No. 22-____

In the
Supreme Court of the United States

Jose Pena,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, following the vacatur of a count of conviction (either on direct appeal or via a § 2255 motion), the district court must resentence the defendant de novo on the remaining counts.

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OPINION AND ORDER BELOW

The amended opinion of the United States Court of Appeals for the Second Circuit is reported at 58 F.4th 613 (2d Cir. 2023) and appears at Pet. App. 02-12.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2255 and entered an order on June 6, 2020, granting Pena's § 2255 motion and vacating two § 924(j) counts, but refusing to resentence him on the remaining counts. The Second Circuit had jurisdiction under 28 U.S.C. §§ 1291 & 2253 and affirmed in an opinion issued on December 13, 2022, which was amended on January 27, 2023.

The Second Circuit extended the time to petition for rehearing to January 26, 2023. Pena sought panel and en banc rehearing on the question presented here on January 25, 2023.

The Circuit denied the rehearing petition without explanation on March 6, 2023. Ninety days from that date is June 4, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition, filed June 1, 2023, is timely under Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2255 states in relevant 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.

28 U.S.C. § 2106 states in relevant part:

The 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.

STATEMENT OF THE CASE

1. The underlying case

Jose Pena was charged with five counts arising from his participation, along with his brother and co-defendant Hector Pena, in the double murder of Jose Suarez and Juan Carmona in June 1997. The superseding indictment charged Jose Pena (Pena) with one count of conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958 (Count 4); two counts of substantive murder for hire, in violation of § 1958 (Counts 5 and 6, one for each victim); and two counts of murder through the use of a firearm during a crime of violence, in violation of § 924(j) (Counts 7 and 8).

A. The § 924(j) counts

Section 924(j) is violated when "[a] person, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm." Both § 924(j) counts alleged that Pena used a firearm "during and in relation to a crime of violence . . . , namely, the conspiracy to commit murder-for-hire charged in Count Four." Count 7 concerns Suarez's death while Count 8 concerns Carmona's.

B. The § 1958 counts

Pena was charged with three counts of murder-for-hire under § 1958. Count 4 accused both Penas of conspiring to kill Suarez and Carmona for pay, "which resulted in the deaths of Jose Suarez and Juan Carmona." Count 5 accused them of killing Suarez for pay and Count 6 accused them of killing Carmona for pay.

The relevant version of § 1958 states:

> (a) Whoever travels in . . . interstate or foreign commerce, or uses . . . the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be . . . imprisoned for not more than ten years []; and if personal injury results, shall be . . . imprisoned for not more than twenty years []; and if death results, shall be punished by death or life imprisonment . . . .

18 U.S.C. § 1958(a) (1997 ed.).

The statute thus creates three distinct crimes of graduating seriousness. The base offense carries a 10-year maximum. A "mid-tier" offense, applicable when

"personal injury results," carries a 20-year maximum. The most serious version, applicable when "death results," carries a mandatory minimum life sentence.

After Apprendi and Alleyne,[1] the two "facts" triggering the aggravated versions of § 1958(a) -- that "personal injury" or "death" "results" -- constitute elements that must be alleged in the indictment and found by a jury beyond a reasonable doubt (or admitted by the defendant at a guilty plea). Accord United States v. Ventura, 742 F. App'x 575, 580 (2d Cir. 2018); see Burrage v. United States, 134 S. Ct. 881, 887 (2014) ("death results" enhancement for drug-distribution offense is Apprendi-Alleyne element). Therefore, the jury had to find that "death result[ed]" on the § 1958 counts for Pena to be subject to a mandatory life term.

At trial, however, the district court specifically told the jury that it need not find that an actual killing occurred -- i.e., that "death result[ed]" -- to convict on any of the § 1958 counts.

Regarding the § 1958 conspiracy charged in Count 4, the court instructed the jury that "you may find the defendants guilty of the crime of conspiring to commit a murder for hire even if no murder for hire was actually committed." The court said the same regarding the substantive § 1958 violations charged in Counts 5 and 6: "The government does not have to prove that the murder was committed or even that it was attempted."

[1] Apprendi v. New Jersey, 530 U.S. 466 (2000); Alleyne v. United States, 133 S. Ct. 2151 (2013).

