No. 22 - ____

IN THE SUPREME COURT OF THE UNITED STATES

KERRY VANDERPOOL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the plain language of 18 U.S.C. § 3742(f) deprive the federal Courts of Appeals of jurisdiction to vacate a sentence when it is uncontested that the sentence is reasonable and legal under the applicable guidelines?

2. When a defendant has been convicted of two separate offenses, and one of them is declared constitutionally invalid, does a district court violate the defendant's due process rights by invoking the "sentencing package" doctrine to justify resentencing the defendant to an increased prison term on the surviving count?

PARTIES TO THE PROCEEDING

Petitioner is Kerry Vanderpool, defendant-appellant below. The United States of America is the Respondent on review.

RELATED CASES

On December 19, 2019, the Court of Appeals for the Second Circuit issued a summary order ("Vanderpool I") in which the convictions for Petitioner, co-defendants WENDELL BELLE and JASON MOYE were vacated in part and affirmed in part as to select counts of conviction and the matters were remanded for resentencing, and co-defendants MICHAEL BROWN and WILLIAM BRACEY were affirmed in their entirety. Another co-defendant, COREY CANTEEN, was resolved with a separate summary order by the Court of Appeals, and his matter was affirmed in its entirety without comment.

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Petitioner Kerry Vanderpool respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's unpublished Summary Order (App. A) is also available at 2022 WL 190432. The October 1, 2020 sentencing order of the district court (App. B) is unpublished.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States.

The decision of the United States Court of Appeals for the Second Circuit, affirming the District Court's judgment and imposed sentence of Mr. Vanderpool in his criminal case, was entered on January 21, 2022. This petition is timely filed pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the United States Constitution provides, in relevant part:

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

18 U.S.C. § 3742(f), "Review of a Sentence," provides as follows:

> **(f) Decision and disposition.**--If the court of appeals determines that--

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and--
(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);
(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);
(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

INTRODUCTION

This case involves a Petitioner who was convicted, upon guilty pleas and pursuant to a written plea agreement, of two separate criminal counts, and given a legal sentence within the appropriate sentencing guidelines on each count. His conviction on one of the two counts was subsequently vacated by the United States Court of Appeals because this Court had ruled the underlying statute unconstitutionally vague. *See United States v. Davis*, 139 S.Ct. 2319, 2324 (2019).

Although one of Petitioner's convictions remained unaffected, both sentences were vacated, and the case was remanded. Upon resentencing, the district court nearly doubled the prison term that it had originally imposed on the surviving count, revising the sentence so that it now exceeded the applicable guidelines. The court did so without adducing additional evidence or citing any identifiable conduct by the defendant since the original sentence which would have justified such an increase. *See Alabama v. Smith*, 490 U.S. 794, 801-02 (1989).

Petitioner contends that (1) the vacatur of his sentence on the surviving conviction exceeded the statutory jurisdiction of the Court of Appeals and (2) the increased punishment imposed on remand was manifestly unfair and violated his due process rights under the Fifth Amendment.

STATEMENT OF THE CASE

On November 22, 2016, Petitioner Kerry Vanderpool pleaded guilty in the United States District Court for the Southern District of New York to two federal criminal offenses: participating in a racketeering conspiracy in violation of 18 U.S.C. § 1962(d) ("Count 1") and knowingly using, carrying, and possessing firearms in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) ("Count Fourteen").[1] App. C. He was sentenced to 84 months' imprisonment on each count, to run consecutively, for a total of 168 months. *Id.* The 84 months on the § 1962(d) count was within the guidelines for that charge, and the 84 months on the § 924(c) count was the statutory mandated sentence.

On June 24, 2019, this Court struck down the residual clause of 18 U.S.C. § 924(c), which authorized heightened penalties for defendants convicted of using, carrying, or possessing a firearm in connection with a federal "crime of violence or drug trafficking crime." *United States v. Davis*, 139 S.Ct. 2319, 2324 (2019). The residual clause, § 924(c)(3)(B), defined a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* This Court concluded that § 924(c)(3)(B), was unconstitutionally vague because it provided "no reliable way to determine which offenses qualify as crimes of violence." *Id.*

[1] For consistency with the record, the counts at issue are referred to by the same numbers they were given in Petitioner's original indictment. None of the other counts in the indictment resulted in convictions or are at issue in this appeal.

