No. 23-7806

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR SEALE, 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

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 redressed.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.J.):

United States v. Seale, No. 3:92-cr-372 (Dec. 1, 1992)
(criminal judgment)

Seale v. United States, No. 3:04-cv-3830 (Dec. 12, 2005)
(denying Section 2255 motion)

Seale v. United States, No. 3:07-cv-4356 (Feb. 27, 2009)
(withdrawing second Section 2255 motion)

Seale v. United States, No. 3:18-cv-9075 (Mar. 26, 2019)
(dismissing second or successive Section 2255 motion)

Seale v. United States, No. 3:19-cv-21016 (Dec. 30, 2022)
(granting Section 2255 relief)

United States v. Seale, No. 3:92-cr-372 (Jan. 3, 2023)
(amended criminal judgment)

United States Court of Appeals (3d Cir.):

United States v. Seale, No. 92-5686 (Apr. 7, 1994)
(direct appeal)

In re Seale, No. 19-2888 (Oct. 18, 2019)
(granting leave to file successive Section 2255 motion)

Seale v. United States, No. 23-1089 (Mar. 22, 2024)
(denying certificate of appealability)

United States v. Seale, No. 23-1088 (Sept. 10, 2024)
(dismissing appeal from amended criminal judgment)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter, but it is available at 2024 WL 3189649. The opinions of the district court (Pet. App. 3a-7a, 10a-21a) are not published in the Federal Supplement but are available at 2023 WL 4686214 and 2022 WL 18024217.

JURISDICTION

The order of the court of appeals was entered on March 22, 2024. The petition for a writ of certiorari was filed on June 20,

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 District of New Jersey, petitioner was convicted on one count of of conspiring to commit Hobbs Act extortion, in violation of 18 U.S.C. 1951; one count of Hobbs Act extortion, in violation of 18 U.S.C. 1951; one count of carrying or using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c); one count of using the mail with intent to commit extortion, in violation of 18 U.S.C. 876; one count of using a telephone with intent to commit extortion, in violation of 18 U.S.C. 875; and two counts of traveling interstate with intent to commit extortion, in violation of 18 U.S.C. 1952. 12/1/1992 Judgment 1. The district court sentenced petitioner to a total of 95 years of imprisonment, which included a five-year consecutive sentence on the Section 924(c) count, and a $1.75 million fine. Id. at 2-4. The court of appeals vacated the fine, and remanded for resentencing, but otherwise affirmed. 20 F.3d 1279. At resentencing, the district court adjusted the fine but did not alter the terms of imprisonment. See 04-cv-3830 D. Ct. Opinion 1 (Dec. 12, 2005) (2005 D. Ct. Op.).

In 2019, the court of appeals granted petitioner authorization to file a successive motion under 28 U.S.C. 2255 to chal-

lenge his Section 924(c) conviction. 19-2888 C.A. Order (Oct. 18, 2019). In December 2022, the district court granted petitioner's authorized Section 2255 motion in part and denied it in part. Pet. App. 10a-21a; see id. at 8a-9a (order). Four days later, in January 2023, the court entered an amended criminal judgment on the case docket. Id. at 22a-27a.

Petitioner noticed appeals from both the order resolving his Section 2255 motion (Appeal No. 23-1089) and the amended criminal judgment (Appeal No. 23-1088). 19-cv-21016 D. Ct. Doc. 24 (Jan. 12, 2023); 92-cr-372 D. Ct. Doc. 101 (Jan. 12, 2023). In the appeal from the order resolving petitioner's Section 2255 motion, the court of appeals denied petitioner's request for a certificate of appealability (COA). Pet. App. 1a-2a. The court of appeals subsequently dismissed petitioner's appeal from the amended criminal judgment. 23-1088 C.A. Order (Sept. 10, 2024). The petition in this case addresses only the first appeal.

1. a. In late 1991, petitioner, a former security officer for Exxon Corporation and a nine-year police veteran, developed a scheme to kidnap the president of an Exxon subsidiary, Sidney J. Reso, to obtain a large ransom. 20 F.3d at 1281; see Sent. Tr. 12-13, 15 (Nov. 30, 1992). Petitioner and his wife prepared for the kidnaping for three months, conducting surveillance at Reso's home to understand his schedule and transportation options and building a coffin-like box in which to put Reso after capturing

him. 20 F.3d at 1281. Petitioner also researched environmental causes to concoct a false motive for the kidnaping. Ibid.

