EXHIBIT A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0246p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABRAHAM A. AUGUSTIN,

Defendant-Appellant.

No. 20-5454

Appeal from the United States District Court
for the Eastern District of Tennessee of Chattanooga.
No. 1:09-cr-00187-1—Travis Randall McDonough, District Judge.

Decided and Filed: October 20, 2021

Before: ROGERS, GRIFFIN, and THAPAR, Circuit Judges.

COUNSEL

ON BRIEF: J. Nicholas Bostic, Lansing, Michigan, for Appellant. Samuel R. Fitzpatrick, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

THAPAR, Circuit Judge. In a drug deal gone wrong, Abraham Augustin kidnapped the middleman at gunpoint and—after he was rescued—tried to hire a hitman to murder him and two other witnesses. A jury convicted Augustin of eight charges. More than a decade later, Augustin sought postconviction relief, arguing that one of his convictions was unlawful under a recent Supreme Court decision. The district court agreed. So it corrected the error by vacating that

conviction and the relevant part of Augustin's sentence. On appeal, Augustin contends that the district court should have gone further and resentenced him entirely. We disagree and affirm.

I.

In 2009, Abraham Augustin was looking to buy cocaine. He asked a man named Robert Jordan, whom he'd met at a local nightclub a week or two before. Jordan didn't deal cocaine, but he agreed to "find somebody" who did. R. 122, Pg. ID 854. So he contacted another man, "Hoss," who offered to sell Augustin six ounces of cocaine for $5,100. The trio met at a local gas station and sealed the deal.

But later that night, Hoss called Jordan. There was a problem: Augustin had shorted him $900. To set things straight, Jordan reached out to Augustin, who agreed to meet "first thing in the morning" to "pay up." *Id.* at 858. When Jordan arrived at the meeting place, Augustin was already there with his friend, Lorrance Dais. Dais sat in the driver's seat of Augustin's car. Augustin told Jordan to get into the passenger's seat while he got in the back. Once they were all inside, Augustin and Dais both "pulled out guns." *Id.* at 860. They told Jordan that "the dope was fake" and that he was being kidnapped. *Id.* at 862.

From there, Augustin and Dais blindfolded Jordan and bound him with zip ties. Augustin then drove to a field in the "middle of nowhere." *Id.* at 866. After Augustin parked the car, he and Dais ordered Jordan to get out and removed his blindfold. Augustin then gave Jordan his phone and said, "I'm going to give you a chance." *Id.* at 934. He demanded that Jordan get them the $4,200, the real cocaine, or access to Hoss.

Not knowing where else to turn, Jordan called his mother. He told her that he'd been kidnapped. But he didn't tell her the full story—he didn't want her to know he'd been part of a drug deal. Without that context, though, she didn't believe him. So Augustin put a gun to Jordan's head and forced him to tell her everything. In the end, she agreed "to try to get the money [the] best way she could" and to bring it to a nearby gas station. *Id.* at 869.

Jordan and his kidnappers waited for her to call with an update on the money. During that time, Jordan tried to explain that he didn't know anything about the fake cocaine. Augustin

didn't believe him. "I know you're lying to me," he said, and slid one bullet into the cylinder of his revolver. *Id.* at 872. And like a game of Russian roulette, Augustin then spun the cylinder, pointed the revolver at Jordan's head, and fired—click. It didn't go off. But to prove that the gun worked—and to show Jordan that nobody could hear them—Augustin fired a couple of shots at a passing bird.

Sometime later, Jordan's mother called to say she was on her way to the gas station. Augustin decided to meet her alone. Before leaving, though, he handed a firearm to Dais and told him to "use that one." *Id.* at 874. Dais and Jordan waited for hours. Dais tried calling Augustin, but he didn't answer. Night fell. Not knowing what else to do, Dais decided they should "walk back into town." *Id.* at 877. He removed the zip ties from Jordan's legs, and they started down the road.

But they didn't get far. Unbeknownst to them, Jordan's mother had called the police and told them that her son had been kidnapped and was being held for ransom. The police had arrested Augustin. And when they came across Dais and Jordan walking along the road, they arrested Dais too.

A couple of days later, however, a state-court judge released Augustin and Dais on bond. Shortly after, Augustin called Jordan: "If you don't show up in court and testify, you know, it's okay." R. 120, Pg. ID 670. Jordan, afraid for his life, contacted the FBI, who rearrested Augustin and Dais on federal charges.

