

No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER BARRET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of December, two thousand twenty-two.

PRESENT: Susan L. Carney,
Steven J. Menashi,
Beth Robinson,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 21-1743-cr

CHRISTOPHER BARRET, DBA DERRICK BROWN,
AKA SEAN BROWN, AKA MOUTHY, AKA THE
GENERAL, AKA CHRIS, AKA SOLO,

Defendant-Appellant,

KAREEM FORREST, AKA DOOLEY, AKA
KAREEM FOREST, RYAN ANDERSON,
AKA DRE, JOSEPH DONALDSON, AKA
SCRATCHY, CHARLES JONES, AKA SPEEDY,
AKA SHAWN BROWN, AKA CHARLES JONES,
KEVIN LEE, AKA BALA BOY, LATOYA
MANNING, LEEMAX NEUNIE, AGENT OF
JUKES, VINCENT QUINONES, KUAME WILSON,
AKA KWAUME WILSON, KERRY GUNTER, AKA
GUNS, ANDRE WILSON, AKA MARIO, LEON
SCARLETT, AKA AGONY, AKA PIGGY, OMAR
MITCHELL, AKA SOX,

Defendants.

For Defendant-Appellant:

BRENDAN WHITE, White & White, New
York, NY.

For Appellee:

GILLIAN KASSNER (Susan Corkery, *on the
brief*), Assistant United States Attorneys, *for*
Breon Peace, United States Attorney for the
Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern
District of New York (Matsumoto, J.).

Upon due consideration, it is hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Christopher Barret appeals the judgment of the U.S. District Court for the Eastern District of New York granting his 28 U.S.C. § 2255 motion in part, vacating two of his convictions, and conducting a limited resentencing as to a third conviction. We assume the parties' familiarity with the facts and procedural history of this case.

On appeal, Barret argues principally that the district court erred because it did not conduct a *de novo* resentencing. He argues that *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), and *United States v. Rigas*, 583 F.3d 108 (2d Cir. 2009), require a district court to conduct a *de novo* resentencing whenever any single conviction of two or more convictions is vacated, as is the case here. But our recent decision in *United States v. Peña* forecloses that argument. *See* No. 20-4192, 2022 WL 17587854 (2d Cir. Dec. 13, 2022). In that case, we held that "Section 2255's plain text, which vests district courts with discretion to select the appropriate relief from a menu of options, precludes us from applying the default rule in *Rigas* to all cases that arise in the § 2255 context." *Id.* at *3. Accordingly, Barret was not entitled to

de novo resentencing on the ground that his § 2255 motion resulted in vacatur of at least one conviction.

In *Peña*, we said that a district court may abuse its discretion in denying *de novo* resentencing when “resentencing would not be strictly ministerial.” *Id.* at *7. In this case, however, Barret has not advanced the alternative argument that the district court abused its discretion under § 2255. He therefore abandoned that argument. *See United States v. Joyner*, 313 F.3d 40, 44 (2d Cir. 2002) (“It is well established that an argument not raised on appeal is deemed abandoned and lost.”) (quoting *United States v. Babwah*, 972 F.2d 30, 34-35 (2d Cir. 1992)).

Separately, Barret argues on appeal that his § 924(c) conviction must be vacated in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). Section 924(c) prohibits the use of a firearm in relation to any “crime of violence or drug trafficking crime.” 18 U.S.C. § 924(c)(1)(A). Barret’s indictment based the § 924(c) charge on “carry[ing] one or more firearms during and in relation to one or more drug trafficking crimes.” App’x 63. Thus, his § 924(c) conviction was not based on carrying a firearm in relation to a crime of violence. *Davis* invalidated a clause defining a “crime of violence.” *Davis*, 139 S. Ct. at 2336. Because Barret’s § 924(c)

conviction did not depend on the clause at issue in *Davis*, that case provides him no basis for relief.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

 Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Christopher Barret,

Petitioner,

v.

MEMORANDUM & ORDER

17-cv-4361 (KAM)

10-cr-809 (KAM)

United States,

Defendant.

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On July 20, 2017, *pro se* petitioner Christopher Barret ("petitioner" or "Mr. Barret"), currently incarcerated at FCI - Hazelton, located in Bruceton Mills, WV, filed this petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2255. (ECF No. 897, Motion to Vacate under 28 U.S.C. 2255 ("Pet. Mot.").) Petitioner challenges his conviction for multiple counts of narcotics-related conspiracy and for brandishing a firearm, on the grounds that he did not receive effective assistance of counsel at trial, at sentencing, and on appeal.

