No. _____

October Term, 2021

IN THE
Supreme Court of the United States

ADOLPHUS SYMONETTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

28 U.S.C. § 2253:

> **(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> . . .
>
> **(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> . . .
>
> **(B)** the final order in a proceeding under section 2255.
>
> **(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> **(3)** The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), the Court stated that "[w]here a district court has rejected [a habeas petitioner's] constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Quoted in Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

The Question Presented:

Whether reasonable jurists would find the district court's decision to vacate Count 3 of the second superseding indictment while simultaneously denying a full resentencing hearing with petitioner being present as to Counts 1 and 2 debatable or wrong?

INTERESTED PARTIES

There are no parties to the instant proceeding other than those named in the caption of the case.

RELATED CASES

United States v. Adolphus Symonette, 10-Cr-60292-Middlebrooks (S.D. Fla. 2010)

Adolphus Symonette v. United States, 20-CIV-Middlebrooks/Hunt (S.D. Fla. 2020)

Adolphus Symonette v. United States, 2021 WL 3186792 (11th Cir. 2021)

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PETITION FOR WRIT OF CERTIORARI

Mr. Adolphus Symonette respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in *Adolphus Symonette v. United States,* 2021 WL 3186792 (11th Cir. 2021) which denied Mr. Symonette's motion for a certificate of appealability of an order entered by the U.S. District Court for the Southern District of Florida granting Mr. Symonette's Motion to Vacate pursuant to 28 U.S.C. § 2255 but denying his request for a full resentencing hearing with the petitioner being present at said hearing.

OPINION BELOW

A copy of the order of the United States Court of Appeals for the Eleventh Circuit, which denied petitioner's motion for a certificate of appealability, is contained in Appendix F.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The order of the court of appeals was entered on April 30, 2021. This petition is timely filed pursuant to this Court's order of July 19, 2021. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following statutory provision:

28 U.S.C. § 2253:

> **(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

. . .

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

. . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS IN THE LOWER COURTS

1. On February 23, 2011, petitioner was charged by a second superseding indictment which one count of conspiracy to commit racketeering, one count of kidnapping, and one count of possession of a firearm in furtherance of a crime of violence, to wit, kidnapping. *See* docket entry 105 (hereinafter "DE") in *U.S. v. Symonette*, Case No. 10-60292-Cr-Middlebrooks (S.D. Fla. 2010).

2. The case proceeded to a jury trial. On July 22, 2011, petitioner was convicted of all three counts as charged. *See id.* at DE 182.

3. On September 30, 2011, petitioner was sentenced to life imprisonment for conspiracy to commit racketeering and kidnapping, to run concurrently. He was also

sentenced to a consecutive 84 months imprisonment possession of a firearm in furtherance of a crime of violence, to wit, kidnapping. *See id.* at DE 193.

4. The judgment and sentence were affirmed in *U.S. v. Symonette*, 486 Fed.Appx. 761 (11th Cir. 2012).

5. On April 14, 2020, the Eleventh Circuit Court of Appeals entered an order granting petitioner leave to file a second or successive motion pursuant to 28 U.S.C. § 2255(h). *See* DE 1 in *Symonette v. U.S.*, Case No. 20-60773-CIV-Middlebrooks/Hunt (S.D. Fla. 2020). The Court ruled that petitioner had made a *prima facie* showing that his 18 U.S.C. § 924(c) might be unconstitutional under *U.S. v. Davis*, 139 S.Ct. 2319 (2019).

6. On May 1, 2020, petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence by a person in federal custody. *See* Appendix A.

7. On June 12, 2020, the government responded to petitioner's motion. *See* DE 7 in Case No. 20-60773-CIV-Middlebrooks/Hunt.

8. On June 26, 2020, petitioner filed a reply to the government's response. *See* DE 8 in Case No. 20-60773-CIV-Middlebrooks/Hunt.

9. On July 28, 2020, U.S. Magistrate Judge Patrick M. Hunt entered a Report and Recommendation in which the Court recommended that petitioner's § 2255 motion be granted and that Count 3 be vacated in light of *U.S. v. Davis*, 139 S.Ct. 2319 (2019). However, the Court also recommended that a full resentencing was unnecessary. *See* Appendix B.

10. On August 7, 2020 and petitioner filed objections to the Report and Recommendation insofar as it recommended that a full resentencing was unnecessary. *See* DE 10 in Case No. 20-60773-CIV-Middlebrooks/Hunt.