But that didn't stop Augustin. A fellow inmate warned that Augustin was sending a letter to a friend looking "for somebody to help do away with the witnesses." *Id.* at 675. Officers retrieved the letter. In it, Augustin asked his friend to arrange three hits, offering to "pay double" for the "heads" of Jordan, Jordan's mother, and another witness. *Id.* at 695.

The government charged Augustin with nearly a dozen counts. After a trial, a jury convicted him of eight. The district court sentenced Augustin to 500 months in prison. He received concurrent terms for seven of the counts, the longest being 380 months. But on top of that, the district court sentenced him to a consecutive 120-month term under 18 U.S.C. § 924(c) for using a firearm during a crime of violence. Augustin challenged his convictions and sentence

on direct appeal. We affirmed. *See United States v. Dais*, 559 F. App'x 438 (6th Cir. 2014). He then filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, which was denied.

Later, Augustin filed a second or successive § 2255 motion. Among other things, he argued that his § 924(c) conviction was unlawful under a recent Supreme Court decision. He also asked the court to appoint counsel to help him challenge his § 924(c) conviction, represent him at a potential resentencing hearing, and explore other benefits to which he may be entitled.

The district court considered Augustin's § 2255 motion and agreed that *United States v. Davis*, 139 S. Ct. 2319 (2019), rendered his § 924(c) conviction unlawful. But rather than resentence Augustin, the court simply corrected his sentence by vacating the § 924(c) conviction and its consecutive 120-month sentence. It reasoned that a sentence correction was appropriate because vacating the § 924(c) conviction and sentence would "not impact the sentences he received on the other counts." R. 249, Pg. ID 2381. It also denied Augustin's motion for appointment of counsel. He appealed.

II.

Augustin raises two issues on appeal. First, he argues that the district court should have resentenced him rather than correct his sentence. And second, he contends that the district court erred when it denied his motion for appointment of counsel. We review the district court's decisions for an abuse of discretion. *See Ajan v. United States*, 731 F.3d 629, 633 (6th Cir. 2013) (form of relief); *Mira v. Marshall*, 806 F.2d 636, 638 (6th Cir. 1986) (per curiam) (appointment of counsel). Finding none here, we affirm.

A.

We begin with the district court's decision to correct Augustin's sentence rather than resentence him. In § 2255, Congress gave federal criminal defendants an additional chance to challenge their convictions and sentences. When, as here, a district court determines that a defendant's conviction is unlawful, it must "vacate and set the judgment aside." 28 U.S.C. § 2255(b). It can then choose one of several remedies. Among other things, the district court

can "resentence" the defendant or "correct" his sentence "as may appear appropriate." *Id.*; *see United States v. Flack*, 941 F.3d 238, 241 (6th Cir. 2019).

The distinction between the two matters. For one, resentencing is "open-ended and discretionary" and akin to "beginning the sentencing process anew." *United States v. Thomason*, 940 F.3d 1166, 1171 (11th Cir. 2019) (citation omitted). It often entails a "reevaluation of the appropriateness of the defendant's original sentence." *Flack*, 941 F.3d at 241 (alteration adopted and citation omitted). Because of the discretion involved in resentencing a defendant, a district court that takes this route must conduct a sentencing hearing with all the necessary components. *See id.* at 240–41 (explaining that a hearing must "occur in open court with the defendant present"); *see also United States v. Hadden*, 475 F.3d 652, 667 (4th Cir. 2007) (determining that the district court below had corrected the sentence in part because it "did not conduct any of the procedures that would have been required at a full-blown sentencing").

A sentence correction, by contrast, is a more limited remedy. It is "arithmetical, technical, or mechanical." *Flack*, 941 F.3d at 241. A district court corrects a sentence when, for example, it simply vacates "unlawful convictions (and accompanying sentences)" without choosing to reevaluate "the appropriateness of the defendant's original sentence." *Id.* (alteration adopted) (quoting *United States v. Palmer*, 854 F.3d 39, 42, 48 (D.C. Cir. 2017)). A hearing is often unnecessary. *Id.*

