

No. 23-5950

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

K. ANTHONY THOMAS
EVAN J. AUSTIN
Counsel of Record
RAHUL K. SHARMA
LOUISE ARKEL
OFFICE OF THE FEDERAL PUBLIC DEFENDER
1002 Broad Street
Newark, New Jersey 07102
(973) 282-8658
Evan_Austin@fd.org

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
A. The Government’s Arguments in Defense of the Decision Below Are Unpersuasive.	3
B. The Government’s Other Reasons for Denying Certiorari Are Also Unpersuasive.	5
C. Mr. Clark’s Potential Release on Parole Will Not Moot This Appeal.	9
CONCLUSION.....	12
SUPPLEMENTAL APPENDIX.....	<i>attached</i>

TABLE OF AUTHORITIES

Cases

<i>Ajan v. United States</i> , 731 F.3d 629 (6th Cir. 2013).....	5, 9
<i>Chafin v. Chafin</i> , 568 U.S. 165 (2013)	10
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	8
<i>Ellis v. Brotherhood of Railway, Airline & Steamship Clerks</i> , 466 U.S. 435 (1984). 10	
<i>Gonzalez v. Thaler</i> , 565 U.S. 134 (2012)	5
<i>Knox v. Service Employees International Union, Local 1000</i> , 567 U.S. 298 (2012) ..	10
<i>Ramsey v. United States Parole Commission</i> , 840 F.3d 853 (D.C. Cir. 2016)	11
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000).....	5
<i>Spencer v. Kemna</i> , 523 U.S. 1 (1998)	10
<i>United States v. Cody</i> , 998 F.3d 912 (11th Cir. 2021)	6
<i>United States v. Gordon</i> , 156 F.3d 376 (2d Cir. 1998).....	4
<i>United States v. Hadden</i> , 475 F.3d 652 (4th Cir. 2007)	5
<i>United States v. Paige</i> , 2022 WL 17455186 (11th Cir. Dec. 6, 2022).....	7

Statutes

18 U.S.C. § 4209.....	11
18 U.S.C. § 4210(a)	11
18 U.S.C. § 4211.....	11
18 U.S.C. § 4214.....	11
28 U.S.C. § 2253.....	3, 5
28 U.S.C. § 2255.....	1, 2, 4, 5, 6, 7, 8

Rules

Federal Rule of Appellate Procedure 22(b)(3)	4
--	---

INTRODUCTION

As Kent Clark explained in his petition for certiorari, this Court should grant review because the decision below was wrong, it deepened an existing circuit split over the need for a certificate of appealability (“COA”) when appealing a district court’s choice of remedy under 28 U.S.C. § 2255(b), and it will leave countless federal prisoners without recourse if a district court grants them postconviction relief only to err in selecting the appropriate remedy. Petition for a Writ of Certiorari (“Pet.”) at 2–3.

Instead of acknowledging the need for clarity on this important question of federal law, the government spends the majority of its brief in opposition defending the decision below. Mr. Clark will not revisit most of these arguments here because the parties will have ample time to brief them if this Court grants review. It is sufficient to say that the government fails to explain why Congress would intentionally insulate remedial errors committed by the district courts, no matter how obvious, from correction on appeal; why a federal prisoner who has already made a “substantial showing of the denial of a constitutional right” in their § 2255 motion would have to show a *second* constitutional injury to appeal an error the district court made when remedying the original violation; and when, if ever, a prisoner could meet that standard by showing that the district court’s “choice of relief violated his constitutional rights.” Brief In Opposition (“BIO”) at 17.

The government’s other reasons for denying certiorari are also unpersuasive. Mr. Clark’s failure to appeal the amended criminal judgment within 14 days should

not prevent this Court from granting review because it was immaterial to the decision below and would not change the outcome according to the government's own view of the law. Mr. Clark is also entitled to relief on the merits because the district court misunderstood its discretion to grant him a full resentencing under § 2255(b)—an issue this Court need not decide in any event.