11. On August 10, 2020, petitioner filed an addendum to his objections. *See* DE 11 in Case No. 20-60773-CIV-Middlebrooks/Hunt.

12. On December 30, 2020, the district court adopted the Report and Recommendation and granted petitioner's § 2255 motion. The Court ruled that Count 3 in the underlying criminal case (Case No. 10-60292-Cr-Middlebrooks) would be vacated by separate order and that petitioner's sentence would be reimposed as to Counts 1 and 2 only. The Court also overruled petitioner's objections, deciding that a full resentencing was unnecessary. The Court also decided against issuing a certificate of appealability. *See* Appendix C.

13. On January 12, 2021, the district court entered an order in Case No. 10-60292-Cr-Middlebrooks in which the Court vacated Count 3 and reimposed petitioner's sentence as to Counts 1 and 2. *See* DE 287. *See also* the Amended Judgment at Appendix D.

14. On January 22, 2021, petitioner filed a notice of appeal in Case No. 10-60292-Cr-Middlebrooks. *See* DE 289. The Eleventh Circuit Court of Appeals Case No. is 21-10268-AA.

15. On January 26, 2021, petitioner filed a notice of appeal in Case No. 20-cv-60773-DMM. *See* DE 13. The Eleventh Circuit Court of Appeals Case No. is 21-

10287-A.

16. On February 11, 2021, the district court entered an Order Denying as Moot the Movant's Motion for Certificate of Appealability. *See* DE 19 in Case No. 20-cv-60773-DMM. In that order, the district court stated that "to the extent that Movant seeks a ruling from the Eleventh Circuit, he ought to file his Motion with that court." DE 19 at 1-2.

17. On February 11, 2021, petitioner filed a Motion for Certificate of Appealability in Eleventh Circuit Court of Appeals Case Number 21-10287-A. *See* Appendix E.

18. Also on February 11, 2021, petitioner filed a Motion to Consolidate Eleventh Circuit Court of Appeals Case Numbers 21-10287-A and 21-10268-AA.

19. On April 30, 2021, the Eleventh Circuit Court of Appeals entered an order granting petitioner's motion to consolidate his appeals in Eleventh Circuit Court of Appeals Case Numbers 21-10287-A and 21-10268-AA. *See* Appendix F. However, the Court also denied petitioner's motion for a certificate of appealability regarding the district court's denial of a full resentencing hearing with the petitioner being present.

STATEMENT OF FACTS

In its response to petitioner's § 2255 petition, the government agreed that Count 3 of the superseding indictment should be vacated in light of *U.S. v. Davis*, 139 S.Ct. 2319 (2019). *See* DE 7 in Case No. 20-cv-60773-DMM. However, the

government objected to a full resentencing hearing with the petitioner being present on the ground that vacating Count 3 would not undermine the life sentence that he received on Counts 1 and 2. *See id.*

In petitioner's reply to the government's response, *see* DE 8 in Case No. 20-cv-60773-DMM, petitioner cited to *U.S. v. Brown*, 879 F.3d 1231 (11th Cir. 2018) in which the court addressed the issue of when a defendant is entitled to a full resentencing hearing where a change to his sentence is required as a result of his having obtained relief pursuant to 28 U.S.C. § 2255. *Brown* stated that one of the factors to be considered is whether "the sentencing court [will] exercise significant discretion in modifying the defendant's sentence, perhaps on questions the court was not called upon to consider at the original sentencing." *Brown*, 879 F.3d at 1239-40

Petitioner wrote in his reply to the government's response that:

> At Mr. Symonette's sentencing hearing, Judge Middlebrooks stated, "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 and behave more differently; however, in this instance I think it would only be a hope. I don't see anything shown by Mr. Symonette *thus far* that would make me believe that that is a likelihood." (Emphasis added.) Page 24 of DE 212 in *U.S. v. Symonette*, 10-60292-Cr-Middlebrooks.
>
> Mr. Symonette was just 26 years old when he was sentenced in 2011, and he had only one criminal history point. *See* paragraph 129 in Mr. Symonette's presentence investigation report. Mr. Symonette is now 35 years old, and during the nine years that he has been in prison, he has repeatedly led worship services for Messianic Jews that have been attended by other inmates. He has also received certificates for completing classes in health, nutrition, exercise, and music.

