No. 23-_____

IN THE

Supreme Court of the United States

KENT CLARK,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal prisoner is required to obtain a certificate of appealability under 28 U.S.C. § 2253(c) to appeal a district court's choice of remedy after granting postconviction relief under 28 U.S.C. § 2255.

2. If a certificate of appealability is required, whether the standard for one has been met where the prisoner made a "substantial showing of the denial of a constitutional right," § 2253(c)(2), by prevailing on a constitutional claim in the § 2255 proceeding.

PARTIES TO THE PROCEEDING

Petitioner is Kent Clark, an inmate at the Federal Medical Center in Devens, Massachusetts.

Respondent is the United States of America.

There are no corporate parties involved in this case.

RELATED PROCEEDINGS

United States District Court for the District of New Jersey:

- *United States v. DeVose*, 2:90-cr-00012-MCA (Aug. 24, 2021)
- *Clark v. United States*, 2:98-cv-03887-DRD (Sep. 9, 1998)
- *Clark v. United States*, 2:04-cv-00133-DRD-SDW (Jan. 29, 2004)
- *Clark v. Deignan*, 2:15-cv-02854-KM (Apr. 8, 2016)
- *Clark v. Warden FCI Fairton*, 1:17-cv-05791-RMB (Oct. 17, 2017)
- *Clark v. United States*, 2:19-cv-17214-MCA (Aug. 12, 2021)*
- *Clark v. United States*, 2:19-cv-20520-MCA (Apr. 19, 2021)

United States Court of Appeals for the Third Circuit:

- *United States v. Clark*, No. 91-5115 (Sep. 11, 1991)
- *United States v. Clark*, No. 99-5054 (Nov. 23, 1999)
- *In re: Clark*, No. 01-1141 (Mar. 1, 2001)
- *United States v. Clark*, No. 01-2299 (Jun. 28, 2002)
- *Clark v. United States*, No. 04-1619 (Sep. 30, 2004)
- *In re: Clark*, No. 16-2884 (Aug. 19, 2019)
- *In re: Clark*, No. 17-3291 (Mar. 5, 2018)
- *Clark v. United States*, No. 21-2704 (Aug. 4, 2023)*

* Proceedings directly at issue in this appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kent Clark respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–14a) is reported at 76 F.4th 206. The opinion of the District Court (Pet. App. 15a–32a) was not reported.

JURISDICTION

The Court of Appeals entered its judgment on August 4, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 2253 and 2255(a)–(d), are reproduced in the appendix. Pet. App. 35a–36a.

INTRODUCTION

This case involves an acknowledged circuit split over the scope and application of the certificate of appealability ("COA") requirement in 28 U.S.C. § 2253(c). This Court's caselaw and the statutory text make clear that a COA is required to appeal a district court's denial of postconviction relief under 28 U.S.C. § 2255. But this Court has never decided whether a COA is required when a district court *grants* a motion for postconviction relief but then errs when selecting the "appropriate" remedy. § 2255(b). The circuits are evenly split on this question. Two circuits—the Fourth and Sixth—allow federal prisoners to appeal a district court's choice of remedy on a successful § 2255 motion without obtaining a COA. Two other circuits—the Third and Eleventh—require a COA.

This Court should grant certiorari to resolve this question for several reasons. *First*, a federal prisoner's ability to appeal an erroneous ruling under § 2255 should not depend on geography; the availability of appellate review, and the procedure for seeking such review, should be consistent nationwide.

Second, the decision below is wrong. The text, structure, history, and purpose of § 2253 make clear that the COA requirement only applies to appeals challenging a district court's *denial* of postconviction relief, not a district court's choice of remedy after *granting* relief. And even if the COA requirement applies, the requirement is satisfied where, as here, the prisoner made a "substantial showing of the denial of a constitutional right" by prevailing on a constitutional claim below.

Third, the questions presented are critically important. Section 2255 allows federal prisoners to seek relief if the sentence they are serving was imposed in violation of the Constitution or the laws of the United States. But that right means little without an effective remedy. Under the reading adopted by the Third and Eleventh Circuits, a district court's choice of remedy under § 2255(b) is unreviewable even if it is clearly erroneous, an absurd result that will wrongfully deny countless federal prisoners meaningful relief on a recurring basis.

Finally, this case is a good vehicle to resolve the questions presented. The Court of Appeals cleanly decided the case in a precedential opinion that hinged on the contested interpretation of § 2253. And this appeal may be Mr. Clark's last chance to obtain relief from the life sentence he has been serving since 1990.

