No. 23-5950

IN THE SUPREME COURT OF THE UNITED STATES

KENT LEROY CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner must obtain a certificate of appealability -- which is necessary to appeal "the final order in a proceeding under [28 U.S.C] 2255," 28 U.S.C. 2253(c)(1)(B) -- to appeal the district court's choice of remedy under 28 U.S.C. 2255(b) when the court granted in part and denied in part petitioner's motion for collateral relief under Section 2255.

2. Whether petitioner is entitled to a certificate of appealability to appeal the district court's choice of remedy for a constitutional violation, on the theory that petitioner has made a "substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), by establishing the constitutional violation that the district court's remedy sought to redress.

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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) is not published in the Federal Supplement but is available at 2021 WL 3561246.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2023. The petition for a writ of certiorari was filed on November 1, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to commit Hobbs Act extortion, in violation of 18 U.S.C. 1951; attempting Hobbs Act extortion, in violation of 18 U.S.C. 1951; conspiring to assault and kidnap a U.S. Postal Service employee and steal his government vehicle, in violation of 18 U.S.C. 371; assaulting a U.S. Postal Service employee with intent to steal his government vehicle, in violation of 18 U.S.C. 2114 (1982); kidnapping a federal employee, in violation of 18 U.S.C. 1201(a) (1982 & Supp. II 1984); theft of a U.S. Postal Service vehicle, in violation of 18 U.S.C. 1707; and carrying or using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (Supp. II 1984). C.A. App. 68, 76-85. The district court sentenced petitioner to life imprisonment plus a consecutive five-year sentence of imprisonment for petitioner's Section 924(c) conviction. Id. at 68. The court of appeals affirmed. 945 F.2d 396 (1991) (Tbl.).

In June 2016, petitioner applied to the court of appeals for authorization to file a successive Section 2255 motion to challenge his Section 924(c) conviction, C.A. App. 27-32, which the court of appeals granted in 2019, id. at 45-46. In 2021, the district court granted petitioner's authorized Section 2255 motion in part and denied it in part. Pet. App. 15a-32a; see id. at 33a-34a (order). Petitioner noticed an appeal only from the district court's order

resolving his Section 2255 motion, not the amended judgment in his criminal case that the court subsequently issued. Id. at 7a; C.A. App. 1. The court of appeals dismissed petitioner's appeal based on its determinations that a certificate of appealability (COA) was needed to appeal and that petitioner had failed to make the required showing for one. Pet. App. 1a-14a.

1. In January 1985, petitioner and Darryl Devose executed a violent scheme to extort $200,000 in funds belonging to the United Counties Trust Company, a bank in Elizabeth, New Jersey, from a banker employed by the bank. Pet. App. 3a; C.A. App. 76-78. To execute their plan, they first assaulted and kidnapped a mail carrier at gunpoint, threatened his life, stripped him of his uniform, and restrained him in the back of his mail truck. Pet. App. 3a; C.A. App. 285. Devose then gained entry into the banker's home by disguising himself in the mail carrier's uniform and feigning a mail delivery. Pet. App. 3a.

Once inside, Devose signaled for petitioner to join him, and they held the banker's 85-year-old mother-in-law and 19-year-old daughter at gunpoint. Pet. App. 3a. Petitioner escorted the daughter upstairs to her bedroom in order to steal her jewelry and, while there, raped her at gunpoint. Ibid.; C.A. App. 211-214. The men then called the banker to demand that he take $200,000 from the bank's vault as ransom; threatened to kill the women if he failed to comply or called the police; and put the banker's

daughter, who had just been raped, on the phone to speak briefly to him. Pet. App. 3a; C.A. App. 215-216, 285.

After calling a third accomplice at the ransom drop site to confirm the plan was underway, petitioner and Devose handcuffed the women to the refrigerator and prepared to depart. Pet. App. 3a; C.A. App. 217, 286. When they saw police officers in front of the house, petitioner and Devose fled through the back door, discarding the postal uniform and a revolver. Pet. App. 3a. Both men remained at large for five years, until their arrests in 1990. C.A. App. 286.

