No. 21-7318

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ABRAHAM A. AUGUSTIN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ABRAHAM A. AUGUSTIN
(Your Name)

P.O. BOX 1032
(Address)

COLEMAN, FLORIDA 33521
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. SENTENCING IN FEDERAL COURT IS GUIDED BY STATUTE AND CONSTITUTIONAL CONSIDERATIONS. STATUTORY REQUIREMENTS INCLUDE CONSIDERATION OF THE FACTORS IN 18 U.S.C. SECTION 3553(a). WHERE THE ORIGINAL JUDGMENT IS IMPACTED BY VACATING A CONVICTION AND REMOVING A MANDATORY PORTION OF THE SENTENCE, DID THE TRIAL COURT ERR BY NOT COMPLYING WITH SECTION 3553(a) AND CONDUCTING A PLENARY RESENTENCING HEARING?

II. THE RIGHT TO COUNSEL IN A SECTION 2255 PROCEEDING IS STATUTORY AND REQUIRES COUNSEL BE APPOINTED WHEN THE INTERESTS OF JUSTICE SO REQUIRE. WHERE AUGUSTIN SOUGHT TO HAVE A CONVICTION VACATED ON CONSTITUTIONAL GROUNDS AND SOUGHT RESENTENCING, DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING THE MOTION TO APPOINT COUNSEL?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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Statutes and Rules

Other

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 20, 2021.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 2, 2021, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. FIFTH AMENDMENT, UNITED STATES CONSTITUTION, provides:
No person shall ... be deprived of life, liberty, or property, without due process of law....

2. SIXTH AMENDMENT, UNITED STATES CONSTITUTION, provides:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. The Statute under which Petitioner sought post-conviction relief was 28 U.S.C. Section 2255.

STATEMENT OF THE CASE

On March 23, 2010, the United States filed a superseding indictment in the United States District Court for the Eastern District of Tennessee, charging petitioner, Abraham A. Augustin, with the following offenses:

Count 1: Kidnapping, in violation of 18 U.S.C. §1201(a)(1) and §2.

Count 2: Using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A) and §2.

Count 5: Felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1).

Count 7: Use of interstate commerce facilities in the commission of murder-for-hire, in violation of 18 U.S.C. §1958.

Count 8-10: Tampering with a witness, in violation of 18 U.S.C. §1512(a)(1)(A).

Count 11: Tampering with witnesses to obstruct official proceeding, in violation of 18 U.S.C. §1512(c)(2).

Dist. Ct. Docket No. 1:09-cr-00187-1; R. 34, 35, Page ID#70-83

Augustin was also indicted for (Count 3) Conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1), (b)(1)(C), and §846 and (Count 4) Carrying a firearm during a drug trafficking, in violation of 18 U.S.C. §924(c)(1)(A) and §2. Augustin and his codefendant, Lorrance B. Dais, were found NOT GUILTY of Counts 3 and 4. Jury Trial, Vol. 3 (JT3), R. 123, Page ID#1202-1205.

Augustin was sentenced to a 500-month prison sentence with 5 years of supervised release on March 10, 2011. R. 113, Page ID# 590. Augustin appealed his conviction but it was affirmed on March 14, 2014. See **United States v. Dais** (and Augustin), 559 Fed. Appx. 438 (6th Cir. 2015) (sixth Circuit No. 11-5356, 11-5357). R. 120 & 134. The Supreme Court denied certiorari on October 6, 2014. R. 133.

On September 15, 2015, Augustin filed a 28 U.S.C. §2255 Motion to Vacate asserting 10 claims of ineffective assistance of trial and appellate counsels. Motion, R. 1421, Page ID# 1311-1325. On September 10, 2018, the district court denied the motion in its entirety. R. 211, Page ID## 1977-2008. A certificate of appealability was also denied. Id., Page ID# 2007. On February 22, 2019, Augustin filed his Panel Rehearing. On April 19, 2019, the Sixth Circuit DENIED the rehearing.