STATEMENT OF THE CASE

A. Legal Framework

1. Under 28 U.S.C. § 2255, a federal prisoner serving a sentence "imposed in violation of the Constitution or laws of the United States" may "move the court which imposed the sentence to vacate, set aside, or correct [it]." § 2255(a). If the motion has merit, "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." § 2255(b). This language "confers upon the district court broad and flexible power in its actions following a successful § 2255 motion." *United States v. Davis*, 112 F.3d 118, 121 (3d Cir. 1997). That power is not unlimited, however: the text of the statute requires that the remedy be "appropriate." § 2255(b). The courts of appeals accordingly review a district court's choice of remedy under § 2255(b) for abuse of discretion. *See, e.g., United States v. Torres-Otero*, 232 F.3d 24, 29–30 (1st Cir. 2000); *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998); *United States v. Hadden*, 475 F.3d 652, 667 (4th Cir. 2007); *Ajan v. United States*, 731 F.3d 629, 633 (6th Cir. 2013); *Troiano v. United States*, 918 F.3d 1082, 1086 (9th Cir. 2019); *United States v. Brown*, 879 F.3d 1231, 1235 (11th Cir. 2018).

2. Appeals from § 2255 proceedings are governed by 28 U.S.C. § 2253. That section, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides that "an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255" unless "a circuit justice or judge issues of a certificate of appealability." § 2253(c)(1)(B). Section 2253 further provides

that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2).

3. This Court has held that a federal prisoner must obtain a COA when appealing "a district court's denial" of habeas relief. *Miller-El v. Cockrell*, 537 U.S. 232, 335 (2003). But the Court has never decided whether a federal prisoner must obtain a COA when appealing a district court's choice of remedy after *granting* relief. The circuits are deeply divided on this question, as explained below.

B. Proceedings Below

1. Petitioner Kent Clark is an inmate at the Federal Medical Center in Devens, Massachusetts. In 1990, Mr. Clark and a man named Darryl DeVose were charged in the District of New Jersey with kidnapping a mail carrier and attempting to extort a bank manager by holding his family hostage at gunpoint on January 14, 1985.[1] Pet. App. 3a. The government alleged that during the home invasion, Mr. Clark raped the bank manager's daughter. *Id.* Mr. Clark pled not guilty but was convicted of seven federal offenses including kidnapping, attempted extortion, and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), after a jury trial.[2] *Id.*

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[1] Justice Samuel Alito was the United States Attorney for the District of New Jersey at the time Mr. Clark was charged. *See* Government's Brief in Opposition, *United States v. DeVose*, 2:90-cr-00012-MCA, ECF No. 17 Ex. 6 at 11 (D.N.J. Jan. 25, 2021) (indictment filed on January 11, 1990).

[2] Mr. Clark has always maintained his innocence and there is strong reason to believe he was wrongfully convicted. He was arrested in 1985 based on an anonymous tip but was not charged after police found that his hair, blood, and saliva samples did not match the physical evidence recovered at the crime scene. Complaint, *Clark v. Deigan*, 2:15-cv-02854-KM, ECF No. 1 at 7, 9–10 (D.N.J. Apr. 21, 2015). He was then charged five years later right as the statute of limitations was set to expire. *Id.* at 8. At trial, the main evidence against Mr. Clark was the testimony of codefendant DeVose, whose identification was found in the stolen mail truck. *Id.* at 7–9. DeVose went into hiding

2. In 1991, Judge H. Lee Sarokin sentenced Mr. Clark to a term of life imprisonment on the kidnapping count, concurrent terms of imprisonment on five other counts, and a consecutive five-year term of imprisonment on the § 924(c) count, for a total sentence of life imprisonment plus five years. Pet. App. 16a. Because Mr. Clark was convicted of an offense that took place before the Sentencing Reform Act of 1984 went into effect, he is an "old law" prisoner who is eligible for parole but is not eligible to move for compassionate release under 18 U.S.C. § 3582(c). Pet. App. 6; *see also, e.g., United States v. King*, 24 F.4th 1226, 1228 (9th Cir. 2022).

