

Appendix A

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

United States District Court	District	Southern District of Florida
Name (<i>under which you were convicted</i>): Adolphus Symonette		Docket or Case No.: 20-60773-CV-Middlebrooks
Place of Confinement: USP Big Sandy, 1197 Airport Road, Inez, KY 41224		Prisoner No.: 96092-004
UNITED STATES OF AMERICA		Movant (<i>include name under which convicted</i>) V. Adolphus Symonette

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

United States District Court for the Southern District of Florida.

(b) Criminal docket or case number (if you know): 10-60292-Cr-Middlebrooks

2. (a) Date of the judgment of conviction (if you know): 09/30/2011

(b) Date of sentencing: 09/30/2011

3. Length of sentence: Life imprisonment, plus an additional 84 months imprisonment on Count 3.

4. Nature of crime (all counts):

Count 1: Conspiracy to commit racketeering, 18 U.S.C. § 1962(c), (d).

Count 2: Kidnapping, 18 U.S.C. section 1201(a)(1) and 2.

Count 3: Possession of a firearm in furtherance of a crime of violence, to wit, the kidnapping in Count 2, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 2.

5. (a) What was your plea? (Check one)

(1) Not guilty (2) Guilty (3) Nolo contendere (no contest)

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

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8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following:

- Name of court: Eleventh Circuit Court of Appeals
- Docket or case number (if you know): 11-15106
- Result: The Court of Appeals affirmed Mr. Symonette's convictions and sentences.
- Date of result (if you know): 08/09/2012
- Citation to the case (if you know): 486 Fed.Appx. 761 (11th Cir. 2012)
- Grounds raised:
 1. The district court abused its discretion in denying appellant's motions to continue trial in order to allow for additional preparation.
 2. The district court erred in denying appellant's motion for judgment of acquittal and renewed motion for judgment of acquittal as to the RICO conspiracy count.
 3. The concurrent life sentences that appellant received for the RICO conspiracy and kidnapping counts were substantively unreasonable.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

- Docket or case number (if you know): _____
- Result: _____
- Date of result (if you know): _____
- Citation to the case (if you know): _____
- Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

- Name of court: United States District Court in the Southern District of Florida
- Docket or case number (if you know): 13-61740-CV-Middlebrooks
- Date of filing (if you know): 8/12/2013

(4) Nature of the proceeding: Motion to vacate sentence pursuant to 28 U.S.C. § 2255.

(5) Grounds raised:

1. Ineffective assistance of counsel;
2. Plain error/actual innocence.
3. Ineffective assistance of counsel.
4. Prosecutorial misconduct.
5. Prosecutorial misconduct.
6. Ineffective assistance/prosecutorial misconduct.
7. Failure of prosecutor to disclose material evidence.
8. Undisclosed evidence that the prosecution witness had lied during confessions.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes No

(7) Result: The motion was denied.

(8) Date of result (if you know): 12/04/2014

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: United States District Court in the Southern District of Florida.

(2) Docket of case number (if you know): 19-63105-CV-Middlebrooks

(3) Date of filing (if you know): 12/17/2019

(4) Nature of the proceeding: Motion to vacate sentence pursuant to 28 U.S.C. § 2255.

(5) Grounds raised:

1. Collateral review of the sentence imposed for the 18 U.S.C. § 924(c) count (Count 3) in light of *U.S. v. Davis*, 139 S. Ct. 2319 (2019), which case was decided on June 24, 2019.

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes No

(7) Result: Motion dismissed for lack of jurisdiction as an unauthorized successive motion.

(8) Date of result (if you know): 03/27/2020

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes No

(2) Second petition: Yes No

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

Regarding the first petition, the district court denied a certificate of appealability on December 4, 2014. See DE 238 in *U.S. v. Symonette*, Case Number 10-60292-Cr-Middlebrooks.

