No. 22-_____

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IN THE
SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER BARRET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, following the vacatur of one or more counts, either pursuant to a direct appeal or a 28 U.S.C. § 2255 motion, a district court must conduct a full de novo resentencing?

2. Whether, even if district courts are required to hold full resentencings following vacatur on direct appeal, 28 U.S.C. § 2255 nevertheless gives courts discretion to hold limited proceedings rather than full de novo resentencings following vacatur of a count of conviction on a 28 U.S.C. § 2255 motion?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were Christopher Barret against the United States of America.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Barret prays for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, by unpublished summary order, reproduced in the appendix at App. 1, affirmed the amended judgment of the United States District Court for the Eastern District of New York dated July 13, 2021, which denied Petitioner a full de novo resentencing. The rulings of the district court are reprinted starting at App. 6.

## JURISDICTION

The summary order in the Court of Appeals was decided on December 22, 2022. This Petition for a writ of certiorari is being timely filed within 90 days of the summary order, in compliance with Rule 13.3 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

## STATUTORY PROVISION INVOLVED

Title 28, United States Code, Section 2255, provides the following, in pertinent part:

> (a)A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b)… If the court finds that … the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

**STATEMENT OF THE CASE**

1. Petitioner stands convicted of a July 13, 2021, amended judgment in the United States District Court for the Eastern District of New York (Hon. Kiyo Matsumoto, U.S.D.J.), with respect to a resentencing proceeding at which he was resentenced to a total of 40 years on multiple counts of conviction. Petitioner was originally convicted in 2014, following a jury trial, of one count each of leading a continuing criminal enterprise, in violation of 21 U.S.C. § 848(a) (Count One); conspiring to distribute over 1000 kilograms of marijuana, in violation of 21 U.S.C. § 846 (Count Two); conspiring to maintain a stash house, in violation of 21 U.S.C. § 856 (Count Three); maintaining a stash house, in violation

of 21 U.S.C. § 856 (Count Four); distribution of over 100 kilograms of marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count Five); and brandishing a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Six).

Specifically, Mr. Barret had been sentenced to concurrent terms 33 years on Counts One, Three and Four to run concurrently; 10 years on Count Two to run concurrently to Counts One, Three, Four and Five; five years on Count Five, to run concurrently to Counts One, Two, Three and Four; and 7 years on Count Six to run consecutively to all other counts, as well as five years of supervised release as to Counts One, Two and Six, three years of supervised release as to Counts Three and Four, and four years of supervised release as to Count Five.

Following a successful 28 U.S.C. § 2255 motion pursuant to which Counts Two and Three were vacated, but the remaining counts of conviction were permitted to stand, the district court held a limited re-sentencing proceeding solely with respect to Count Four, due to the fact that the court had imposed an illegal sentence, and ultimately sentenced Mr. Barret to 156 months' imprisonment on that count, to run concurrently with the other remaining counts of conviction.

2. Petitioner was initially charged in 2010, in connection with his alleged leadership role in a marijuana distribution conspiracy centered on a group called the "Fatherless Crew." According to prosecutors, between 2006 and 2010, the "Fatherless Crew" distributed thousands of pounds of marijuana worth millions of dollars. Crew members received drugs from suppliers in Arizona and California via the United States Postal Service and sold them wholesale to New York-based drug dealers. Members of the "Fatherless Crew" armed themselves with firearms and engaged in acts of violence against members of other drug trafficking organizations.

Following trial, Petitioner was convicted of all six counts against him, and a *Fatico* hearing was held on February 25, 2014, with respect to disputed facts in advance of sentencing. At the hearing, the government offered evidence regarding Petitioner's alleged involvement in two murders. The Court ultimately found by a preponderance of the evidence that Petitioner had some involvement in one killing but not the other.