C. The 2014 sentencing

The jury convicted Pena on all five counts.

Prior to sentencing, the Presentence Report ("PSR") concluded (incorrectly) that each § 1958 count mandated a life sentence; that the § 924(j) counts carried a maximum of life; and that the Guidelines range was life. No one objected.

Sentencing occurred in December 2014. It took less than 10 minutes; defense counsel said only, "Mr. Pena objects to the recitation of facts set forth in the report and maintains his innocence."

The court sentenced Pena to five life terms, to run concurrently.

2. Subsequent history

Pena appealed to the Second Circuit, which affirmed via summary order in March 2016. 642 F. App'x 40 (2d Cir. 2016).

Pena filed his first § 2255 motion the same year in the district court, seeking to vacate his convictions on unrelated grounds. The court denied the motion. Pena appealed, but the Circuit dismissed for untimeliness. 2d Cir. No. 17-2100.

A. *United States v. Davis* (2019)

In February 2020 Pena asked the Second Circuit for permission to file a successive § 2255 motion in the district court to vacate his § 924(j) convictions in light of United States v. Davis, 139 S. Ct. 872 (2019). See 2d Cir. No. 20-144. Davis held that the residual clause in § 924(c)'s two-pronged definition of "crime of violence," see 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague under Johnson

v. United States, 135 S. Ct. 2551 (2015). After Davis, therefore, an offense could qualify as a "crime of violence" for § 924(c) only if it satisfied the elements clause in the same definition -- that is, as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

Pena argued that Davis required the vacatur of both § 924(j) counts because each relies on conspiracy to commit murder for hire as the crime of violence. That offense -- like nearly all conspiracy offenses -- is in essence an agreement and does not require any physical force. See, e.g. United States v. Barrett, 936 F.3d 126 (2d Cir. 2019) (conspiracy to commit Hobbs Act robbery not a crime of violence).

The Second Circuit granted Pena permission to file a § 2255 motion in June 2020.

B. This § 2255 motion

In the district court, the Government conceded that the court should grant Pena's § 2255 motion and vacate the two § 924(j) counts: The "convictions on Counts Seven and Eight can no longer stand . . . because conspiracy to commit murder-for-hire qualifies as a 'crime of violence' . . . only under the 'residual' [] clause of that statute, which Davis declared unconstitutionally vague."

But the Government said that resentencing was unnecessary. The court should just "grant [] the defendant's petition and [] ent[er] [] an amended judgment on the remaining three counts of conviction," leaving undisturbed those "sentence[s]

of life imprisonment." "Amending the judgment, without a plenary resentencing, is appropriate here," the Government claimed, "because [] the sentences imposed on the three remaining counts of conviction were not driven or affected in any way by the presence of the Section 924(j) counts" and because "the defendant received the statutory mandatory sentence on each" count.

Pena disagreed as to the remedy. He argued that resentencing de novo was required by Circuit precedent upon vacatur of the § 924(j) counts – United States v. Quintieri, 306 F.3d 1217, 1227 (2d Cir. 2002), and United States v. Rigas, 583 F.3d 108, 118 (2d Cir. 2009), mandated this result. See infra. And even if resentencing were discretionary, the court should resentence here because each § 1958 count carried only a maximum of 10 years' imprisonment, not mandatory life, given the jury's verdict.

The district court adopted the Government's position. It granted Pena's § 2255 motion and vacated the two § 924(j) counts and their accompanying life sentences. But instead of resentencing him on the remaining counts, the court simply entered an amended judgment shorn of the vacated counts but retaining the three § 1958 counts and their life sentences.

C. The panel's decision

A panel of the Second Circuit affirmed. Pet. App. 02-12. In an opinion issued December 13, 2022, and amended on January 27, 2023, the panel ruled that the Circuit's Rigas-Quintieri rule did not apply in the § 2255 context. The panel

believed that "Section 2255's plain text [] vests district courts with discretion to select the appropriate relief from a menu of options," including a sentence correction rather than de novo resentencing.

