contentions are incorrect. In entering the amended judgment, the district court specified that the criminal judgment was being "[a]mended to correct the sentence imposed on Count Three" -- the Section 922(g) count. Pet. App. C1 (emphasis omitted); see id. at B6 (providing that "Petitioner's sentence on Count 3 is CORRECTED" but that "[i]n all other respects, the judgment and sentence of April 26, 2011 remain the same") (emphasis omitted). Petitioner does not seek to appeal that amendment, which he does not claim is independently erroneous.

Instead, petitioner seeks to appeal the district court's determination that it would not engage in a full resentencing to

modify the sentences imposed on the other three counts, leaving those sentences unchanged. See Pet. C.A. Br. 1 (identifying "the issue" on appeal as "[w]hether the district court erred in denying [petitioner] a resentencing hearing on all counts") (capitalization and emphasis omitted). The court made that determination in its final order on petitioner's Section 2255 motion. See Pet. App. B6. Indeed, the court described its disposition -- removing the ACCA sentence on a single count but declining to disturb the sentences on the other counts -- as having granted the requested relief only "in part." Ibid. (emphasis omitted). Petitioner accordingly needed a COA to appeal that disposition and seek additional relief. See 28 U.S.C. 2253(c)(1)(B).

2. Petitioner notes (Pet. 7-10) decisions of the Fourth and Sixth Circuits that have allowed prisoners in certain circumstances to appeal a district court's remedial order under Section 2255 without first obtaining a COA. See United States v. Hadden, 475 F.3d 652, 659-666 (4th Cir. 2007); Ajan v. United States, 731 F.3d 629, 630-632 (6th Cir. 2013). But any conflict between those decisions and the decision below does not warrant further review in this case. As even petitioner's amici acknowledge (NACDL Br. 12), "[r]ather than relying on the language and history of the statutes at issue," the Fourth and Sixth Circuits "each * * * took an extratextual approach to sections

2253 and 2255 that is not a tenable model for other circuits to follow." And the straightforward application of the definition of "proceeding" to Section 2255 motions in the decision below has not been addressed by either circuit. Cf. Pet. App. A8 (noting the analytical deficiency in Hadden). But even if those courts would consider the merits of petitioner's appeal in the absence of a COA, this would be a poor vehicle in which to address the question presented because petitioner has not shown that he would be entitled to relief on the merits in any circuit.

In an earlier decision that this Court already declined to review, the court of appeals determined that reasonable jurists would not have found debatable the district court's determination to leave in place the sentences on the three drug counts that were unaffected by Johnson's ACCA holding. See 2019 WL 7207043, cert. denied, 140 S. Ct. 2549. The court of appeals explained that removing the ACCA enhancement, as Johnson required, "did not undermine the sentence as a whole, as it pertained only to one count and did not control [petitioner's] Guidelines range calculation." Id. at *2. And that view of the merits is consistent with both the Fourth Circuit's decision in United States v. Hadden, supra, and the Sixth Circuit's decision in United States v. Ajan, supra. In Hadden, the prisoner argued -- like petitioner here -- that the "sentence-package theory of sentencing" required the district court to engage in a full resentencing on all counts once

it vacated a sentence on a firearms count. See 475 F.3d at 669; Pet. App. B3-B4 (discussing petitioner's reliance on the "sentencing package doctrine"). But the Fourth Circuit rejected that argument, explaining that the district court did not abuse its discretion when it chose "to 'correct' Hadden's sentence in lieu of conducting a formal 'resentencing.'" Hadden, 475 F.3d at 668 (brackets omitted); see id. at 667-670. Correcting the sentence on the firearm count was sufficient to produce a lawful sentence, and the Fourth Circuit found "nothing in the sentence-package theory [that] forbids the district courts from doing what the text of [Section] 2255 clearly permits: 'correct[ing]' a prisoner's unlawful sentence without conducting a formal 'resentenc[ing].'" Id. at 669 (third and fourth sets of brackets in original).

Similarly, in Ajan, the Sixth Circuit recognized that "the district court has discretion to choose from any of the four enumerated [Section] 2255 remedies." 731 F.3d at 634. While the Sixth Circuit remanded because it was uncertain whether the district court had understood its discretion in that regard, see ibid., nothing in the opinion suggests that the district court would abuse its discretion if it chose simply to correct the error in the prisoner's previously entered sentence without engaging in a full resentencing. See ibid. ("[O]n remand, Ajan might not prevail on the merits of his argument that he is entitled to a

resentencing and a lower sentence."); see also United States v. Augustin, 16 F.4th 227, 232 (6th Cir. 2021) (explaining that court did not abuse its discretion in Section 2255 proceedings when it corrected a sentence by vacating a conviction and sentence under Section 924(c) without holding a full resentencing, leaving sentences imposed on other counts unchanged).

Accordingly, under the court of appeals' earlier decision denying petitioner a COA, as well as the two decisions from other circuits on which petitioner himself primarily relies, it is clear that petitioner could not obtain relief on the merits even if his appeal were permitted to proceed without a COA. Resolution of the question presented would thus have no effect on petitioner's entitlement to collateral relief. Nor has petitioner demonstrated that it would meaningfully affect other cases in which a COA is denied on similar grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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