3. On August 22, 2019, Mr. Clark filed an authorized *pro se* motion for postconviction relief under 28 U.S.C. § 2255 contending that his § 924(c) conviction was invalid under *Johnson v. United States*, 576 U.S. 591 (2015). Motion to Vacate, Set Aside, or Correct Sentence, *Clark v. United States*, 2:19-cv-17214-MCA, ECF No. 1 (D.N.J. Aug. 22, 2019). He accordingly asked the District Court (Hon. Madeline Cox Arleo) to vacate the conviction and resentence him. *Id*. at 16. In response, the government conceded that Mr. Clark's § 924(c) conviction was invalid under *Johnson* and its progeny but argued (1) the District Court should decline to vacate the conviction under the concurrent sentence doctrine and (2) a full resentencing was not warranted in any event because the five-year sentence Mr. Clark received on the § 924(c) count did not affect his life sentence on the other counts. Government's

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immediately after the offense, was caught in 1990, and then cooperated against Mr. Clark in exchange for a five-year sentence. *Id*. Mr. Clark tried for years to prove his innocence, but those efforts ended unsuccessfully in 2016, when the Last Resort Exoneration Project at Seton Hall Law School confirmed that the physical evidence in the case been lost or destroyed by the government, making it impossible to exonerate him through modern DNA testing. Stipulation of Dismissal, *Clark*, 2:15-cv-02854-KM, ECF No. 16 Ex. 2 (D.N.J. Apr. 7, 2016).

Opposition to Motion to Vacate Conviction Under 28 U.S.C. § 2255, *Clark*, 2:19-cv-17214-MCA, ECF No. 16 at 7–11 (D.N.J. Jan. 11, 2021).

4. In January 2021, Mr. Clark filed a supplemental motion through appointed counsel (Office of the Federal Public Defender, Assistant Federal Public Defender Rahul K. Sharma appearing). Emergency Supplemental Motion to Vacate Sentence, *Clark*, 2:19-cv-17214-MCA, ECF No. 18 (D.N.J. Jan. 15, 2021). The supplemental motion argued that a full resentencing was appropriate for several reasons, including (1) the vacatur of Mr. Clark's § 924(c) conviction would meaningfully alter the sentencing calculus; (2) after spending over 30 years in prison, he was, according to BOP staff, a "changed man"; (3) the life sentence he received in 1991 "may well have been the product of sentencing policies that have been drastically reconsidered in the intervening years"; and (4) he was 66 years old and was showing signs of accelerating dementia. *Id*. at 2–5. In the months that followed, counsel filed several letters and exhibits updating the Court on Mr. Clark's rapidly deteriorating health, including his formal diagnosis of dementia in May 2021 and subsequent hospitalization for respiratory failure. *Clark*, 2:19-cv-17214-MCA, ECF Nos. 24 (D.N.J. Feb. 5, 2021); 25 (D.N.J. Mar. 5, 2021); 31 (D.N.J. June 11, 2021); 32 (D.N.J. July 28, 2021).

5. The District Court granted Mr. Clark's § 2255 motion in part in an opinion and order filed on August 12, 2021. Pet. App. 15a–34a. The Court vacated the § 924(c) conviction after finding that it was invalid and that the concurrent sentence doctrine did not apply. Pet. App. 25a. The Court nevertheless "decline[d]

to conduct [a] full resentencing" because it found that such a remedy was "not required" by the sentencing package doctrine, which counsels in favor of resentencing when the sentence on a vacated count is interdependent with the sentence on other counts. *Id*. The Court also stated:

> Petitioner's arguments about his ailing health, his post-sentencing rehabilitation, his family's concerns for his welfare, and the weak evidence in his case are not justifications for a full resentencing either, absent a cognizable legal basis for resentencing.

Pet. App. 29a. On August 24, 2021, the Court entered an amended judgment in Mr. Clark's criminal case vacating his § 924(c) conviction and five-year sentence but leaving his other sentences undisturbed. Amended Judgment, *United States v. DeVose*, 2:90-cr-00012-MCA, ECF No. 20 (Aug. 24, 2021).

6. On September 10, 2021, Mr. Clark appealed the District Court's § 2255 order denying resentencing. Pet. App. 7a. He argued that the Court abused its discretion by denying resentencing solely because the sentencing package doctrine did not "require" it, a reason that failed to address his many arguments for why resentencing was nevertheless warranted under the Court's broad remedial discretion. Appellant's Opening Brief, *Clark v. United States*, 21-2704, ECF No. 30 at 13 (3d Cir. Aug. 5, 2022). Mr. Clark also argued that the District Court's comment about the lack of a "cognizable legal basis" for resentencing indicated it did not understand its discretion to grant resentencing under § 2255(b). Appellant's Reply Brief, *Clark*, 21-2704, ECF No. 41 at 25 (3d Cir. Oct. 6, 2022). Finally, Mr. Clark argued that a COA was not required to appeal the District Court's choice of remedy

after granting his motion for postconviction relief and that, if a COA was required, he had met the standard for one. Pet. App. 7a.