Following sentencing, Petitioner timely appealed, raising several issues attacking both the conviction and the sentence. Among the issues were that the evidence was insufficient to establish that he and a co-defendant conspired to distribute more than 1,000 kilograms of marijuana; that the district court erred

by admitting evidence of prior crimes, wrongs, or other acts pursuant to Rule 404(b) of the Federal Rules of Evidence; and that the district court erred in admitting co-conspirator's testimony.

By published opinion of February 15, 2017, and an accompanying summary order, this Court affirmed the district court's judgment of conviction in its entirety. *United States v. Barret*, 848 F.3d 524 (2d Cir. 2017).

3. By pro se motion filed July 20, 2017, Petitioner moved pursuant to 28 U.S.C. § 2255 to vacate his conviction on the grounds that he was deprived of his right to effective assistance of counsel. Specifically, for the purpose of this Petition, Petitioner alleged that his counsel at sentencing was ineffective for having failed to object to the Probation Department's incorrect calculation of the offense level and guidelines range in the presentence report, on the grounds that he should not have been convicted of Count Two when he had already been convicted of Count One, a greater offense. Additionally, Petitioner argued that counsel was ineffective with respect to the sentence on Counts Three and Four, by failing to raise the issue that each count had a statutory maximum of 20 years, but the district court erroneously imposed a sentence of 33 years, to run concurrently.

Subsequent to his initial motion, Mr. Barret made numerous supplemental filings, including several requests for a reduction of sentence based on Amendment 782 to the United States Sentencing

Guidelines, as well as a request that he be granted relief pursuant to the Supreme Court's then-recent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).

By Memorandum & Order of May 15, 2020, the district court granted the 2255 motion in part, vacating Counts Two and Three as unauthorized cumulative punishment pursuant to *Rutledge v. United States*, 517 U.S. 292 (1996). As the court noted, it had already agreed with Mr. Barret at the time of his posttrial motions that under controlling law, he could not be sentenced for the two lesser included offenses. (A 106; Memorandum & Order at 31) Accordingly, the court ruled that Counts Two and Three be vacated, and that the judgment be amended accordingly to so reflect. (2d Cir. Appendix at 120; Memorandum & Order at 35)

The court did order resentencing with respect to Count Four, concluding that although Counts Three and Four each have a statutory maximum sentence of 20 years pursuant to 21 U.S.C. § 856(b), the court had erroneously imposed a sentence of 33 years' incarceration for Counts One, Three, and Four to run concurrently. (A 118; Memorandum & Order at 43)

4. At the July 13, 2021, resentencing proceeding, the district court explained its decision not to hold a full resentencing as follows:

> When a conviction a vacated under Section 2255, the Court must discharge the prisoner or resentence him or

> grant a new trial or correct the sentence as may appear appropriate. The Second Circuit has interpreted this language to give a District Court broad and flexible remedial authority having vacated and set the judgment aside to resentence a defendant and correct the sentence as appropriate. United States versus Gordils 117 F.3d 99 at page 103 decided by the Second Circuit in 1997.
>
> Although a District Court is authorized to hold a full resentencing when a conviction is vacated, several courts in this Circuit have concluded that a de novo resentencing is limited to instances where the conviction was overturned on direct appeal and is not applicable in Section 2255 cases.
>
> There are a number of district courts. One decision out of the Southern District Ayyad versus United States 16-CV-4346 holding that the default rule requiring that the District Court hold a de novo resentencing each and every time a defendant successfully challenges at least one count of a multi-count conviction with the intention with the narrow scope of Section 2255.
>
> Similarly, in United States versus Kaziu, 09-CV-660 2021 Westlaw 1751156 at 2 the Court held that there is growing awareness that a full resentencing proceeding is not always necessary after vacatur of a conviction stemming from a 2255 petition.
>
> Similarly, United States versus Medunjanin 10-CR-19 stating that where the Court vacates a conviction and sentence for one 924(c) offense, but denied the request for resentencing and leaving undisturbed the sentencing on the remaining counts of conviction.
>
> In any event, in my May 15th, 2020, decision on Mr. Barret's 2255 petition I expressly limited today's resentencing to Mr. Barret's vacated sentence on Count 4. Because I vacated Counts 2 and 3, I declined to resentence Mr. Barret as to Counts 2 and 3. (APP 9-10)