Presently before the court are (i) petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 or, more appropriately, a petition, dated July 20, 2017 (ECF Nos. 897, 905, 931, 934)¹; (ii) petitioner's motion for discovery pursuant

¹ The court has previously adjudicated petitioner's related supplemental submissions, *i.e.* ECF No. 931, Motion to Amend/Correct Motion to Vacate under 28 U.S.C. 2255, dated April 23, 2018, and ECF No. 934, Second Motion to Amend/Correct Motion to Vacate under 28 U.S.C. 2255, dated May 4, 2018.

correctly calculated petitioner's total offense level.

Petitioner's argument is not legally supported and is denied.

5) Petitioner Must Be Resentenced with Respect to Count Four

Fifth, petitioner contends that his counsel failed to raise an issue with the court's sentence for Counts Three and Four. Specifically, during sentencing, the court correctly identified that Counts Three and Four each have a statutory maximum sentence of 20 years. 21 U.S.C. § 856(b). Due to an error, the court imposed a sentence of 33 years' incarceration for Counts One, Three, and Four to run concurrently. (Sent. Tr. 49, 59.)

The government has requested a sentence of 240 months on Count Three and 156 months on Count Four, to run consecutively to each other. As discussed above, petitioner's conviction for Count Three is hereby vacated, thus the court will not re-sentence him with respect to Count Three. In addition, the court hereby VACATES but will resentence Mr. Barret on Count Four, and will appoint counsel to represent Mr. Barret for the purposes of re-sentencing him on Count Four. The court will review the government's updated sentencing request and defense counsel's forthcoming sentencing request as to Count Four, which requests will be due 30 days from the date of this Memorandum and Order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	10-CR-00809(KAM)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
CHRISTOPHER BARRET,	:	Tuesday, July 13, 2021
	:	3:00 p.m.
Defendant.	:	
	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR RE-SENTENCING
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Court Reporter: VICTORIA A. TORRES BUTLER, CRR
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Proceedings recorded by mechanical stenography, transcript
produced by Computer-Aided Transcription.

1 MR. SILVERMAN: Yes, Your Honor.

2 THE COURT: Thank you.

3 When a conviction is vacated under Section 2255, the
4 Court must discharge the prisoner or resentence him or grant a
5 new trial or correct the sentence as may appear appropriate.
6 The Second Circuit has interpreted this language to give a
7 District Court broad and flexible remedial authority having
8 vacated and set the judgment aside to resentence a defendant
9 and correct the sentence as appropriate. United States versus
10 Gordils 117 F.3d 99 at page 103 decided by the Second Circuit
11 in 1997.

12 Although a District Court is authorized to hold a
13 full resentencing when a conviction is vacated, several courts
14 in this Circuit have concluded that a de novo resentencing is
15 limited to instances where the conviction was overturned on
16 direct appeal and is not applicable in Section 2255 cases.

17 There are a number of district courts. One decision
18 out of the Southern District Ayyad versus United States
19 16-CV-4346 holding that the default rule requiring that the
20 District Court hold a de novo resentencing each and every time
21 a defendant successfully challenges at least one count of a
22 multi-count conviction with the intention with the narrow
23 scope of Section 2255.

24 Similarly, in United States versus Kazu, 09-CV-660
25 2021 Westlaw 1751156 at 2 the Court held that there is growing

1 awareness that a full resentencing proceeding is not always
2 necessary after vacature of a conviction stemming from a 2255
3 petition.

4 Similarly, United States versus Medunjanin 10-CR-19
5 stating that where the Court vacates a conviction and sentence
6 for one 924(c) offense, but denied the request for
7 resentencing and leaving undisturbed the sentencing on the
8 remaining counts of conviction.

9 In any event, in my May 15th, 2020, decision on
10 Mr. Barret's 2255 petition I expressly limited today's
11 resentencing to Mr. Barret's vacated sentence on Count 4.
12 Because I vacated Counts 2 and 3, I declined to resentence
13 Mr. Barret as to Counts 2 and 3.

14 I have given respectful consideration to the factors
15 set forth at 18 U.S. Code Section 3553(a). Also, issues of
16 public safety, the post-sentencing conduct of Mr. Barret, the
17 harsh conditions under which he was held during the COVID-19
18 pandemic and his health issues, and I conclude that a
19 reduction to Mr. Barret's 2014 sentence is warranted under the
20 circumstances of this case as to Count 4.

21 Regarding the section 3553(a) factors I will not
22 reiterate what I previously stated at Mr. Barret's previous
23 sentencing on May 27th, 2014, which is incorporated by
24 reference except as to vacated Counts 2 and 3 and except as
25 stated today regarding Count 4. I will address Mr. Barret's