2. In January 1990, a federal grand jury in the District of New Jersey indicted petitioner, C.A. App. 71, 76-85,[1] and later that year, petitioner was convicted after a jury trial of conspiring to commit Hobbs Act extortion, in violation of 18 U.S.C. 1951; attempting Hobbs Act extortion, in violation of 18 U.S.C. 1951; conspiring to assault and kidnap a U.S. Postal Service employee and steal his government vehicle, in violation of 18 U.S.C. 371; assaulting a U.S. Postal Service employee with intent to steal his government vehicle, in violation of 18 U.S.C. 2114 (1982); kidnapping a federal employee, in violation of 18 U.S.C. 1201(a) (1984 & Supp. II 1984); theft of a U.S. Postal Service vehicle, in viola-

[1] When petitioner was indicted, Justice Alito represented the United States in this case as the U.S. Attorney for the District of New Jersey. C.A. App. 85.

tion of 18 U.S.C. 1707; and carrying or using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (Supp. II 1984). C.A. App. 68, 76-85.

Because petitioner's January 1985 offense conduct occurred before the effective date of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 et seq., the Sentencing Guidelines did not apply to petitioner's sentencing. C.A. App. 7; see Lyons v. Mendez, 303 F.3d 285, 289 (3d Cir. 2002) (per curiam) (analyzing Act's effective date). The district court instead exercised its sentencing discretion to sentence petitioner to a total of life plus five years of imprisonment: life imprisonment for the kidnapping count; concurrent terms of imprisonment ranging from five to 20 years for the other non-Section 924 counts; and a mandatory consecutive five-year term of imprisonment for the Section 924(c) count. Pet. App. 16a-17a; C.A. App. 68; see 18 U.S.C. 924(c) (Supp. II 1984).

In explaining the sentence, the district court described petitioner's conduct as "terrorism"; recounted the "devastating" effect of petitioner's conduct on the 19-year-old rape victim and her 85-year-old grandmother; and found "little doubt" that petitioner's offenses had accelerated the death of the banker who, as the father and son-in-law of the female victims, "blamed himself for what happened" and experienced a pronounced decline in health in the wake of petitioner's offense conduct. C.A. App. 286-287. The court observed that, "[s]hort of outright murder, it [was]

difficult * * * to envision a more despicable crime" given the "[t]hreats of force, extortion, kidnapping, rape and just the sheer acts of terror" that petitioner perpetrated against "totally innocent people." Id. at 287-288. The court also made clear that its sentence reflected petitioner's "extensive criminal record," which included "undisputed weapons charges, robberies, aggravated assault, larceny, theft and drug possession on numerous occasions." Id. at 288. The court concluded: "If ever there was a crime that warranted substantial punishment, this is certainly it." Ibid.

The court of appeals affirmed. 945 F.2d 396 (1991) (Tbl.).

3. Beginning in 1998, petitioner filed multiple (unsuccessful) collateral attacks against his convictions and sentence, including multiple motions filed under 28 U.S.C. 2255. Gov't C.A. Br. 5-7.

In June 2016, petitioner applied to the court of appeals for authorization to file a successive Section 2255 motion to challenge his Section 924(c) conviction. See C.A. App. 31, 42; id. at 27-32 (application); id. at 33-43 (Section 2255 motion). In 2019, the court of appeals granted that application in light of United States v. Davis, 139 S. Ct. 2319 (2019), which held that Section 924(c)(3)(B)'s definition of a predicate "crime of violence" -- which Congress adopted in 1986 -- is unconstitutionally vague, id. at 2324, 2336. See C.A. App. 45-46; see also 18 U.S.C. 924(c)(3) (Supp. II 1984).