7. On August 4, 2023, the Third Circuit dismissed Mr. Clark's appeal for lack of jurisdiction in a precedential opinion. Pet. App. 2a. It first considered "whether a COA is necessary when a defendant obtains § 2255 relief and seeks to challenge the district court's choice of remedy," a question that had "divided" its sister circuits. Pet. App. 9a. Siding with the Eleventh Circuit over the Fourth and Sixth, the Court held that "a COA is required when an appeal challenges solely whether the district court granted an appropriate § 2255 remedy." Pet. App. 10a. The Court then found that Mr. Clark had failed to meet the standard for a COA. Pet. App. 14a. It found that the issue on appeal did not involve the denial of a "constitutional right" because Mr. Clark was not "constitutionally entitle[d]" to a full resentencing under § 2255(b). *Id*. The Court also found that although a constitutional claim "was the basis for [Mr. Clark's] § 2255 motion," that did not entitle him to a COA because he was not appealing the "District Court's resolution of [that] question." Pet. App. 13a. The Court accordingly dismissed the appeal for lack of jurisdiction. Pet. App. 14a.

REASONS FOR GRANTING THE PETITION

This Court should grant review. The circuits are deeply divided over the need for a COA when appealing a district court's choice of remedy under § 2255(b), creating a geographic lottery that arbitrarily determines whether a federal prisoner will be able to obtain appellate review of—and ultimately relief from—an erroneous § 2255 order.

The decision below is also wrong. The text, structure, history, and purpose of § 2253 make clear that the COA requirement prevents the courts of appeals from being overrun with frivolous habeas claims that have already been reviewed and denied by the district courts. The COA requirement does not prevent the courts of appeals from correcting errors district courts commit after *granting* habeas relief. This Court should therefore clarify that the COA requirement does not apply to choice-of-remedy appeals, or that, if it does, it is satisfied where the prisoner made a "substantial showing of the denial of a constitutional right" by prevailing on a constitutional claim in their § 2255 motion.

Further, the questions presented are critically important. If the decisions of the Third and Eleventh Circuits are left to stand, the courthouse doors will be wrongfully closed to countless federal prisoners who were granted relief under § 2255 but then denied an effective remedy due to district court error, an absurd result that will recur every time this Court issues a constitutional ruling entitling federal prisoners to postconviction relief.

Finally, this case is a good vehicle. The Court of Appeals cleanly decided the case in a precedential opinion that hinged on the contested interpretation of § 2253(c). And this appeal may be Mr. Clark's last chance at obtaining relief from the life sentence he has been serving since 1990.

A. The Circuits Are Deeply Divided Over the Need for a COA When Appealing a District Court's Choice of Remedy Under 28 U.S.C. § 2255(b).

First, this Court should grant review because the circuits are deeply split over the need for a COA when appealing a district court's choice of remedy under § 2255(b), creating an untenable situation in which the availability of appellate review and the procedure for obtaining it varies across the country.

1. The question presented in this case was first addressed by the Fourth Circuit in 2007. *See Hadden*, 475 F.3d at 652. It found that when a prisoner "seeks to appeal . . . the district court's decision *not to grant relief* on some of the claims in support of his § 2255 petition, he is appealing 'the final order in a proceeding under § 2255' and must obtain a COA." *Id*. at 664 (emphasis in original). If, however, "the petitioner seeks to appeal the order by challenging *the relief granted*—i.*e.,* whether the relief was 'appropriate' under § 2255 . . . he is appealing a new criminal sentence and therefore need not obtain a COA." *Id*. (emphasis in original).

The Fourth Circuit explained that this reading "serves the policies behind §§ 2253 and 2255." *Id*. at 665. It explained that "one of the central purposes of § 2253's COA requirement is to prevent the Government from having to respond to merit-less appeals from the denial of habeas relief." *Id*. (citations omitted). This policy makes

sense because "habeas review occurs after the prisoner has already had an opportunity on direct appeal to challenge his conviction and sentence." *Id.* When a district court grants habeas relief and imposes a particular remedy, however, "that order has never been subjected to appellate review." *Id.* The Fourth Circuit accordingly found that "Section 2253's policy justifications would be over-served" if it was interpreted to discourage appeals from a district court's choice of remedy after granting habeas relief. *Id.*

2. The Sixth Circuit came to the same conclusion six years later in *Ajan*. 731 F.3d at 629. Citing *Hadden*, it held that "a COA is not required to appeal the relief granted after a successful § 2255 motion." *Ajan*, 731 F.3d at 631–32.