Finally, although Mr. Clark received a conditional grant of parole after he filed his petition for certiorari, his potential release from the Bureau of Prisons ("BOP") will not moot this appeal because he can still obtain effective relief at a resentencing hearing. This case therefore remains a good vehicle for this Court to decide the important and unsettled questions presented. It should do so by granting review.

ARGUMENT

A. The Government's Arguments in Defense of the Decision Below Are Unpersuasive.

The government spends considerable time defending the Third Circuit's reading of the COA requirement and its decision to dismiss this appeal for lack of jurisdiction. BIO at 12–17, 21–22. Because the parties will have an opportunity to fully brief this issue if this Court grants review, Mr. Clark will not revisit it in depth here. A few points bear quickly addressing, however.

1. The government attempts to frame the issue in this case as whether a federal prisoner can appeal a “grant of relief different from the relief that the prisoner requested.” BIO at 17. The government took a similar tack below, referring to Mr. Clark's claim as a “demand for a more generous remedy under § 2255(b).” *Clark v. United States*, No. 21-2704, ECF No. 36 at 33 (3d Cir. Aug. 23, 2022) (“Gov't Third Cir. Br.”). But the issue in this case is not whether a prisoner can complain to the court of appeals if the district court simply denies them their preferred postconviction remedy. The issue is whether a prisoner can obtain relief if the district court *commits legal error*—such as by applying the wrong legal standard, making a clearly erroneous finding, or abusing its discretion in some other way—in selecting the appropriate remedy. The government offers no explanation for why Congress would intentionally insulate such errors from correction by the courts of appeals, which is likely why it uses the word “error” only once in its brief and instead uses euphemisms like “other nonconstitutional rulings” when discussing what a prisoner cannot appeal under the reading of 28 U.S.C. § 2253 adopted below. BIO at 22.

2. The government also tries to minimize the consequences of the Third Circuit’s decision by suggesting federal prisoners who were denied an appropriate remedy could “potentially satisfy the standard [for appeal] if the granted relief left some constitutional injury in place or itself was entered unconstitutionally.” BIO at 17. But the government fails to provide even a single example of when a prisoner could meet that standard by showing that the district court’s “choice of relief violated his constitutional rights.” *Id.* The reality—as the government itself has explained—is that this standard could rarely, if ever, be met because a claim of remedial error under § 2255(b) is a “*statutory* claim” that generally will not “implicate[] any constitutional provision.” Gov’t Third Cir. Br. at 11, 31 (emphasis added). And the situation becomes even more illogical when one remembers that the COA requirement only applies in one direction, Fed. R. App. P. 22(b)(3), allowing *the government* to appeal any time *it* believes the district court erred in selecting the appropriate remedy. *Compare* Pet. App. at 1a–14a *with United States v. Gordon*, 156 F.3d 376, 381–82 (2d Cir. 1998) (reviewing the government’s claim that the district court erred in selecting the appropriate remedy under § 2255). Once again, the government fails to explain why Congress would allow it to obtain relief from remedial errors but deny the same right to federal prisoners, for whom the entire system of postconviction relief was created in the first place. *See* § 2255(a).

3. Finally, although the government acknowledges that the purpose of the COA requirement is to “screen[] out issues unworthy of judicial time and attention” and “ensure[] that frivolous claims are not assigned to merits panels,” BIO at 21

(quoting *Gonzalez v. Thaler*, 565 U.S. 134, 137, 145 (2012)), it fails to admit that this screening function has already been satisfied where a prisoner has prevailed on the merits of their underlying claim. The same is true of the plain text of § 2253(c) even if the COA requirement applies. The government has no answer to the straightforward fact that a prisoner who has succeeded on the merits of a constitutional claim in their § 2255 motion has necessarily made a “substantial showing of the denial of the constitutional right.” *See* Pet. App. at 20–22. Requiring the prisoner to show a *second* constitutional violation to obtain relief from a remedial error reads a requirement into the text of the statute that is not there, creates a standard for appeal that is impossible to meet, and violates this Court’s admonition in *Slack v. McDaniel*, 529 U.S. 473 (2000), that the COA requirement should not be read in a way that would “allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.” *Id.* at 483.