In 2021, the district court granted petitioner's Section 2255 motion in part and denied it in part. Pet. App. 15a-32a; see id. at 33a-34a (order). The court concluded that the definition of "crime of violence" in 18 U.S.C. 16 (Supp. II 1984) -- rather than the similar definition in Section 924(c)(3) that Congress enacted after petitioner's offense conduct -- governed whether petitioner's January 1985 kidnapping of the mail carrier qualified as a predicate "crime of violence" for petitioner's Section 924(c) offense. Pet. App. 20a-21a; see C.A. App. 84. The court further determined that the kidnapping offense could no longer be classified a "crime of violence" based on (1) Sessions v. Dimaya, 138 S. Ct. 1204 (2018), which held that Section 16(b)'s residual definition of a "crime of violence" is unconstitutionally vague, and (2) the government's concession that the kidnapping offense does not qualify categorically as a "crime of violence" under Section 16(a)'s alternative definition. Pet. App. 20a-21a. Accordingly, the court concluded that petitioner's Section 924(c) conviction should be vacated. Id. at 25a.

The district court separately addressed the "appropriate" remedy under Section 2255(b), which provides that if the court in a Section 2255 proceeding finds that the challenged judgment or sentence is invalid, "the court shall vacate and set the judgment aside and shall [1] discharge the prisoner or [2] resentence him or [3] grant a new trial or [4] correct the sentence as may appear

appropriate," 28 U.S.C. 2255(b). See Pet. App. 25a-29a. The district court observed that, under Section 2255(b), "a court has the discretion to vacate the judgment, grant a new trial, resentence, or correct the sentence, 'as may appear appropriate.'" Id. at 25a (quoting 28 U.S.C. 2255(b)). The court then concluded that petitioner's Section 924(c) conviction and its consecutive five-year term of imprisonment should be vacated and his overall sentence should be corrected to remove the portion attributable to Section 924(c), but that a full resentencing proceeding was unwarranted. Id. at 25a, 28a-29a.

On August 12, 2021, the district court entered its order granting in part and denying in part petitioner's Section 2255 motion. Pet. App. 33a-34a. The order vacated petitioner's Section 924(c) conviction and its five-year term of imprisonment; "denie[d] [p]etitioner's request for a full resentencing"; directed that petitioner's "remaining convictions and sentences shall remain undisturbed"; and ordered that "an Amended Judgment of Conviction shall be entered in [p]etitioner's criminal case." Ibid.

Two weeks later, the district court filed an amended judgment in petitioner's criminal case (No. 90-cr-12), C.A. App. 1a-2a, which the clerk entered on the docket on August 26, 2021. Pet. App. 7a. The amended judgment eliminated petitioner's original Section 924(c) conviction and sentence but otherwise left undisturbed the convictions and sentences for petitioner's non-Section

924(c) counts, including the sentence of life imprisonment for the kidnapping count. C.A. App. 1a-2a; cf. id. at 68 (1991 judgment).

4. a. A 14-day period for appealing the amended judgment in his criminal case (No. 90-cr-12), see Fed. R. App. P. 4(b)(1)(A), expired on Thursday, September 9, 2021. The next day, September 10, petitioner filed a notice of appeal in the Section 2255 proceeding that bears a different case number (No. 19-cv-17214) and states that petitioner appeals from the district court's "Order * * * entered in this action on August 12, 2021" (i.e., the partial grant and partial denial of his motion). C.A. App. 1. That notice of appeal from the final order in petitioner's Section 2255 proceeding was filed within the applicable 60-day period to appeal a Section 2255 order. Fed. R. App. P. 4(a)(1)(B)(i); see Rules Governing Section 2255 Proceedings R. 11(b) ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules.").

Section 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a certificate of appealability [COA], an appeal may not be taken to the court of appeals from * * * (B) the final order in a proceeding under section 2255." 28 U.S.C. 2253(c)(1). That provision specifies that "federal courts of appeals lack jurisdiction to rule on the merits of appeals" from such orders "until a COA has been issued." Gonzalez v. Thaler, 565 U.S. 134, 142 (2012) (citation omitted).

b. Petitioner sought to appeal the district court's decision under Section 2255(b) to correct his sentence rather than conduct a full resentencing. Pet. C.A. Br. 14-24. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-14a.

The court of appeals determined that Section 2253(c)(1) required a COA to establish appellate jurisdiction because petitioner had appealed the final order in his Section 2255 proceeding. Pet. App. 8a-11a. The court rejected petitioner's argument that his appeal did not require a COA on the theory that it was a direct appeal from "a new criminal sentence," not an appeal from the district court's Section 2255 order for which a COA is necessary. Pet. C.A. Br. 24-29.