Although district courts have broad discretion to choose between these remedies, *United States v. Mitchell*, 905 F.3d 991, 994 (6th Cir. 2018), the facts may dictate that one is more appropriate. For example, resentencing may be necessary if the error "undermines the sentence as a whole" such that the district court *must* "revisit the entire sentence." *Thomason*, 940 F.3d at 1172. In that case, a court would need to start from scratch—that is, to recalculate the Guidelines range, reconsider the § 3553(a) sentencing factors, and "determine[] anew what the sentence should be." *Flack*, 941 F.3d at 241. Resentencing may also be necessary if a court must exercise significant discretion "in ways it was not called upon to do at the initial sentencing." *Thomason*, 940 F.3d at 1173 (citation omitted). For instance, if the court "vacates a mandatory-minimum sentence and then is able to consider the statutory sentencing factors for the first time." *Id.*

Here, the district court reasonably chose to correct Augustin's sentence rather than to resentence him. First, the error did not undermine Augustin's entire sentence. To be sure, there may be times when vacating one conviction in a multi-count judgment compels a court to reconsider an entire sentence. But not every multi-count judgment "presents a sentencing package in which vacating the sentence on one count unravels the remaining sentences." *Palmer*, 854 F.3d at 49; *see also Thomason*, 940 F.3d at 1172; *Troiano v. United States*, 918 F.3d 1082, 1086–87 (9th Cir. 2019). And vacating Augustin's § 924(c) sentence did not unravel the rest. As the district court explained, vacating his § 924(c) sentence did "not impact the sentences he received on the other counts." R. 249, Pg. ID 2381. It didn't even affect Augustin's Guidelines range. *See Thomason*, 940 F.3d at 1172–73; *see also Troiano*, 918 F.3d at 1087–88 (rejecting a similar challenge because the defendant's "Guidelines range would have remained" the same). Both with and without the § 924(c) conviction, his Guidelines range was 360 months to life. Thus, the error did not affect the remainder of Augustin's sentence. So it can stand independently.

That's especially true here for another reason. When Augustin was originally sentenced, circuit precedent required the district court to set an appropriate sentence for each underlying conviction without considering the sentencing effects of his § 924(c) conviction. *See United States v. Franklin*, 499 F.3d 578, 583 (6th Cir. 2007). Simply put, Augustin's § 924(c) sentence played no role in the district court's calculation of his other sentences. Because of that, we cannot conclude that those sentences are so connected with his § 924(c) sentence that they must fall with it.

Second, the district court did not need to resentence Augustin because it did not exercise any new or significant discretion. It never reevaluated "the appropriateness of the defendant's original sentence" or reconsidered the § 3553(a) factors from scratch. *Flack*, 941 F.3d at 241 (alteration adopted and citation omitted). The district court simply imposed a corrected sentence that was "largely consistent" with the rationale for Augustin's original sentence. *Mitchell*, 905 F.3d at 994 (quoting *United States v. Nichols*, 897 F.3d 729, 738 (6th Cir. 2018)). So the district court didn't have to conduct a resentencing hearing for this reason either.

In sum, the district court did not abuse its discretion by correcting Augustin's sentence rather than resentencing him. Even if the district court could have held a resentencing hearing, Augustin was not entitled to one.

B.

Augustin also argues that the district court erred by denying his request for counsel. It did not.[1]

As an initial matter, Augustin had no constitutional right to counsel when the district court was choosing whether to resentence him or correct his sentence. To be sure, criminal defendants have a constitutional right to counsel at "critical stages" of criminal proceedings. *Benitez v. United States*, 521 F.3d 625, 630 (6th Cir. 2008) (citation omitted). But the "choice between correcting a sentence and performing a full resentencing" under § 2255 is part of a postconviction proceeding. *United States v. Cody*, 998 F.3d 912, 915 (11th Cir. 2021). And unlike criminal proceedings, there is generally "no right to counsel in postconviction proceedings." *Garza v. Idaho*, 139 S. Ct. 738, 749 (2019); *see also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). So Augustin had no right to counsel at that time.

Nor did he have a right to counsel when the district court actually entered the corrected sentence. Again, the right to counsel only attaches at "critical stages" of criminal proceedings. *Benitez*, 521 F.3d at 630 (citation omitted). And the imposition of a corrected sentence is not one. *Cf. Thomason*, 940 F.3d at 1171–72 (holding that, unlike a resentencing, a sentence correction is not a critical stage at which a defendant has the right to be present). Instead, it is a mechanical act that does not present "a reasonable probability that [the defendant's] case could suffer significant consequences from his total denial of counsel at the stage." *Van v. Jones*, 475 F.3d 292, 313 (6th Cir. 2007).