On the morning of April 29, 1992, petitioner and his wife abducted Reso as he left home for work. 20 F.3d at 1281. When Reso reached the foot of his driveway to collect his morning newspaper, petitioner exited a van driven by his wife and grabbed Reso at gunpoint. 92-5686 Gov't C.A. Br. 11 (May 12, 1992), available at 1993 WL 13120477. Reso struggled, and petitioner shot him in the arm. Ibid.; see 20 F.3d at 1281. Rather than end the scheme, petitioner and his wife continued the kidnaping, handcuffing Reso and taping his eyes and mouth shut with duct tape, locking him in the coffin-sized box, and keeping Reso in the box for four days with no food and little water at a self-serve storge unit, until Reso died while alone in the box. Sent. Tr. 70, 88 (court findings); see 92-5686 Gov't C.A. Br. 10-15; see also 20 F.3d at 1281.

Notwithstanding Reso's death, petitioner and his wife continued to execute their scheme for another six weeks. 20 F.3d at 1281. Posing as an environmental group named the "Fernando Pereira Brigade, Warriors of the Rainbow," they demanded a $18.5 million ransom and led the Reso family, Exxon employees, the Federal Bureau of Investigation, and the general public to "believe that Reso was still alive but would be 'eliminated' if their instructions were

not followed." Ibid. In June 1992, petitioner and his wife were arrested before any ransom was paid. Ibid.

b. After petitioner's wife cooperated with the authorities and led the police to the shallow grave in which petitioner had buried Reso, petitioner pleaded guilty without a plea agreement on all seven counts of his federal indictment. 20 F.3d at 1281-1282; see 92-5686 Gov't Br. 2-3. At sentencing, the district court emphasized that petitioner had committed a "variety of serious heinous crimes" that were "thoroughly evil," finding "no other word for it." Sent. Tr. 87. The court found petitioner's crimes were "cold [and] calculating," reflected "unmitigated evil," and exhibited such "casual amoral brutality and viciousness [that they] shocked even the most jaded." Id. at 89.

In addition to recounting the circumstances of Reso's coffin-like confinement, the district court observed that Reso's "teeth [had been] broken" and "knocked down his throat." Sent. Tr. 87-88; see id. at 70. The court also emphasized the degree to which Reso's family had suffered: petitioner had "demand[ed] that [Reso's] 57-year-old wife * * * personally appear on television" to "plead for [Reso's] life"; required that "she and the family personally accompany the ransom money and answer the telephone"; and made the family and "the world" listen to Reso's "last words" -- "forced and compelled ransom directions" that "sen[t] [Reso's] family around at high speed through the countryside" with "a maze

of directions in writing and over the telephone" to "deliver a huge ransom in cash." Id. at 65, 87-88. "The planning and coldness behind all of this," the court stated, "defies imagination" and was "unique in its cruelty." Id. at 65, 88.

The sentencing court determined that the "cold-blooded, calculated and deliberate" nature of petitioner's crimes and "[t]he magnitude of [his] acts" "require[d] that the [c]ourt deal with [petitioner] as severely as the law allows." Sent. Tr. 87, 89. The court emphasized that its "intent" was that "[petitioner] be imprisoned for the rest of [his] life without parole" so that he would "never be free." Id. at 91. The court imposed the statutory maximum sentence for each of petitioner's counts of convictions and ran each sentence "consecutive with one another" to produce a total sentence of 95 years of imprisonment, including the five-year consecutive sentence for petitioner's Section 924(c) conviction. See id. at 91-92.

c. On direct appeal, the court of appeals upheld petitioner's prison sentence, 20 F.3d at 1282 n.3, but vacated the fine and remanded for resentencing, id. at 1290. At resentencing, the district court adjusted the fine, but it did not alter the terms of imprisonment. See 2005 D. Ct. Op. 2.