The court of appeals explained that although a federal prisoner may "directly appeal[]" "the sentence entered [in his criminal case] following a § 2255 proceeding," petitioner did "not argue that his new criminal sentence is statutorily, constitutionally, or otherwise erroneous" and instead "challenge[d] only the District Court's choice not to grant a full resentencing." Pet. App. 10a-11a. The court of appeals noted that other courts of appeals are "divided about whether a COA is necessary when a defendant obtains § 2255 relief and seeks to challenge the district court's choice of remedy." Id. at 9a. But the court found it "'apparent from the text of section 2255 that a district court's choice be-

tween correcting a sentence and performing a full resentencing is a part of the [Section 2255] proceeding under that statute,' not part of the underlying criminal case," id. at 10a (citation omitted).

The court of appeals observed that Section 2255(b) specifies "the remedy for an unlawful sentence" in Section 2255 proceedings by first requiring the court to "vacate[] and set[] aside the judgment" and then to choose an "'appropriate' remedy from among four options: (1) 'discharge the prisoner,' (2) 'resentence him,' (3) 'grant a new trial,' or (4) 'correct [his] sentence.'" Pet. App. 8a-9a (quoting 28 U.S.C. 2255(b)) (third set of brackets in original). And it then explained that because "§ 2255(b) requires the court to choose an appropriate remedy from among the four listed options," Section 2255(b) "necessarily" renders "the choice of a remedy * * * part of the § 2255 proceeding," thereby making a COA a prerequisite to a remedy-focused appeal. Id. at 10a (emphasis omitted).

Turning to the circumstances of this case, the court of appeals declined to issue a COA. Pet. App. 12a-14a. The court observed, inter alia, that petitioner's contention that his Section 2255 motion was based on "a constitutional claim -- i.e., that the § 924(c) conviction is unconstitutional" -- did not warrant a COA because petitioner "does not appeal the District Court's resolution of [that constitutional] question." Id. at 13a n.6.

ARGUMENT

Petitioner contends (Pet. 15-20) that the statutory requirement that a federal prisoner obtain a COA to appeal "the final order in a proceeding under section 2255," 28 U.S.C. 2253(c)(1)(B), applies only to appeals challenging the denial of Section 2255 relief, not appeals challenging limitations on relief that was provided. Petitioner alternatively contends (Pet. 20-22) that if a COA is required, a COA should necessarily be granted when a prisoner prevails on a constitutional claim, even if he seeks to appeal only the type of relief granted on nonconstitutional grounds. The court of appeals correctly dismissed petitioner's appeal, and petitioner would not be entitled to a different Section 2255 remedy in any court of appeals. No further review is warranted.

1. A federal prisoner may not appeal from "the final order in a proceeding under section 2255" unless a circuit justice or judge issues a COA. 28 U.S.C. 2253(c)(1)(B). Because a district court's selection of the type of relief that Section 2255(b) authorizes for a meritorious Section 2255 claim is part of "the final order in a proceeding under section 2255," a COA is required to appeal that choice of relief.

a. As the court of appeals correctly explained, a proceeding under Section 2255 includes the filing of a motion as authorized by Section 2255(a) and each of the procedural steps that Section 2255(b) then directs the district court to take with

respect to that motion. Pet. App. 8a-9a. One of those steps is the court's selection of one of the four types of relief that Section 2255(b) authorizes. The final sentence of Section 2255(b) provides that if the court finds that a prisoner's sentence was unlawful, the court, in addition to vacating and setting aside the judgment, "shall [1] discharge the prisoner or [2] resentence him or [3] grant a new trial or [4] correct the sentence as may appear appropriate." 28 U.S.C. 2255(b).