On September 17, 2018, Augustin filed a document entitled "Request to grant relief due to Sessions v. Dimaya (2018)." In that filing, he explained developments in the interpretation of the catchall subsection of §924, which ultimately led to his successful §2255 motion. The district court never addressed this claim. On July 3, 2019, Augustin filed an application pursuant to 28 U.S.C. §2244 for leave to file a second motion pursuant to §2255 raising the unconstitutionality of the

residual clause of §924(c)(3) and several other issues. Docket No. 19-5717. On November 13, 2019, the Sixth Circuit granted the application and forwarded the motion to the District Court. Motion (Second), R. 245, Page ID# 2273-2311. The grant was limited to the constitutional validity of Count 2 based on **United States v. Davis**, __ U.S. __, 139 S. Ct. 2319, 2336, 204 L. Ed. 2d 757 (2019) and was denied in all other respects. See Sixth Circuit Docket No. 19-5717, Doc. 8-2, p. 3.

Upon the §2255's arrival in the District Court, the government responded and conceded that Count 2 was no longer viable (response was filed in the civil case). The Government also, however, urged the District Court to "correct" the sentence without a resentencing. Response, R. 5 [1:19-cv-328], Page ID# 57. Augustin mailed a reply, which was docketed by the District Court on January 13, 2020. Reply, R. 247, Page ID## 2318-2368. In his reply, Augustin presented several reasons why a resentencing hearing should occur which are discussed below.

On January 14, 2020, the District Court granted that motion because the residual clause "crime of violence" language in 18 U.S.C. §924(c)(1)(A) had been ruled unconstitutional thereby requiring that the conviction as to Count 2 be vacated. R. 249, Page ID## 2379-2380; see Appendix **B**. The District Court then entered an amended judgment removing the conviction for Count 2 and reducing Augustin's sentence from 500 months to 380 months. This reflected the removal of the mandatorily consecutive 120 months for Count 2. Amended Judgment, R. 250, Page ID## 2382-2388.

On January 31, 2020, Augustin moved to alter or amend the judgment asking the District Court to reverse its conclusion that correcting the sentence without resentencing hearing was appropriate. Motion, R. 251, Page ID# 2389-2396. On February 25, 2020, the District Court received a letter from Augustin outlining significant personal history, which was not included in his PSR. Letter, R. 257, Page ID##2744-2754.

On April 28, 2020, the District Court issued an order dealing with numerous post-judgment matters. Important to this writ is the denial of the motion to alter or amend the judgment (R. 251). Order, R. 261, Page ID# 2761; see Appendix **C**. In that same order, however, the District Court directed the Clerk to file the Notice of Appeal related to the Amended Judgment. Id., Page ID# 2762. The Notice of Appeal was filed on April 28, 2020. Notice, R. 262, Page ID# 277.

The Appellant Brief was filed in the Sixth Circuit on November 23, 2020. Sixth Circuit Docket No. 20-5454, Doc. 17. Following the Appellee Brief, Augustin filed his reply. Initially, the Sixth Circuit granted and scheduled an oral argument

for October 22, 2021. But weeks before the scheduled argument, it canceled the argument, and then denied the appeal on October 20, 2021. See Appendix A. Augustin timely filed a panel rehearing. The Sixth Circuit denied the panel rehearing on December 2, 2021. See Appendix D.

Introduction

In 2011, during his sentencing, Augustin was a violent offender under the then-current judgment and indictment. He received an aggregate sentence of 500 months, including 380 months on the kidnapping offense to ran consecutive to the 120 month sentence on the §924(c) conviction. The kidnapping offense was the longest sentence imposed. In 2018, this Court in Sessions v. Dimaya, 138 S. Ct. 1204 (2018) invalidated the 18 U.S.C. §16(b), the residual clause, which defined a crime of violence. Furthermore, the following year in Davis, this Court also invalidated the residual clause in §924(c)'s crime of violence. As a result thereof, all of Augustin's convictions became non-violent and he no longer faced a mandatory minimum.

Following the vacatur of the §924(c), Augustin asked the district court for appointment of counsel since by the time of filing he had been incarcerated for ten years, several laws had been enacted that he may have qualified for, and he now stood before the sentencing court as a non-violent offender without a mandatory minimum. Augustin presented the district court numerous evidence of post-conviction rehabilitation to be considered at his resentencing hearing. Moreover, in his reply to the government's response, Augustin opposed the government's position and propounded that among other things: (1) his remaining convicted offenses had been reclassified as non-violent; (2) recent research and evidence have shown links between his Post Traumatic Stress Disorder ("PTSD") and his crime—research and evidence not available during the initial 2011 sentencing; (3) a sentencing disparity; and (4) post-conviction rehabilitation evidence qualifies him for a downward variance, requiring a resentencing hearing. The District Court denied both requests to appoint counsel and conduct a resentencing hearing.

