

IN THE SUPREME COURT OF THE UNITED STATES

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MERL SIMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the one-year limitation period under 28 U.S.C. 2255(f)(1) restarts when a district court, having earlier entered a final judgment of conviction, amends the judgment to modify the amount of restitution, and the defendant does not file a direct appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-6) is not published in the Federal Reporter but is available at 2024 WL 1230122. The order of the district court (Pet. App. 7-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2024. A petition for rehearing was denied on June 21, 2024 (Pet. App. 1). The petition for a writ of certiorari was filed on September 18, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Northern District of California, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); three counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 240 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, which the district court denied as untimely. Pet. App. 7-15. The court of appeals granted a certificate of appealability, C.A. Doc. 2-1 (Nov. 21, 2022), and affirmed, Pet. App. 2-6.

1. From February to April 2016, petitioner and two co-conspirators committed about 24 armed robberies of businesses in California's Bay Area. C.A. Supp. E.R. 100-102. Petitioner served as the getaway driver for at least three of the robberies, during one of which a co-conspirator fired a shot at (and missed) a fleeing employee. Id. at 101. For the final attempted robbery, of a bar in San Francisco, petitioner served as one of the gunmen,

but he and his co-conspirators were arrested before they could complete the robbery. Ibid.

2. A federal grand jury in the Northern District of California returned an indictment charging petitioner with, among other offenses, conspiracy and attempt to commit Hobbs Act robbery and completed Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 7. Petitioner pleaded guilty to those offenses, and the government dismissed the other counts. Judgment 1; Pet. App. 8. As part of his plea agreement, petitioner waived his right to appeal or collaterally attack his convictions or sentence, but he reserved his right to claim ineffective assistance of counsel. Pet. App. 8.

In April 2017, the district court sentenced petitioner to 240 months of imprisonment. Judgment 2. Petitioner was also ordered to pay restitution to two victims in the amount of \$2014. Judgment 5. The court entered judgment on May 3, 2017, Judgment 1, and petitioner did not appeal, Pet. App. 5.

On August 6, 2018, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 9. Petitioner raised numerous claims, although he subsequently withdrew all of them except a claim of ineffective assistance of counsel alleging that his attorney failed to file a notice of appeal despite petitioner's

directive to do so. Id. at 9, 14 n.2. In October 2018, while the motion was pending, the district court entered an amended judgment increasing petitioner's restitution by \$290 (to account for two additional robbery victims) and "alter[ing] the wording, but not substance, of the default mandatory and standard conditions of supervised release." Id. at 3; see Am. Judgment 6.

The district court denied petitioner's Section 2255 motion as untimely under Section 2255(f), which in pertinent part requires such a motion to be filed within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255(f)(1); see Pet. App. 15. The court found that petitioner's judgment of conviction had become final on May 17, 2017 -- the date when his time to appeal the original judgment had expired -- which made petitioner's Section 2255 motion due on May 17, 2018, about three months before he filed it. Pet. App. 13; see Fed. R. App. P. 4(b)(1)(A). The court further concluded that there was no basis for tolling the statute of limitations. Pet. App. 13-15.

3. The court of appeals granted a certificate of appealability, C.A. Doc. 2-1; see 28 U.S.C. 2253(c), and affirmed, Pet. App. 2-6.

Applying its prior decision in United States v. Gilbert, 807 F.3d 1197 (9th Cir. 2015), the court of appeals rejected petitioner's argument that Section 2255(f)(1)'s one-year limitation period "restarted" in October 2018 when the district court entered the amended judgment modifying the restitution order. Pet. App.