> Additionally, he has not been cited for a prison disciplinary infraction since 2014. These are all positive things that Judge Middlebrooks could not have considered in 2011 because they had not yet occurred. But it is positive behavior like this that may well cause the sentencing court to exercise significant discretion in modifying Mr. Symonette's sentence at a resentencing hearing.
>
> The *Brown* Court said that addressing the 18 U.S.C. § 3553(a) factors in ways that were unnecessary at the original sentencing is also a relevant consideration insofar as the second question posed in *Brown* is concerned. *Brown*, 879 F.3d at 1240. One of those § 3553 factors is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C. § 3553(a)(6). In 2019, co-defendant Kendrick Lewis' sentence was reduced after he was granted relief by way of a §2255 motion in which he made the same argument that Mr. Symonette made in his §2255 motion where he relied upon *U.S. v. Davis*, 139 S.Ct. 2319 (2019). *See* DE 268 and 269 in *U.S. v. Lewis*, 10-60292-Cr-Middlebrooks. Because Lewis' resentencing occurred in 2019, it was obviously something that Judge Middlebrooks could not have considered in 2011 when he sentenced Mr. Symonette. However, Judge Middlebrooks would be able to take that into consideration at a resentencing hearing.

DE 8 in Case No. 20-cv-60773-DMM at 8-9 (footnote omitted).

A magistrate judge later issued a Report and Recommendation in which the Court recommended that petitioner's § 2255 motion be granted insofar as vacating Count 3 was concerned but also recommended against having a full resentencing because there was nothing in the record to suggest that the sentencing judge's decision as to Count 3 influenced his decision as to Counts 1 and 2. *See* Appendix B. But

immediately thereafter the Court said:

> *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.

Appendix B at 7 (emphasis added).

Petitioner objected to the Report and Recommendation stating that although petitioner is currently serving a life sentence, he has, during the nine years that he has been in prison,[1] tried to better himself and help others by doing such things as leading

[1] Petitioner has now been in prison for ten years.

worship services for inmates as well as completing classes in health, nutrition, exercise, and music. *See* DE 10 in Case No. 20-cv-60773-DMM at 1-2.

Petitioner also attached a report published in 2016 by the U.S. Sentencing Commission entitled "Recidivism Among Federal Offenders: A Comprehensive Overview." *See* DE 10 in Case No. 20-cv-60773-DMM at 2. Petitioner wrote:

> Page 18 of that document states that "30.2 percent of offenders with zero total criminal history points were rearrested within eight years, compared to 81.5 percent of offenders with more than 10 total criminal history points." Mr. Symonette had one criminal history point and a criminal history category of 1 when he was originally sentenced. *See* paragraph 129 of the PSI. Thus, it is certainly arguable that he has a low risk of recidivism. Additionally, page 23 of that same report states that inmates who are over the age of 60 when released have the lowest recidivism rate of all offenders, while inmates who are between the ages of 51 and 60 when released have the second-lowest rate of recidivism.
>
> The study concluded by saying that "[t]he Commission found that, consistent with existing research, two factors — offenders' criminal histories and their ages at the time of release into the community -- were most closely associated with differences in recidivism rates."

Id. at 2-3.[2]

Shortly after filing objections to the Report and Recommendation, petitioner filed an addendum to his objections which contained a document that listed thirteen

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[2] Petitioner was 35 years old when he filed his objections to the Report and Recommendation. Attached to his objections was a chart published in 2019 by the U.S. Department of Health and Human Services which reflected that a person his age had a life expectancy of 75 years.

educational courses that petitioner had attended while in prison and which also reflected that he had no disciplinary infractions during the first six months of 2020. *See* DE 11 in Case No. 20-cv-60773-DMM.

Nevertheless, the district court adopted the Report and Recommendation in its entirety. *See* Appendix C. Regarding the decade's worth of mitigating evidence reflecting petitioner's post-offense rehabilitation, the court stated merely that "[m]ovant . . . 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. . . . 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." *See* Appendix C at 2.