In re-sentencing Mr. Barret to 156 months' imprisonment on Count Four, the district court stated the following:

> Considering all of the 18 U.S. Code Section 3553(a) factors and, in particular, the nature and circumstances of Mr. Barret's offense, the need to both specifically and generally deter, and to protect the public, and to instill respect for the law, I find that this sentence that I will impose for Count 4 concurrently with Mr. Barret's 33-year sentence for Count 1 will be sufficient but not greater than necessary to achieve 3553(a)'s purpose, will appropriately reflect the seriousness of Mr. Barret's crime and adequately deter conduct of a similar nature and account for Mr. Barret's postsentencing conduct.
>
> Consequently, I am authorized to find, and do find, all of the facts appropriate for a sentencing as following on Count 4:
>
> Mr. Barret is sentenced to 156 months in custody as to Count 4 to be served concurrently with Counts 1 and 5. The consecutive sentence for Count 6 remains unchanged. He will serve three years of supervised release on Count 4 which will be served concurrently with the supervised release for Count 1 of five years, Count 5 of four years, and Count 6 of five years. (A 187-91; Sentencing Tr. at 52-56)

5. Petitioner appealed that sentence, arguing principally that he was entitled to a full de novo resentencing in light of the Second Circuit's default rule in *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), *United States v. Rigas*, 583 F.3d 108 (2d Cir. 2009), that resentencing is required following vacatur of any count of conviction.

Shortly after oral argument was held in the instant case, a separate panel of the Second Circuit decided *United States v. Pena*, 58 F.4th 613 (2d Cir. 2022) (amended Jan. 27, 2023), addressing the same question but concluding that the court's precedent in *Quintieri* and *Rigas* did not require de novo resentencing in

circumstances where one or more counts of conviction is vacated in connection with a 2255 motion. In light of the *Pena* decision, the Second Circuit affirmed the judgment here in a summary order, holding as follows, in pertinent part:

> On appeal, Barret argues principally that the district court erred because it did not conduct a de novo resentencing. He argues that *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), and *United States v. Rigas*, 583 F.3d 108 (2d Cir. 2009), require a district court to conduct a de novo resentencing whenever any single conviction of two or more convictions is vacated, as is the case here. But our recent decision in *United States v. Peña* forecloses that argument. *See* No. 20-4192, 2022 WL 17587854 (2d Cir. Dec. 13, 2022). In that case, we held that "Section 2255's plain text, which vests district courts with discretion to select the appropriate relief from a menu of options, precludes us from applying the default rule in *Rigas* to all cases that arise in the § 2255 context." *Id*. at *3. Accordingly, Barret was not entitled to de novo resentencing on the ground that his § 2255 motion resulted in vacatur of at least one conviction.

(APP 3-4)

This Petition followed.

## REASONS FOR GRANTING THE PETITION

### I. The Court Should Grant Certiorari To Make Clear That, Following The Vacatur Of One Or More Counts, Whether Pursuant To A Direct Appeal Or A 28 U.S.C. § 2255 Motion, A District Court Must Conduct A Full De Novo Resentencing.

1. Certiorari is warranted here so the Court can resolve a circuit split on the important question of whether, where one or more counts is vacated on appellate review, a district court must hold a full de novo resentencing proceeding, as the Second Circuit has long required, or whether the decision to hold a full resentencing is discretionary, as several other circuits have held. Further, the Court should grant Certiorari to determine whether the same rule applies in cases where one or more counts have been vacated pursuant to a 28 U.S.C. § 2255 motion.