Moreover, the district court did not abuse its discretion in declining to resentence Pena, because any such proceeding "would have been strictly ministerial" and "an empty formality," as each remaining count mandated life. Although the jury failed to find the aggravating fact ("death results") triggering that mandatory penalty on the § 1958 counts, Pet. App. 12, the panel explained, the district court's imposition of life sentences on those counts was harmless. "There is overwhelming evidence that the jury would have found that death was the result of the conduct alleged in Counts [4, 5, and 6] had it received proper instructions." Id. 11.

Pena timely sought panel and en banc rehearing . See ECF No. 68, 2d Cir. 20-4192. The Circuit denied the petition without explanation on March 6, 2023.

REASONS FOR GRANTING THE WRIT

Every day, courts around the country wonder what to do after vacating an unlawful count of conviction. Is de novo resentencing required when this occurs, as the Second Circuit holds (at least when the vacatur occurs on direct appeal rather than on collateral review)? Or is resentencing only sometimes required, as the Sixth, D.C., and Eleventh Circuits hold? Or, finally, is resentencing always at the court's discretion, as the Ninth and Fourth Circuits hold?

The Court should grant the writ to resolve this split among the courts of appeals. The appropriate remedy upon vacating a count of conviction is a question that arises daily. And the lower courts' disagreement on this issue is longstanding. This Court's intervention is necessary to ensure uniformity.

Moreover, the Second Circuit here got the answer wrong. While the Circuit had previously held, correctly, that de novo resentencing is required upon vacating a count, it erred by deviating from that rule in this Section 2255 case. As shown below, resentencing de novo is the correct remedy whenever a count is vacated, whether that occurs on direct appeal or via collateral attack.

A. The circuits are split on the appropriate remedy after vacating a count of conviction

The Court should grant the writ to resolve a longstanding split among the federal courts of appeals on this question.

Until this case, the Second Circuit required de novo resentencing upon vacatur of a count, regardless of whether vacatur occurred on direct appeal or collateral review. As the court explained in Rigas, a case on direct appeal, "where a count of conviction is overturned -- as opposed to an aspect of a sentence -- resentencing must be de novo." 583 F.3d at 116. The court said the same thing in Quintieri, a case on appeal following the partial grant of a § 2255 motion: "A district court's sentence is based on the constellation of offenses for which the defendant was convicted." 306 F.3d at 1227. Therefore, "[w]hen part of a conviction is vacated, 'the constellation of offenses of conviction has been changed.'" United States v.

Weingarten, 713 F.3d 704, 711–12 (2d Cir. 2013) (quoting Quintieri, 306 F.3d at 1227–28). When this occurs, in order "[f]or the district court to sentence the defendant accurately and appropriately" -- which is of course the court's duty -- "it must confront the offenses of conviction and facts anew," Quintieri, 306 F.3d at 1228, and "must reconsider the sentences imposed on each count, as well as the aggregate sentence," Rigas, 583 F.3d at 118.

Rigas "resolve[d] any ambiguity" that previously lingered over this issue in the Second Circuit: Defendants "are entitled to be resentenced de novo at a plenary sentencing hearing" when a court "identifie[s] a conviction error, not a mere sentencing error." Id. at 117.

The Second Circuit did not deviate from this rule. Indeed, it "has adhered to the 'de novo default rule' ... in successive cases where a portion of a defendant's conviction was overturned on appeal, even though the portion of the conviction that was overturned was unlikely to alter the ultimate sentence in any significant way." Id. at 116; see, e.g., United States v. Hertular, 562 F.3d 433, 446 (2d Cir. 2009) (de novo resentencing even though the "factual mosaic" of the offense "may be little altered"); United States v. Graham, 691 F.3d 153, 156 (2d Cir. 2012) (where original sentence was 600 months, ordering de novo resentencing on remaining seven counts after vacating one count carrying 120 months); United States v. Yepes-Casas, 473 F. App'x 90, 91 (2d Cir. 2012) (irrelevant that vacated count was "hardly . . . material to the sentencing decision," because "this Circuit's recent precedent is unequivocal:

any 'conviction error' requires a de novo re-sentencing"); United States v. Powers, 842 F.3d 177, 180-81 (2d Cir. 2016) (de novo resentencing required after vacatur of one of 11 essentially identical counts (where the sentence on the vacated count ran concurrently with the ten unaffected counts) because "Rigas controls and de novo resentencing is required"); United States v. Minaya, 2021 WL 222131, at *4-5 (2d Cir. Jan. 22, 2021) (de novo resentencing even though only one § 924(c) count (of 13 total counts) was vacated and the original sentence was 92 years).