3. In 2021, the Eleventh Circuit split from the Fourth and Sixth Circuits in *United States v. Cody*, 998 F.3d 912 (11th Cir. 2021). It held that a district court's choice of remedy is part of the "proceeding under § 2255," and that, as a result, "a certificate of appealability is required to challenge the choice of remedy." *Id.* at 913, 915. Mr. Cody filed a petition for a writ of certiorari, which this Court denied. *See Cody v. United States*, 142 S. Ct. 1419 (2022).

4. The Third Circuit then deepened the split when it agreed with the Eleventh Circuit in this case and held that a "COA is required when an appeal challenges solely whether the district court granted an appropriate § 2255 remedy." Pet. App. 10a.

5. Other circuits have also come to differing conclusions on this issue without fully addressing it. In *Williams v. United States*, 150 F.3d 639 (7th Cir.

1998), the Seventh Circuit dismissed a choice-of-remedy appeal for lack of jurisdiction after finding in a single sentence that a COA was required.[3] *Id*. at 640. By contrast, the Second Circuit recently decided a choice-of-remedy appeal on the merits without requiring a COA. *See United States v. Peña*, 58 F.4th 613 (2d Cir. 2023).

6. Until this Court steps in to resolve it, this circuit split will continue to lead to starkly different results in materially identical cases. Imagine two federal prisoners—Prisoner A and Prisoner B—who committed the same federal offenses and are serving similar sentences in the same BOP facility. Both apply for relief under § 2255 when this Court strikes down a conviction they share as unconstitutional. Because Prisoner A committed his offense in Baltimore, he files his motion in the District of Maryland. Prisoner B, who committed his offense 75 miles away in Wilmington, files in the District of Delaware. In both cases, the district courts grant relief under § 2255 but then deny resentencing due to the same legal error.

7. Under the current state of the law, the prisoners' fates would then drastically diverge. Prisoner A could appeal to the Fourth Circuit and obtain relief from the district court's remedial error, leading to the possibility of resentencing and a reduced term of imprisonment on remand. Prisoner B, by contrast, would be out of luck. Although the district court committed the same mistake in his case, he would be prevented from obtaining relief because the Third Circuit would dismiss his appeal for lack of jurisdiction.

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[3] The Seventh Circuit's summary treatment of the issue can be explained by the fact that it was not contested. When the government objected to a lack of a COA, the appellant requested one rather than argue that a COA was not required. *Id*. at 740.

8. This scenario is not merely hypothetical. In *Ajan*, the appellant raised an argument very similar to the argument Mr. Clark raised below: that the district court erred by failing to understand its discretion to grant resentencing under § 2255(b). *Ajan*, 731 F.3d at 632. Because the Sixth Circuit found that a COA was not required, it proceeded to the merits and found that a remand was necessary because it could not determine "whether the district court exercised its discretion or thought it had none." *Id*. at 634. The Sixth Circuit's caution was warranted: on remand, the district court granted a full resentencing and ultimately reduced Mr. Ajan's term of imprisonment by over 13 years. *See United States v. Ajan*, 2:02-cr-00071-JRG-CRW-1, ECF Nos. 364 (E.D. Tenn. Sep. 2, 2009); 460 (E.D. Tenn. Aug. 15, 2014); 489 (E.D. Tenn. Dec. 12, 2014). Although the district court committed the same mistake in this case, Mr. Clark was denied the chance to obtain similar relief because the Third Circuit found it lacked jurisdiction to consider the issue.[4]

10. In addition to creating inconsistencies in the availability of appellate review, the circuit split has also created inconsistencies in the procedure for obtaining it. Because the Fourth Circuit considers an appeal from a district court's choice of remedy under § 2255 an appeal from a new criminal sentence, it requires the appeal to be filed by the 14-day criminal deadline. *See United States v. Chaney*, 911 F.3d 222, 225 (4th Cir. 2018). In the Third and Eleventh Circuits, by contrast, the 60-day