Regarding the second petition, on March 25, 2020, Mr. Symonette filed an application with the Eleventh Circuit Court of Appeals for leave to file a successive motion. That application was granted on April 14, 2020. See DE 272 in *U.S. v. Symonette*, Case Number 10-60292-Cr-Middlebrooks.

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Mr. Symonette's conviction in Count 3 for violating 18 U.S.C. § 924(c)(1)(A)(ii) is invalid under *U.S. v. Davis*, 139 S. Ct. 2319 (2019).

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. Symonette was convicted of 18 U.S.C. § 924(c)(1)(A)(ii). In *U.S. v. Davis*, 139 S. Ct. 2319 (2019), the Supreme Court declared that the residual clause, codified at 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague. Therefore, in order to qualify as a crime of violence under 18 U.S.C. § 924(c), an offense must be a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The predicate crime of violence that the government relied upon at Mr. Symonette's trial was the federal offense of kidnapping, codified at 18 U.S.C. § 1201(a)(1). See Count 3 in the Second Superseding Indictment, DE 105 in Case Number 10-60292-Cr-Middlebrooks, and page 221 of the jury instructions, DE 199 in Case Number 10-60292-Cr-Middlebrooks. In *U.S. v. Dugas*, 2020 WL 535696 (N.D. Fla. Jan. 31, 2020), the Court stated that "[t]he Eleventh Circuit has not specifically decided whether kidnapping qualifies as a crime of violence for purposes of § 924(c)(3)(A). However, a recent analogous decision is instructive. In *United States v. Gillis*, 938 F.3d 1181 (11th Cir. 2019), the Court reversed a defendant's conviction of solicitation to commit a crime of violence in violation of 18 U.S.C. § 373 "[b]ecause § 1201(a) can be violated without the 'use, attempted use, or threatened use of physical force against property or against the person of another' as required by § 373(a)'s force clause, and because . . . 'physical force' does not include 'intellectual force or emotional force,' " *Gillis*, 938 F.3d at 1210. It stands to reason, that federal kidnapping in violation of § 1201(a) is not categorically a crime of violence." That being the case, the offense of kidnapping is not a crime of violence under § 924(c)(3)(A) and is therefore not a proper predicate for a § 924(c) conviction. Thus, Mr. Symonette's conviction and sentence for Count 3, i.e., the § 924(c) count, should be vacated, and a *de novo* resentencing should be held. See *U.S. v. Fowler*, 749 F.3d 1010, 1017 (11th Cir. 2014) (when a sentencing package becomes unbundled as a result of a conviction being set aside in a section 2255 proceeding, the district court has the authority to recalculate and reconsider the defendant's sentence in order for that sentence to comport with the district court's original intentions at sentencing).

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Count 3 in Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

Mr. Symonette's judgments and convictions were affirmed on appeal in 2012, but *U.S. v. Davis*, 139 S. Ct. 2319, was not decided until 2019.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: Motion to vacate sentence pursuant to 28 U.S.C. section 2255.

Name and location of the court where the motion or petition was filed:

U.S. District Court for the Southern District of Florida.

Docket or case number (if you know): 19-63105-CV-Middlebrooks

Date of the court's decision: 3/27/2020

Result (attach a copy of the court's opinion or order, if available):

A copy of the report and recommendation as well as the order adopting report and recommendation are attached. See DE 5 and 8 in case number 19-63105-CV-Middlebrooks.

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

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(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Eleventh Circuit Court of Appeals

Docket or case number (if you know): 20-11172-A

Date of the court's decision: 4/14/2020

Result (attach a copy of the court's opinion or order, if available):

See attached order. DE 1 in Symonette v. U.S., Case Number 20-60773-CV-Middlebrooks.