4. For these and other reasons that can be addressed more fully at the merits stage, the reading of the COA requirement adopted by the Third Circuit is wrong. This Court should grant review and reverse the decision below.

B. The Government’s Other Reasons for Denying Certiorari Are Also Unpersuasive.

The government’s other reasons for denying certiorari are also unpersuasive.

1. The government argues that this Court should deny review because unlike the appellants in *United States v. Hadden*, 475 F.3d 652 (4th Cir. 2007) and *Ajan v. United States*, 731 F.3d 629 (6th Cir. 2013), Mr. Clark failed to appeal the

amended criminal judgment within 14 days.¹ BIO at 17–18. But this is a non-issue for several reasons.

2. For one, the decision below made no finding about Mr. Clark’s failure to appeal the criminal judgment and was in no way limited by that fact. The court’s holding—“that a COA is required when an appeal challenges solely whether the district court granted an appropriate § 2255 remedy”—applies regardless of whether the appeal is from the § 2255 order or the amended criminal judgment. Pet. App. 10a. Similarly, in *United States v. Cody*, 998 F.3d 912 (11th Cir. 2021), the Eleventh Circuit held that a COA was required to appeal the district court’s choice of remedy notwithstanding the fact that Mr. Cody had appealed the amended judgment in his criminal case. *Id.* at 915 (“The certificate-of-appealability requirement applies not only to an appeal from the final order in a proceeding under section 2255 but also to an appeal from an amended criminal judgment, to the extent it raises section 2255 issues.”).

3. Mr. Clark’s failure to timely appeal the criminal judgment also has no bearing on whether a COA is required *according to the government’s own view of the law*. As the government put it in its brief to the Third Circuit, a prisoner cannot “circumvent the COA requirement through the simple expedient of directly appealing the Amended Judgment entered in his criminal case.” Gov’t Third Cir. Br. at 13. Although Mr. Clark disagrees with the government’s conclusion that the COA

¹ The government concedes that Mr. Clark timely appealed the district court’s § 2255 order. BIO at 9.

requirement applies to choice-of-remedy appeals, he agrees that the issue does not hinge on whether there was an appeal from the criminal judgment. *See* Pet. at 15–20.

4. Finally, even if this Court believes Mr. Clark’s failure to timely appeal the criminal judgment means he was required to obtain a COA, he is still entitled to relief on the second question presented because he has met the standard for one. *See id.* at 20–22. The government attempts to dismiss the importance of this question by arguing that Mr. Clark has failed to “identify a division of authority [on the issue] that might arguably warrant this Court’s review.” BIO at 21. But as Mr. Clark pointed out in a Rule 28(j) letter below, the Eleventh Circuit recently granted a COA in a choice-of-remedy appeal because “reasonable jurists could debate whether choosing a particular remedy over another after relief from a § 2255 motion . . . denies a defendant due process.” *United States v. Paige*, 2022 WL 17455186, at *2 (11th Cir. Dec. 6, 2022) (unreported). The *Paige* decision shows that even in the circuits that agree about the need for a COA, there is disagreement about whether the standard has been met in choice-of-remedy appeals. This question is no less important than the first because it goes to the same fundamental issue: whether a federal prisoner who was denied an appropriate remedy under § 2255(b) due to district court error can obtain relief on appeal. For these reasons, Mr. Clark’s failure to appeal the amended criminal judgment within 14 days should not prevent this Court from granting review.

5. The government also argues that this Court should deny review because Mr. Clark was not “entitled to more relief than he received” on the merits. BIO at 19. As an initial matter, this Court need not, and indeed should not, decide this issue because the court of appeals dismissed Mr. Clark’s appeal for lack of jurisdiction without reaching the merits of his claim. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 (2005) (“[W]e are a court of review, not of first view.”). There is also a need for this Court to resolve the unsettled jurisdictional questions presented by this case regardless of the underlying merits.

