No. 21-6099

In the Supreme Court of the United States

SANDCHASE CODY,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY ARGUMENTS

The government concedes that the circuits are split on the jurisdictional question here: whether a successful 28 U.S.C. § 2255 movant must obtain a certificate of appealability ("COA") to appeal a district court's choice of remedy under § 2255(b). BIO at 12–13. The government agrees that two circuits hold that a COA is not required and only the Eleventh Circuit holds that a COA is required. *Compare United States v. Hadden*, 475 F.3d 652, 659–66 (4th Cir. 2007); *Ajan v. United States*, 731 F.3d 629, 639–32 (6th Cir. 2013), *with United States v. Cody*, 998 F.3d 912 (11th Cir. 2021). The split is therefore mature and intractable.

Unable to deny the split on this jurisdictional issue, the government asks the Court to let it persist only because, in its view, Mr. Cody could not obtain relief even if the Eleventh Circuit granted him a COA. BIO at 13–15. Regardless of the correct answer on the merits, the divergent views on this important jurisdictional question only underscore the need for this Court's intervention. That said, contrary to the government's argument, the Eleventh Circuit's decision is wrong. Pet. at 11–12.

As explained in Mr. Cody's petition, the Fourth and Sixth Circuits analyzed many factors in reaching their decisions, including this Court's precedent, the statutory text, and the policies underlying AEDPA. *Id.* at 7–12. The Eleventh Circuit, on the other hand, simply looked at the word "proceeding" under 28 U.S.C. § 2253(c)(1). The government does not dispute this. Instead, it doubles down on the Eleventh Circuit's abridged analysis. BIO at 10–12. But for the reasons articulated by the Fourth and Sixth Circuits, the government cannot be right.

Indeed, if the government were right, that would effectively mean a defendant like Mr. Cody—a successful § 2255 movant whose original judgment was infected with unconstitutional error—could never obtain meaningful appellate review of a district court's choice of remedy. And if a defendant cannot receive meaningful appellate review when a district court modifies his judgment, that would implicate a defendant's right to procedural due process. *See Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that if a State grants appellate review, it must do so in a way consistent with due process); *cf. Jones v. Barnes*, 463 U.S. 745, 757 n.1 (1983) (Brennan, J., dissenting) (opining in dicta that there is "little doubt" that a State must provide some opportunity for meaningful review of a conviction and stating that "[t]here are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property . . . ."). The logical legal implications of the government's argument show that it cannot be right.

Moreover, if Mr. Cody were granted a COA there is a good chance that the Eleventh Circuit would agree that the only "appropriate" remedy under § 2255(b) is a "resentence[ing]." 28 U.S.C. § 2255(b). As he argued below, Mr. Cody's original judgment was riddled with errors that undermined his sentence as a whole. Resentencing Mr. Cody would have given the district court a chance to address those errors. Indeed, if the district court resentenced Mr. Cody today, his Guidelines calculation would be reduced by eight levels, cutting his Guidelines range by more

than half.[1] The district court's decision to merely correct his judgment allowed the court to close its eyes to these significant changes. But errors in a new judgment do not get a free pass because they were made once before. *See Magwood v. Peterson,* 130 S. Ct. 2788, 2801 (2010) ("An error made a second time is still a new error.").[2]

Mr. Cody's case is an excellent opportunity to resolve the acknowledged disagreement among the circuits on this important jurisdictional question. This Court should grant review and resolve the circuit split.

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[1] At Mr. Cody's original sentencing, his Guidelines range was 262-to-327 months' imprisonment because the district court applied the career-offender Guideline and an enhanced base offense level under USSG § 2K2.1(a)(2). But because of intervening changes to the Guidelines, he would no longer be subject to those enhancements and his new Guidelines range would be only 120-to-150 months.

[2] As a final matter, the government claims the Eleventh Circuit has already rejected this argument because one judge denied him a COA in his separate civil appeal. BIO at 12–13. Not so. An order denying a COA is not binding on later merit panels and subject to review by the appellate court. 11th Cir. R. 27-1(d)(2), (g); *see also* 11th Cir. R. 22-1(c). So the government's reliance on this single judge order is unpersuasive.

CONCLUSION

For the above reasons, Mr. Cody's petition for writ of certiorari should be granted.

Respectfully submitted,

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