That choice of a remedy is an essential part of a district court's final order in Section 2255 proceedings. This Court has "long held that an order resolving liability without addressing a plaintiff's requests for relief is not final." Riley v. Kennedy, 553 U.S. 406, 419 (2008). And where a district court agrees with a prisoner's claim that his sentence is unlawful, the type of relief that the court selects under Section 2255(b) is a necessary component of a "final" order; without such a selection, the Section 2255 proceeding would still be pending, with no interlocutory appeal available. See 28 U.S.C. 1291, 2253(a); Ayestas v. Davis, 138 S. Ct. 1080, 1089 & n.2 (2018); see also 28 U.S.C. 2255(d). Indeed, this Court has found it "obvious that there could be no final disposition of the § 2255 proceedings" that could be appealed until the district court effectuates the "remedy" that Section 2255 expressly contemplates by "'discharg[ing] the prisoner or resentenc[ing] him or grant[ing] a new trial or correct[ing] the

sentence as may appear appropriate.'" Andrews v. United States, 373 U.S. 334, 339-340 & n.8 (1963) (quoting third paragraph of 28 U.S.C. 2255 (1958), which is now codified at 28 U.S.C. 2255(b)).

b. Petitioner contends (Pet. 15-20) that Section 2253(c)'s "COA requirement only applies to appeals from orders denying [postconviction] relief." Pet. 15. In his view, although Section 2253(c)(1)(B) requires a COA to appeal the "'final order'" in a Section 2255 proceeding, a "'final order'" is one that resolves the "'merits'" of the proceeding, which does not include a "collateral decision" like a "district court's choice of remedy." Pet. 16 (quoting Harbison v. Bell, 556 U.S. 180, 183 (2009)). But petitioner identifies no sound reason to conclude that the district court's choice of a remedy for a Section 2255 claim is not itself part of "the final order in a proceeding under section 2255" from which a prisoner's "appeal may * * * be taken to the court of appeals," 28 U.S.C. 2253(c)(1)(B).

Instead, as just discussed, it is well settled that an order is "final" for purposes of an appeal if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," Hall v. Hall, 138 S. Ct. 1118, 1124 (2018) (citation omitted), such that the "district court [then] disassociates itself from a case," Gelboim v. Bank of Am. Corp., 574 U.S. 405, 408 (2015) (citation omitted). Thus, as noted, an order that simply addresses the merits of Section 2255 claims without resolving the

prisoner's associated "requests for relief is not final." Riley, 553 U.S. at 419; see Andrews, 373 U.S. at 339-340 & n.8.

Petitioner relies (Pet. 16-17) on Harbison v. Bell, but Harbison is consistent with those well-established principles. In Harbison, the district court appointed a federal public defender to represent Harbison (a state prisoner) in filing his federal habeas petition; the court denied that petition; Harbison appealed; and, in 2005, the court of appeals affirmed. 556 U.S. at 182. More than a year later -- after all habeas proceedings had long ended -- Harbison's appointed counsel moved the district court "to expand the authorized scope of her representation to include state clemency proceedings," and the court denied that motion. Ibid.

In that context, this Court observed that the COA requirement in Section 2255(c)(1)(A) applies to "final orders that dispose of the merits of a habeas corpus proceeding -- a proceeding challenging the lawfulness of the petitioner's detention" -- and that "[a]n order that merely denies a motion to enlarge the authority of appointed counsel * * * is not such an order." Harbison, 556 U.S. at 183. That decision addressing an order entered long after the district court had fully resolved Harbison's habeas petition in a final order (which Harbison appealed) lends no support to petitioner's view that the district court's choice of the remedy for an unlawful sentence under Section 2255(b) is not a part of

the "final[] order that dispose[s] of the merits of [the Section 2255] proceeding," ibid.

c. Petitioner also errs in arguing (Pet. 18-19) that Section 2253(c)'s COA requirement applies only to orders denying post-conviction relief. By its terms, Section 2253(c)'s COA requirement applies whenever a federal prisoner seeks to appeal "the final order in a proceeding under section 2255," regardless of whether that order grants or denies the relief requested in the Section 2255 motion. 28 U.S.C. 2253(c)(1)(B). Nor is such a distinction conceptually sound; cases in which the district court grants a different form of relief than the one that the prisoner requested could easily be described as denials. Here, for example, the final order denied the relief petitioner sought because it "denie[d] [p]etitioner's request for a full resentencing." Pet. App. 33a. The order would thus appear to qualify as "the final order in a proceeding under section 2255," 28 U.S.C. 2253(c)(1)(A), even under petitioner's theory.