3. The court of appeals explained that "because a defendant 'is not permitted to challenge his restitution with a § 2255 motion, it would make no sense to let him restart the statute of limitations under § 2255 from an amended judgment'" that made no substantive change except "'the specific amount of restitution.'" Ibid. (quoting Gilbert, 807 F.3d at 1201). The court distinguished this Court's decision in Manrique v. United States, 581 U.S. 116 (2017), which did not involve Section 2255 and instead concerned what a defendant must do to appeal a restitution order when the determination of restitution is deferred. See id. at 118; Pet. App. 4 (noting that Manrique and Gilbert "concern[] different procedural mechanisms"). It likewise distinguished United States v. Colvin, 204 F.3d 1221 (9th Cir. 2000), in which the defendant filed a direct appeal, one of his convictions was reversed and the case remanded, and within one year of the ensuing amended judgment he filed a timely Section 2255 motion. Id. at 1222; see Pet. App. 5. Unlike the prisoner in Colvin, the court observed, petitioner never appealed his convictions. Finally, the court held that petitioner was not entitled to equitable tolling. Pet. App. 5-6.

#### ARGUMENT

Petitioner contends (Pet. 7-8) that his motion to vacate his sentence under 28 U.S.C. 2255 was rendered timely by the district court's issuance of an amended judgment modifying the amount of restitution. The court of appeals correctly rejected that proposition, its decision does not conflict with that of any other

circuit, and this case is a poor vehicle for considering the question presented in any event. Further review is unwarranted.

1. The court of appeals correctly held, in accordance with its prior decision in United States v. Gilbert, 807 F.3d 1197 (9th Cir. 2015), that petitioner's motion to vacate his sentence was untimely under 28 U.S.C. 2255(f)(1). Pet. App. 3-5.

a. The Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, requires sentencing courts to order "that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1). As this Court has observed, however, "the amount to be imposed is not always known at the time of sentencing." Manrique v. United States, 581 U.S. 116, 118 (2017). "When that is the case, the court may enter an initial judgment imposing certain aspects of a defendant's sentence, such as a term of imprisonment, while deferring a determination of the amount of restitution until entry of a later, amended judgment." Ibid.; see 18 U.S.C. 3664(d)(5) (generally permitting a delay "not to exceed 90 days after sentencing"); see also Dolan v. United States, 560 U.S. 605, 608 (2010) (holding that "a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution -- at least where \* \* \* the sentencing court made clear prior to the deadline's expiration that it would order restitution").

In Gilbert, the Ninth Circuit held "that when a judgment imposes a sentence but leaves the amount of restitution to be

determined, the one-year statute of limitations to file a § 2255 motion does not restart when the specific amount of restitution is later entered." 807 F.3d at 1201; see 28 U.S.C. 2255(f)(1). Even when restitution is deferred, the initial judgment of conviction constitutes a final judgment, see Manrique, 581 U.S. at 122-123 (citing Dolan, 560 U.S. at 617-618), as the sentencing laws make clear, see 18 U.S.C. 3582(b) (providing that "a judgment of conviction that includes \* \* \* a sentence [of imprisonment] constitutes a final judgment" despite possible modification); 18 U.S.C. 3664(o) (providing that a judgment is final even though restitution can be amended under Section 3664(d)(5)).

Treating such a judgment as nonfinal for purposes of Section 2255(f)(1), at least when the defendant does not appeal, see pp. 9-11, infra, would be nonsensical. When a judgment is entered and all that remains is specification or modification of the restitution amount, as Gilbert explains, "it would make no sense" to treat Section 2255(f)(1)'s limitation period as restarting upon the entry of the amended judgment, because a prisoner "is not permitted to challenge his restitution with a § 2255 motion." 807 F.3d at 1201.\* Such a rule would therefore invite needless delay in

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\* See 28 U.S.C. 2255(a) (movant must be "in custody \* \* \* claiming the right to be released"); Brian R. Means, Postconviction Remedies § 7:7 (Aug. 2024 update) ("[l]ower courts \* \* \* have uniformly held that the imposition of a fine or an order of restitution does not satisfy the 'custody' requirement") (footnotes omitted); see also id. n.3 (collecting cases); but cf. Gonzalez v. United States, 792 F.3d 232, 237 (2d Cir. 2015) (per curiam) (noting the Second Circuit has "'not as yet foreclosed the

collateral review, contrary to Congress's goal, in enacting Section 2255(f)'s "stringent time restrictions," to "expedite collateral attacks." United States v. Hicks, 283 F.3d 380, 388 (D.C. Cir. 2002); see Mayle v. Felix, 545 U.S. 644, 662 (2005).