REASONS FOR GRANTING THE PETITION

I. SENTENCING IN FEDERAL COURT IS GUIDED BY STATUTE AND CONSTITUTIONAL CONSIDERATIONS. STATUTORY REQUIREMENTS INCLUDE CONSIDERATION OF THE FACTORS IN 18 U.S.C. §3553(a). WHERE THE ORIGINAL JUDGMENT IS IMPACTED BY VACATING A CONVICTION AND REMOVING A MANDATORY PORTION OF THE SENTENCE, THE TRIAL COURT ERRED BY NOT COMPLYIING WITH 3553(a) AND CONDUCTING A PLENARY RESENTENCING HEARING.

Pursuant to Supreme Court Rule 10, a petition for a writ of certiorari will be granted only for compelling reasons. Of the three reasons this Court is to consider, Augustin asserts:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter and has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a decision by the lower court, as to call for an exercise of this Court's supervisory power.

Rule 10(a) of the Rules of the Supreme Court of the United States.

Specifically, the Sixth Circuit's decision in this appeal conflicts with the authoritative decision of the Eleventh Circuit, **United States v. Brown**, 879 F.3d 1231 (11th Cir. 2018), on the proper requirement for a defendant whose §924(c) conviction and sentence have been vacated. The Eleventh Circuit requires district courts to conduct a resentencing hearing where the imposed sentence has been vacated and the defendant is now required to be resentenced under a different criterion. Conversely, Augustin's panel in the Sixth Circuit denied this requirement by the Eleventh Circuit. Both decisions are in conflict:

The requirement of case law that a defendant that is to be resentenced under a different criterion he did not qualify for during his initial sentencing, following the vacatur of the previous judgment and sentence, receive a resentencing hearing.

Pursuant to this Court's ruling in **Magwood v. Patterson**, 561 U.S. 320 (2010), the vacatur of the sentence is the vacatur of the judgment. "The successful §2255 petitioner has obtained relief because the original sentence unlawful." **Ajan v. United States**, 731 F.3d 629, 632 (6th Cir. 2013). See **United States v. Hadden**, 475 F.3d 652, 664 (4th Cir. 2007) ("[T]he end result of the resentencing or correction of the prisoner's sentence [under §2255] is an entirely new sentence .... To hold otherwise would prevent the defendant from ever obtaining direct appellate review of his new sentence."). The Sixth Circuit noted:

We are unconvinced by the argument that Ajan's sentence is not new at all because the district court re-imposed the

Same sentence on the undisturbed counts. Several courts have expressly noted that a "new sentence" need not be Substantially different from the original sentence. See Hadden, 475 F.3d at 661 n. 9; United States v. Torres-Otero, 232 F.3d 24, 30 (1st Cir. 2000).

Ajan, 731 F.3d at 632 n. 2.

See **Murphy v. United States**, 634 F.3d 1303, 1311 (11th Cir. 2011) ("[W]e reasoned in Ferreira II that: ... a judgment is defined as both the conviction and the sentence," and, therefore, "when a defendant is resentenced, the defendant becomes confined under a new judgment[.]"). More importantly, in Campbell, supra, the Eleventh circuit indicated that "Magwood permits a petitioner who received an intervening judgment to attack the unaltered prior conviction[.]" **Campbell v. Secretary for the Dept. of Corrections**, 447 Fed. Appx. 25, 27 (11th Cir. Oct. 13, 2011). See also **Johnson v. United States**, 623 F.3d 41, 46 (2nd Cir. 2010) (agreeing with the Eleventh Circuit's position) and **Wentzell v. Neven**, 674 F.3d 1124 (9th Cir. 2012) (agreeing with the Second Circuit's reasoning in Johnson v. United States).

To be precise, the vacatur of count Two—the §924(c)—unraveled the entire sentencing package and, therefore, judgment. The Eleventh Circuit stated:

> This approach is consistent with our Court's rule that sentences on multiple counts be considered as part of a single Sentencing package. See United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996) (per curiam). We have recognized 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." United States v. Fowler, 749 F.3d 1010, 1015 (11th Cir. 2014). If there is a chance that an erroneous sentence on one count of conviction influenced the sentencing judge's decisions on other counts, then merely excising the mistaken sentence for one count won't put the defendant in the same position as if no error had been made. A resentencing hearing with the defendant present may therefore be required.