2. Petitioner subsequently filed a series of unsuccessful motions to vacate his sentence under 28 U.S.C. 2255. See 04-cv-3830 D. Ct. Order (Dec. 12, 2005) (denying motion); 07-cv-4356

D. Ct. Doc. 12 (Feb. 27, 2007) (withdrawing motion); 18-cv-9075 D. Ct. Order (Mar. 26, 2019) (dismissing motion).

In 2019, the court of appeals granted petitioner's application to file a successive Section 2255 motion to challenge his Section 924(c) conviction based on this Court's then-recent decision in United States v. Davis, 588 U.S. 445 (2019), which held that Section 924(c)(3)(B)'s definition of a predicate "crime of violence" is unconstitutionally vague, id. at 470. See 19-2888 C.A. Order 1 (Oct. 18, 2019); 19-2888 C.A. Mot. to File Second or Successive Section 2255 Mot. 1-2 (Aug. 26, 2019); see also 18 U.S.C. 924(c)(3) (Supp. IV 1986).

On December 30, 2022, the district court granted petitioner's Section 2255 motion in part and denied it part. Pet. App. 8a-9a. The court vacated petitioner's Section "924(c) conviction and its accompanying five-year sentence" and fine, but denied petitioner's "request for a full resentencing." Id. at 8a & n.1; see id. at 13a-19a. The court instead ordered that an "amended judgment" be entered in petitioner's criminal case in which the "sentences on the remaining counts of [petitioner's] conviction shall remain intact and undisturbed." Id. at 8a.

In its accompanying opinion (Pet. App. 10a-21a), the district court explained that while petitioner was entitled to vacatur of his Section 924(c) conviction in light of Davis, id. at 13a-19a, an "entirely new sentencing" to allow reconsideration of the total

sentence "under the sentencing package doctrine" was unwarranted, id. at 19a-21a. The court stated that when one or more counts of conviction are vacated, the sentencing-package doctrine allows for resentencing on the remaining counts when necessary to accurately reflect the sentencing court's intent regarding the appropriate total punishment for the defendant's crimes. Id. at 19a. The court explained that the "thrust of the doctrine" is to authorize a court to revisit the overall sentence when the original "sentence on the remaining counts" was "interdependent" with the "sentence on the vacated count." Ibid. The court observed, however, that a full resentencing is unwarranted "where the sentencing judge [has] already imposed 'the highest sentence available' on the remaining counts of the conviction," because such a sentence reflects that the subsequent "vacatur of a consecutive § 924(c) conviction d[id] not unravel the package imposed." Id. at 20a (citation omitted).

In this case, the district court found the sentencing judge's original sentencing intent to be "abundantly clear," where the judge had chosen "'the highest sentence available'" by imposing "the applicable statutory maximum sentence on each count" of conviction and then directing that all of those sentences were to "run consecutively" to each other. Pet. App. 20a. The district court observed that the sentencing judge had emphasized at sentencing that the maximal sentence that he had chosen was designed to "ensure[] that [p]etitioner would be 'imprisoned for the rest of

[his] life without parole'" and thus reflected the the "'intent'" that petitioner "'should never be free.'" Ibid. (citation omitted).

The court thus found that the vacatur of the five-year consecutive sentence for an invalid Section 924(c) count did not "not 'unravel' an interdependent sentencing plan." Pet. App. 20a. And the court explained that given that "the applicable maximums [had already been] imposed," a full resentencing was unnecessary because it would not provide the court any "opportunity to impose a harsher sentence on the remaining counts in order to rebalance [p]etitioner's sentence." Ibid. The court added that any "lesser sentence on [p]etitioner's remaining counts" would result in a "windfall" to petitioner that would not "'accurately reflect'" the court's "sentencing intentions." Ibid.

Four days later, on January 3, 2023, the district court entered an amended judgment on the docket in petitioner's criminal case (No. 92-cr-372), reflecting the vacatur of petitioner's conviction and sentence on the Section 924(c) count and maintaining the remaining consecutive sentences totaling 90 years. Pet. App. 22a-23a.

3. Petitioner filed identical notices of appeal in both the Section 2255 proceeding (No. 19-cv-21016) and his criminal case (No. 92-cr-372), in which he stated that he was appealing both "the order granting in part and denying in part his [Section 2255] petition * * * in Civil Number 19-21016" and the amended "judgment * * * in Criminal Number 92-372." 19-cv-21016 D. Ct. Doc. 24 (Jan.

12, 2023); 92-cr-372 D. Ct. Doc. 101 (Jan. 12, 2023). The court of appeals docketed petitioner's appeal from the Section 2255 order as Appeal No. 23-1089 and his appeal from the amended criminal judgment as Appeal No. 23-1088. See Pet. App. 1a.

a. In Appeal No. 23-1089 (from which petitioner now petitions for a writ of certiorari), the court of appeals partially remanded the Section 2255 proceeding for the district court to decide whether a certificate of appealability (COA) should issue. 23-1089 C.A. Order (Jan. 31, 2013). The district court denied a COA on remand. Pet. App. 3a-7a.