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?
Yes No
(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?
Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the
you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the
issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the
judgment you are challenging:

(a) At the preliminary hearing:

Pro se

(b) At the arraignment and plea:

Jonathan Kasen

(c) At the trial:

Ronald Chapman

(d) At sentencing:

Ronald Chapman

(e) On appeal:

Ronald Chapman

(f) In any post-conviction proceeding:

Ronald Chapman

(g) On appeal from any ruling against you in a post-conviction proceeding:

Ronald Chapman

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court
and at the same time? Yes No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are
challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or
sentence to be served in the future? Yes No

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Mr. Symonette filed an application with the Eleventh Circuit Court of Appeals seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence. See *In re: Adolphus Symonette*, Docket Number 20-11172-A (11th Cir. 2020). The Court granted his motion stating:

"Symonette has made a *prima facie* showing that he is entitled to relief under [*U.S. v. Davis*, 139 S. Ct. 2319 (2019)]. See 28 U.S.C. §§ 2244(b)(3)(C), 2255(h)(2). The predicate crime of violence for Symonette's § 924(c) conviction was kidnapping. There is no precedent from the Supreme Court or this Court addressing whether kidnapping qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. However, [*U.S. v. Gillis*, 938 F.3d 1181 (11th Cir. 2019)], which concluded that kidnapping did not categorically satisfy the substantively similar elements clause in 18 U.S.C. § 373(a), suggests that kidnapping no longer qualifies as a valid predicate offense for § 924(c) offenses following *Davis*. 938 F.3d at 1200, 1210. Consequently, Symonette has made a *prima facie* showing that his § 924(c) conviction may be unconstitutional under *Davis*. See 28 U.S.C. §§ 2244(b)(3)(C), 2255 (h)(2); [*Jordan v. Secretary, Dept. of Corrections*, 485 F.3d 1351, 1357-58 (11th Cir. 2007)]."

See DE 272 at 5-6 in *U.S. v. Symonette*, 10-60292-Cr-Middlebrooks.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

Vacate movant's conviction and sentence for Count 3, *i.e.*, the 18 U.S.C. § 924(c) count, and conduct a *de novo* resentencing as to the remaining counts

or any other relief to which movant may be entitled.

/s/ Ronald S. Chapman
Attorney for Adolphus Symonette

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____.

(month, date, year)

Executed (signed) on May 1, 2020 (date)

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Attorney Ronald Chapman is representing Mr. Symonette in this 28 U.S.C. § 2255 motion. It is virtually impossible for Attorney Chapman to communicate with Mr. Symonette because he is currently under lockdown at USP Big Sandy in Inez, Kentucky due to the coronavirus pandemic.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

Case No. 20-60773-CIV-MIDDLEBROOKS/HUNT
(10-60292-CR-MIDDLEBROOKS)

ADOLPHUS SYMONETTE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

This matter is before this Court on Movant Adolphus Symonette's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. ECF. No. 4. The Honorable Donald M. Middlebrooks previously referred this case to the undersigned United States Magistrate Judge for a report and recommendation regarding disposition of all dispositive motions. ECF No. 5; *see also* 28 U.S.C. § 636(b); S.D. Fla. Mag. R. 1. Having carefully reviewed the Motion, the Response, the Reply, the applicable law, and being otherwise fully advised in the premises, the undersigned hereby RECOMMENDS that Movant's motion be GRANTED.

I. Background

Following a jury trial, Movant was convicted of conspiracy to commit racketeering in violation of 18 U.S.C. §§ 1962(d) and 1963(a) ("Count 1"); kidnapping in violation of 18 U.S.C. § 1201(a)(1) ("Count 2"); and possession of a firearm during and in relation to a crime of violence (kidnapping), in violation of 18 U.S.C. § 924(c)(1)(A) ("Count 3").

Movant was sentenced to a total term of life imprisonment, plus an additional 84 months, consisting of concurrent life sentences on each of Counts 1 and 2, and a consecutive term of 84 months' imprisonment on Count 3. The Eleventh Circuit affirmed his convictions and sentences.