Brown, 879 F.3d at 1239.

Once the District Court in this case vacated Count Two, §924(c), with its mandatory minimum sentence, the re-imposition of the remaining judgment and sentence—initially crafted and imposed as punishment for a set of violent convictions—to a set of now non-violent offenses required a resentencing hearing. The District Court's imposition of a violent-offense-sentence on a set of now non-violent conviction made the new sentence more onerous and violated the Fifth Amendment of the U.S. Constitution. The District Court was called to modify the sentence due to many reasons, the first being that Augustin's offenses were now non-violent and he no longer faced a mandatory minimum sentence.

> But if a court is called upon to exercise significant discretion in modifying a sentence, a resentencing hearing may be required. This Court has long recognized that if a modification makes a sentence more onerous, a resentencing is required. See United States v. Jackson, 923 F.2d 1494, 1497 (11th Cir. 1991). 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 an 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. 720, 745, 107 S. Ct. 2658, 2667, 96 L. Ed. 2d 631 (1987).

Brown, 879 F.3d at 1239.

A. Augustin's offenses are non-violent and non-applicable to the Adam Walsh Act

Initially, at the time the United States indicted, convicted, and sentenced Augustin, his offenses were crimes of violence. But ten years later, none of these offenses qualified. The United States Sentencing Guidelines range and Sentencing Commission never recalculated and reset a new offense level that a non-violent offender today in his situation would face. During sentencing, the penalty for kidnapping was, and still is today, limitless, i.e. zero to life imprisonment, because of the violent label of this offense. And unlike numerous other offenses such as Murder-for-hire, Hobbs Act, Carjacking, etc. that sets a maximum penalty of 10-to-20-years if death did not result (as relevant in this case), kidnapping carried no such scrutiny and limit. Primarily, this limitless penalty was a result of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (the "Adam Walsh Act" or "AWA") enacted to prevent the sexual exploitation of children by sexual predators. Understandably, following intense lobbying by John Walsh (host of America's Most Wanted) after the kidnaping and death of his son Adam Walsh, Congress enacted the Act to protect children and minors from sexual predators online and other places of vulnerability, especially through the use of instrumentalities and/or facilities of interstate commerce. Take for example, **United States v. Sessions**, 1996 U.S. App. LEXIS 4243, at *2 (10th Cir. 1996), a case ten years before the AWA was enacted, where Sessions was found guilty of kidnapping "a female juvenile and transporting her across state lines, 18 U.S.C. §1201(a)(2), and to using and carrying a firearm during and in relation to the kidnapping, 18 U.S.C. §924(c). He was sentenced to seventy-one (71) months of incarceration for kidnapping, and a sixty (60) month consecutive sentence for using and carrying a firearm during a crime of violence." Id.

The AWA was meant to prevent this type of sentencing for such type of offenders, who would surely be released into society in less than a decade, only to commit these crimes all over again. Clearly, Augustin received a higher sentence than this sexual predator. However, Augustin's case is not even remotely related to these types of cases—involving children sexual exploitation—that this limitless penalty was meant to punish. Even taking the government's allegations

as truth, the kidnapping was the result of a drug deal gone badly between two criminal parties. And if anyone was exploited, it was Augustin who was cheated out of his money then incarcerated, convicted, and sentenced (to a 500-month excessive sentence) under the AWA meant to punish sexual predators of children; while Jordan was allowed to continue his drug activities to the point where he was eventually incarcerated by the time of Augustin's sentencing for selling (real) crack cocaine (this time) to another customer.

The District Court in Augustin's case was required to modify the sentence on the remaining counts, as they were no longer violent. To keep the sentence the same made it more onerous and violated the Fifth Amendment. When Augustin was sentenced in 2011, the kidnapping was a violent offense, therefore, the reason why the §924(c) had been attached. Today, kidnapping is no longer a violent offense, either for §924(c) purposes—pursuant to Davis, or as defined and categorized in federal court—pursuant to **Dimaya**. In fact, in addition to the kidnapping offense, all of Augustin's convictions were considered violent during his 2011 sentencing. But today, not even one of his current convictions qualifies as a violent offense. Even today, three hundred and eighty months for a first time, non-violent offender with one felony prior (for a non-violent offense) is truly excessive by any standard in any court.