The district court observed that, under 28 U.S.C. 2253(c), a COA may be granted only if the applicant "makes 'a substantial showing of the denial of a constitutional right.'" Pet. App. 5a. And the court found that petitioner failed to make that showing because petitioner "seeks to appeal only the denial of a full resentenc[ing]" yet made no "substantial showing that the court's denial of [such] a resentencing amounted to the denial of a constitutional right." Id. at 6a; see id. at 7a. The court observed that it had "considerable discretion in determining whether a resentencing is required"; that "resentencing is [not] necessary [here] to rebalance the remaining counts" given the "abundantly clear" intent of the original sentencing judge; and that no constitutional provision requires "a full resentencing * * * following the vacation of a single count of conviction." Id. at 6a-7a.

b. The court of appeals in petitioner's appeal from the Section 2255 proceeding (No. 23-1089) likewise denied a COA. Pet. App. 1a-2a. The court observed that it "may issue a [COA] 'only if the applicant has made a substantial showing of the denial of a constitutional right,'" and found "[j]urists of reason would not debate the District Court's decision to not hold a resentencing hearing." Id. at 1a (quoting 28 U.S.C. 2253(c)(2)). The court added that "[b]ecause only No. 23-1089 is currently before us, no action will be taken at this time regarding the government's motion to dismiss or for summary action in [No.] 23-1088." Id. at 1a-2a.

4. After petitioner filed his petition for a writ of certiorari from the denial of a COA in his Section-2255-proceeding appeal, see Pet. 1, 15-21, the court of appeals dismissed for lack of jurisdiction petitioner's appeal (No. 23-1088) from the amended judgment in his criminal case. 23-1088 C.A. Order (Sept. 10, 2024); see 23-1088 C.A. Order (Sept. 23, 2024).

ARGUMENT

Petitioner contends (Pet. 15-19) 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. 19-21) 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 denied petitioner's request for a COA, and petitioner would not be entitled to a different Section 2255 remedy in any court of appeals. This Court has denied review in other cases presenting similar questions. See Clark v. United States, 144 S. Ct. 1382 (2024) (No. 23-5950); Cody v. United States, 142 S. Ct. 1419 (2022) (No. 21-6099). The same result is warranted here.

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. 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. Cody v. United States, 998 F.3d 912, 915-916 (11th Cir. 2021), cert. denied, 142 S. Ct. 1419 (2022). One of those steps is the court's selection of one of the four types of relief that Section 2255(b) authorizes. Id. at 916; accord Clark v. United States, 76 F.4th 206, 211 (3d Cir.

2023), cert. denied, 144 S. Ct. 1382 (2024). 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).

The choice of a remedy is an essential part of a district court's final order in Section 2255 proceedings. Clark, 76 F.4th at 211; Cody, 998 F.3d at 915. 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. 15-19) that the COA requirement in Section 2253(c)(1)(B) to appeal the "'final order'" in a Section 2255 proceeding does not apply to an appeal from a "district court's choice of remedy under [Section] 2255(b)" because, in petitioner's view, a "'final order'" is one that resolves only the "'merits'" of the proceeding. Pet. 16 (quoting Harbison v. Bell, 556 U.S. 180, 183 (2009)) (emphasis omitted). 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, 584 U.S. 59, 64 (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 2253(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. 15, 19) that Section 2253(c)'s "COA requirement only applies to appeals from orders denying [postconviction] relief." Pet. 15. 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 order that petitioner seeks to review denied the relief petitioner sought because it "denied" "[p]etitioner's request for a full resentencing." Pet. App. 8a (capitalization omitted); see id. at 21a. The order would thus appear to qualify as "the final order in a proceeding under section 2255," 28 U.S.C. 2253(c)(1)(B), under petitioner's own theory.

Petitioner suggests (Pet. 18-19) 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 a 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 the prisoner cannot make a substantial showing that the choice of relief violated his constitutional rights.

d. Petitioner asserts (Pet. 11-15) 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. 13. The current petition for a writ of certiorari, however, does not arise in a posture that presents the same circumstance considered in the cases that petitioner cites.