[4] In a two-sentence footnote, the Third Circuit stated that it "disagree[d]" with Mr. Clark's contention that the District Court misunderstood its discretion under § 2255(b). Pet. App. 11a–12a. This Court should not put too much stock in this footnote, however, because it does not fully analyze Mr. Clark's arguments and amounts to dicta issued by a court that believed it lacked jurisdiction to reach the merits.

deadline for civil appeals presumably applies because an appeal from the district court's choice of remedy is considered an appeal from the § 2255 proceeding. *See* Rule 11(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

11. This unequal state of affairs has gone on long enough. A federal prisoner's ability to obtain appellate review of an erroneous § 2255 order should not depend on the district in which the order was entered. This Court should grant certiorari to clarify the law and ensure the COA requirement is applied consistently nationwide.

B. The Decision Below is Wrong.

Review is also warranted because the decision below is wrong. The text, structure, history, and purpose of § 2253 make clear that the COA requirement only applies to appeals from orders denying habeas relief. And even if the COA requirement applies to choice-of-remedy appeals, the plain text of the requirement is satisfied when a prisoner makes a "substantial showing of the denial of a constitutional right" by prevailing on a constitutional claim in the § 2255 proceeding. § 2253(c)(2).

1. The statutory interpretation pioneered by the Eleventh Circuit in *Cody*, and adopted by the Court of Appeals below, proceeds syllogistically. Under § 2253, a COA is required to appeal the "final order in a proceeding under section 2255." § 2253(c)(1)(B). A district court's choice of remedy after granting relief is part of the

"proceeding under section 2255." *Id.* Therefore, a COA is required to appeal the choice of remedy.

2. Although this reading is appealing in its logical simplicity, it is ultimately at odds with the statutory text and structure, ignores relevant precedent and history, and leads to absurd results.

3. The starting point, as always, is "the text of the statute." *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023). In finding that the COA requirement applies to choice-of-remedy appeals, the Third and Eleventh Circuits focused on the phrase "proceeding under Section 2255." *See Cody*, 998 F.3d at 915 (discussing the dictionary definition of the word "proceeding"). But the COA requirement does not apply to every appeal arising from a § 2255 "proceeding"—it applies only to appeals from the "*final order*" in such proceedings. *Id.* (emphasis added).

4. In *Harbison v. Bell*, 556 U.S. 180 (2009), this Court explained what constitutes the "final order" subject to the COA requirement in § 2253(c). The "final order" is the order that "*dispose[s] of the merits* of a habeas corpus proceeding—a proceeding challenging the lawfulness of the petitioner's detention." *Id.* at 183 (emphasis added). *Harbison* accordingly instructs that the COA requirement only applies to appeals challenging a district court's resolution of the *merits* of a § 2255 motion—in other words, the district court's decision on whether the challenged sentence was "imposed in violation of the Constitution or laws of the United States." § 2255(a). A district court's choice of remedy under § 2255(b) does not "dispose of the merits" of the motion—it is a collateral decision that comes after the "lawfulness of

the petitioner's detention" has already been decided. *Harbison*, 566 U.S. at 183. As a result, an appeal from the choice of remedy is not an appeal from the "final order" and does not require a COA under *Harbison*.

5. This reading is in harmony with several other features of the statutory text. First, the COA requirement in § 2253 applies to the "final order" in federal postconviction proceedings under § 2255 *and* habeas corpus proceedings under § 2254. *See* § 2253(c)(1)(A) and (B). The "final order" in a habeas corpus proceeding does not involve the choice of remedy presented in § 2255 because the habeas court "cannot do anything else than discharge the prisoner from wrongful confinement." *In re Medley*, 134 U.S. 160, 173 (1890); *see also* Brief of the National Association of Criminal Defense Lawyers and Due Process Institute as Amici Curiae for Petitioner, *Cody v. United States*, No. 21-6099, at 8–11 (S. Ct. Nov. 24, 2021). Because "identical words used in different parts of the statute are generally presumed to have the same meaning," *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005), the phrase "final order" should be read to mean the same thing in both contexts: the order determining "the lawfulness of the petitioner's detention," *Harbison*, 556 U.S. at 183.