In 2013, Movant filed a § 2255 motion, which the Court denied with prejudice. In 2019, Movant filed an application for leave to file a second or successive § 2255 motion, in which he argued, in relevant part, that his § 924(c) conviction was unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The Eleventh Circuit denied the application. Again in 2019, Movant filed a second § 2255 motion, which the Court denied because Movant did not obtain an order from the court of appeals authorizing the district court to consider the motion.

Movant has now filed a second application for leave to file a second or successive motion to vacate, set aside or correct sentence. The Eleventh Circuit granted his application, finding that Movant "has made a *prima facie* showing that his § 924(c) conviction may be unconstitutional under [*United States v. Davis*, 139 S. Ct. 2319 (2019)]." ECF No. 1 at 5.

II. Analysis

Movant challenges the validity of his conviction on Count 3 in light of *Davis*. In *Davis*, the Supreme Court held that 18 U.S.C. § 924(c)(3)(B), often referred to as "the residual clause," is unconstitutionally vague. Movant asks this Court to vacate his conviction and sentence on Count 3 and to conduct a full resentencing as to Counts 1 and 2, arguing that because all three counts were interrelated, Count 3 must have influenced the sentencing judge as to the overall sentencing. Movant notes that his

codefendant Kendrick Lewis, who pleaded guilty to the kidnapping charge and to possession of a firearm during and in relation to a crime of violence (the kidnapping charge), was successful in a similar § 2255 motion. In that case, the Court vacated the § 924(c) charge and conducted a full resentencing on the remaining count (without objection from the Government). *Lewis v. United States*, Case No. 19-61764-CIV-MIDDLEBROOKS/REID; Case No. 10-60292 at ECF Nos. 249, 268, 269.

The Government concedes that, in light of *Davis*, the conviction and sentence on Count 3 should be vacated. However, the Government opposes a full resentencing because it contends that Movant cannot demonstrate that the alleged erroneous sentence on Count 3 influenced the sentencing judge's decisions on Counts 1 and 2. The Government claims that the lack of influence is clear because the sentencing judge imposed two concurrent life sentences as to Counts 1 and 2, while the alleged erroneous conviction resulted in a consecutive 84-month sentence.

To obtain relief based on the recent holding in *Davis*, Movant must, as a threshold matter, show that his conviction under § 924(c) was likely the result of application of the residual clause. See *Beeman v. United States*, 871 F.3d 1215, 1221, 1225 (11th Cir. 2017). Movant meets that threshold requirement.

"Crime of violence" is defined in § 924(c)(3) as follows:

For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Section 924(c)(3)(A) is commonly referred to as the “elements clause” and section 924(c)(3)(B) as the “risk-of-force clause” or “residual clause.”

Federal kidnapping in violation of 18 U.S.C. § 1201(a) can be committed either by physical or psychological force. *United States v. Gillis*, 938 F.3d 1181, 1210 (11th Cir. 2019). In *Gillis*, the Eleventh Circuit held that federal kidnapping does not qualify as a crime of violence under the elements clause of 18 U.S.C. § 373(a), which the Court deemed similar to the elements clause of § 924(c)(3)(A). See *id.* at 1200, 1210. Other district courts in this Circuit have held that *Gillis* compels the conclusion that a § 1201 kidnapping does not qualify as a crime of violence under § 924(c)(3)(A)’s elements clause. See *United States v. Dugas*, Case No.: 5:16-cv-95/MCR/MJF, 2020 WL 535696, at *3 (N.D. Fla. Jan. 31, 2020); *United States v. Noble*, No. 12-00090-KD-B, 2020 WL 831141, at *3 (S.D. Ala. Feb. 19, 2020); *Robinson v. United States*, 1:16cv515-MHT, 2019 WL 4791512, at *1 (M.D. Ala. Sept. 30, 2019). Accordingly, it appears Movant’s sentence on Count 3 cannot be supported by application of the elements clause.