In the week prior to oral argument, the Government filed a letter with the Court of Appeals for the Second Circuit indicating that, pursuant to *Davis*, that count of Petitioner's conviction (Count 14) must be dismissed. The Government recommended that the Court of Appeals further vacate the conviction on Count 1 and remand the matter to the district court for resentencing on Count 1. Petitioner argued to the Court of Appeals that it should grant the Government's request to vacate the conviction under Count 14 for the reasons stated in *Davis*, but that the Court of Appeals was statutorily precluded from adjusting the sentence on Count 1 because there was nothing illegal about that sentence.

On February 19, 2020, the United States Court of Appeals for the Second Circuit vacated Petitioner's § 924(c) (Count 14) conviction in light of this Court's holding in *Davis*. App. D. Although the conviction on § 1962(d) (Count 1) remained intact, the Court of Appeals vacated both of Petitioner's sentences and remanded the case for resentencing on Count 1. *Id.*

On September 29, 2020, the district court held another sentencing hearing. App. E. At resentencing, the Government affirmatively stated that there had been "no material change in the facts that the Court considered when it imposed" Petitioner's original fourteen-year sentence. App. E, p. 13, lines 8-10. No new evidence was adduced, no new facts were cited, and no behavior on the part of the Petitioner was offered to justify an upward change to the original sentence. Petitioner objected to resentencing on Count 1, and argued that for both procedural and substantive reasons, that the district court must

sentence Petitioner to no more that 84 months on the surviving count. Petitioner was nevertheless resentenced to 156 months' incarceration on Count 1 – an increase of 72 months, or six years, over the original sentence. App. B.

Petitioner timely appealed his new sentence to the United States Court of Appeals for the Second Circuit, arguing that (1) the Court of Appeals had lacked jurisdiction under 18 U.S.C. § 3742(f) to vacate the overall sentence and remand for full resentencing and (2) the sentence imposed by the district court on remand violated his procedural and substantive due process rights under the Fifth Amendment. The Court of Appeals affirmed in a summary order entered January 21, 2022. App. A.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS LACKED JURISDICTION UNDER 18 U.S.C. § 3742(f) TO VACATE PETITIONER'S SENTENCE ON THE SURVIVING CHARGE AFTER THE § 924(c) CHARGE WAS VACATED.

A. Standard of Review

A court's determination that it has jurisdiction to resentence a defendant on a surviving charge after his § 924(c) conviction has been vacated is – like all jurisdictional issues – a question of law, subject to *de novo* review on appeal. *United States v. Mendoza*, 118 F.3d 707, 709 (9th Cir. 1997).

B. Argument

It is axiomatic that the United States Courts of Appeals are creatures of statute; their jurisdiction is expressly provided for by statute, and they have no power to act outside of

the jurisdictional boundaries which Congress has drawn for them. *Patchak v. Zinke*, 138 S.Ct. 897, 906 (2018); *United States v. Al-Nouri*, 983 F.3d 1096, 1098 (9th Cir. 2020). The federal statute that enables Courts of Appeals to review criminal sentences, 18 U.S.C. § 3742(f), "Review of a Sentence," did not authorize the Second Circuit to disturb Petitioner's sentence under Count 1.

§ 3742(f) provides as follows:

> **(f) Decision and disposition.**--If the court of appeals determines that--
> **(1)** the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
> **(2)** the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and--
> **(A)** if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);
> **(B)** if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);
> **(3)** the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

18 U.S.C. § 3742(f).

Under the plain terms of the statute, a challenged sentence can be disturbed only if it is (1) imposed in violation of law or (2) unjustifiably outside of the applicable guidelines

range. If the sentence does not fall within either of these categories, § 3742(f)(3) *requires* the Court of Appeals to affirm it. The statute does not provide the court with any discretion to do otherwise.

In the instant case, the Court of Appeals made no finding that the sentence for Count 1 fell within subsection (1) or (2) of § 3742(f). Nor could it; it is undisputed that the original sentence of 84 months, while at the low end of the guidelines, was reasonable, appropriate, and within the applicable range. At the original sentencing hearing, the district court articulated in detail its reasons for imposing the sentence, taking into account the seriousness of the crime and the overall circumstances presented.

Nonetheless, despite making no finding whatsoever that the sentence on Count 1 met the requirements of § 3742(f)(1) or (2), the Court of Appeals vacated the sentence in its entirety and remanded for resentencing. When challenged on Petitioner's subsequent appeal, it defended its vacatur of the sentence by claiming (1) the doctrine of the law of the case prohibited the second panel from disturbing the ruling of the first panel and (2) the court had been reversing sentences under these circumstances at least since its decision in *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), and its ability to do so had become a "rule, not a guideline" that it was obligated to follow. Both of these justifications were in error.