In *United States v. Quintieri*, 306 F.3d 1217, 1228 n.6 (2d Cir. 2002), the Second Circuit established a default rule requiring a full de novo resentencing proceeding following reversal on appeal, although, significantly, *Quintieri* involved an appeal from the denial of a 2255 petition. 306 F.3d at 1223. In so holding, the Second Circuit noted the key distinction between reversals based on an erroneous conviction and vacated judgments based on an error in sentencing, where a more limited resentencing would be permitted. *See, e.g., United States v. Rigas*, 583 F.3d 108, 117 (2d Cir. 2009).

In contrast, other circuits have expressly determined that there is no default requirement that a full resentencing be held. *See Troiano v. United States*, 918 F.3d 1082, 1087 (2d Cir. 2019) ("we now clarify that the decision to unbundle a sentencing package—that is, to conduct a full resentencing on all remaining counts of conviction when one or more counts of a multi-count conviction are undone—rests within the sound discretion of the district court"); *United States v. Palmer*, 854 F.3d 39, 48–49 (D.C. Cir. 2017) ("the district court revised the original sentence in view of the change in the law on merger since appellant was sentenced at trial[, and] did no more than mechanically vacate the unlawful convictions … [and o]therwise, the district court left appellant's original sentence in place, unaltered[; t]he district court was required to do no more, for Section 2255(b) accords it discretion in choosing from among four remedies, "as may appear appropriate"); *United States v. Augustin*, 16 F.4th 227, 232 (6th Cir. 2021) (*citing Troiano* and *Palmer*).

The central rationale behind the rule announced by the Second Circuit in *Quintieri* is that "[a] district court's sentence is based on the constellation of offenses for which the defendant is convicted and their relationship to a mosaic of facts," and "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[, and accordingly f]or the district court to sentence the defendant accurately and appropriately, it must confront the offenses of conviction and the facts anew." 306 F.3d at 1227-28. Thus, subsequent decisions of the Second Circuit have recognized that the vacatur of any count of conviction, no matter where in the hierarchy of charges it may stand, requires de novo resentencing. *See United States v. Hertular*, 562 F.3d 433, 446 (2d Cir. 2009) (applying *Quintieri* and requiring de novo resentencing because reversal of one of four counts of conviction, even though "the 'factual mosaic' may be little altered"). As the *Hertular* Court continued: "even in these circumstances, we must vacate the defendant's sentence and remand the case to the district court so that it may decide, in the first instance, whether a conviction on three rather than four counts affects its assessment of the sentencing factors detailed in 18 U.S.C. § 3553(a)." *Id*.

The other circuits confronting the issue have instead adhered to a mechanistic review of whether grouped sentences will necessarily be impacted by the vacatur of one of the underlying counts, without acknowledging the impact on the overall factual mosaic at the heart of every sentencing. *See Palmer*, 854 F.3d at 49 ("not every judgment involving multiple convictions presents a sentencing package in which vacating the sentence on one count

unravels the remaining sentences"); *Troiano*, 918 F.3d at 1087 (Even were we to conclude that the counts were grouped for sentencing—something the record does not reflect here—the decision to restructure a defendant's entire sentence when only one of the counts of conviction is found to be invalid is discretionary and not, as Troiano suggests, mandatory").

2. We respectfully submit that the analysis employed by the Second Circuit in *Quintieri* and its progeny—namely that there is a crucial and fundamental distinction between cases in which a count of conviction has been found erroneous, as opposed to cases in which there was simply an error in sentencing—is the correct analysis, and that such circumstance necessarily requires that the full set of circumstances, including changes to the overall mosaic since the time of the original sentencing, be considered at a de novo resentencing. As the Second Circuit explained:

> 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. *See Bryce*, 287 F.3d at 252–54 (holding that resentencing properly proceeded de novo after one of two convictions was vacated and the district court was presented with important evidence that was not previously available); *United States v. Morales*, 185 F.3d 74, 85 (2d Cir.1999) (*citing Atehortva* and requiring de novo resentencing "[b]ecause the sentences imposed on the reversed and remaining counts are or may be interdependent"), *cert. denied*, 529 U.S. 1010, 120 S.Ct. 1282, 146 L.Ed.2d 229 (2000). In contrast, resentencing to correct specific sentencing errors does not ordinarily undo the entire "knot of calculation."