That said, district courts can appoint counsel in § 2255 proceedings if "the interests of justice so require." 18 U.S.C. § 3006A(a)(2), (a)(2)(B). This standard "contemplates a peculiarly context-specific inquiry." *Martel v. Clair*, 565 U.S. 648, 663 (2012). Courts "should

[1]The government briefly suggests that correcting the sentence may have mooted the motion. We disagree. Among other things, Augustin also sought counsel to help determine what other benefits he may have been entitled to under the law. Those additional requests kept the motion alive.

consider the legal complexity of the case, the factual complexity of the case, and the petitioner's ability to investigate and present his claims, along with any other relevant factors." *Wiseman v. Wachendorf*, 984 F.3d 649, 655 (8th Cir. 2021) (citation omitted); *see also Lavado v. Keohane*, 992 F.2d 601, 606 (6th Cir. 1993).

Applying this standard, the district court did not abuse its discretion when it denied Augustin's request for counsel. *See Mira*, 806 F.2d at 638. First, the legal and factual issues in this case were not complex. Indeed, the relevant facts were simple—just the basic circumstances of Augustin's convictions and sentence. No additional investigation was required. And the legal issues were simple too: whether Augustin's § 924(c) conviction was unlawful under *Davis* and, if so, which remedy the court should pick. The government conceded that Augustin's § 924(c) conviction was unlawful. And the only other relevant issue was a narrow one—whether to resentence Augustin or to correct his sentence.

Second, Augustin was capable of presenting his arguments. Indeed, he thoroughly briefed his § 924(c) argument—even the government agreed that he was right. He also submitted a lengthy reply brief arguing for resentencing. That brief cited and discussed numerous relevant decisions from the Supreme Court and lower federal courts. On top of that, Augustin attached an appendix detailing information he wished to offer at resentencing, including evidence of his rehabilitation. This all shows he ably investigated and presented his arguments.

Taken together, we cannot conclude that the district court abused its discretion by denying his motion for appointment of counsel.

* * *

We affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-5454

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ABRAHAM A. AUGUSTIN,

Defendant - Appellant.

FILED
Oct 20, 2021
DEBORAH S. HUNT, Clerk

Before: ROGERS, GRIFFIN, and THAPAR, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee of Chattanooga.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

ABRAHAM A. AUGUSTIN, *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent.*	)	Case Nos. 1:19-cv-328, 1:15-cv-237, 1:09-cr-187 Judge Travis R. McDonough Magistrate Judge Susan K. Lee

MEMORANDUM AND ORDER

Before the Court is Petitioner's second motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 245, in Case No. 1:09-cr-187). The Government has responded and agrees that Petitioner is eligible for relief. (See Doc. 5, at 1, in Case No. 1:19-cv-328.) For the following reasons, Petitioner's motion will be **GRANTED**.

I. BACKGROUND

On October 20, 2010, a federal jury convicted Petitioner of one count of kidnapping, in violation of 18 U.S.C. § 1201; one count of using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A); one count of knowingly possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1); one count of using the mail with intent to commit murder for hire, in violation of 18 U.S.C. § 1958; and three counts of attempting to hire a person to kill another with the intent to prevent his or her testimony at trial, in violation of 18 U.S.C. § 1512(a)(1)(A). (*See* Docs. 89, 113, in Case No. 1:09-cr-187.) United States District Judge Curtis L. Collier sentenced Petitioner to a total term of 500 months' imprisonment. (Doc. 113, at 3, in Case No. 1:09-cr-187.) This 500-month sentence included a

120-month sentence on Petitioner's § 924(c) conviction, which was ordered to be served consecutively to his collective 380-month sentence on the other counts. (*Id.*) Petitioner appealed his convictions and his sentence, but the United States Court of Appeals for the Sixth Circuit affirmed. *See United States v. Dais*, 559 F. App'x 438, 450 (6th Cir. 2014).

On September 15, 2015, Petitioner filed his first motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, claiming ineffective assistance of counsel (Doc. 141, in Case No. 1:09-cr-187). This Court denied that petition and declined to issue a certificate of appealability (Doc. 211, in Case No. 1:09-cr-187), and the Sixth Circuit subsequently denied his application for a certificate of appealability (Doc. 227, in Case No. 1:09-cr-187).

On November 13, 2019, the Sixth Circuit granted Petitioner authorization to file a second § 2255 petition challenging his § 924(c) conviction in light of the Supreme Court decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).[1] (*See* Doc. 244, at 4, in Case No. 1:09-cr-187.) Although Petitioner mistakenly purported to base his second § 2255 petition on the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (*see* Doc. 245, at 7, in Case No. 1:09-cr-187), the Government conceded and the Sixth Circuit agreed that, while *Dimaya* did not support Petitioner's claims for relief, *Davis* did support his challenge to his § 924(c) conviction (Doc. 244, at 4, in Case No. 1:09-cr-187).