6. The requirement for a COA in § 2253(c)(1) must also be read in conjunction with the standard for obtaining one in § 2253(c)(2). *See Maracich v. Spears*, 570 U.S. 48, 65 (2013) ("[A]n interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning."). When these neighboring provisions are read together, several things become clear. The first is that, although § 2253(c)(1) requires a COA to appeal

the "final order" in a postconviction proceeding no matter who is appealing, the COA requirement only applies to prisoners because it would not make sense to condition the government's ability to appeal on the "substantial showing of the denial of a constitutional right." *See* Fed. R. App. P. 22(b)(3) ("[A] certificate of appealability is not required when a state . . . or the United States . . . appeals."). The second is that the COA requirement only applies to orders announcing the "denial" of habeas relief, because otherwise a COA could never issue.

7. The history and purpose of § 2253 support this reading. This Court has explained that the COA requirement is "not the innovation of AEDPA." *Miller-El*, 537 U.S. at 337. It is the statutory successor of the "certificate of probable cause" ("CPC"), an earlier requirement prisoners had to meet to obtain "appellate review of the dismissal of a habeas petition." *Slack v. McDaniel*, 529 U.S. 473, 480 (2000). Congress established the CPC as a "threshold prerequisite to appealability in 1908, in large part because it was concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending the completion of the appellate process." *Miller-El*, 537 U.S. at 337 (internal quotation marks and citations omitted). The CPC requirement also reflected the understanding that "a presumption of finality and legality attaches" after "direct review . . . comes to an end" and that, as a result, "[t]he role of federal habeas proceedings . . . is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). AEDPA, which introduced the modern COA requirement, likewise sought to "eliminate delays in the

federal habeas review process," *Gonzalez v. Thaler*, 565 U.S. 134, 144 (2012), and promote "finality." *Miller-El*, 537 U.S. at 326.

None of these motivating concerns—frivolity, delay, and finality—are present when a prisoner appeals a district court's choice of remedy under § 2255(b). The habeas petition is not frivolous because relief has already been granted on the merits. There is nothing to "screen[] out"—the COA's "gatekeeping function" has been satisfied. *Gonzalez*, 565 U.S. at 145. The appeal is not delaying the challenged sentence from being carried out because the challenged sentence has already been vacated. Nor is finality a concern, because the finality of the original judgment was pierced when the district court "vacate[d] it and set [it] aside." § 2255(b). As the Fourth Circuit noted 15 years ago in *Hadden*, when the COA requirement is applied to an order granting, as opposed to denying, habeas relief, its purpose is "over-served." 475 F.3d at 664.

8. Finally, the reading adopted by the Third and Eleventh Circuits leads to absurd results. Under their reading, a COA is required to appeal a district court's choice of remedy under § 2255(b) but, in a Kafkaesque twist, one can never issue because the choice of remedy does not involve a "constitutional right." § 2253; Pet. App. 14a. This means that a federal prisoner cannot obtain appellate relief even if the district court applied the wrong legal standard, misunderstood its discretion, failed to explain its decision, or clearly erred in some other way in imposing the "appropriate" remedy. § 2255(b). This result is all the more absurd because it only applies once a prisoner has demonstrated entitlement to relief by prevailing on the

merits of their claim. This reading begs the question: why would Congress create a framework for postconviction relief under § 2255 only to make it unenforceable in a critical respect? Why deny appellate review to the prisoners with the most substantial claims? Why create a right to postconviction relief without an effective remedy?

9. The better reading—the one more consistent with the text, structure, history, and purpose of § 2253—is that the COA requirement only applies to appeals from a district court's denial of postconviction relief, not a district court's choice of remedy after granting relief.

10. Additionally, even if the COA requirement applies to choice-of-remedy appeals, the Court of Appeals was wrong to dismiss Mr. Clark's appeal for lack of jurisdiction because he has met the standard for one.

11. The statutory text is plain: to obtain a COA, the prisoner must make a "substantial showing of the denial of a constitutional right." § 2253(c). As Mr. Clark argued below, he has done exactly that. It is undisputed that the claim Mr. Clark raised in his § 2255 motion was constitutional: he argued that his § 924(c) conviction rested on an unconstitutionally vague definition of "crime of violence" under *Johnson* and its progeny. Pet. App. 19a. It is also undisputed that the claim was substantial: the government conceded the conviction was invalid and the District Court vacated it. Pet. App. 25a. That is all that is required for a COA to issue under § 2253(c). By prevailing on his *Johnson* claim in the district court, Mr. Clark necessarily made a "substantial showing of the denial of a constitutional right." § 2253(c).