306 F.3d at 1227-28. The Court should thus grant Certiorari to hold that the reasoning in *Quintieri* does in fact require a full de novo resentencing where a count of conviction has been vacated.

3. Although the holding of *Quintieri* and subsequent cases do not limit the rule only to direct appeals, *Quintieri* itself arose in the context of an appeal from a § 2255 proceeding, and the same sentencing principles would invariably apply whether vacatur resulted from a direct appeal or a § 2255 motion, the Second Circuit recently held that the default rule of Quintieri applies only to appeals and not to § 2255 motions. In *United States v. Pena*, 64 F.4th 613 (2d Cir. 2023), the Second Circuit engaged in the following discussion:

> Peña relies on our decisions in *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), and *Rigas* to argue that the district court was required to conduct a de novo resentencing. Neither of these decisions justifies a conclusion that de novo resentencing was mandatory here.
>
> In *Quintieri*, we considered whether a district court was required to resentence a defendant de novo

after we had vacated the defendant's sentence and remanded for resentencing. 306 F.3d at 1221–22. We commented that resentencing "usually" should be de novo after a conviction is reversed on appeal. *Id.* at 1228. But the defendant there did not have any of his convictions overturned on appeal. See id. at 1223, 1229. We had remanded because his sentence was incorrectly calculated; his convictions, however, were valid. See id. at 1223 (explaining that the Court affirmed the defendant's convictions on direct appeal and that, in later habeas litigation, the Court remanded for resentencing because it appeared that the offense level for one of the defendant's convictions was improperly enhanced); *id.* at 1229 (noting that the remand "was limited to the issue" of sentence calculation). Quintieri therefore held that, in large part because the defendant complained of an error that impacted only his sentence and not the validity of his underlying conviction, de novo resentencing was not mandatory. *Id.* at 1228. Hence, while *Quintieri* contains dicta about what "usually" and "likely" should happen when a conviction is overturned on appeal, the case's holding is limited to the modest proposition that de novo resentencing was not required to correct the sentencing error under the circumstances presented in that case. *Id.* Quintieri does not stand for the assertion that de novo resentencing is mandatory whenever a conviction is overturned by this Court.

In contrast to *Quintieri*, *Rigas* did involve defendants who had a portion of their convictions overturned on appeal. 583 F.3d at 113, 118. We held that the defendants were entitled to de novo resentencing because "de novo resentencing is required where a conviction is reversed in part on appeal." *Id.* at 115, 118; *see also id.* at 117 (underscoring that this requirement is a "rule, not a guideline"). But Rigas was decided in the context of a direct appeal, not a collateral challenge pursuant to § 2255 such as the case before us now. *See id.* at 113. Peña argues that this procedural posture is a distinction without a difference and urges us to extend the default rule in *Rigas* to the § 2255 context. We decline to do so. While the default rule in *Rigas* may apply whenever a conviction is reversed on direct appeal, § 2255's plain text, which vests district courts with discretion to select the appropriate relief from a menu of options, precludes us

from applying the *Rigas* default rule to all cases that arise in the § 2255 context.

District courts in this Circuit have come to a similar conclusion. For example, in *United States v. Medunjanin*, No. 10-cr-0019 (BMC), 2020 WL 5912323 (E.D.N.Y. Oct. 6, 2020), the district court held that "the default rule does not require a de novo resentencing in the § 2255 context" because the "plain text of § 2255 vests the Court 'with the discretion to determine first the nature of the relief that 'may appear appropriate,'" *id.* at *8 (citation omitted). Similarly, in *Ayyad v. United States*, No. 16-cv-4346 (LAK), 2020 WL 5018163 (S.D.N.Y. Aug. 24, 2020), the district court noted that it was not "aware of[] any case in which the [de novo resentencing] default rule has been applied in the habeas context" and reasoned that such a rule "would be in tension with the narrow scope of Section 2255," *id.* at *2.