With the elements clause removed from the picture, Movant’s Count 3 conviction and sentence under § 924(c) can only be upheld if kidnapping qualifies as a crime of violence under the residual clause. Since, after *Davis*, the residual clause in § 924(c)(3)(B) has been found to be unconstitutionally vague, there is no remaining basis to find that a federal kidnapping charge is a crime of violence under either clause of § 924(c)(3). *Davis*, 139 S. Ct. at 2336. Accordingly, Movant is entitled to relief and his conviction and sentence on Count 3 must be vacated.

The question remains whether simply vacating the consecutive 84-month sentence is sufficient or, on the other hand, whether a full resentencing is necessary. On

this the Parties disagree. Curiously, the Parties largely rely on the same authority for their disparate positions.

In *United States v. Hernandez*, the Eleventh Circuit held that when a district court grants a § 2255 motion, it “must choose from among four distinct remedies: (1) discharge the prisoner; (2) resentence the prisoner; (3) grant the prisoner a new trial; or (4) correct the prisoner’s sentence.” 735 F. App’x 998, 1001 (11th Cir. 2018) (quoting *United States v. Brown*, 879 F.3d 1231, 1236 (11th Cir. 2018)). In deciding whether to hold a new sentencing hearing, the court should ask two questions: “First, did the errors requiring the grant of habeas relief undermine the sentence as a whole?; and ‘Second, will the sentencing court exercise significant discretion in modifying the defendant’s sentence, perhaps on questions the court was not called upon to consider at the original sentencing?’” *Id.* (quoting *Brown*, 879 F.3d at 1239–40).

In general, “a resentencing hearing may be required ‘[i]f there is a chance that an erroneous sentence on one count of conviction influenced the sentencing judge’s decisions on other counts.’” *Id.* This situation might occur, for example, if the original sentencing judge did not consider certain factors because a mandatory minimum sentence rendered such consideration unnecessary. *Id.* In such circumstances, due process may require a hearing with the defendant present. *Id.*

Movant quotes extensively from *United States v. Fowler*, 749 F.3d 1010 (11th Cir. 2014), in support of his request for a full resentencing. He cites *Fowler* for the proposition that “sentences that include a mandatory consecutive term of imprisonment, such as the consecutive ten-year sentence that Fowler received on Count 2, are particularly well suited to [being] treated as a package because they are inherently interdependent.” *Id.*

at 1017 (internal quotation and footnote omitted). But in *Fowler* the sentence to be vacated was a life sentence for witness tampering resulting in murder. After *Fowler* successfully challenged his witness-tampering conviction, the district court resentenced him to life imprisonment on the lone surviving firearm count, explaining that its original sentence “was obviously a package” and that it never would have imposed a ten-year sentence “on a murder-with-a-firearm charge standing alone.” *Id.* at 1012.

Similarly, Movant points to the resentencing of codefendant Lewis in support of his request for a full resentencing. But in Lewis’ case, simply vacating the sentence on the § 924(c) charge would have reduced his total sentence from 180 months to 96 months.¹ Upon resentencing, which was not opposed by either party, Judge Middlebrooks, like the judge in *Fowler*, actually increased the sentence on the sole remaining count from 96 months to 144 months. Case No. 10-60292-CR-MIDDLEBROOKS at ECF No. 269. Thus, while the total sentence was reduced, the sentence on the underlying kidnapping count was increased. Clearly, then, the two sentences as to Lewis were interrelated, and a full resentencing was appropriate.