Petitioner suggests (Pet. 19-20) that it would be "absurd" for Section 2255 to require a COA "to appeal a district court's choice of remedy under § 2255(b)" and that Congress would not have "create[d] a framework for postconviction relief under § 2255 only to make it unenforceable in a critical respect" on appeal. But Congress has authorized the issuance of a COA, and hence permits an appeal, "only" where the prisoner "has made a substantial

showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 483-484 (2000) (explaining that the denial of a nonconstitutional "federal" right is insufficient). A grant of relief different from the relief that the prisoner requested could potentially satisfy that standard if the granted relief left some constitutional injury in place or itself was entered unconstitutionally. The standard is not satisfied, however, where a petitioner cannot make a substantial showing that the choice of relief violated his constitutional rights.

d. Petitioner argues (Pet. 11-12, 14) that this Court's review is warranted because the Fourth and Sixth Circuits have allowed prisoners in certain circumstances to challenge a district court's choice of remedy in the Section 2255 context by filing "an appeal from [the] new criminal sentence" embodied in the amended judgment entered in the prisoner's criminal case, Pet. 14. Any division of authority reflected in the Fourth and Sixth Circuits' decisions would not warrant further review here, however, because those decisions have no application to petitioner's case.

In United States v. Hadden, 475 F.3d 652, 659-666 (4th Cir. 2007), the Fourth Circuit adopted the "novel" theory that if a prisoner "seeks to appeal the order [in a Section 2255 proceeding] by challenging the relief granted -- i.e., whether the relief was 'appropriate' under § 2255" -- "he is appealing a new criminal

sentence" rather than the Section 2255 order itself "and therefore need not obtain a COA." Id. at 664 (emphasis omitted); see id. at 666. The Sixth Circuit later followed that theory. Ajan v. United States, 731 F.3d 629, 631 (6th Cir. 2013) (following Hadden). But to take advantage of that theory, a prisoner -- like any defendant appealing a criminal judgment -- must file a notice of appeal from the amended criminal judgment within 14 days of its entry. See United States v. Chaney, 911 F.3d 222, 224-225 (4th Cir. 2018) (holding that, under Hadden's theory, the 14-day deadline of Fed. R. App. P. 4(b) applies and dismissing appeal as untimely); Ajan, 731 F.3d at 631 ("It is the Amended Judgment that Ajan appeals.").

Petitioner did not, as that theory contemplates, appeal from the amended criminal judgment (C.A. App. 1a) that was entered on the docket in his criminal case on August 26, 2021, Pet. App. 7a. Petitioner instead filed his notice of appeal (C.A. App. 1) from the grant of Section 2255 relief. The notice made clear that petitioner was appealing the district court's order "entered in" the Section 2255 proceedings "on August 12, 2021" (ibid.), i.e., the final order in the Section 2255 proceeding (Pet. App. 33a-34a). Had petitioner in fact sought to appeal the amended judgment in his criminal case, his notice of appeal would plainly have been untimely because it was filed on September 10, 2021, one day after the 14-day period to appeal expired. Ibid.; see pp. 8-9, supra. This case therefore does not present circumstances under which

either the Fourth or Sixth Circuit would conclude that petitioner could appeal without a COA.

e. Moreover, even if petitioner had timely appealed the amended judgment in his criminal case as contemplated by Hadden and Ajan, any division of authority reflected in those decisions would not warrant review because neither the Fourth nor Sixth Circuits would agree with petitioner that he was entitled to more relief than he received. The district court found no reason to conduct a full resentencing after vacating petitioner's Section 924(c) conviction and its five-year sentence because the court determined that it did not need to consider either (1) reducing petitioner's sentence on the non-Section 924(c) counts (because "nothing suggest[ed]" it had originally been "increased * * * due to the § 924(c) conviction") or (2) "increas[ing] [petitioner's] sentence" for those counts to account for the elimination of the five-year sentence under a sentencing-package theory (because "[p]etitioner already is serving a life sentence"). Pet. App. 28a. Petitioner lacks any viable challenge to that decision under Hadden and Ajan.