6. In any event, the government’s view of the merits is wrong. As Mr. Clark explained in the court of appeals and in his petition, the district court made two legal errors in selecting the appropriate remedy for his successful § 2255 motion. First, it erred by focusing solely on the fact that resentencing was not “required” by the sentencing package doctrine, a reason that failed to address Mr. Clark’s many arguments for why resentencing was nevertheless *warranted* under the court’s broad remedial discretion. Pet. at 8. Second, the district court demonstrated that it did not understand nor fully exercise its discretion when it stated that it lacked a “cognizable legal basis” to grant resentencing—a basis § 2255(b) clearly provided. *Id.* The fact that the district court recited the correct legal standard at times, BIO at 8, 21, does not mean it properly understood or applied that standard, especially where it made several statements to the contrary throughout its analysis. If nothing else, the district court’s conflicting statements create significant doubt about whether it

“exercised its discretion or thought it had none,” requiring a remand for further proceedings as in *Ajan*. 731 F.3d at 634.

6. Ultimately, the government fails to identify a persuasive reason to deny certiorari in this case. And as Mr. Clark explained in his petition, there are many strong reasons to grant it, including the need for this Court to restore uniformity to federal postconviction law by resolving the circuit split over the proper application of the COA requirement. Pet. at 2–3.

C. Mr. Clark’s Potential Release on Parole Will Not Moot This Appeal.

Finally, Mr. Clark’s potential release on parole later this year will not moot this appeal.

1. Mr. Clark filed his petition for a writ of certiorari on November 1, 2023. On December 11, 2023, the United States Parole Commission (the “Commission”) held a parole hearing in his case. Petitioner’s Supplemental Appendix at 1. On January 5, 2024, the Commission released a Notice of Action granting Mr. Clark parole effective September 10, 2024, after service of over 34 years of imprisonment. *Id.* The Commission found that the “continued decline in [Mr. Clark’s] mental and physical functioning, as explained by the medical documentation and testimony at [his] hearing, makes [him] unlikely to commit a new offense if released.” *Id.* Because Mr. Clark will need “assistance with basic living tasks to be successful in the community,” his release is “conditioned upon [] securing a suitable release plan,” including “a residence where a family member can assist [him] or where [he] will receive professional medical care.” *Id.*

2. After spending over three decades in prison, Mr. Clark welcomes the Commission's decision and is hopeful he will be released as planned. As Mr. Clark is painfully aware, however, nothing is guaranteed until he is actually released. In 2022, after initially granting Mr. Clark parole, the Commission reopened the proceedings *sua sponte*, held a reconsideration hearing, and denied parole. Accordingly, the fact that Mr. Clark has been granted parole does not mean he will be released on time or even at all, especially where his release is contingent on a suitable release plan that includes someone to care for him in light of his worsening dementia—a need made more difficult by the tragic fact that many of Mr. Clark's family members have passed away since his arrest in 1990.

3. Even if Mr. Clark is released in September, however, this appeal will not become moot. A case becomes moot “only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps. Intl. Union, Loc. 1000*, 567 U.S. 298, 307 (2012)). A case is not moot “[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation.” *Knox*, 567 U.S. at 307–08 (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 442 (1984)). Where a favorable decision can relieve a defendant from an ongoing term of parole, there is effective relief to be had and the case is not moot. *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (“An incarcerated convict’s (or a parolee’s) challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the

incarceration (or the restriction imposed by the terms of the parole) constitutes a concrete injury.”).

3. If Mr. Clark is released on parole, he will have to abide by a number of conditions and will be subject to a variety of sanctions—including potential revocation and return to the BOP—if he violates them. *See* 18 U.S.C. §§ 4209 (describing conditions of parole) and 4214 (describing penalties for violations) (repealed Oct. 12, 1984); *Ramsey v. United States Parole Comm’n*, 840 F.3d 853, 855 (D.C. Cir. 2016) (repealed parole statutes remain in effect for “old law” prisoners). And because he was sentenced to life imprisonment, Mr. Clark will be subject to these conditions for the rest of his life unless the Commission decides to terminate his supervision early. *See* 18 U.S.C. §§ 4210(a) and 4211.