This case is illustrative. Because the claims in petitioner's Section 2255 motion did not concern (and could not have concerned) restitution, he had no reason to await the amended judgment to seek collateral review. Indeed, petitioner filed his Section 2255 motion before the district court had even amended the judgment's restitution amount. See pp. 3-4, supra. It would be especially inappropriate to treat petitioner's original judgment as nonfinal under Section 2255(f)(1) because that judgment already included a restitution amount, and the district court's only subsequent material amendment was a small increase in that amount. See Pet. App. 3. In light of Gilbert, the court of appeals correctly held that petitioner's motion was filed more than one year after his "judgment of conviction bec[a]me[] final" and was therefore untimely. 28 U.S.C. 2255(f)(1).

b. Petitioner scarcely disputes (Pet. 7-8) the correctness of Gilbert and the decision below; he contends merely that Gilbert is "in tension" with Manrique, supra. But Manrique addresses a different question: whether, in a deferred-restitution case, a

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possibility'" that, in a "rare situation," "'a restitution order might entail a sufficiently severe restraint on liberty \* \* \* as to amount to a form of custody'" (quoting Kaminski v. United States, 339 F.3d 84, 87 (2d Cir.), cert. denied, 540 U.S. 1084 (2003)).

notice of appeal concerning the initial judgment encompasses a restitution order in a subsequent amended judgment. 581 U.S. at 118; see id. at 125 (holding that it does not); see also Pet. App. 4 (opinion below noting that Manrique and Gilbert "concern[] different procedural mechanisms").

The "tension" that petitioner posits appears to rest on his view (Pet. 8) that Manrique "suggests" a defendant can wait for the amended judgment to appeal even the "non-restitution components of the judgment," whereas Gilbert requires that "the non-restitution components of the initial judgment \* \* \* be challenged by collateral attack under § 2255 immediately after the initial judgment is issued" -- potentially requiring the defendant to file his Section 2255 motion before his appeal is resolved. But, as the decision below explained, Gilbert does not address circumstances in which the defendant files a direct appeal. Pet. App. 5 (distinguishing United States v. Colvin, 204 F.3d 1221 (9th Cir. 2000), on that ground); see Gilbert, 807 F.3d at 1201. Filing a timely appeal generally suspends the finality of a conviction for purposes of postconviction review. See Clay v. United States, 537 U.S. 522, 525 (2003); cf. Gilbert, 807 F.3d at 1199 ("if the movant does not pursue a direct appeal to the Court of Appeals, the conviction becomes final when the time for filing a direct appeal expires"). There is accordingly no inconsistency between Manrique and Gilbert.

2. Nor do Gilbert and the decision below conflict with the decision of any other court of appeals. Petitioner posits (Pet. 4-7) a conflict with Gonzalez v. United States, 792 F.3d 232 (2d Cir. 2015) (per curiam), and United States v. Anthony, 25 F.4th 792 (10th Cir. 2022). Like Manrique, however, those cases arose in a materially different procedural context involving direct appeals.

In Gonzalez, the defendant appealed his judgment of conviction, the Second Circuit vacated and remanded for recalculation of restitution, the district court entered an amended judgment, and the defendant filed a Section 2255 motion within one year of that latter judgment. 792 F.3d at 233-234. The district court dismissed the motion as time-barred, but the court of appeals reversed, holding that "[w]here a [judgment] is vacated and the cause is remanded for substantive proceedings, the new judgment is subject to renewed collateral attack" under Section 2255. Id. at 236; see id. at 234.