The Fourth Circuit in Hadden determined that a district court does not abuse its discretion in choosing "to 'correct' [a] sentence" by vacating the defective Section 924(c) portion thereof "in lieu of conducting a formal 'resentencing'" where, in the original sentencing proceedings, "the Government did not seek" and

the district court "did not, in fact, increase" the prisoner's remaining sentence and "the district court itself -- by striking the § 924(c) sentence -- indicated that it was satisfied with the resulting sentence." Hadden, 475 F.3d at 668-669 (explaining that the "sentencing-package theory of sentencing" does not require a "formal 'resentencing'" in that context) (brackets omitted). That is the case here. See Pet. App. 28a ("nothing suggests the Court increased the sentences on the kidnapping or other charges due to the § 924(c) conviction").

The Sixth Circuit in Ajan, in turn, observed that a district court is "certainly free" to "choose a correction over a different remedy" by simply vacating the part of a sentence based on an invalid Section 924(c) conviction and leaving the remaining sentence unchanged. Ajan, 731 F.3d at 633. The Sixth Circuit remanded Ajan's case to district court only because the district court's decision left it unclear "whether the district court exercised its [Section 2255] discretion or thought it had none." Id. at 633-634. And when a district court does exercise its discretion to vacate a defective Section 924(c) portion of the sentence and leaves the rest unchanged, the Sixth Circuit does not overturn that decision where the district court determines that "vacating [the] § 924(c) sentence did 'not impact the sentences [the prisoner] received on the other counts.'" United States v. Augustin, 16 F.4th 227, 232 (6th Cir. 2021) (citation omitted), cert.

denied, 142 S. Ct. 1458 (2022). Here, however, the district court recognized that it had discretion to grant other forms of relief, but decided not to do so, see Pet. App. 11a n.5, and the Sixth Circuit would not grant petitioner relief.

2. Petitioner's separate argument (Pet. 20-22) that he was entitled to a COA lacks merit. The decision below correctly recognized that the district court's conclusion that petitioner's "§ 924(c) conviction is unconstitutional" is not a basis on which petitioner could obtain a COA to appeal the district court's separate conclusion in selecting the remedy of correcting the judgment rather than conducting a full resentencing. Pet. App. 13a n.6. The favorable constitutional ruling "cannot be a basis for a COA" because petitioner does "not [seek to] appeal the District Court's resolution of [that constitutional] question." Ibid. Petitioner's contrary arguments lack merit, and petitioner does not identify a division of authority that might arguably warrant this Court's review of the second question he presents.

"The COA process screens out issues unworthy of judicial time and attention" on appeal, and "ensures that frivolous claims are not assigned to merits panels," by limiting Section 2255 appeals to those in which a judge has found that the prisoner has made "a 'substantial showing of the denial of a constitutional right.'" Gonzalez v. Thaler, 565 U.S. 134, 137, 145 (2012) (quoting 28 U.S.C. 2253(c)(2)). Thus, where the district court has "rejected

the constitutional claim[] on the merits," the prisoner must show that "reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong." Slack, 529 U.S. at 484. And where a district court denies a prisoner's constitutional claim on procedural grounds without resolving the merits of the constitutional question, the prisoner must show that "jurists of reason" would both "find it debatable whether the district court was correct in its procedural ruling" and, in addition, "find it debatable whether the petition states a valid claim of the denial of a constitutional right." Ibid.

Disregarding that focus on arguable constitutional error, petitioner incorrectly contends (Pet. 20-22) that a COA must issue if a prisoner shows that the district court correctly resolved the merits of a constitutional claim in a case where the prisoner seeks to appeal only other nonconstitutional rulings. But unless he can claim some unaddressed constitutional infringement, he cannot meet the explicit statutory prerequisite for an appeal. See 28 U.S.C. 2253(c)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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