> A court's duty is always to sentence a defendant as he stands before the court on the day of sentencing. A defendant's post-sentencing conduct sheds light on the likelihood that he will engage in future criminal conduct, a central factor that district courts must assess when imposing a sentence. 18 U.S.C. §3553(a)(2)(B)-(C).

Pepper v. United States, 131 S. Ct. 1229, 179 L. Ed. 2d 196, 215 (2011) (quoting **United States v. Bryson**, 229 F.3d 425, 426 (CA2 2000).

Because of the absence of a resentencing hearing, the fact that Augustin no longer faced a mandatory minimum as he did initially in 2011 was never taken into account. Nor was he given an opportunity to present any mitigating evidence for a downward variance that was never presented in 2011 since during the 2011 sentencing such evidence was futile and the mandatory minimum would have negated it. Augustin's panel agreed with this assessment and stated:

> Resentencing may also be necessary if a court must exercise significant discretion "in ways it was not called upon to do at the initial sentencing." **United States v. Thomason**, 940 F.3d 1166, 1173 (11th Cir. 2019). For instance, if the court "vacates a mandatory-minimum sentence and then is able to consider the statutory sentencing factors for the first time." Id.

See Appeal Case No. 20-5454, Doc. 41-1, pg. 5; Appendix **A**.

But on the next page, the panel excused the decision to deny resentencing—calling the §924(c) an "error"—even though Augustin met the requirement of having had a mandatory minimum sentence vacated –by first stating, "with and without the §924(c) conviction, his Guidelines range was 360 months to life. Thus, the error did not affect the remainder of Augustin's sentence. So it can stand independently[]" and "[w]hen Augustin was originally sentenced, circuit precedent required the district court to set an appropriate sentence for each underlying conviction without considering the sentencing effects of his §924(c) conviction. See United States v. Franklin, 499 F.3d 578, 583 (6th Cir. 2007). Simply put, Augustin's §924(c) sentence played no role in the district court's calculation of his other sentences. Because of that, we cannot conclude that those sentences are so connected with his §924(c) sentence that they must fall with it." Id. at pg. 6.

The Sixth Circuit still refused to take into account "each underlying conviction" and "the district court's calculation of [Augustin's] other sentences" in 2011 were for crimes of violence—especially the kidnapping's sentence under the AWA meant to punish sexual predators. Today, those convictions no longer are violent. And, therefore, the court resentenced Augustin—not as he stood before the Court on the day of sentencing in 2020, as a non-violent offender, but—as he stood before the court, ten years prior in 2011, as a violent offender.

Granting the writ in this case is extremely important due to the fact that laws in this country are constantly evolving, changing for the better as courts move towards different directions. Sentencing commissions are not always activated to revamp sentencing guidelines. Furthermore, when a defendant has been incarcerated in prison for some time under a mandatory minimum sentence and he is to be resentenced without a mandatory minimum, he should be given the opportunity to present the evidence that was irrelevant during the first sentencing due to the mandatory minimum. What is to incentivize good behavior from a defendant in prison with a long sentence, other than the hope that one day if he is to be resentenced, his prison record could possibly help decide his new sentence. What better requirement for a defendant to receive a resentencing hearing than when he received a violent-offender's sentence during his initial sentence, then ten years into his sentencing, a change in intervening law changes his offenses to non-violent. Such a fundamental classification requires him to be reassessed as a non-violent offender to receive a matching sentence. Without this requirement, the district court is merely re-imposing a sentence for a set of violent offenses on a set of non-violent offenses.

The Sixth Circuit's decision on this issue has presented a question of exceptional importance: Whether in light of all the facts presented to the District Court and the Court of Appeals Augustin's resentencing was merely a correction or a formal resentencing that warranted a resentencing hearing. Augustin asserts it was a formal resentencing warranting a hearing. And several other circuits cited in this application that have also addressed this issue have concurred with Augustin's position, thus creating an inter-circuit split. The decision by the Sixth Circuit on this issue conflicts with the authoritative decisions of other United States courts of appeals and this Court that have addressed the issue. This calls for an exercise of this Court's supervisory power.