Gilbert and the decision below do not conflict with Gonzalez. Gilbert discussed Gonzalez at length and distinguished it on the grounds that the defendant there had appealed and received an amended judgment as a result of the court of appeals' vacatur and remand of the original judgment. 807 F.3d at 1200-1201. And Gilbert noted (id. at 1201) that the Ninth Circuit had previously applied reasoning similar to Gonzalez's in Colvin, supra -- a decision that Gonzalez relied upon, see 792 F.3d at 235, and which

remains controlling law in the Ninth Circuit, see Pet. App. 5. There is thus no disagreement between the Second and Ninth Circuits on the question presented. Cf. United States v. Tulsiram, 815 F.3d 114, 118, 119 n.8 (2d Cir. 2016) (per curiam) (citing both Gonzalez and Gilbert approvingly).

For the same reasons, the Tenth Circuit's decision in Anthony is distinguishable from Gilbert and the decision below. See Anthony, 25 F.4th at 801 n.10 (describing Gonzalez as "confront[ing] \* \* \* facts similar to the facts before us"). The defendant in Anthony appealed his judgment, the Tenth Circuit vacated and remanded for recalculation of restitution, and the defendant filed a Section 2255 motion while the remand proceedings were pending. Id. at 794. Agreeing with Gonzalez, the Tenth Circuit held that the motion was timely -- or, more precisely, that the "§ 2255 limitations period ha[d] yet to begin." Id. at 801; see id. at 801 n.10. Anthony is thus part of the same distinguishable line of cases as Gonzalez and Colvin. And although Anthony expressed disagreement with Gilbert in a footnote, the Tenth Circuit (like petitioner, see p. 9, supra) appeared to misread Gilbert as governing cases in which the defendant filed a direct appeal. See Anthony, 25 F.4th at 804 n.15. Consistent with Gilbert and the decision below, the Tenth Circuit has elsewhere recognized that the amendment of an otherwise-final judgment, absent an appeal and remand, does not restart Section 2255(f)'s limitation period. See United States v. Chapman, 220 Fed. Appx. 827, 830 (judgment amended

under Federal Rule of Criminal Procedure 35(b)), cert. denied, 552 U.S. 876 (2007); see also United States v. Olvera, 775 F.3d 726, 729 & n.7 (5th Cir. 2015) (collecting authority in accord). Petitioner accordingly errs in asserting a circuit conflict.

3. In any event, this case would be a poor vehicle for considering the question presented. Even if petitioner's Section 2255 motion were timely, his only claim is that his counsel was ineffective for failing to file a notice of appeal. See pp. 3-4, supra. Even assuming that that claim had merit and petitioner were entitled to "a new opportunity to appeal," Garza v. Idaho, 586 U.S. 232, 247 (2019), the petition for a writ of certiorari identifies no colorable basis for appeal. Petitioner has indicated that he would challenge his Section 924(c) conviction for lack of a predicate "crime of violence." 18 U.S.C. 924(c)(1)(A); see Pet. App. 9; D. Ct. Doc. 125, at 2 (Apr. 9, 2020). Yet such a claim (even assuming petitioner's appeal waiver were not enforced) would not be viable because the predicate offense here -- completed Hobbs Act robbery, see Pet. App. 7 -- qualifies as a crime of violence under Section 924(c), as every court of appeals to consider the question has held. Br. in Opp. at 10, Chachanko v. United States, 143 S. Ct. 524 (2022) (No. 21-8199) (collecting cases); see, e.g., United States v. Eckford, 77 F.4th 1228, 1233 (9th Cir.), cert. denied, 144 S. Ct. 521 (2023). Resolution of the question presented would make no ultimate difference to petitioner's convictions and sentence. See Supervisors v. Stanley, 105 U.S. 305, 311

(1882) (this Court does not grant a writ of certiorari to "decide abstract questions of law \* \* \* which, if decided either way, affect no right" of the parties).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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