The district court vacated Count 3 in the underlying criminal case and reimposed a life sentence as to Counts 1 and 2. *See id.* at 3. The court also decided against issuing a certificate of appealability regarding whether to conduct a full resentencing hearing. *See id.*

Petitioner subsequently filed a motion for certificate of appealability in the Eleventh Circuit Court of Appeals. *See* Appendix E. The Circuit Court denied that motion stating:

> [R]easonable jurists would not debate the District Court's denial of Mr. Symonette's request for a full resentencing hearing. Vacating the Count 3 conviction and sentence did not undermine the sentence as a whole. The sentence imposed under Count 3 was a consecutive 84-month sentence that followed Mr. Symonette's two concurrent life sentences for Counts 1 and 2. Vacating the 84-month consecutive sentence had no impact on the life sentence. See Brown, 879 F.3d at 1239. Moreover, in refusing to grant a full resentencing hearing, the District Court reiterated that, at Mr. Symonette's original sentencing hearing, the sentence imposed for Count 3 did not influence the life sentences that were imposed on his other two counts.

Appendix F at *2.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The sentencing court would be able to exercise significant discretion in modifying the petitioner's life sentence for reasons that the court was not called upon to consider at the original sentencing. Those reasons consist of a decade's worth of mitigating evidence regarding petitioner's post-offense rehabilitation. Reasonable jurists would find the district court's decision to not grant petitioner a full resentencing with his presence required to be debatable or wrong.

28 U.S.C. § 2253(c)(2) provides that an appeal from a final order in a § 2255 proceeding may not be taken without a certificate of appealability ("COA") certifying that "the applicant has made a substantial showing of the denial of a constitutional right." In *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), the Court stated that "[w]here

a district court has rejected [a habeas prisoner's] constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

In *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003), the Court stated:

> . . . In *Slack, supra,* at 483, 120 S.Ct. 1595, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle,* 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing [for granting a COA]. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383).
>
> . . .
>
> . . . [O]ur opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner " 'has already failed in that endeavor.' " *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383.

Miller-El continued:

> A prisoner seeking a COA must prove " 'something more than the absence of frivolity' " or the existence of mere "good faith" on his or her part. *Barefoot, supra,* at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack,* "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

Miller-El, 537 U.S. at 338.

> At the COA stage . . . a court need not make a definitive inquiry into [resolving the merits of a petitioner's constitutional claims.] As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. *Slack,* 529 U.S., at 481, 120 S.Ct. 1595; *Hohn,* 524 U.S., at 241, 118 S.Ct. 1969. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. *The question is the debatability of the underlying constitutional claim, not the resolution of that debate.*

Miller-El, 537 U.S. at 342 (emphasis added).

Reasonable Jurists Would Find the District Court's Decision to Not Grant Petitioner a Full Resentencing with His Presence Required to be Debatable or Wrong

In *Symonette v. U.S.*, 2021 WL 3186792 at *2 (11th Cir. 2021), the Court relied heavily upon *U.S. v. Brown*, 879 F.3d 1231 (11th Cir. 2018) in denying petitioner's motion for a COA. *Brown* stated in part that:

> From our precedent, two inquiries emerge to guide our consideration of whether a defendant is entitled to a resentencing hearing when a change to his sentence is required as a result of his § 2255 motion. First, did the errors requiring the grant of habeas relief undermine the sentence as a whole? 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? When these factors are present, a District Court's sentence modification qualifies as a critical stage in the proceedings, requiring a hearing with the defendant present. Stincer, 482 U.S. at 745, 107 S.Ct. at 2667.

Brown, 879 F.3d at 1239-40.

The *Symonette* Court answered the first inquiry by saying no: the errors requiring the grant of habeas relief did not undermine the sentence as a whole. *Symonette*, 2021 WL 3186792 at *2. However, the Court failed to address the second inquiry at all. Regarding the second inquiry, *Brown* said that "[i]f If a sentencing court has no discretion in how it modifies a sentence—as in [*U.S. v. Parrish*, 427 F.3d 1345 (11th Cir. 2005)] where the court was required to reinstate the exact same sentence—a resentencing hearing may not be required. But if a court is called upon to exercise

significant discretion in modifying a sentence, a resentencing hearing may be required. . . . A resentencing hearing is also needed when a court must exercise its discretion in modifying a sentence in ways it was not called upon to do at the initial sentencing." *Brown*, 879 F.3d at 1239.

In petitioner's case, the sentencing court *would* have discretion in deciding whether to modify petitioner's life sentence to a term-of-years sentence because the life sentence that was originally imposed for Counts 1 and 2 was discretionary, not mandatory. Additionally, the sentencing court would have the discretion to modify petitioner's sentence in ways it was not called upon to do at the original sentencing hearing. Such ways were set forth in *Symonette v. U.S.*, Case No. 20-60773-CIV-Middlebrooks/Hunt (S.D. Fla. 2020) at DE 8, 10, and 11. *See also supra* at 7-10.