As to Movant, however, the remaining sentences on Counts 1 and 2 are life sentences without parole. Vacating the consecutive 84-month sentence imposed as to Count 3 would have no effect on the total sentence in any real sense. Life, in the federal system, is life. And there is nothing in the record presented to the undersigned to suggest that the required mandatory consecutive sentence on the § 924(c) count had any

¹ Lewis was originally sentenced to 135 months on Count 2 and a consecutive 84 months on Count 3 for a total sentence of 219 months. His sentence was later reduced pursuant to Fed.R.Crim.P. 35 to 96 months on Count 2 and 84 months consecutive on Count 3 for a total sentence of 180 months. Case No. 10-60292-CR-MIDDLEBROOKS at ECF Nos. 155, 217.

influence whatsoever on the sentencing judge's decision as to Counts 1 and 2. See *Hernandez*, 735 F. App'x at 1001. Accordingly, there is no requirement for a full resentencing.

Nevertheless, the fact that a new sentencing is not required does not necessarily mean that resentencing is a bad idea. Movant points out that Judge Middlebrooks observed at sentencing: "I always have concerns about a life sentence for a relatively young person because there's always the chance they might turn their life around." ECF No. 8 at 8. Movant also lists in his Reply certain intervening mitigating factors that Judge Middlebrooks "could not have considered in 2011 because they had not yet occurred." *Id.* Finally, Movant notes that Judge Middlebrooks reduced codefendant Lewis' total sentence upon resentencing after vacating his § 924(c) sentence relying on *Davis*. The goal of avoiding sentencing disparities among defendants, he argues, supports a resentencing for Movant.

In the end, it all comes down to this: it is the sentencing judge who is in the best position to decide whether a full resentencing is necessary, as only the sentencing judge knows whether the sentence imposed on Count 3 in any way affected his thinking in imposing sentence as to Counts 1 and 2. If the answer to that question is no, then a simple vacation of the sentence on Count 3 is appropriate. If the answer is yes, then a resentencing would be proper.

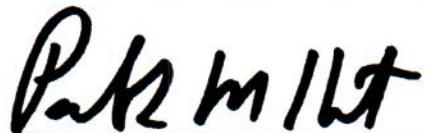
III. Recommendation

Based upon the foregoing, the undersigned hereby RECOMMENDS that Movant's § 2255 Motion be GRANTED and that Movant's § 924(c) conviction and sentence be VACATED. Based on the information available to the undersigned, it appears that a

resentencing is unnecessary. However, if the sentencing judge believes the sentence imposed on Count 3 affected the sentences imposed on Counts 1 and 2, then Movant should be resentenced, with an opportunity to raise any relevant factors under 18 U.S.C. § 3553. See *Fowler*, 749 F.3d at 1017 ("When the sentencing package becomes unbundled . . . the district court has the authority to recalculate and reconsider the defendant's sentence for it to comport with the district court's original intentions at sentencing.") (internal quotations and brackets omitted).

Within fourteen days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to any of the above findings and recommendations as provided by the Local Rules for this district. 28 U.S.C. § 636(b)(1); S.D. Fla. Mag. R. 4(b). The parties are hereby notified that a failure to timely object waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions contained in this Report and Recommendation. 11th Cir. R. 3-1 (2016); see *Thomas v. Am*, 474 U.S. 140 (1985).

DONE and SUBMITTED at Fort Lauderdale, Florida, this 28th day of July 2020.



PATRICK M. HUNT
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Honorable Donald M. Middlebrooks
All Counsel of Record

Appendix C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 20-60773-CIV-MIDDLEBROOKS/Hunt
(10-CR-60292-MIDDLEBROOKS)

ADOLPHUS SYMONETTE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on Magistrate Judge Patrick Hunt's Report and Recommendation ("Report"), recommending granting Movant Adolphus Symonette's counseled Motion to Vacate, pursuant to 28 U.S.C. §2255 (DE 9). Movant was convicted, for Count 3, under 18 U.S.C. § 924(c)(3)(B)'s residual clause, which the Supreme Court has since held to be unconstitutionally vague. *See United States v. Davis*, 139 S. Ct. 2319, 2336 (2019). The Report recommends, and the government concedes, that Movant's conviction and sentence on Count 3 should be vacated. (DE 9 at 3-4).