II. STANDARD OF REVIEW

To obtain relief under 28 U.S.C. § 2255, a petitioner must demonstrate: "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid." *Short v. United States*,

[1] Though Petitioner sought to raise several claims in a second § 2255 petition, the Sixth Circuit only authorized a second petition based on the challenge to his § 924(c) conviction. (*See* Doc. 244, at 3–4, in Case No. 1:09-cr-187.)

471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998). If the court finds that the sentence imposed was not authorized by law, it must vacate and set aside the judgment and discharge the prisoner, resentence him, grant him a new trial, or correct the sentence. 28 U.S.C. § 2255(b).

III. ANALYSIS

Petitioner now argues that his conviction under 18 U.S.C. § 924(c)(1)(A) for using and carrying a firearm in relation to a crime of violence must be vacated because his kidnapping conviction no longer qualifies as a "crime of violence" for the purposes of § 924(c). (Doc. 1, at 6–7, in Case No. 1:19-cv-328.)

Section 924(c)(1)(A) imposes mandatory-minimum penalties on any person who "uses or carries a firearm" during and in relation to a "crime of violence" or "drug trafficking crime" or "possesses a firearm" in furtherance of such a crime. *See* 18 U.S.C. § 924(c)(1)(A). This is true even if the underlying crime of violence or drug trafficking crime already carries "an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." *See id.* The statute imposes a mandatory-minimum sentence of five years' imprisonment for anyone who violates § 924(c)(1)(A); however, the mandatory minimum is raised to seven years if the firearm is "brandished" and ten years if it is "discharged."[2] *Id.*

[2] Petitioner was subject to a mandatory-minimum sentence of ten years' imprisonment on his § 924(c) conviction because the Court determined at sentencing that Petitioner had discharged the related weapon. (*See* Doc. 124, at 4–5, 7–8, 10, in Case No. 1:09-cr-187; Doc. 113, at 3, in Case No. 1:09-cr-187.)

qualifies as a crime of violence, his § 924(c) conviction and sentence must be vacated. *See Knight v. United States*, 936 F.3d 495, 497 (6th Cir. 2019) (vacating a § 924(c) conviction for using a firearm during a kidnapping under *Davis*).

The only remaining consideration for the Court is the remedy to grant in connection with the grant of Petitioner's second § 2255 petition. As previously stated, once a court vacates and sets aside a judgment, it shall either (1) discharge the prisoner, (2) resentence him, (3) grant him a new trial, or (4) correct the sentence, "as may appear appropriate." 21 U.S.C. § 2255(b). "Section 2255 gives district judges wide berth in choosing the proper scope of post-2255 proceedings." *Ajan v. United States*, 731 F.3d 629, 633 (6th Cir. 2013) (citations and internal quotation marks omitted). Thus, while a district court "has the authority to resentence a defendant who has secured reversal of a § 924(c) conviction under § 2255," it may correct an improper sentence without holding a resentencing hearing, when appropriate. *Id.* at 634; *see also United States v. Nichols*, 897 F.3d 729, 738 (6th Cir. 2018) (holding that "a court imposing a corrected sentence [has] discretion to impose a corrected sentenced based on a brief order, a hearing that resembles a *de novo* sentencing proceeding, or anything in between," as long as the corrected sentence is substantively and procedurally reasonable).

In this case, the Court finds that correcting Petitioner's sentence without a resentencing hearing is appropriate. Though the Government contends that, in absence of the § 924(c) conviction, Petitioner's offense level for his kidnapping conviction (for which he received the most significant sentence) could have been enhanced an additional two levels for the presence of a firearm, the Government concedes that the additional two levels would not impact the guidelines range for the kidnapping offense. (*See* Doc. 5, at 7–8, in Case No. 1:19-cv-328 (explaining that the applicable guidelines range is 360 months to life, with or without the firearm

enhancement).) Because vacating Petitioner's § 924(c) conviction and sentence will not impact the sentences he received on the other counts, the Court will correct his overall sentencing without modifying or holding a hearing on the sentences on the other counts.[3]

IV. CONCLUSION

For the reasons stated herein:

1. Petitioner's second motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 245, in Case No. 1:09-cr-187) is **GRANTED**;

2. Petitioner's conviction and sentence on Count Two of the Superseding Indictment for using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) are **VACATED**;

3. Petitioner's sentence will be **REDUCED** by 120 months to reflect a total term of 380 months' imprisonment on the remaining counts of conviction;[4]

4. Petitioner's special assessment will be **REDUCED** to $ 700.00;

5. The judgment dated March 13, 2017 (Doc. 47) will be **AMENDED** to reflect this reduced sentence; and

6. Petitioner's motion to appoint counsel (Doc. 4, in Case No. 1:19-cv-328) is **DENIED AS MOOT**.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

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[3] Moreover, because the Court finds that a resentencing hearing is not necessary, it will **DENY** Petitioner's motion to appoint counsel (Doc. 4, in Case No. 1:19-cv-328) **AS MOOT**, as Petitioner requests counsel primarily with regard to the present § 2255 petition and a potential resentencing hearing (*see id.* at 1–2).

[4] This term consists of 380 months on Count One, 120 months on each of Counts Five and Seven, 360 months on each of Counts Eight, Nine, and Ten, and 240 months on Count Eleven, to be served concurrently. (*See* Doc. 113, at 3, in Case No. 1:09-cr-187.)

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	Case Nos. 1:09-cr-187
v.	)	
	)	Judge Travis R. McDonough
ABRAHAM A. AUGUSTIN	)	
	)	Magistrate Judge Susan K. Lee
	)	

ORDER

Before the Court are Defendant Abraham A. Augustin's motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59 (Doc. 251), Augustin's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) (Doc. 252), Augustin's motion to file a Federal Rule of Criminal Procedure 29 motion for acquittal, a Federal Rule of Criminal Procedure 33 motion for new trial, and a "protective" notice of appeal towards criminal procedures of this case and file a Federal Rule of Civil Procedure 59 motion to alter judgment (Doc. 253), Augustin's motion for acquittal pursuant to Federal Rule of Criminal Procedure 29 and/or new trial pursuant to Federal Rule of Criminal Procedure 33 (Doc. 254), and his motion requesting the return of the $100 special assessment on the vacated count of conviction (Doc. 259). The Court has also received and reviewed Augustin's letter, dated February 20, 2020 (Doc. 257). For the reasons set forth below:

1. Augustin's motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59 (Doc. 251) will be **DENIED**;

2. The Government will be **ORDERED** to respond to Augustin's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) (Doc. 252) on or before **May 9, 2020**;

3. Augustin's motion for acquittal pursuant to Federal Rule of Criminal Procedure 29 and/or new trial pursuant to Federal Rule of Criminal Procedure 33 (Doc. 254) will be **DENIED**;

4. Augustin's motion to file Federal Rule of Criminal Procedure 29 motion for acquittal, Federal Rule of Criminal Procedure 33 motion for new trial, and a "protective" notice of appeal towards criminal procedures of this case and file a Federal Rule of Civil Procedure 59 motion to alter judgment towards civil procedures of this case (Doc. 253) will be **GRANTED** to the extent asks the Clerk to file a notice of appeal on his behalf; and

5. Augustin's motion for return of the $100 special assessment (Doc. 259) will be **DENIED**.

I. BACKGROUND

On October 20, 2010, a federal jury convicted Augustin of one count of kidnapping, in violation of 18 U.S.C. § 1201; one count of using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A); one count of knowingly possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1); one count of using the mail with intent to commit murder for hire, in violation of 18 U.S.C. § 1958; and three counts of attempting to hire a person to kill another with the intent to prevent his or her testimony at trial, in violation of 18 U.S.C. § 1512(a)(1)(A). (*See* Docs. 89, 113, in Case No. 1:09-cr-187.) United States District Judge Curtis L. Collier sentenced Augustin to a total term of 500 months' imprisonment. (Doc. 113, at 3, in Case No. 1:09-cr-187.) This 500-month sentence included a 120-month sentence on Augustin's § 924(c) conviction, which Judge Collier ordered to be served consecutively to his collective 380 months on the other counts. (*Id.*) Augustin appealed his convictions and his sentence, but the United States Court of Appeals for the Sixth Circuit affirmed. *See United States v. Dais*, 559 F. App'x 438, 450 (6th Cir. 2014).