II

The second part of this claim is that the Sixth Circuit's decision to deny a resentencing hearing "has decided an important federal question in a way that conflicts with relevant decisions of this Court," viz., **Pepper v. United States**, 562 U.S. 476, 507, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011).

Rule 10(c) of the Rules of the Supreme Court of the United States.

The Sixth Circuit failed to recognize that a vacated judgment removes all aspects of the sentence including the previous assessment of the sentencing factors. It also failed to recognize that a criminal sentence is a package of remedies that is impacted when any part of the previous assessment is removed. Id.

This Court ruled that when an "entire sentence package" has been vacated, the sentencing court must revisit every part of the sentencing package. And this more expansive remedy may require a defendant to be present at a resentencing hearing to "contribute to the fairness of the procedure." See **Stincer**, 482 U.S. at 745, 107 S. Ct. at 2557. When Augustin's entire sentence package was vacated, however, the District Court refused to revisit every part of the sentencing package. The purpose of this resentencing hearing would allow Augustin an allocation. "[T]he purpose of allocution [is] to allow the defendant the opportunity to challenge the information the original sentencing judge will rely upon as well as to present evidence in mitigation." **Jackson**, 923 F.2d at 1498.

In addition, this Court ruled:

We hold that when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation and that such evidence may, in appropriate cases, support a

downward variance from the non-advisory Federal Sentencing Guidelines range.

Pepper, 179 L. Ed. 2d at 208.

This Court explained this recommendation as followed:

> It has been uniform and constant in the federal judicial tradition for a sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime. For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

Id. at 212.

This recommendation becomes even more controlling when one takes into account the reclassification of all of Augustin's convictions from violent offenses to no-violent offenses without the sentencing guidelines reflecting this fundamental change. In the absence of the sentencing guidelines adjusting this change of classification, it is the sentencing court's duty to revisit the entire package.

> Accordingly, although the Guidelines should be the starting point and the initial benchmark, district courts may impose sentences within statutory limits based on appropriate consideration of all the factors listed in 18 U.S.C. §3553(a), subject to appellate review for "reasonableness." This sentencing framework applies both at a defendant's initial sentencing and at any subsequent resentencing after a sentence has been set aside on appeal. 18 U.S.C. §3742(g) provides that a district court to which a case is remanded shall resentence a defendant in accordance with §3553.

Id. at 213-14.

This Court's strong—"must" revisit—language is a mandate that applies to this case.

> Evidence of post-sentencing rehabilitation may be highly relevant to several of the 18 U.S.C. §3553(a) factors that Congress has expressly instructed district courts to consider at sentencing. For example, evidence of post-sentencing rehabilitation may plainly be relevant to the history and characteristics of the defendant. 18 U.S.C. §3553(a)(1). Such evidence may also be pertinent to the need for the sentence imposed to serve the general purposes of sentencing set forth in §3553(a)(2)—in particular, to afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training or other correctional treatment in the most effective manner. 18 U.S.C. §3553(a)(2)(B)-(D). In assessing deterrence, protection of the pubic, and rehabilitation, 18 U.S.C. §3553(a)(2)(B), (C), and (D), there would seem to be no better evidence than a defendant's post-incarceration conduct. Post-sentencing rehabilitation may also critically inform a sentencing judge's overarching duty under §3553(a) to impose a sentence sufficient, but not greater than necessary, to comply with the sentencing purposes set forth in §3553(a)(2).

Id. at 214.

Perhaps in anticipation of this case, this Court has granted the sentencing court the power to impose a sentence outside the guidelines, if the Sentencing Commission policy statement is no longer applicable. Undoubtedly, when Congress

enacted 18 U.S.C. §16, which defined crimes of violence for the entire federal system, into the (a) force clause and (b) residual clause, all subsequent statutes—ACCA and §924(c)—were modeled after and copied its language.

But today, we now know the very residual that classified Augustin's offenses as violent is now unconstitutional. In such a case as instant, this Court has ruled: "[A] district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views. See Kimbrough v. United States, 552 U.S. 85, 109-110, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007). That is particular true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." Id at 220.

In conclusion, the Pepper Court remanded the case with these instructions:

> On remand, the District Court should consider and give appropriate weight to that [post-sentencing rehabilitation] evidence, as well as any additional evidence concerning Peppers conduct since his last sentencing in January 2009.