4. A favorable outcome in this case can change that. Although a resentencing hearing may no longer be necessary to obtain Mr. Clark’s release from the BOP, it can still provide him effective relief by reducing his term of imprisonment to time served, thereby ending his term of parole, freeing him from federal supervision, and eliminating the possibility that he could be remanded into custody for a violation, even a minor one. *See* §§ 4210(a) (federal parolees remain under the custody and control of the Attorney General “until the expiration of the maximum term or terms for which such parolee was sentenced”) and 4214(d) (authorizing revocation for the violation of any condition of parole). This case will therefore not become moot even if Mr. Clark is released on parole this fall, and it remains a good vehicle to resolve the important questions presented.

CONCLUSION

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

Respectfully submitted,

s/Evan J. Austin

Assistant Federal Public Defender

Counsel of Record

K. ANTHONY THOMAS

RAHUL K. SHARMA

LOUISE ARKEL

OFFICE OF THE FEDERAL PUBLIC DEFENDER

1002 Broad Street

Newark, New Jersey 07102

(973) 282-8658

Evan_Austin@fd.org

No. 23-5950

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

PETITIONER'S SUPPLEMENTAL APPENDIX

K. ANTHONY THOMAS
EVAN J. AUSTIN
Counsel of Record
RAHUL K. SHARMA
LOUISE ARKEL
OFFICE OF THE FEDERAL PUBLIC DEFENDER
1002 Broad Street
Newark, New Jersey 07102
(973) 282-8658
Evan_Austin@fd.org

TABLE OF CONTENTS

Notice of Action from the United States Parole Commission (Jan. 5, 2024).....	1
---	---

Notice of Action

Name: CLARK, KENT
Register Number: 13649-050

Institution: Devens FMC
Date: January 05, 2024

As a result of the hearing conducted on December 11, 2023, the following action was ordered:

Reopen and advance continue to expiration. Parole effective on 9/10/2024 after the service of 411 months. This grant of parole is to occur on or after the two-thirds date of your aggregate sentence and thus the decision to release is made pursuant to 18 U.S.C. §4206(d).

You shall be subject to a system of location monitoring inclusive of a curfew and/or exclusion zones as determined by your Supervision Officer, for a period not to exceed 90 days.

In addition, you shall not have direct or indirect contact with the victim of your offense, [REDACTED], or her immediate family, including [REDACTED], and shall not come within 100 yards of [REDACTED], any member of her family, or their homes.

REASONS:

After consideration of all factors and information presented, at this time, The Commission finds that the continued decline in your mental and physical functioning, as explained by the medical documentation and testimony at your hearing, makes you unlikely to commit a new offense if released. The Commission finds you will need assistance with basic living tasks to be successful in the community, and this release decision is conditioned upon you securing a suitable release plan, which must include either a residence where a family member can assist you or where you will receive professional medical care.

THIS DECISION IS APPEALABLE TO THE NATIONAL APPEALS BOARD.

All Appeals must be submitted within 30 days of the Notice of Action.

Copies of this Notice are sent to your institution and to your supervising officer. In certain cases, copies may also be sent to the sentencing court. You are responsible for advising any others you wish to notify.

U.S. Department of Justice
United States Parole Commission
90 K Street, N.E., 3rd Floor
Washington, D.C. 20530

Notice of Action

cc:

U.S. Probation Office
District of New Jersey
Martin Luther King, Jr. Fed Bldg & Cthse
50 Walnut Street, Room 1001
Newark, NJ 07102

Erin DeSilva
U.S. Probation Officer
U.S. Probation - District of New Jersey
50 Walnut Street
Newark, NJ 07102

Rahul Sharma
Office of the Federal Public Defender
Newark
972 Board Street
Second Floor
Newark, NJ 07102
District of New Jersey

Papa Team
Designation & Sentence Computation Ctr
U.S. Armed Forces Reserve Complex
Grand Prairie Office Complex
346 Marine Forces Drive
Grand Prairie, TX 75051

CMC
Devens FMC
P. O. Box 880
Ayer, MA 01432

omg