1. The Law of the Case

With respect to the first justification, the doctrine of the law of the case does not prevent a panel of the Court of Appeals from correcting a jurisdictional error committed by a prior panel. The doctrine of the law of the case refers generally to the rule that "'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Pepper v. United States,* 562 U.S. 476, 506 (2011) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983)). The doctrine reflects appellate courts' unwillingness to relitigate issues that have already been decided in a given case, but it does not limit a court's power to revisit decisions that were clearly made in error. *Musacchio v. United States*, 577 U.S. 237, 245 (2016); *see Quintieri,* 306 F.3d at 1217 ("when a court reconsiders its own ruling on an issue in the absence of an intervening ruling . . . by a higher court . . . 'that decision should generally be adhered to by that court in subsequent stages in the same case,' unless 'cogent' and 'compelling' reasons militate otherwise") (*quoting United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 2000), and *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)). "[R]igid adherence to rulings made at an earlier stage of a case is not required under all circumstances." *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 697 (D.C. Cir. 2022); *see also Pepper*, 562 U.S. at 506–07 (revisiting a prior ruling that could be considered the law of the case where the prior ruling "is clearly erroneous and would work a manifest injustice" (internal citations omitted)).

In the instant case, the Court of Appeals refused to reverse its prior holding that it had jurisdiction to vacate under § 3742(f), despite the fact that the plain language of the statute mandated otherwise. As noted *supra*, jurisdictional issues are questions of pure law and are always subject to *de novo* review. No deference is owed to a jurisdictional mistake – amounting to a clear error – made by a lower court or a prior panel. Moreover, as discussed more fully *infra*, the court's adherence to its prior panel's ruling worked a manifest injustice; it amounted to an increased penalty for no justifiable reason. The Court of Appeals not only had the discretion, but it also had a duty, to reverse the prior panel's mistake of law.

2. The *Quintieri* Rule

With respect to the second justification, the Court of Appeals does not have the power to establish a "rule" that directly conflicts with the statutory jurisdictional boundaries imposed on it by Congress. The fact that the court has been following the "rule" of *Quintieri* for twenty years does not negate the fact that *Quintieri* authorizes the court to do something that Congress has expressly forbidden, namely, to vacate a sentence that is lawful and appropriate under the relevant guidelines.

The *Quintieri* court, considering situations "where one or more convictions have been vacated and we have remanded for resentencing on the remaining counts," held that a defendant who challenges one or more of his convictions "assumes the risk" that his entire sentence may be recalculated on remand:

> A district court's sentence is based on the constellation of offenses for which the defendant was convicted and their relationship to a mosaic of facts, including the circumstances of the crimes, their relationship to one another, and other relevant behavior of the defendant. When the conviction on one or more charges is overturned on appeal and the case is remanded for resentencing, the constellation of offenses of conviction has been changed and the factual mosaic related to those offenses that the district court must consult to determine the appropriate sentence is likely altered. For the district court to sentence the defendant accurately and appropriately, it must confront the offenses of conviction and facts anew. The offenses and facts as they were related at the first sentence may, by then, have little remaining significance. The "spirit of the mandate" in such circumstances is therefore likely to require *de novo* resentencing.

Quintieri, 306 F.3d at 1227–28.

In addition to the obvious injustice, discussed more fully *infra*, of including in a "constellation of offenses" a conviction that has been reversed because the underlying statute is unconstitutional, this approach allows the Court of Appeals to vacate sentences that were error-free the first time around, "confront[ing] the offenses of conviction and facts anew," when the statute authorizing the appeal clearly and unambiguously states that such sentences must be affirmed. § 3742(f)(3).

It is respectfully submitted that the so-called *Quintieri* rule allows the Court of Appeals to act beyond the jurisdictional powers given to it by Congress, and this Court should grant certiorari to correct the error.

II. PETITIONER'S RESENTENCING POST-*DAVIS* WAS MANIFESTLY UNFAIR AND VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT.

A. Standard of Review

Appellate courts review the imposition of a sentence under an abuse-of-discretion standard, "tak[ing] into account the totality of the circumstances." *Gall v. United States*, 552 U.S. 38, 51 (2007). The question before this Court is whether the district court's resentencing was *reasonable* – that is, whether the district court judge abused her discretion by imposing an increased sentence unsupported by additional facts. *Id.* at 56; *United States v. Booker*, 543 U.S. 200 (2005).