Id. at 223.

And as a reminder of an issue raised in the first part of this petition, this Court concluded:

> A criminal sentence is a package of sanctions that a district court utilizes to effectuate its sentencing intent. Because a district court's original sentencing intent may be undermined by altering one portion of the calculus, an appellate court when reversing one part of a defendant's sentence may vacate the entire sentence so that, on remand, the trial court can reconfigure the sentencing plan to satisfy the sentencing factors in 18 U.S.C. §3553(a).

Id. at 224.

The sentencing court--during sentencing in 2011 and 2020--also ignored Augustin's PTSD diagnosis that he received from his combat tour and Improvised Explosive Device (IED) blast in Fallujah, Iraq. The District Court instead preferred to believe Augustin is inherently and innately criminal, never taking into account the fact that prior to Augustin's IED traumatic blast in Iraq, he had never been in trouble with the law; and all of his legal troubles began once he returned from Iraq and begun suffering from PTSD. The Sixth Circuit's decision to affirm the sentencing court's decision to not consider any post-conviction rehabilitation evidence is contrary to this Court's precedent mandating that a sentencing court "must" revisit the entire sentencing package. Such a decision conflicts with a decision from this Court in Peppers and calls for an exercise of this court's supervisory powers.

II. THE RIGHT TO COUNSEL IN A §2255 PROCEEDING IS STATUTORY AND REQUIRES COUNSEL BE APPOINTED WHEN THE INTERESTS OF JUSTICE SO REQUIRES. WHERE AUGUSIN SOUGHT TO HAVE A CONVICTION VACATED ON CONSTITUTIONAL GROUNDS AND SOUGHT RESENTENCING, THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO APPOINT COUNSEL.

The Constitution does not guarantee a right to counsel in a §2255 proceeding. **Kissner v. Palmer**, 826 F.3d 898, 905 (6th Cir. 2016), see **Pennsylvania v. Finley**, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). A statutory right to appoint counsel exists under 28 U.S.C. §2255(g) states:

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

In turn, 18 U.S.C. §3306A(a)(2)(B) states:

(2) Whenever the United States magistrate judge or the court determines that the interests of justice so requires, Representation may be provided for any financially eligible person who—
(A) [misdemeanors and infractions]; or
(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

In conducting this analysis, courts are guided by factors including the legal and factual complexity of the case, petitioner's ability to investigate and present his claims, and any other factors relevant to the case. See **Hoggard v. Purkett**, 29 F.3d 469, 471 (8th Cir. 1994).

Even though Augustin presented a successful application for leave to file his second §2255 motion to the Sixth Circuit, he actually relied on the wrong case, **Dimaya**. **United States v. Davis**, __ U.S. __, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019) was decided on June 24, 2019. Augustin filed his application for leave to file his second 2255 motion nine days later on July 3, 2019 apparently unaware of this Court's ruling. He motioned in a subsequent motion that he had been unable to do certain types of research and was denied access to his legal materials for a period of time due to a pending transfer within the BOP.

The Fifth Circuit held that the Dimaya analysis applied to 18 U.S.C. §924(c)(3)(B) and the conviction for that offense was vacated. **United States v. Davis** (after remand), 903 F.3d 483, 386 (5th Cir. 2018), vacated on other grounds. This was

decided well before he applied for leave to file his second motion under §2255 but he did not use it to persuade the Sixth Circuit to grant him relief.

The defendants in Davis filed for rehearing and argued that the Fifth Circuit should have vacated their sentences on all counts and they should receive a full resentencing not the limited remedy of simply removing the time imposed as a direct result of the 924(c)(3)(B) conviction. Davis, 139 S. Ct. at 2337. The Fifth Circuit deferred ruling until this Court disposed of the appeal. Id. On November 12, 2019, the Fifth Circuit in fact vacated the sentences in full and remanded for resentencing in full. **United States v. Davis**, 784 Fed. Appx. 277, 278 (5th Cir. 2019), citing **Pepper v. United States**, 562 U.S. 476, 507, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011) ("Because a district court court's original sentencing intent may be undermined by altering one portion of the calculus, an appellate court when reversing one part of a defendant's sentence may vacate the entire sentence ...." (citation and internal quotation marks omitted). Augustin drafted his motion for appointment of counsel on November 24, 2019 and the Clerk filed it on December 9, 2019. Motion, R. 4 (1:19-cv-328), Page ID # 48. Augustin did not mention this development in the Fifth Circuit's processing of Davis.