The Parties dispute how to proceed with respect to the scope of Movant's resentencing. I sentenced Movant to concurrent terms of life imprisonment on Counts 1 and 2, for the crimes of conspiracy to commit racketeering in violation of 18 U.S.C. §§ 1962(d) and 1963(a), and kidnapping, in violation of 18 U.S.C. § 1201(a)(1). (DE 193 in Case No. 10-CR-60292-DMM). “[A] resentencing hearing may be required ‘[i]f there is a chance that an erroneous sentence on one count of conviction influenced the sentencing judge’s

decisions on other counts”” *United States v. Hernandez*, 735 F. App’x 998, 1001 (11th Cir. 2028) (quoting *United States v. Brown*, 879 F.3d 1231, 1239-40 (11th Cir. 2018)). The Report notes that vacating Movant’s 84-month consecutive sentence imposed on Count 3 would appear to have no real effect on the total sentence in Movant’s case, as “[l]ife, in the federal system, is life.” (DE 9 at 6). Judge Hunt therefore posits that resentencing appears to be unnecessary, but he appropriately defers this question to me. (DE 9 at 7-8).

Movant urged the magistrate judge to recommend a full resentencing (DE 8), and he has now filed objections to the Report on this sole issue. (DE 10, DE 11). Movant requests that I vacate Count 3 and then revisit his total sentence of life imprisonment on Counts 1 and 2, arguing that all of the counts were interrelated and therefore “reconstruct[ing]” the entire “sentencing package” is necessary to ensure consistency with the Sentencing Guidelines. (DE 10 at 1; DE 8 at 6-8). Movant further points to evidence of rehabilitation and suggests that my reconsideration of the §3553 factors may warrant a reduced sentence on the remaining counts in light of all the current circumstances. (DE 10 at 1). I disagree. The counts here were not interdependent in such a way that the sentence I imposed on Count 3 influenced my decision on the remaining counts. Therefore Movant is not entitled to a full resentencing.

CONCLUSION

After a *de novo* review of Judge Hunt’s Report, the record in this case, Movant’s objections and applicable law, I agree with the Report’s recommendations. And for the reasons set forth above, I decline to conduct a full resentencing hearing. Instead, I will vacate Movant’s conviction on Count 3 and also the 84-month consecutive sentence imposed on

that count. The concurrent life sentences imposed on Counts 1 and 2 shall remain undisturbed.

Accordingly, it is **ORDERED AND ADJUDGED** that:

- (1) The Report (DE 9) is **ADOPTED**.
- (2) Petitioner Adolphus Symonette's Motion to Vacate pursuant to 28 U.S.C. § 2255 (DE 4) is **GRANTED**.
- (3) Movant's conviction and sentence as to Count 3 in the underlying criminal case (Case No. 10-CR-60292-Middlebrooks), will be vacated by separate Order, and Movant's sentence will be re-imposed as to Counts 1 and 2 only.
- (4) Movant's objections to the Report (DE 10, DE 11) are **OVERRULED**.
- (5) Certificate of Appealability: Because I am granting Movant's requested habeas relief, and because my decision as to whether to conduct a full resentencing hearing would seem to lie within my sole discretion as the sentencing judge, it does not appear necessary to make any determination about whether to issue a certificate of appealability. However, to the extent that my decision regarding whether to conduct a full resentencing hearing is appealable, I decline to issue a certificate of appealability as to that issue. I have considered the standard set forth in 28 U.S.C. § 2253(c)(2) and conclude that Movant cannot make the requisite showing.
- (6) The Clerk of Court is directed to **CLOSE THIS CASE**.

(7) All pending motions are **DENIED AS MOOT**.

SIGNED in Chambers at West Palm Beach, Florida, this 30th day of December, 2020.



Donald M. Middlebrooks
Donald M. Middlebrooks
United States District Judge

cc: Magistrate Judge Patrick Hunt
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