We have held that judges have discretion with respect to resentencing in the § 2255 context. In *United States v. Gordils*, 117 F.3d 99 (2d Cir. 1997), we rejected the defendant's argument that district courts have no discretion to engage in de novo resentencing under § 2255, *id.* at 104. "[A]t least in the context of a 'truly interdependent sentence' such as where a mandatory consecutive sentence affects the applicable offense level under the guidelines—the language of § 2255 provides sufficient statutory authority for a district court to exercise its jurisdiction to resentence defendants 'as may appear appropriate.'" Id. (citations omitted). Peña argues that the discretion discussed in *Gordils* was erased by *Quintieri* and *Rigas*. We conclude to the contrary that § 2255's statutory text continues to grant district courts discretion in the matter.

The government argues that every circuit to analyze this issue has held that de novo resentencing is not required in this context. That appears to be correct.

A recent opinion of the Sixth Circuit is instructive. In *United States v. Augustin*, 16 F.4th 227 (6th Cir. 2021), cert. denied, 142 S. Ct. 1458 (mem.) (2022), a defendant was convicted on eight counts of an indictment, including a conviction under § 924(c) for

> using a firearm during a crime of violence, id. at 231. After Augustin argued that his § 924(c) conviction was no longer valid under Davis, the district court vacated his § 924(c) conviction and the corresponding 120-month sentence without a de novo resentencing. *Id*.
>
> Augustin argued on appeal that the district court should instead have resentenced him. *Augustin*, 16 F.4th at 231. The Sixth Circuit noted that resentencing is "akin to 'beginning the sentencing process anew'" and requires a full sentencing hearing. *Id*. at 232 (citation omitted). A sentence correction, on the other hand, is appropriate when "it simply vacates 'unlawful convictions (and accompanying sentences)' without choosing to reevaluate 'the appropriateness of the defendant's original sentence.'" *Id*. (citation omitted). The Sixth Circuit concluded that "district courts have broad [but not unbounded2] discretion to choose between these remedies." *Id*.

*Id*. at 618-20.

It is important to note that in its initial, unamended *Pena* decision, the Second Circuit stated that *Quintieri* had been decided in the context of a direct appeal, but amended that decision to recognize that, in fact, the issue had arisen in the context of a habeas petition. *Id*. at 618, n.1.

4. Ultimately, if the Court were to agree that full de novo resentencing is required on vacatur following appeal, there is no reason why that principle should not equally to a § 2255 proceeding. To be sure, the statutory language of § 2255 provides that in the case of a vacatur, a district court "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id*. (emphasis added.) As the Second Circuit recognized in *Quintieri*, however, mere correction

of the sentence may be appropriate where there has been an error in sentencing that can easily be corrected without reference to the overall constellation of counts, but that remedy cannot be adequate where a count of conviction itself has been vacated, since that necessarily will affect the overall mosaic of facts and charges underlying the judgment of conviction as a whole. 306 F.3d at 1227-28.

Logic dictates that this is also the "appropriate" relief with respect to a § 2255 motion in which a count is vacated, just as it would be in a direct appeal. *See United States v. Gordils*, 117 F.3d 99, 103 (2d Cir. 1997)("We see no compelling reason why the legal interdependence of sentences under the guidelines should not as surely lead us to reconsider related sentences in the context of collateral attack as it does in the context of a direct appeal"). Accordingly, the language of § 2255 does not authorize district courts to exercise a greater level of discretion than would be available to them following vacatur on direct appeal, but rather to provide the "appropriate" relief as circumstances dictate, *i.e.*, to follow the rule announced in *Quintieri*. *See* 28 U.S.C. § 2106 ("[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such

appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances").

**Conclusion**

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 21, 2023

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