Regarding the factor of legal complexity, Augustin specifically mentioned this in his motion for counsel. He requested counsel to assist in addressing whether he qualified for relief under the First Step Act, whether a new PSI and/or guidelines would be needed, and to present mitigating factors. Motion, R. 4 (1:19-cv-328), Page ID # 48.

Significantly, one area of mitigation he wanted to present was information related to his injuries received from an IED when he was serving in Iraq as a United States Marine. Id. This is significant because during the original sentencing in 2011, trial defense counsel had failed to timely file a motion for downward departure and filed it the day of sentencing (consisting of two paragraphs, no attachments, and no reference to any other part of the record). Sentencing Transcript, R. 124, Page ID ## 1218; 1224-1225 and Motion R, R. 108, Page ID ## 581-82. Trial counsel was unable to articulate to the trial court the trial court guideline concepts and factors on which he relied. Trial counsel was also unaware that Augustin had received treatment from Veteran's Administration until he was in the middle of the sentencing hearing and he was unprepared to argue or demonstrate a connection between those mental health issues and the sentencing offenses. Sentencing Transcript, R. 124, Page ID ## 1225-1227.

Take for example, during the 2011 sentencing, counsel's response to the sentencing judge's inquiry: JUDGE: And is there any obvious link between the defendant's mental issues and commission of this offense? COUNSEL: There has been no diagnosis of such or any assessment to that affect. See Sentencing Transcript, R. 124, P. 17 L. 11-15.

Even in 2011 there was plenty of evidence to refute counsel's position and support the link between Augustin's PTSD and the crimes, but counsel's unpreparedness deprived Augustin of this link on record. And the record today remainns empty on this issue, even though today additional research has confirmed the link between the two. Augustin clearly would have difficulty in obtaining the necessary documentation while incarcerated. He would not have the skills for presenting to the trial court how the information created "causation" or had a connection to the offenses. Because his trial counsel failed him in this regard, his request for counsel to present this information during an opportunity for resentencing should have been given greater consideration.

Requirement for Counsel in Critical Stages

It is well established that sentencing is a critical stage in a criminal proceeding. **Mempa v. Rhay**, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). See also **Garner v. Florida**, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (affirming that sentencing is a critical stage). Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. **United States v. Wade**, 388 U.S. 218, 227-28, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); **Powell v. Alabama**, 287 U.S. 45, 57, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

The fact that the sentence for Count 2 was mandatorily consecutive and did not impact the guideline for Count 1, is not controlling as to whether the remainder of the judgment is still valid. Deciding whether a criminal judgment is severable or is completely ineffective when any portion is set aside is not just an academic exercise. The District Court clearly thought the instant judgment was severable and proceeded to simply make mathematical re-calculations accordingly. This is not consistent with this Court's view of sentencing. If a portion of a criminal judgment (other than clerical) is reversed or vacated, Augustin asserts that the original assessment of the sentencing factors of §3553(a) by the sentencing

judge have also been rendered ineffective. The re-imposition of a judgment through an "amended judgement" is a critical stage which requires counsel.

CONCLUSION

Augustin asserts that criminal judgements are not severable. When a count is vacated because of a constitutional defect and the mandatory sentence that it caused is removed, the original assessment of an appropriate sentence is meaningless. A valid, reasonable interpretation of §2255(b) requires that sentencing "corrections" be limited to specific situations where clerical errors have been made.

It was impossible to determine from the record a valid reason from the District Court from selecting "corrections" as its option. The reason it gave—no impact on the other sentences—has been rejected. It is also impossible on the record to determine if the goals of §3553(a) remain satisfied today in light of the significant change in the posture of the convictions. The absence of counsel to assist Augustin in presenting his reasoning and the authority cited herein infringes on the perceptions of fairness in sentencing that is a hallmark of justice in a civilized society.

RELIEF REQUESTED

WHEREFORE, Augustin respectfully requests this Honorable Court to grant this writ of certiorari, vacate the amended judgment in its entirety, and remand to the District Court for a plenary sentencing hearing with counsel.

Dated this 1st day of March 2022.

Respectfully Submitted,