B. Argument

As noted, petitioner was originally sentenced to 84 months' imprisonment on Count 1 and 84 months' imprisonment on Count 14 to run consecutively to each other. The Court of Appeals subsequently vacated the conviction on Count 14 because the underlying statute, § 924(c), had been struck down in part as unconstitutionally vague as applied to Petitioner. Petitioner was sent back to the district court for resentencing on Count 1, and the district court then nearly doubled the original sentence – from 84 months to 156 months. The drastic increase in the Petitioner's prison term reflected and *was intended to include* the conduct of which the Petitioner had been unconstitutionally convicted.[2] The

[2] The district court, on resentencing, noted that she "continued to believe that the aggregate sentence previously imposed satisfied the admonition of a sentence that is reasonable and no greater than necessary to achieve the goal of sentencing." App. E, p. 33, lines 12-15. The 12 month reduction in the total sentence on resentencing reflected the

new sentence went from low end of the guidelines to years above the guidelines without any new fact previously unknown to the district court at the original sentence. This approach – punishing a criminal defendant for the violation of an unconstitutionally vague statute – is manifestly unfair and violates his due process rights under the Fifth Amendment.

Sentencing judges have wide discretion to impose sentences within the applicable guidelines range. *Gall*, 552 U.S. at 49; *Pepper*, 562 U.S. at 480. This discretion does not, however, extend to punishing defendants for crimes of which they were unconstitutionally convicted. *See United States v. Hayes*, 872 F.3d 843, 847 (7th Cir. 2017) ("the Guidelines themselves instruct that convictions that are ruled unconstitutional are not to be counted in calculating a defendant's criminal history"). Nonetheless, it is a widespread practice among federal district courts to use the "sentencing package" doctrine to do that – impose sentences that take into account the time that would have been served if the unconstitutional conviction had remained standing. *See Greenlaw v. United States*, 554 U.S. 237, 253-54 (2008).

This Court has, in dicta, acknowledged the "current practice in so-called 'sentencing package cases'" and declined to modify it in the absence of a direct challenge:

> Those cases typically involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction.

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credit the district court gave to Petitioner for the impact of COVID on the conditions of his confinement.

> The appeals court, in such instances, may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a) (2000 ed. and Supp. V). In remanded cases, . . . trial courts have imposed a sentence on the remaining counts longer than the sentence originally imposed on those particular counts, but yielding an aggregate sentence no longer than the aggregate sentence initially imposed. Thus the defendant ultimately may gain nothing from his limited success on appeal, but he will also lose nothing, as he will serve no more time than the trial court originally ordered.

Id. (internal citations omitted).

The "sentencing package" approach is longstanding and widespread and serves as a mechanism for preserving a punishment after its underlying conviction has been removed. Euphemisms like "unbundling," *United States v. Shue*, 825 F.2d 1111, 1114 (7th Cir. 1987), and "altering the factual mosaic related to [vacated] offenses," *Quintieri*, 306 F.3d at 1227-28, are used to justify increased prison terms after successful appeals. *See United States v. Rigas*, 583 F.3d 108, 118 (2d Cir. 2009) ("a district court that is required to resentence *de novo* [after vacatur of one or more counts] must reconsider the sentences imposed on each count, as well as the aggregate sentence").

Petitioner now directly challenges this practice and asks that this Court reconsider its constitutionality. It is inaccurate to say that defendants like the Petitioner "will lose nothing" if they are given an increased prison term at resentencing to reflect, in any part, the behavior that served as the basis for their unconstitutional conviction. What they will lose is some measure of their liberty as the result of an end-run around a concededly unconstitutional statute. The practice therefore flies directly in the face of the Fifth

Amendment's protection against the loss of liberty without due process of law. U.S. Const. Amend. V.Moreover, the "sentencing package" doctrine is used unfairly by sentencing courts to lengthen sentences after successful appeals. Although it purports to authorize *de novo* sentencing, it is notably never used to shorten sentences after an unconstitutional count has been dismissed. The doctrine thus amounts to a mechanism widely used by district courts to increase penalties on a defendant who has sought appellate review. Here the sentence went from 84 months to 154 months without any new fact to justify the increase.

As such, this Court is urged to grant certiorari to reexamine the ongoing viability of this practice in light of the Fifth Amendment. This Court cannot continue to countenance increased punishments after successful appeals under the guise of a legal fiction like "bundling" or "packaging" legitimate and illegitimate sentences.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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KERRY VANDERPOOL,

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v.

UNITED STATES OF AMERICA,

Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4479 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 15th day of April, 2022.

_____

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