The Sixth, Eleventh, and D.C. Circuits employ a different rule. There, de novo resentencing is not always required; sometimes the court can simply "correct" the defendant's sentence, without a full resentencing, after vacating a count. Generally, "district courts have broad discretion to choose between" resentencing or a sentence correction in these circuits. United States v. Augustin, 16 F.4th 227, 232 (6th Cir. 2021). But "resentencing may be necessary if the error 'undermines the sentence as a whole' such that the district court must 'revisit the entire sentence.'" Id. at 232 (emphasis in original). "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." Id.; accord United States v. Palmer, 854 F.3d 39, 49-50 (D.C. Cir. 2017) (choice of remedy upon vacatur is usually discretionary, but resentencing is required when "sentences for individual counts [are] intertwined" or where there is "a sentencing package in which vacating the sentence on one count unravels the

remaining counts"); United States v. Thomason, 940 F.3d 1166, 1172 (11th Cir. 2019) (same).

The Fourth and Ninth Circuits follow a different rule – resentencing is never required. Whether to resentence de novo following vacatur of a count always rests in the discretion of the district court. Even where the vacated sentence (accompanying the vacated count) was part of a "sentencing package," for instance, the court need not resentence the defendant on the remaining counts. Troiano v. United States, 918 F.3d 1082, 1087 (9th Cir. 2019). The decision 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." Id.; accord United States v. Hadden, 475 F.3d 652, 669 (4th Cir. 2007) (same).

The split among the circuits on this question is longstanding and deep. This Court's intervention is required to ensure federal uniformity.

B. *De novo* resentencing is required upon vacatur of a count; the Second Circuit erred in creating an exception for vacaturs that follow the grant of a § 2255 motion

The Court should also grant the writ because the Second Circuit erred in this case. Although its Rigas-Quintieri rule is the correct one, the court mistakenly deviated from that rule in Pena's case. De novo resentencing should be the outcome whenever a count of conviction is vacated, regardless of whether the vacatur occurs on direct appeal or via collateral attack.

In every multi-count case, "[a] district court's sentence is based on the constellation of offenses for which the defendant was convicted." Quintieri, 306 F.3d at 1227. "When part of a conviction is vacated," therefore, "'the constellation of offenses of conviction has been changed.'" Weingarten, 713 F.3d at 711–12 (2d Cir. 2013) (quoting Quintieri, 306 F.3d at 1227–28). In order "[f]or the district court to sentence the defendant accurately and appropriately" after vacatur of a count, therefore, "it must confront the offenses of conviction and facts anew," Quintieri, 306 F.3d at 1228, and "must reconsider the sentences imposed on each count, as well as the aggregate sentence," Rigas, 583 F.3d at 118.

Resentencing is the only remedy that accounts for the fact that "the constellation of offense," upon which the court's overall sentence is based, is altered whenever a count of conviction is vacated. To ensure that the overall sentence is "accurate[] and appropriate[]" following vacatur, a court must reconsider its sentence shorn of the vacated count. The only way to do that is through de novo resentencing.

The panel misread the Rigas-Quintieri rule as applying only on direct appeal. Indeed, as noted, Quintieri itself followed the partial grant of defendant's § 2255 motion.

And none of the Second Circuit's cases applying the rule says that it governs only when a count is vacated on direct appeal and not via collateral attack. To the contrary, the court described the rule broadly, applicable whenever a count is

vacated. See, e.g., United States v. Natal, 849 F.3d 530, 538 (2d Cir. 2017) ("[T]his Court has recently confirmed that when a count of conviction is overturned due to a 'conviction error,' the proper remedy is de novo resentencing . . . ."). This aligns with the principle that "[t]he most appropriate remedy" in the § 2255 context, Brian Means, Federal Habeas Manual § 13:7 (2022 ed.), "is to put § 2255 defendants in the same boat as direct appellants, i.e., to permit resentencing." United States v. Hillary, 106 F.3d 1170, 1172 (4th Cir. 1997).