In *Baptiste v. U.S.*, 2021 WL 328069 (S.D. Fla. 2021), the Magistrate Judge issued a Report and Recommendation in which he concluded that a full resentencing hearing with the defendant being present was constitutionally required after two of the counts that the movant was convicted of ten years earlier by a jury were vacated after movant filed a § 2255 motion based upon *U.S. v. Davis*, 139 S.Ct. 2319 (2019). In reaching that conclusion, the Magistrate Judge discussed Brown's second inquiry, *i.e.*, would 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? *Baptiste* said:

> Movant highlights his rehabilitative conduct since his incarceration ten years ago, emphasizing that he "is now

> able to present a decade's worth of mitigating evidence regarding his post-offense rehabilitation." [DE 27 at 6]. In *Pepper v. United States*, 562 U.S. 476, 491, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011), the Supreme Court held that "[e]vidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing." Movant is entitled to present evidence of his rehabilitation to the District Court before it imposes a new sentence. Thus, the undersigned concludes that a resentencing hearing is constitutionally required in this case.

Baptiste, 2021 WL 328069 at *4.[3]

In the instant case, petitioner would likewise be able to present a decade's worth of mitigating evidence regarding his post-offense rehabilitation were he granted a full resentencing hearing where he could personally address the sentencing court.

In the block quote immediately above, *Baptiste* quoted *Pepper v. U.S.*, 562 U.S. 476 (2011). In *Pepper*, the Court held that when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation and that such evidence may support a downward variance from a sentencing guidelines range. *Id.* at 481. The Court said:

> [E]vidence of postsentencing rehabilitation may plainly be relevant to "the history and characteristics of the defendant." § 3553(a)(1). Such evidence may also be pertinent to "the need for the sentence imposed" to serve the general purposes of sentencing set forth in § 3553(a)(2)—in particular, to "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the

[3] The District Court adopted the Report and Recommendation. *See* DE 29 in *Baptiste v. U.S.*, Case No. 19-cv-61975 (S.D. Fla.). A full resentencing hearing is scheduled in December 2021. *See* DE 484 in *U.S. v. Baptiste*, Case No. 10-cr-60077 (S.D. Fla.).

> defendant," and "provide the defendant with needed educational or vocational training ... or other correctional treatment in the most effective manner." §§ 3553(a)(2)(B)-(D); see *McMannus,* 496 F.3d, at 853 (Melloy, J., concurring) ("In assessing ... deterrence, protection of the public and rehabilitation, 18 U.S.C. § 3553(a)(2)(B)(C) & (D), there would seem to be no better evidence than a defendant's post-incarceration conduct"). Postsentencing rehabilitation may also critically inform a sentencing judge's overarching duty under § 3553(a) to "impose a sentence sufficient, but not greater than necessary," to comply with the sentencing purposes set forth in § 3553(a)(2).

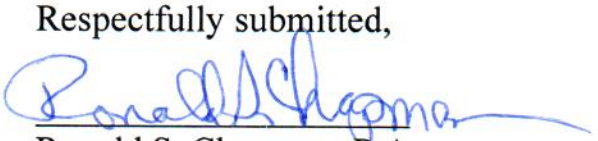
Pepper, 562 U.S. at 491. *See also U.S. v. Davis*, 784 Fed.Appx. 277, 278 (5th Cir. 2019) (on remand from U.S. Supreme Court, the circuit court cited *Pepper* when ordering the district court to conduct a full resentencing).

Further evidence that reasonable jurists would find the district court's decision to not grant petitioner a full resentencing to be debatable or wrong is the fact that the Report and Recommendation itself states that "the fact that a new sentencing is not required does not necessarily mean that resentencing is a bad idea." See Appendix B at 7. *Compare with Garrey v. Kelly*, 2021 WL 1251370 (D. Mass. 2021) (disagreement between Magistrate Judge and District Court Judge was itself evidence that reasonable jurists could debate about whether constitutional error occurred during jury selection).

CONCLUSION

Based upon the foregoing petition, petitioner requests that this Court grant his petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit and order that Court to grant petitioner's motion for a certificate of appealability as to the issue of whether a full resentencing hearing should be conducted with petitioner being present at said hearing.

Respectfully submitted,



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