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). To take advantage of that theory, a prisoner would need to 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, as that theory contemplates, appeal from the amended criminal judgment (Pet. App. 22a-27a) that was entered on the docket in his criminal case on January 3, 2023, thereby initiating Appeal No. 23-1088. See p. 9, supra. Petitioner's current petition for a writ of certiorari, however, does not seek review of any ruling in No. 23-1088. The current petition instead seeks review of the court of appeals' order denying a COA in No. 23-1089, i.e., the court's order in petitioner's appeal of the order denying resentencing (Pet. App. 1a-2a). See Pet. 1, 15-21. The current petition therefore does not present circumstances under which either the Fourth or Sixth Circuit would conclude that petitioner could appeal without a COA.

Any division of authority reflected in Hadden and Ajan 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 here found no reason to conduct a full resentencing after vacating petitioner's Section 924(c) conviction and the corresponding five-year sentence because the court determined that vacating that sentence did "not 'unravel' an inter-dependent sentencing plan." Pet. App. 20a. The court emphasized that the sentencing court had been "abundantly clear" that it had imposed "'the highest sentence available'" -- choosing "the applicable statutory maximum sentence on each count" of conviction and running all sentences "consecutively" -- in order to ensure that "[p]etitioner would be 'imprisoned for the rest of [his] life.'" Ibid. (citation omitted); see pp. 5-6, supra (discussing sentencing). And because a full resentencing would not enable the court to "impose a harsher sentence on the remaining counts in order to rebalance [p]etitioner's sentence" in light of the statutory maximums already imposed, the court concluded that a full resentencing was unwarranted. Pet. App. 20a. 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" to 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 and reentering the remaining sentence -- indicated that it was satisfied with the resulting sentence." Hadden, 475 F.3d at 668-669 (explaining that the "sentence-package theory of sentencing" does not require a "formal 'resentencing'" in that context) (brackets omitted). That is the case here. See Pet. App. 20a-21a (explaining that the sentencing judge "clear[ly]" intended to impose consecutive, statutory-maximum sentences for all counts and that the proper course here was to vacate the five-year sentence for the Section 924(c) conviction "and leave [p]etitioner's remaining sentences intact").

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). In this case, the district court expressly recognized that it had "considerable discretion in determining whether a resentencing is required," Pet. App. 6a, and it exercised that "'broad and flexible power'" by determining that "the proper course 'following [petitioner's] successful [Section] 2255 motion'" was to correct petitioner's sentence rather than hold a full resentencing, id. at 19a-21a. Thus, the Sixth Circuit, like the Fourth Circuit, would not grant petitioner any relief from that determination.

e. Petitioner ultimately requests (Pet. 14) that the Court "hold this petition for a writ of certiorari until the Third Circuit decides if the criminal appeal [No. 23-1088] can proceed." The Third Circuit has since dismissed that separate appeal for lack of jurisdiction, see p. 11, supra, and the court of appeals' subsequent disposition of that distinct appeal provides no sound basis for this Court to grant the certiorari petition here, which, as noted, seeks review of a Section 2255 COA decision that would not lead to relief in any court of appeals.

If, however, the Court were to view the circumstances of petitioner's case as implicating a disagreement in the circuits that could warrant this Court's review, the government does not object to holding the current petition pending the filing and disposition of any petition for a writ of certiorari from the dismissal of the appeal from the entry of the amended final

judgment on the docket. It is not clear that both the events from which petitioner appealed are independently final appealable orders. Section 2255 may be read to indicate that the Section 2255 proceedings encompass any "resentenc[ing]" or "correct[ion] [of] the sentence," 28 U.S.C. 2255(b), in which case it is unclear whether petitioner would view the order denying resentencing (at issue here) or the amended judgment (the potential subject of a later petition) as the appropriate final order for appellate purposes. But for the reasons discussed above, that issue does not ultimately affect petitioner's entitlement to relief.

2. Petitioner's separate argument (Pet. 19-21) that he was entitled to a COA lacks merit. The order below correctly recognized that the district court's conclusion that petitioner's Section 924(c) conviction is unconstitutional is not a basis on which petitioner could obtain a COA to appeal the district court's separate "decision not to hold a [full] resentencing hearing" when it selected the remedy of correcting petitioner's criminal sentence. Pet. App. 1a. 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. Petitioner's contrary arguments lack merit, and petitioner does not identify a division of authority that would 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. 19-21) 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.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

THOMAS E. BOOTH
Attorney

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