Quintieri itself described its holding in general terms: "Today we conclude that when a resentencing results from a vacatur of a conviction, we in effect adhere to the de novo default rule." 306 F.3d at 1229 n.6. Rigas, though a direct appeal, summarized the Circuit's rule in similarly broad terms, without suggesting that it was inapplicable on collateral review: "Quintieri supplies two pertinent rules: (1) where a count of conviction is overturned -- as opposed to an aspect of a sentence -- resentencing must be de novo; and (2) de novo means 'anew.'" 583 F.3d at 116 (quoting Quintieri, 306 F.3d at 1228); see also Kaminski v. United States, 334 F.3d 84, 89 n.3 (2d Cir. 2003) (noting that "[w]here a habeas challenge to incarceration results in the overturning of a conviction, . . . the defendant must later be resentenced in toto").

The logic of the Rigas-Quintieri rule applies with equal force to § 2255 proceedings. Vacatur of a count alters the "constellation of offenses" upon which a sentence is based, regardless of how the vacatur occurs. Whenever a count is

removed, the court "must confront the offenses of conviction and the facts anew" in order to "sentence the defendant accurately and appropriately." 306 F.3d at 1228.

The panel's reliance on the language of § 2255 fails. It claims that "[s]ection 2255's plain text, which vests district courts" with broad 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." Pet. App. 08; see id. 07 (discussing § 2255(b), which states that a court may "[1] vacate and set the judgment aside and . . . discharge the prisoner or [2] resentence him or [3] grant him a new trial or [4] correct the sentence as may appear appropriate"). Broad and flexible remedial power, the panel contends, trumps the mandatory-resentencing rule.

This gambit collapses because appellate courts possess remedial authority at least as flexible and broad as that granted by § 2255 -- but are nonetheless bound by the Rigas-Quintieri rule. Section 2106 of Title 28 vests federal appellate courts with sweeping power:

> The 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.

The statute delegates "very broad remedial authority" to appellate courts. Yaman v. U.S. Dep't of State, 634 F.3d 610, 612 (D.C. Cir. 2011). Any disposition deemed "just under the circumstances" can be ordered. United States v. Guiliano, 644 F.2d 85, 89

(2d Cir. 1981); see, e.g., United States v. Jones, 878 F.3d 10, 20 & 24 n.6 (2d Cir. 2017) (finding no error and affirming defendant's sentence, but remanding and directing district court to "reconsider the sentence imposed" – and to impose a new sentence if appropriate – due to case's unusual procedural history).

Section 2106 thus grants to appellate courts remedial power at least as "flexible" and expansive as that granted by § 2255 to the district court. And if the Rigas-Quintieri rule is compatible with § 2106, it is also compatible with § 2255. In either context, if a court overturns a count of conviction, de novo resentencing must follow.

Finally, the panel believed that resentencing here would have been, in any event, an "empty formality" and "strictly ministerial." But even if there exists a "futility" exception to the mandatory-resentencing rule, this case does not fall within it.

As the panel acknowledges, the jury convicted Pena only of the base § 1958 offense on the three remaining counts because it did not find that he caused "bodily injury" or "death" on those counts. Thus, instead of three mandatory life terms, Pena would face a sentencing range of 0 to 30 years at a resentencing. This would be a life-changing event for him, not an empty gesture.

Whether a reviewing court would find the life sentences harmless error, in light of the evidence and record, is irrelevant. The question is what sentence the district court is empowered to impose at a resentencing, not whether a sentence

imposed at such a proceeding would later be found erroneous, but harmless, on subsequent review. Because the jury here found Pena guilty only of the base offense on each of the § 1958 counts, the court could sentence him to a maximum of 10 years' imprisonment on each count (for a total of 30 years if the sentences ran consecutively). E.g., United States v. Omar Gonzalez, 686 F.3d 122, 130 (2d Cir. 2012) (internal citations and quotations omitted). The panel's lengthy discussion of harmlessness and related doctrines is, respectfully, a red herring.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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