On September 15, 2015, Augustin filed his first motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, claiming ineffective assistance of counsel (Doc. 141, in

Case No. 1:09-cr-187). This Court denied that petition and declined to issue a certificate of appealability (Doc. 211, in Case No. 1:09-cr-187). The Sixth Circuit subsequently denied his application for a certificate of appealability. (Doc. 227, in Case No. 1:09-cr-187.)

On November 13, 2019, the Sixth Circuit granted Augustin authorization to file a second § 2255 petition challenging his § 924(c) conviction in light of the Supreme Court decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).[1] (*See* Doc. 244, at 4, in Case No. 1:09-cr-187.) Although Augustin mistakenly purported to base his second § 2255 petition on the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (*see* Doc. 245, at 7, in Case No. 1:09-cr-187), the Government conceded and the Sixth Circuit agreed that, while *Dimaya* did not support Augustin's claims for relief, *Davis* did support his challenge to his § 924(c) conviction (Doc. 244, at 4, in Case No. 1:09-cr-187).

On January 14, 2020, this Court granted Augustin's second § 2255 petition, vacated his conviction and sentence under § 924(c), and reduced his total sentence to 380 months' imprisonment. (Doc. 249, at 6.) On January 31, 2020, Augustin filed each of the above-listed motions (Docs. 251, 252, 253, 254).

II. ANALYSIS

A. Augustin's Federal Rule of Civil Procedure 59(e) Motion

In his motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e), Augustin asks the Court to reverse its previous finding that correcting his sentence without a resentencing hearing was appropriate. (Doc. 251, at 1.) Augustin first seeks relief on the ground that the Court's January 14, 2020 order did not consider or acknowledge receipt of

[1] Though Augustin sought to raise several other claims, the Sixth Circuit only authorized a second petition based on the challenge to his § 924(c) conviction. (*See* Doc. 244, at 3–4.)

Augustin's reply, which was docketed on January 13, 2020. (*Id.*) Augustin also expresses concern that the Court did not actually receive his reply until after the order was filed. (*Id.* at 2.)

Augustin's reply (Doc. 247) was indeed received and reviewed by this Court prior to the filing of its order on January 14, 2020. As Augustin recounts in his motion for alteration of the Court's order, the primary argument he raised in his reply was that, rather than correct his sentence without a hearing as the Government suggest in its response, the Court should grant him a resentencing hearing based on the decision of the Supreme Court of the United States in *Davis*, the decision of the United States Court of Appeals for the Eleventh Circuit's decision in *United States v. Brown*, 879 F.3d 1231 (11th Cir. 2018), and the decision of the Supreme Court of the United States in *Pepper v. United States*, 562 U.S. 476 (2011). (Doc. 247, at 2–6, 12–16; Doc. 251, at 2.)

The Court reviewed and considered Augustin's arguments prior to filing its order. However, after considering whether to resentence Augustin or correct his sentence without a resentencing hearing, the Court determined that correction without a hearing was appropriate. (*See* Doc. 249, at 5.) The Court reasoned that, since Augustin's guidelines range with respect to his remaining convictions would be unaffected, there was no need to hold a resentencing hearing. (*Id.* at 5–6.) In the Sixth Circuit, a court may impose a corrected sentence based on an order, a resentencing hearing, or anything in between, so long as the sentence imposed is substantively and procedurally reasonable. *United States v. Nichols*, 897 F.3d 729, 738 (6th Cir. 2018). The sentence imposed in its January 14, 2020 order and the accompanying amended judgment was both substantively and procedurally reasonable. Nevertheless, the Court will briefly explain why the cases cited by Augustin in his reply do not entitle him to a resentencing hearing.

First, the language in *Davis* that Augustin relies on in his reply does not entitle him to a

exercise control and custody over his belongings on the date that the property was seized. (Doc. 252, at 1.) Specifically, Augustin argues that the federal government effectively controlled his property when FBI Special Agent Wayne Jackson ordered that it be seized and stored by the Bradley Count Sheriff's Office. (*See id.* at 1–2, 9.) Augustin relies on the reasoning of *United States v. Fabela-Garcia*, 753 F. Supp. 326 (D. Utah 1989), as discussed in *United States v. Lee*, 62 F.3d 1418 (6th Cir. 1995) (unpublished table decision). He also cites multiple documents from the Bradley County Sheriff's Department indicating that the property at issue was to be held for Special Agent Jackson, that the impounded U-Haul seized from Augustin would be returned upon Jackson's approval, and that Bradley County was not to release any of the property without first calling Jackson. (Doc. 252-1, at 8, 12, 14, 16.)