12. The Court of Appeals nevertheless denied a COA because the issue Mr. Clark raised *on appeal*—that the District Court abused its discretion in denying his request for resentencing—was not constitutional in nature. Pet. App. 13a. But this interpretation of § 2253 is in direct conflict with this Court's decision in *Slack*. The appellant there was a state prisoner whose habeas petition was denied after the district court found it violated the bar on "second or successive" petitions. *Slack*, 529 U.S. at 478. In this Court, the state argued the prisoner could not obtain a COA because the language of § 2253(c) indicates that "no appeal can be taken if the District Court relies on procedural grounds to dismiss the petition." *Id*. at 483. The state argued, in other words, that "only constitutional rulings may be appealed." *Id*.

This Court "reject[ed] this interpretation." *Id*. It explained:

> The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.

Id. The Court accordingly held that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," a COA should issue when the prisoner shows that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. at 484.

13. The logic of *Slack* applies with equal force here. There is no reason to believe Congress intended to allow an appeal when a district court commits procedural error at the merits stage but prohibit an appeal when a district court

commits procedural error at the remedy stage. In both scenarios, the procedural error would "bar vindication of substantial constitutional rights" if left uncorrected. *Slack*, 529 U.S. at 483. And in both scenarios, the prisoner has satisfied the COA's screening function by independently showing "the denial of a constitutional right." § 2253(c).

14. Accordingly, if this Court finds that the COA requirement applies to choice-of-remedy appeals, it should clarify that the requirement is met where, as here, the prisoner made a "substantial showing of the denial of a constitutional right" by raising and prevailing on a constitutional claim in the postconviction proceeding.

C. The Questions Presented are Critically Important.

This Court should also grant review because the questions presented are critically important and likely to frequently recur.

1. Section 2255 is the principal means for federal prisoners to obtain relief when, after the conclusion of direct review, it becomes apparent that the sentence they are serving violates the law. That is what happened following this Court's decisions in *Johnson*, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019), which struck down as unconstitutionally vague the similarly worded residual clauses in the Armed Career Criminal Act, the Immigration and Nationality Act, and § 924(c). These decisions affected a massive number of federal prisoners and led to thousands of motions for postconviction relief under § 2255. *See Davis*, 139 S. Ct. at 2333 (explaining that the residual clause in § 924(c) alone had been used in "tens of thousands of federal prosecutions" since its enactment); *In re Matthews*, 934 F.3d 296, 298 n.2 (3d Cir. 2019) (authorizing over

200 federal prisoners in the Third Circuit to file § 2255 motions under *Johnson* and its progeny); *In re Jones*, 830 F.3d 1295, 1301 (11th Cir. 2016) (Rosenbaum and Pryor, JJ., concurring) (noting "1,800 *Johnson*-based requests for authorization" to file second-or-successive § 2255 motions in a three-month period).

2. If the decisions of the Third and Eleventh Circuit are left to stand, the courthouse doors will be wrongfully closed to countless federal prisoners like Mr. Clark, who were granted postconviction relief under *Johnson* but then denied an effective remedy due to district court error.

3. And although many *Johnson* cases have already been resolved, this problem will continue to recur every time this Court issues a new retroactively-applicable decision striking down a federal criminal law as unconstitutional. *See, e.g., United States v. Rahimi*, 143 S. Ct. 2688 (2023) (granting certiorari to review a Fifth Circuit decision striking down 18 U.S.C. § 922(g)(8) as facially unconstitutional under the Second Amendment).

5. This Court should grant certiorari in this case and clarify the COA requirement so that federal prisoners with valid constitutional claims—now and in the future—can obtain the relief to which they are entitled under § 2255.

D. This Case is a Good Vehicle.

Finally, this case is a good vehicle to resolve the question presented. The Court of Appeals decided the case on purely legal grounds in a precedential opinion that hinged on the contested interpretation of § 2253(c). This case therefore provides an

ideal opportunity for this Court to clarify the important issue it passed on when it denied certiorari in *Cody* last year. *See Cody*, 142 S. Ct. 1419 (2022).

This appeal may also be Mr. Clark's last chance at relief from the life sentence he has been serving since his conviction in 1990. He is now 69 years old and continues to struggle with dementia. Tragically, because Mr. Clark is an "old law" prisoner, the avenue for compassionate release under § 3582 that is available to the vast majority of federal prisoners is unavailable to him. And although he is eligible for parole, he has so far been denied it despite his failing health. Mr. Clark's best chance at freedom was dashed when the District Court misunderstood its authority to grant him resentencing after vacating his § 924(c) conviction under § 2255(b). Only this Court can correct that error now. It should do so by granting review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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