The documents Augustin cites were not before the Court upon its initial consideration of his motion, and they raise a question as to whether the federal government constructively possessed the property at issue. Accordingly, the Government is **ORDERED** to file a response to Augustin's Rule 60(b) motion (Doc. 252) on or before **May 8, 2020**. The Court will **RESERVE** judgment on Augustin's motion until it reviews the Government's response.

C. Augustin's Motion for Acquittal and/or New Trial

Augustin also seeks acquittal or a new trial based on the evidence he cites in his Rule 60(b) motion (Doc. 252) concerning whether the federal government had control over his property. (*See* Doc. 254, at 1.) This motion will be denied because both his request for a judgment of acquittal and for a new trial are untimely.

Federal Rule of Criminal Procedure 29 specifies that the time to move for a judgment of acquittal is "within 14 days after a guilty verdict or after the Court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c)(1). Augustin's motion was filed years after he was found guilty

and is therefore untimely to the extent he seeks a judgment of acquittal. *See id.*

A motion for a new trial under Federal Rule of Criminal Procedure 33 based on newly discovered evidence "must be filed within 3 years after the verdict or finding of guilty," and a motion for new trial based on any other ground "must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1)–(2). Augustin was found guilty in October of 2010, and his motion was not filed until January 31, 2020. Thus, even to the extent his motion is based on newly discovered evidence, it is time barred.[2]

D. Augustin's Motion for Notice of Appeal

Augustin also filed a separate motion asking the Clerk's office to file a notice of appeal as to the Court's January 14, 2020 judgment (Doc. 250) within 14 days of the denial of his criminal motions. (Doc. 253, at 2.) Ordinarily, a notice of appeal must be filed within 30 days after entry of the judgment or order being appealed. Fed. R. App. P. 4(a)(1)(A). However, when a defendant files a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59, the appeal time runs from the entry of the order resolving that motion. Fed. R. App. P. 4(a)(4)(A)(iv). Because the Court now disposes of Augustin's Rule 59 motion and has denied his criminal motions, the Court will **GRANT** his motion and **DIRECT** the Clerk to file a notice of appeal on Augustin's behalf.

E. Augustin's Motion for Return of Special Assessment

Pursuant to the Court's order granting Augustin's § 2255 (Doc. 249), the special

[2] Even if this motion were not time barred, the Court would still deny it. The documents on which Augustin relies and most of his arguments relate to the Government's obligation to return any property that may have been in its possession and not to the underlying facts of conviction or Augustin's trial. (Doc. 254, at 1–7.) Augustin's unsupported assertions that Jackson was dishonest or unethical during the investigation and trial of Augustin's case (*id.* at 8) are not enough to have his conviction overturned.

assessment in this case was reduced from $800.00 to $700.00. Augustin now seeks the return of the $100.00 special assessment on the vacated count. (*See* Doc. 259) However, while Augustin was initially ordered to pay a special assessment of $800, he only paid a total of $649.89.[3] Because the amount paid is less than the amount of the amended special assessment, the Court will **DENY** his motion (Doc. 259).

III. CONCLUSION

For the reasons stated herein:

1. Augustin's motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59 (Doc. 251) is **DENIED**;

2. The Government is **ORDERED** to respond to Augustin's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) (Doc. 252) on or before **May 9, 2020**;

3. Augustin's motion for acquittal pursuant to Federal Rule of Criminal Procedure 29 and/or new trial pursuant to Federal Rule of Criminal Procedure 33 (Doc. 254) is **DENIED**;

4. Augustin's motion to file Federal Rule of Criminal Procedure 29 motion for acquittal, Federal Rule of Criminal Procedure 33 motion for new trial, and a "protective" notice of appeal towards criminal procedures of this case and file a Federal Rule of Civil Procedure 59 motion to alter judgment towards civil procedures of this case (Doc. 253) is **GRANTED** to the extent he asks the Clerk to file a notice of appeal on his behalf; and

5. Augustin's motion for the return of the $100 special assessment is **DENIED**.

SO ORDERED.

/s/Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

[3] The Court does observe, though, that Augustin does not owe any money at present, because "the obligation to pay an assessment ceases five years after the date of judgment." 18 U.S.C. § 3013(c).

EXHIBIT D

No. 20-5454

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 02, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABRAHAM A. AUGUSTIN,

Defendant-Appellant.

ORDER

BEFORE: ROGERS, GRIFFIN, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk