

No. ____-____

IN THE
Supreme Court of the United States



NIDAL AYYAD,
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*

PETITION FOR A WRIT OF CERTIORARI

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June 9, 2023

QUESTION PRESENTED

Whether, following the vacatur of a count of conviction (either on direct appeal or via a § 2255 motion), the district court must resentence the defendant *de novo* on the remaining counts.

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OPINION AND ORDER BELOW

The Summary Order and Judgment of the United States Court of Appeals for the Second Circuit in *United States v. Ayyad*, Docket No. No. 20-3832cr, dated February 14, 2023, which is unpublished, appears as Appendix A of this petition (A1-6).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1) and predicated upon the entry of a decision by a United States court of appeals in conflict with the decision of other United States courts of appeals on the same important issue as to call for an exercise of the Court's supervisory power, and Rules 10(a) and 13 of this Court's rules.

The Second Circuit entered the Summary Opinion on February 14, 2023 (Appendix A at A1-6)) and denied the rehearing petition without explanation on March 17, 2023 (Appendix F at A21). Ninety days from that date is June 15, 2023.

This petition is filed timely under U.S. Sup. Ct. Rule 13 (1) and (3).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2255, provides the following, in pertinent part:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) ... If the court finds ... that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Title 28, United States Code, Section 2106 states in relevant part:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Nidal Ayyad was charged with nine felony charges based on his role in the 1993 World Trade Center bombing. Mr. Ayyad has been incarcerated for more than 30 years since his arrest at his home in Maplewood, NJ, on March 10, 1993.

The fifth superseding indictment charged Mr. Ayyad with one count of conspiracy to damage a building by use of an explosive device, in violation of 18 U.S.C. § 371 (Count One); bombing a building used in interstate and foreign commerce, 18 U.S.C. § 844(i) (Count Two); bombing property of the United States, 18 U.S.C. § 844(f) (Count Three); transporting explosives in interstate commerce for the purpose of damaging or destroying property, 18 U.S.C. § 844(d) (Count Four); bombing automobiles used in interstate commerce, 18 U.S.C. § 33 (Counts Five and Six); assaulting federal officers, 18 U.S.C. § 111 (Count Eight); using and carrying a bomb during and in relation to crime of violence, namely, the conspiracy charged in Count One, 18 U.S.C. § 924(c)(1) (Count Nine); and using and carrying a

bomb during and in relation to crimes of violence, namely, the assault, charged in Count Eight, 18 U.S.C. § 924(c)(1) (Count Ten).

According to the Pre Sentence Report (“PSR”) dated April 14, 1994, Mr. Ayyad participated in the bombing by arranging for \$8,560 in cash financing which was used to rent storage locker space and purchase chemicals which later became the bomb, and making a series of calls to rent a van to carry the bomb (PSR ¶¶29, 38, 40, 42). Following the bombing, Mr. Ayyad called the New York Daily News and sent a letter to the New York Times in which he claimed responsibility for the terrorist attack on the World Trade Center in the name of the Liberation Army and demanded that the United States revise its Middle Eastern foreign policy (PSR ¶50). The February 26, 1993, bombing resulted in the deaths of six people, injury to more than 1,000 others, including three U.S. Secret Service agents and hundreds of millions of dollars in damage to the World Trade Center complex and had substantial economic impact on New York City, New York State, the Port Authority of New York and New Jersey and the whole country (PSR ¶¶57, 93-98, 100).

Mr. Ayyad was convicted of all nine counts after a jury trial on March 4, 1994.

The 1994 Sentencing and Remand

Mr. Ayyad was sentenced on May 24, 1994, to a term of 2160 months on Counts One through Six and Eight and two thirty-year sentences for Counts Nine and Ten, which were required to run consecutively with each other and the sentences imposed on Counts One through Six and Eight, for a total of 2880 months

(2160+720 = 2880); that is 240 years.

The Second Circuit affirmed the convictions but remanded the case for resentencing. *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (Salameh I).

The 1999 Resentencing

On remand, Mr. Ayyad was resentenced *de novo* on October 13, 1999. At that time, the sentencing judge imposed a total term of imprisonment of 1405 months, that is, 117 years, one month. The district court imposed sentences of 685 months each on Counts One through Six and Eight, to run concurrently with each other. The district court based the 685-month sentence on Mr. Ayyad's life expectancy less one month. The district court imposed mandatory thirty-year sentences on Counts Nine and Ten, the 18 U.S.C. § 924(c)(1) counts, to be served consecutively to each other and to the sentences imposed on Counts One through Six and Eight. The Second Circuit affirmed that judgment. *United States v. Salameh*, 261 F.3d 271, 277 (2d Cir. 2001) (Salameh II).

The 2020 Resentencing

Following this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Ayyad filed a 28 U.S.C. § 2255 motion seeking to vacate his 18 U.S.C. § 924(c)(1) convictions under Counts Nine and Ten. The government consented with respect to Count Ten in light of this Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).

In an Order dated June 24, 2020, the lower court, citing *Johnson*, *Davis* and the Second Circuit's opinion in *United States v. Barrett*, 936 F.3d 126 (2d Cir. 2019),

denied Mr. Ayyad’s motion, a similar motion made by co-defendant Mohammad Salameh, as to Count Nine but granted the motions as to Count Ten (Appendix B at A-10). As a part of that Order the district judge stated that it would enter an amended judgment reflecting the ruling (Id.). The lower court also preemptively denied a Certificate of Appealability from the amended judgment which it indicated it would issue (Id.).

On July 20, 2020, before the lower court entered the amended judgment, Mr. Ayyad moved the district court for *de novo* sentencing. He argued that the Second Circuit’s precedents required following the vacatur of a count of conviction under *United States v. Rigas*, 583 F.3d 108 (2d Cir. 2009), and *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002). Mr. Ayyad cited his “extraordinary record of post-sentence rehabilitation during his 27 years of incarceration” as reflecting “his contrition and rehabilitative efforts”. The government opposed this motion.

On August 24, 2020, the district court denied Petitioner’s application (Appendix C at A-11-17). The lower court based its decision on a misinterpretation of “the *Quintieri* default rule” to apply only where “the conviction on one or more charges is overturned on appeal and the case is remanded for resentencing,” but not “in the habeas context.” (Appendix C at A-15, quoting 306 F.3d at 1227–28). Noting the “limited availability” of § 2255 relief, the lower court reasoned that “[a] default rule requiring that the district court hold a *de novo* resentencing each and every time a defendant successfully challenges at least one count of a multi-count conviction would be in tension with the narrow scope of [§] 2255” (Appendix C at A-

15). The lower court accepted the government's argument that "the plain text of § 2255 vests this Court with the discretion to determine first the nature of the relief that 'may appear appropriate.'" (Appendix C at A-15; see § 2255(b)). The district court acknowledged that he had discretion to resentence Ayyad *de novo* but declined to exercise that discretion on three grounds: first, that "the vacatur of one of the two consecutive 30-year sentences that themselves were imposed to follow service of the concurrent sentences of one month short of movant's life expectancy has not altered the 'knot of calculation'" reflected in the overall sentence (Appendix C at A-15); second, that Mr. Ayyad had "previously appealed" his sentence, and his arguments had either been "rejected by the Court of Appeals" or "were waived," so that "the policies that animate the mandate rule counsel against a discretionary *de novo* resentencing" (Id. at 6); and third, that there was a "strong likelihood" that any resentencing would be "entirely academic" (Id.). Mr. Ayyad filed a notice of appeal from this order on October 13, 2020, along with a motion for a Certificate of Appealability. The district court denied the Certificate of Appealability from the August 24, 2020 order on November 29, 2020 (Appendix D at A-18).

On November 9, 2020, the district court entered the Second Amended Judgment in this case. Consistent with the August 24, 2020 order that judgment deleted the conviction and sentence on Count Ten and reimposed the sentences of 685 months on Counts One through Six and Eight, to run concurrently with one another and a consecutive term of 360 months on Count Nine for a total of 1045 (685+360 = 1045); that is more than 87 years.

Mr. Ayyad renewed his applications for Certificates of Appealability before the Second Circuit from both the Second Amended Judgment and the order denying *de novo* resentencing. By order dated May 13, 2021, the Second Circuit denied Ayyad's motion for a certificate of appealability from the judgment because he failed to make "a substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c) and *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) and denied his motion for a certificate of appealability from the order denying resentence *de novo* as "unnecessary" under its opinion in *Illarramendi v. United States*, 906 F.3d 268, 270 (2d Cir. 2018) (Appendix E at A19-20). Thereafter, the Court of Appeals appointed the undersigned pursuant to the Criminal Justice Act and ruled on the appeal on its merits.

The Panel Decision

By Summary Order dated February 14, 2023, Second Circuit affirmed the district court's order and judgment based on its decision in *United States v. Peña*, 55 F.4th 367 (2d Cir. 2022, amended January 27, 2023), petition for certiorari filed on June 1, 2023, in Docket No. 22-7701 (Appendix A at A1-7).

In the Summary Order the Second Circuit abandoned the rule, which it had applied for more than two decades, that *de novo* resentencing is required upon vacatur of a count of conviction, whether by direct appeal or a habeas petition, unless its imposition is strictly ministerial. *United States v. Quintieri*, 306 F.3d at 1228 n.6. *See United States v. Draper*, 553 F.3d 174, 184 (2d Cir. 2009) (conviction reversed on two counts which were dismissed requiring *de novo* resentencing). *See*

United States v. Powers, 842 F.3d 177 (2016).

Based on its *Peña* decision, the Second Circuit held that “[w]hen, as here, a conviction is vacated by the district court after a successful habeas challenge, § 2255 ‘vests district courts with discretion to select the appropriate relief from a menu of options,’ including either conducting *de novo* resentencing or entering an amended judgment.” (Appendix A at A-3, citing *Peña* at *4).

The Second Circuit further ruled that the district court did not abuse its discretion in denying Mr. Ayyad's motion for *de novo* resentencing. The panel cited with approval the lower court's reasoning that given the nature of his crimes, the amount of time remaining on his sentence, and his current age—resentencing would not realistically lead to a sentence short enough for Mr. Ayyad to be released within his lifetime. The panel said that “Such a decision is not an abuse of discretion. ‘[A] district court may properly deny *de novo* resentencing when the exercise would be an empty formality, as it would be here.’” Appendix A at A-3, citing *Peña* at *7.

Mr. Ayyad timely sought panel and *en banc* rehearing, which the Circuit denied without explanation on March 17, 2023 (Appendix F at A-21).

This petition for certiorari asks the Court to resolve the conflict among the circuits on the important question of whether, where one or more counts have been vacated pursuant to a 28 U.S.C. § 2255 motion, a district court must hold a full *de novo* resentencing proceeding, as the Second Circuit has long required, or whether the decision to hold a full resentencing is discretionary, as the Second Circuit in this case and several other circuits have held.

REASON FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ON WHETHER FOLLOWING VACATUR OF A COUNT OF CONVICTION THE DISTRICT COURT MUST RESENTENCE *DE NOVO*

At present, when confronted with resentencing following vacatur of a count of conviction, district courts apply different rules as set by their respective circuit courts of appeal. In the Second Circuit, the default rule has been *de novo* resentencing whether the reversal was on direct appeal or until its holding in *Peña*, on collateral review. In the Sixth, D.C., and Eleventh Circuit *de novo* resentencing is required only in some cases, while in the Ninth and Fourth Circuits, *de novo* resentencing is always at the district court's discretion. This case presents the Court with a means to resolve this conflict and ensure uniformity by adopting *de novo* resentencing as the default rule. As shown below, resentencing *de novo* is the correct remedy whenever a count is vacated, whether that occurs on direct appeal or via collateral attack.

A. The Circuits Are Split on the Appropriate Remedy After Vacating a Count of Conviction

Until its wrongly decided *Peña* decision, the Second Circuit consistently held that the appropriate default rule where a count of conviction is overturned was *de novo* resentencing. In contrast, the Second Circuit held that where an aspect of a sentence is reversed, more limited modification of the judgement would be permitted. *See Quintieri* 306 F.3d at 1227; *Rigas*, 583 F.3d at 117 “where a count of conviction is overturned -- as opposed to an aspect of a sentence -- resentencing must be *de novo*.”).

The *Quintieri* panel explains that “[a] district court’s sentence is based on the constellation of offenses for which the defendant is convicted and their relationship to a mosaic of facts.” 306 F.3d at 1227. Since overturning one or more charges changes the “constellation of offenses of conviction” and the factual mosaic related to those offenses” the Second Circuit held that the district court must determine anew whether the appropriate sentence should be altered. 306 F.3d at 1227–28. *See United States v. Weingarten*, 713 F.3d 704, 711–12 (2d Cir. 2013). *See also United States v. Natal*, 849 F.3d 530, 538 (2d Cir. 2017) (confirming that when a count of conviction is overturned due to a “conviction error,” the proper remedy is *de novo* resentencing).

On resentencing *de novo*, the lower court must consider changes to the “factual mosaic” including facts which have occurred since the original sentencing. *See, e.g., United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (per curiam) (post-sentencing rehabilitation); *see also Werber v. United States*, 149 F.3d 172, 178 (2d Cir. 1998) (“[T]he district court was required to resentence in light of the circumstances as they stood at the time of his resentencing”).

The factors weighing in favor of resentencing *de novo*, apply with equal force when the vacatur occurs in § 2255 proceedings. Indeed, in one part of the *Quintieri* opinion, the Second Circuit described its holding in terms more general than direct appeal: “Today we conclude that when a resentencing results from a vacatur of a conviction, we in effect adhere to the *de novo* default rule.” *Quintieri*, 306 F.3d at 1229 n.6.

Following *Quintieri*, the Second Circuit applied this default rule for more than two decades. As post-*Quintieri* cases establish, the vacatur of any count of conviction, no matter how tangential that count may appear, necessitates *de novo* resentencing. *See, e.g., United States v. Hertular*, 562 F.3d 433, 446 (2d Cir. 2009) (applying *Quintieri* and requiring *de novo* resentencing because reversal of one of four counts of conviction “changes the ‘constellation of offenses’ relevant to sentencing,” even though “the ‘factual mosaic’ may be little altered”). “[E]ven in these circumstances, we must vacate the defendant’s sentence and remand the case to the district court so that it may decide, in the first instance, whether a conviction on three rather than four counts affects its assessment of the sentencing factors detailed in 18 U.S.C. § 3553(a).” *Id.* *See also United States v. Powers*, 842 F.3d at 180–81 (applying the *Quintieri-Rigas* rule after vacating one of 13 counts of conviction); *United States v. Yepes-Casas*, 473 F. App’x 90, 91 (2d Cir. 2012) (irrelevant that vacated count was “hardly . . . material to the sentencing decision,” because “this Circuit’s recent precedent is unequivocal: any ‘conviction error’ requires a *de novo* re-sentencing”).

To be sure, the Second Circuit’s default rule did not apply to cases in which resentencing would be merely ministerial, *Quintieri*, 306 F.3d at 1228 n.6. However, even in those cases, the district court must make a factual finding. In contrast in Mr. Ayyad’s case, the Second Circuit set aside its default rule because the district court said that there was a “strong likelihood” that any resentencing would be

“entirely academic” without make a factual finding in that respect (Appendix A at A-3).

In contrast to the Second Circuit’s default rule, the Sixth, Eleventh, and D.C. Circuits distinguish between resentencing (*de novo*) and a limited sentence correction which is “arithmetical, technical or mechanical” and allow the district courts broad discretion to choose. For example, the Sixth Circuit has held that following a successful 2255 review, the district court can then choose one of several remedies including among other things, “resentence” the defendant or “correct” his sentence “as may appear appropriate.” *United States v. Augustin*, 16 F.4th 227, 231 (6th Cir. 2021); *United States v. Flack*, 941 F.3d 238, 241 (6th Cir. 2019). However, the Sixth Circuit has recognized that even though the district court has discretion if the error “undermines the sentence as a whole” the district court must “revisit the entire sentence.” *United States v. Augustin*, 16 F.4th at 232 (citations omitted). The D.C. Circuit employs the same rule, *see United States v. Palmer*, 428 U.S. App. D.C. 281, 291, 854 F.3d 39, 49 (D.C. Cir. 2017) (resentencing is unnecessary where the district court merely vacated convictions for lesser included offenses subject to merger), as does the Eleventh Circuit, *see United States v. Thomason*, 940 F.3d 1166, 1169 (11th Cir. 2019) (resentencing is unnecessary where the corrected error did not change the guideline range but where the error undermines the sentence as a whole, the district court must revisit the entire sentence).

The Fourth and Ninth Circuits provide their district courts with even broader discretion. In those Circuits, district courts are never required to conduct *de novo*

resentencing. *Troiano v. United States*, 918 F.3d 1082, 1086 (9th Cir. 2019) (the district court's decision to correct a sentence is reviewed for abuse of discretion). The Ninth Circuit purports to rely, in part, on decisions made in the Second and Eleventh Circuits. However, on review, these cases dealt with whether the appropriate remedy after finding ineffective assistance of counsel was resentencing rather than vacatur of the underlying convictions, *United States v. Brown*, 879 F.3d 1231, 1235 (11th Cir. 2018) and *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998), cited at *Brown*, 879 F.3d at 1235, while the issue here is what the district court should do after vacating a count of conviction. Accord, *United States v. Hadden*, 475 F.3d 652, 667 (4th Cir. 2007) citing *United States v. Gordon*, 156 F.3d 376, 381 (2d Cir. 1998).

This Court's intervention is required to resolve this split among the circuits to ensure that federal courts uniformly apply the law.

B. *DE NOVO* RESENTENCING IS REQUIRED UPON VACATUR OF A COUNT; THE SECOND CIRCUIT ERRED IN CREATING AN EXCEPTION FOR VACATURS THAT FOLLOW THE GRANT OF A § 2255 MOTION

The Court should also grant the writ because the Second Circuit erred in this case by abandoning its long-held *Quintieri-Rigas* rule in Mr. Ayyad's case because the vacatur resulted from a collateral attack. *De novo* resentencing should follow any vacatur of a count of conviction whether from a direct appeal or from a collateral attack.

1. **The Second Circuit’s Traditional Rule Recognized that Resentencing is Necessary Whenever a Count of Conviction Is Vacated**

Until its decision in *Peña*, the Second Circuit properly recognized that the vacatur of a count of conviction required *de novo* resentencing. The Second Circuit said that “[a] district court’s sentence is based on the constellation of offenses for which the defendant was convicted and their relationship to a mosaic of facts”, so that when part of a conviction is vacated “the constellation of offenses of conviction has been changed.” *Quintieri*, 306 F.3d at 1227-1228, *see also Weingarten*, 713 F.3d at 711-12 (2d Cir. 2013). The Second Circuit explained that in order “[f]or the district court to sentence the defendant accurately and appropriately” after vacatur of a count, therefore, “it must confront the offenses of conviction and facts anew,” *Quintieri*, 306 F.3d at 1228, and “must reconsider the sentences imposed on each count, as well as the aggregate sentence,” *Rigas*, 583 F.3d at 118. To ensure that the overall sentence is appropriate, the sentencing judge must reconsider all of the relevant sentencing factor under 18 U.S.C. § 3553(a). As the Second Circuit held, whenever a count is removed, the court “must confront the offenses of conviction and the facts anew” in order to “sentence the defendant accurately and appropriately.” 306 F.3d at 1228.

The Second Circuit required *de novo* resentencing without distinction as to whether the vacatur resulted from a direct appeal as in *Rigas* or from collateral attack, as in *Quintieri*. Moreover, the Second Circuit routinely affirms cases in which lower courts granted government requests for *de novo* resentencing. For example, in *United States v. Gordils*, 117 F.3d 99, 101 (2d Cir. 1997), the Second

Circuit concluded: “We see no compelling reason why the legal interdependence of sentences under the guidelines should not as surely lead us to reconsider related sentences in the context of collateral attack as it does in the context of a direct appeal.” 117 F.3d at 103.

2. The Text of 28 U.S.C. § 2255 Does Not Require a Different Result

Contrary to the suggestion of the Second Circuit in the instant case and in *Peña*, the text of Section 2255 did not require the Second Circuit to dispense with its long-held rule. Whatever discretion district courts have under Section 2255 is subject to remedial authority under Title 28, United States Code, Section 2106. Section 2106 provides appellate courts with broad power to oversee the sentencing practices of the lower courts. The section provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

As a result, the Second Circuit’s *Quintieri-Rigas* rule provides a reasonable rubric on which to review a district court’s exercise of discretion under Section 2255. Section 2255(b) directs the district court upon finding that a judgment is vulnerable to collateral attack to determine the “appropriate” relief including whether to “vacate and set the judgment aside and ... discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” The *Quintieri-Rigas* rule informed sentencing judges to determine which remedy is appropriate. The purpose of this rule is to ensure that the defendant is sentenced as

he appears before the court. Allowing district judges to simply excise the portion of the sentence imposed on the vacated count not only undermines that principle, it is antithetical to the concept that different portions of a sentence are part of the same fabric, whether one calls it a constellation or rubric, such that once a part has been undone the entire fabric must be reviewed. When the district court does that, it must look at the defendant as he appears at that time.

The instant case is a clear example of why justice requires this result. Decades have passed since the initial crimes and sentencing. Mr. Ayyad at this time has a long history of progress while incarcerated. The Second Circuit has long recognized that post-sentence rehabilitation is a relevant consideration in resentencing. *See, e.g., Bryson*, 229 F.3d at 426 (on remand in direct appeal, defendant entitled to present evidence of post-sentencing rehabilitation). Denying Mr. Ayyad an opportunity to present that evidence produces an intrinsically unjust result.

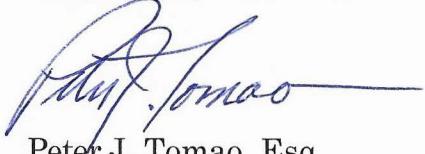
Moreover, applying the *Peña* holding to this case produced an asymmetrical result. The district court refused even to consider Mr. Ayyad's post-sentencing rehabilitation as a mitigating factor, but clearly relied upon post-sentencing facts, namely the 2001 World Trade Center attack to support the sentence. The judge said that resentencing was unlikely to result in a reduced sentence in part because of "the killing of over 3,000 people in the successful 2001 attack on the World Trade Center" without considering how the 2001 attack related to Mr. Ayyad at the time he was resentenced. See Appendix C at A-17.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THIS COURT IS
RESPECTFULLY URGED TO GRANT THE WRIT OF CERTIORARI
TO REVIEW THE ORDERS DENYING PETITIONER'S MOTION FOR
DE NOVO SENTENCING AND JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
AND THE OPINION AND ORDER OF THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING THOSE
ORDERS.

Dated: Garden City, New York
June 9, 2023

Respectfully Submitted,



Peter J. Tomao, Esq.
CJA Counsel to the Petitioner
NIDAL AYYAD
600 Old Country Road Suite 323
Garden City, New York 11530
(516) 877-7015

APPENDIX

20-3832-cr
United States v. Ayyad

**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.

1 **At a stated term of the United States Court of Appeals for the Second Circuit,**
2 **held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of**
3 **New York, on the 14th day of February, two thousand twenty-three.**

4
5 **PRESENT:**

6 **AMALYA L. KEARSE,**
7 **MICHAEL H. PARK,**
8 **ALISON J. NATHAN,**
9 *Circuit Judges.*

10

11 **UNITED STATES OF AMERICA,**

13 *Appellee,*

16 **v.**

20-3832

18 **NIDAL AYYAD,**

20 *Defendant-Appellant.*

23 **FOR DEFENDANT-APPELLANT:** PETER J. TOMAO, Garden City, N.Y.

25 **FOR APPELLEE:**

RYAN B. FINKEL (Stephen J. Ritchin, *on the brief*),
Assistant United States Attorney, *for* Damian
Williams, United States Attorney for the Southern
District of New York, New York, N.Y.

1 Appeal from a judgment of the United States District Court for the Southern District of
2 New York (Kaplan, J.).

3 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
4 **DECREED** that the judgment of the district court is **AFFIRMED**.

5 Defendant-Appellant Nidal Ayyad was convicted of several felony charges based on his
6 role in the 1993 World Trade Center bombing. Counts Nine and Ten of his conviction were
7 charged under 18 U.S.C. § 924(c) and each carried a mandatory, consecutive sentence of 360
8 months. In 1999, Ayyad was sentenced to a total of 1,405 months: 685 months for Counts One
9 through Six and Count Eight and 360 months for each of Count Nine and Count Ten, to be served
10 consecutively. In 2016, Ayyad filed a 28 U.S.C. § 2255 motion seeking to dismiss his § 924(c)
11 convictions. The government consented with respect to Count Ten in light of *United States v.*
12 *Davis*, 139 S. Ct. 2319 (2019). The district court granted Ayyad’s motion as to Count Ten and
13 stated that it would enter an amended judgment, reducing Ayyad’s sentence by 360 months. The
14 district court denied Ayyad’s motion for *de novo* resentencing and entered an amended judgment
15 This appeal followed. We assume the parties’ familiarity with the underlying facts, the procedural
16 history of the case, and the issues on appeal.

17 The district court did not err in denying Ayyad’s motion for *de novo* resentencing. First,
18 *de novo* resentencing was not mandatory. Relying on *United States v. Quintieri*, 306 F.3d 1217
19 (2d Cir. 2002), which held in the context of a 28 U.S.C. § 2255 motion that the vacatur of a count
20 of conviction is “likely to require *de novo* resentencing,” *id.* at 1228, Ayyad argues that “when a
21 resentencing results from a vacatur of a conviction, *de novo* sentencing is the default rule,”
22 Appellant’s Br. at 11. But this Court recently rejected this argument and held that the “default

1 rule” applies only when “a conviction is reversed on direct appeal.” *United States v. Peña*, 58
2 F.4th 613, ---, No. 20-4192, 2023 WL 1456387, at *4 (2d Cir. Jan. 27, 2023). In light of our
3 holding in *Peña*, the district court was not required to conduct *de novo* resentencing after vacating
4 Ayyad’s conviction on Count Ten. When, as here, a conviction is vacated by the district court
5 after a successful habeas challenge, § 2255 “vests district courts with discretion to select the
6 appropriate relief from a menu of options,” including either conducting *de novo* resentencing or
7 entering an amended judgment. *Id.*

8 Second, the district court did not abuse its discretion in denying Defendant’s request for *de*
9 *novo* resentencing. Ayyad argued that *de novo* resentencing was necessary because the district
10 court needed to consider “facts which have occurred since” Ayyad was first sentenced, including
11 his “extraordinary institutional record.” Appellant’s Br. at 21. The district court offered several
12 reasons for its decision to deny Ayyad’s motion, including that *de novo* resentencing would likely
13 be “entirely academic.” *Ayyad v. United States*, No. 16-CV-4346 (LAK), 2020 WL 5018163, at
14 *3 (S.D.N.Y. Aug. 24, 2020). The district court reasoned that—given the nature of Ayyad’s
15 crimes, the significant amount of time remaining on his sentence, and Ayyad’s current age—
16 resentencing would not realistically lead to a sentence short enough for Ayyad to be released within
17 his lifetime. Such a decision is not an abuse of discretion. “[A] district court may properly deny
18 *de novo* resentencing when the exercise would be an empty formality, as it would be here.” *Peña*,
19 2023 WL 1456387, at *7.

20 Remand for *de novo* resentencing is not warranted so we need not consider whether
21 remanding to a different judge would be appropriate. We have considered all of Ayyad’s

1 remaining arguments and find them to be without merit. For the foregoing reasons, the judgment
2 of the district court is **AFFIRMED**.

3 FOR THE COURT:

4 Catherine O'Hagan Wolfe, Clerk of Court

5
6



United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: February 14, 2023
Docket #: 20-3832cr
Short Title: United States of America v. Salameh (Ayyad)

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:93-cr-180-2
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Kaplan

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: February 14, 2023
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DC Court: SDNY (NEW YORK
CITY)DC Docket #: 1:93-cr-180-
2
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Kaplan

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
NIDAL AYYAD,

Movant,

-against-

16-cv-4346 (LAK)
(93-cr-0180 (LAK))

UNITED STATES OF AMERICA,

Respondent.

----- x
MOHAMMAD SALAMEH,

Movant,

-against-

16-cv-5184 (LAK)
(93-cr-0180 (LAK))

UNITED STATES OF AMERICA,

Respondent.

----- x

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge*.

Movants were convicted of multiple felony counts in connection with the 1993 World Trade Center bombing, including two counts charged under 18 U.S.C. § 924(c), Counts Nine and Ten. The predicate offense for Count Nine was assault on a federal official in violation of 18 U.S.C. § 111, as charged in Count Eight. The predicate offense for Count Ten was conspiracy to destroy buildings in violation of 18 U.S.C. § 371.

“At resentencing, Judge Duffy sentenced each defendant (1) on Counts 1-6 & 8, to a sentence designed to be one month short of life expectancy, (2) on Counts Nine and Ten (the § 924(c) counts), to two consecutive additional 30-year sentences, (3) on the miscellaneous counts (7, 11, 12), to additional concurrent sentences, (4) to a \$250,000 fine, and (5) to \$250 million in restitution. The exact prison time imposed under Counts 1-6 & 8 varied among the defendants according to their ages.” *United States v. Salameh*, 261 F.3d 271, 275 (2d Cir. 2001). As relevant here, Ayyad was sentenced to 1,405 months’ imprisonment and Salameh to 1,403 months’ imprisonment. *Id.*

In June 2016, movants (and several of their co-defendants) filed nearly identical *pro*

se 28 U.S.C. § 2255 motions challenging their convictions on Counts Nine and Ten [DI 859, 863].¹ The Court stayed the motions pending the resolution of constitutional challenges to Section 924(c)(3)'s definition of a "crime of violence." [DI 873, 902].

In *Johnson v. United States*, the Supreme Court invalidated 18 U.S.C. §924(e)(2)(B), which contained language similar to that in 18 U.S.C. § 924(c), under which movants were convicted. 135 S.Ct. 2551 (2015). Several years later, the Court in *United States v. Davis*, 139 S.Ct. 2319 (2019), held that the Section 924(c)(3)(B) "risk of force" or "residual" clause is unconstitutionally vague. In light of *Davis*, the Second Circuit in *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019), vacated a defendant's conviction under Section 924(c)(3)(B) for conspiracy to commit Hobbs Act robbery. The Circuit's decision did not alter that defendant's convictions under 924(c)(3)(A), known as the "force" or "elements" clause, which were predicated on substantive Hobbs Act offenses.

In their initial Section 2255 petitions, movants argued that their convictions should be vacated because that the predicate offenses were not "crimes of violence" under *Johnson v. United States*, 135 S.Ct. 2551 (2015) (and *Davis* and *Barrett*). In their reply, movants argued for the first time the trial court's jury instructions provide additional grounds for relief. [See DI 931, 948.] The trial court had instructed that movants could be convicted on Count Eight on a *Pinkerton* theory of liability. Accordingly, as the Court explained recently in a memorandum and order on a Section 2255 motion by one of movants' co-defendants:

"[Movants contend] that the jury was not required to find that they assaulted a federal officer, the crime of violence, and instead could have convicted them based on the co-defendants' membership in the conspiracy. In other words, they argue that their convictions on Count Eight were effectively – or at a minimum, could have been – conspiracy convictions. Since a defendant's own use of violent physical force is not an element of the offense of conspiracy, they argue, their convictions on Count Eight do not satisfy Section 924(c)(3)(A)'s requirement that the predicate offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]". Accordingly, they argue that Count Eight is not a valid predicate offense for Count Nine." *Abouhalima v. United States*, No. 20-cv-834(LAK), 2020 WL 3318031, at *1 (S.D.N.Y. June 18, 2020).

The Court found previously that movants were convicted in Count Nine under 18 U.S.C. § 111(b) and that assaulting a federal officer in violation of this subsection is a "crime of violence" under Section 924(c)(3)(A)'s elements clause. [DI 941 at 2]. However, because movants' reply submission – the first submitted by counsel, the Federal Defenders of New York – asserted a new ground in support of their argument, the Court directed additional briefing. [Id. at 2-3].

¹

All docket references are to 93-cr-180.

The government argues that movants waived this argument since it was not raised in movants' principal briefs. Typically, such a failure "constitutes waiver." *Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009). However, the circumstances present here warrant a different outcome. By Standing Orders, the chief judge appointed the Federal Defenders of New York to represent eligible prisoners in their Section 2255 petitions that were based on *Johnson*. *In re: Motions for Sentencing Reductions Under 28 U.S.C. § 2255 in Light of Johnson v. United States*, 15 Misc. 373 (S.D.N.Y. Nov. 18, 2015); *In re: Petitions Under 28 U.S.C. §§ 2255 and 2241 in Light of Johnson v. United States*, 16 Misc. 217 (S.D.N.Y. June 8, 2016). In doing so, the chief judge specified that the Federal Defenders would file supplemental briefs, and "suggested that individual judges defer any consideration of such petitions" until the filing of that brief. 16 Misc. 217 at 1-2. Consistent with this recommendation, the Court in its discretion will consider movants' *Pinkerton* argument.

The government contends that movants are procedurally barred from raising their *Pinkerton* argument. They contend further that even if the argument was not barred, it fails on the merits.

When a challenge to conviction is not raised on direct appeal, a defendant is prohibited from doing so in a Section 2255 petition unless he demonstrates "(1) cause for the procedural default and ensuing prejudice or (2) actual innocence." *Thorn v. United States*, 659 F.3d 227, 231 (2d Cir. 2011). Cause may be shown where a claim was "so novel that its legal basis [was] not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16 (1984).

As the Court stated in its prior memorandum and order:

"When movant[s] filed [their] direct appeals more than twenty years ago,² a conspiracy to commit a 'crime of violence' itself was a 'crime of violence' under Section 924(c)(3). See *United States v. Patino*, 962 F.2d 263, 267 (2d Cir. 1992). Even after the Supreme Court's decision in *Johnson*, the Second Circuit in 2018 upheld the constitutionality of Section 924(c)'s residual clause. See *United States v. Barrett*, 903 F.3d 166, 175 (2d Cir. 2018), abrogated by *United States v. Davis*, 139 S.Ct. 2319 (2019). It was not until 2019, nearly two decades after movant[s] filed their direct appeal, that *Davis* and *Barrett* were decided. Accordingly, movant[s] have shown cause and prejudice and thus [are] not procedurally barred from raising this claim." *Abouhalima*, 2020 WL 3318031, at *2.

"However, this claim fails on the merits. As the government argues, the *Pinkerton* instruction does not transform movant[s'] conviction[s] for assaulting a federal official into a conspiracy to do so. Movant[s] could have been convicted on Count Eight for a *substantive* violation of Section 111 in either of two ways. First, the jury could have convicted on the theory that the defendant[s] [themselves] assaulted a federal official. Second, it could have convicted [them] on the theory that [they were

²

United States v. Salameh, 152 F.3d 88 (2d. Cir. 1998).

members] of the conspiracy and that the assault was reasonably foreseeable.³ See *Pinkerton v. United States*, 328 U.S. 640, 645-47 (1946).” *Abouhalima*, 2020 WL 3318031, at *2.

Movants were convicted on Count Eight at trial. Accordingly, they were convicted of *substantive* assault on a federal officer, not of a *conspiracy* to assault a federal officer. The *Pinkerton* instruction thus does not implicate Section 924(c)(3)(B)’s residual clause. See *United States v. Blanco*, No. 19-1680, 2020 WL 3026248, at *1 n.3. (2d Cir. June 5, 2020).

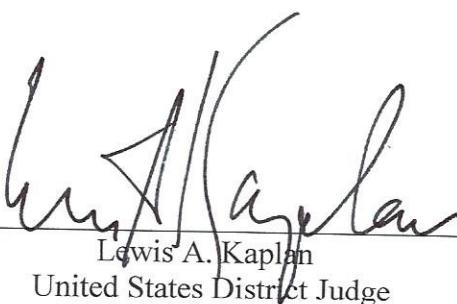
In light of *Davis* and *Barrett*, the government consents to vacatur of movants’ convictions on Count Ten. [DI 928 at 1 n.2].

Accordingly, movants’ motion to vacate their convictions [DI 859, 863] is granted as to Count Ten and denied in all other respects. The Court will enter amended judgments reflecting this ruling.

A certificate of appealability is denied and the Court has concluded than any appeal from this order would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a)(3).

SO ORDERED.

Dated: June 24, 2020



Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
NIDAL AYYAD,

Movant,

-against-

16-cv-4346 (LAK)
[93-cr-0180 (LAK)]

UNITED STATES OF AMERICA,

Respondent.

----- x

MEMORANDUM OPINION

Appearances:

Robert M. Baum
FEDERAL DEFENDERS OF NEW YORK, INC.
Attorney for Movant

Ryan B. Finkel
Assistant United States Attorney
AUDREY STRAUSS
ACTING UNITED STATES ATTORNEY
Attorneys for Respondent

LEWIS A. KAPLAN, *District Judge*.

This case involves a defendant convicted of multiple felonies in the 1993 World Trade Center bombing who ultimately was sentenced to an aggregate term of imprisonment of 1,405 months. The Court has vacated the conviction on one count which carried a consecutive term of imprisonment of 360 months. The question before the Court is whether it is obliged to conduct a full resentencing or, alternatively, may enter an amended judgment reducing the aggregate term of imprisonment by 360 months.

Facts

Movant was convicted on multiple felony counts in connection with the 1993 World Trade Center bombing in which six people were killed and more than a thousand injured, and in which the bombers caused millions of dollars in damage.¹ Among the counts of conviction were counts under 18 U.S.C. § 924(c), Counts 9 and 10. The predicate offense for Count 9 was assault on a federal official in violation of 18 U.S.C. § 111 as charged in Count 8. The predicate offense for Count 10 was conspiracy to destroy buildings in violation of 18 U.S.C. § 371.

At resentencing, the sentencing judge sentenced movant, principally, to (1) concurrent terms of imprisonment of 685 months, which was designed to be one month short of his life expectancy,² on Counts 1-6 and 8, and (2) two additional mandatory 360 month sentences on each of Counts 9 and 10 (the § 924(c) counts) to run consecutively to each other and to the 685 months of imprisonment on Counts 1-6 and 8. Movant thus was sentenced to an aggregate term of 1,405 months' imprisonment.³

In June 2016, movant filed a 28 U.S.C. § 2255 motion challenging his convictions on Counts 9 and 10. The motion was stayed pending resolution of constitutional challenges to Section 924(c)(3)'s definition of "crime of violence."

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United States v. Salameh ("Salameh I"), 152 F.3d 88, 108 (2d Cir. 1998).

²

The sentencing judge believed that the statutory text and Second Circuit case law at the time of sentencing required this calculation. *United States v. Salameh*, 261 F.3d 271, 275 (2d Cir. 2001). Obviously, had he thought otherwise, he would have imposed concurrent life sentences on those counts. As the Circuit later pointed out in affirming the sentence, however, movant and his co-defendants "have no legal right to a sentence shorter than their correct life expectancy." *Id.*

³

Id.

In a memorandum and order dated June 24, 2020 [DI 959⁴], this Court granted the motion to the extent of vacating the conviction on Count 10, but denied it in all other respects. It stated that it would enter an amended judgment reflecting that ruling.

Movant now contends that he is entitled to a full resentencing. He argues that *United States v. Quintieri*⁵ “created a default rule where conviction errors require[] *de novo* resentencing while sentencing errors allow for a limited resentencing.”⁶ As this Court’s vacatur of the 360 month consecutive sentence on Count 10 corrected a conviction rather than a sentencing error, he maintains that he is entitled to a *de novo* resentencing. He maintains also that he “has demonstrated an extraordinary record of post-sentence rehabilitation during his 27 years of incarceration” and hopes to persuade the Court to impose an aggregate sentence shorter than would be imposed if the Court simply eliminated the 360 months consecutive sentence on Count 10 from the previous aggregate of 1,405 months.⁷

The government takes a different view. It maintains first that the default rule of *Quintieri* applies only “when the conviction on one or more charges is overturned on appeal and the case is remanded for resentencing,”⁸ which is not the situation now before this Court. And it goes on to contend that a *de novo* resentencing would be inappropriate in this case for a variety of reasons, including the sentence’s structure and duration.

⁴

Docket entries refer to 93-cr-180.

⁵

306 F.3d 1217 (2d Cir. 2002).

⁶

DI 972.

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DI 963.

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Quintieri, 306 F.3d at 1227-28; *United States v. Rigas*, 583 F.3d 108, 115 (2d Cir. 2009).

Discussion

Following “ambiguous” characterizations of the *Quintieri* rule, the Circuit in 2016 issued a per curiam opinion in *United States v. Powers* that clarified, subject to one exception, that “where only part of a conviction is subsequently overturned,” the “‘default rule’ to remedy a so-called ‘conviction error’ – as distinct from a so-called ‘sentencing error’ – is *de novo* resentencing.”⁹

The “only viable exception” to that default rule is where “the defendant has already received, as his or her sentence on an upheld count of conviction, a mandatory minimum sentence.”¹⁰ This is so because “a district court’s amending its judgment of conviction is, by force of law, strictly ministerial” in that circumstance.¹¹ In other words, a resentencing would be unnecessary where it would not alter a defendant’s aggregate term of incarceration.

The *Quintieri* default rule is inapplicable here. As the Circuit has explained, that rule applies to instances where “the conviction on one or more charges is *overturned on appeal and the case is remanded for resentencing*.”¹² Movant does not cite, nor is the Court aware of, any case in which the *Quintieri* default rule has been applied in the habeas context.

The nature of habeas petitions demonstrates why this is so. A final judgment may be attacked collaterally pursuant to Section 2255 only in narrow circumstances.¹³ The limited availability

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842 F.3d 177, 179 (2d Cir. 2016) (citing *Quintieri*, 306 F.3d at 1228 & n.6).

¹⁰

Id. at 180.

¹¹

Id.

¹²

Quintieri, 306 F.3d at 1227-28 (emphasis added); *United States v. Rigas*, 583 F.3d at 115 (same).

¹³

See United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995).

of Section 2255 reflects an interest in the finality of a criminal judgment, an interest that is not present on a direct appeal.¹⁴ A default rule requiring that the district court hold a *de novo* resentencing each and every time a defendant successfully challenges at least one count of a multi-count conviction would be in tension with the narrow scope of Section 2255.

Moreover, as the government observes, “[a]ny argument that this Court’s order vacating [one count] of the defendant’s conviction should be treated as a mandate from a court of appeals is meritless, particularly given that the plain text of § 2255 vests this Court with the discretion to determine first the nature of the relief that ‘may appear appropriate.’”¹⁵ Thus, the Court is not persuaded that *Quintieri* obliges it to conduct a *de novo* resentencing in this Section 2255 context.

To be sure, a district court may determine that it is appropriate to hold a full resentencing following a habeas petition that results in the vacatur of one of several counts of conviction. But the Court is not persuaded that it should do so here.

First, the principle underlying the *Quintieri* rule is that when a conviction is partially vacated, “[t]he constellation of offenses of conviction has been changed and the factual mosaic related to those offenses that the district court must consult to determine the appropriate sentence is likely altered.”¹⁶ In other words, once one conviction is vacated, the “knot of calculation” is undone.¹⁷ But the vacatur of one of the two consecutive 30 year sentences that themselves were imposed to follow service of the concurrent sentences of one month short of movant’s life expectancy has not altered the

¹⁴

See Yick Man Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010).

¹⁵

DI 970 (quoting 28 U.S.C. § 2255(b)).

¹⁶

Quintieri, 306 F.3d at 1227-28.

¹⁷

Id.

“knot of calculation.”¹⁸ Those consecutive 30 year sentences were intended, collectively and individually, to prevent movant from being released from incarceration even on the sentencing court’s mistaken impression that it could not impose a life sentence on the other counts. That is, those 30 year consecutive sentences on Counts 9 and 10 were not “inextricably tied to other counts.”¹⁹

Second, it bears mention that movant previously appealed from the sentences imposed when he last was resentenced. Whatever arguments he chose to advance then were rejected by the Court of Appeals. Whatever arguments he elected not to raise at least arguably were waived. And the policies that animate the mandate rule counsel against a discretionary *de novo* resentencing on the 685 month sentences imposed on Counts 1-6 and 8, regardless of whether that rule forecloses *de novo* resentencing as a matter of law.

Third, the strong likelihood is that the movant’s argument in favor of a *de novo* resentencing is entirely academic. On any resentencing he would have to be sentenced to 360 months imprisonment on Count 9, to be served consecutive to any sentence imposed on the other counts.²⁰ He is 53 years old. In order for a *de novo* resentencing to have any real world effect – that is, to give him any real chance of release prior to his passing – the Court would have to impose concurrent sentences

¹⁸

The Court recognizes that the structure of the sentence would not preclude an application of the *Quintieri* default rule had Ayyad’s conviction been vacated and remanded on direct appeal. *See Rigas*, 583 F.3d at 116. But the question of a resentencing is not before the Court on a remand. For the reasons explained above, the Court has concluded it is not bound by *Quintieri* in the habeas context.

¹⁹

Quintieri, 306 F.3d at 1227.

²⁰

18 U.S.C. § 924(c)(1)(B)(ii).

of 27 years or less on Counts 1-6 and 8.²¹ The probability of such a sentence on Counts 1-6 and 8 for a man who “used his position as an engineer at Allied Signal, a large New Jersey chemical company, to order the necessary chemical ingredients for bomb making, and to order hydrogen tanks from ALG Welding Company that would enhance the bomb's destructive force”²² in circumstances in which six died, more than a thousand were injured, and millions of dollars of damage done is sufficiently slim as to make a *de novo* resentencing an unwise exercise of this Court’s discretion. That is all the more so when one considers that the object of this movant’s crime was even more horrific, as evidenced by the killing of over 3,000 people in the successful 2001 attack on the World Trade Center.

Accordingly, the Court will enter an amended judgment reflecting the vacatur of Count 10 and reducing movant’s term of imprisonment by 360 months.

SO ORDERED.

Dated: August 24, 2020

/s/ Lewis A. Kaplan

Lewis A. Kaplan
United States District Judge

²¹

Assuming (without deciding) that movant’s life expectancy is 80 years, and as movant is 53 years of age and has served approximately 27 years of his sentence, the total of any sentence on Counts 1-6 and 8 on a *de novo* resentencing would have to be approximately 27 years or less for there to be any actual impact on his overall term of incarceration.

²²

Salameh I, 152 F.3d at 107-08.

Memorandum Endorsement

Ayyad v United States, 16-cv-4346 (LAK), 93-cr-180 (LAK)

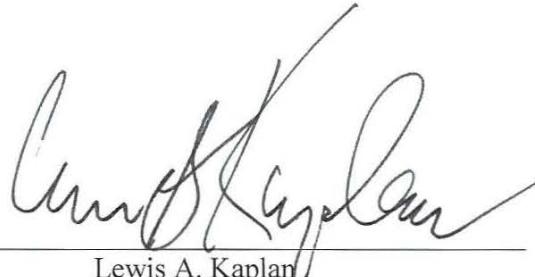
Movant seeks a certificate of appealability “on the question whether Ayyad was entitled to plenary resentencing upon the vacatur of his Count 10 conviction in light of United States v. Davis, 139 S. Ct. 2319 (2019).” 93-cr-180 Dkt 985, at 2.

AEDPA narrowly restricted the availability of appeals from denials of habeas corpus petitions and Section 2255 motions. It provides that “a COA may not issue unless ‘the applicant has made a substantial showing of the denial of a constitutional right.’” 28 U.S.C. § 2253(c). Movant, however, did not contend that when he sought a plenary resentencing that he was entitled to it as a matter of constitutional right. His motion for a COA does not do so now. He now does so only by quoting out of context from *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), when in fact *Slack* makes abundantly clear that a COA should issue only upon “a substantial showing of the denial of a *constitutional* right.” *Id.* at 484 (emphasis added).

As there has been no such showing here, the motion for a certificate of appealability (93-cr-180 Dkt 985, 16-cv-4346 Dkt 19) is denied.

SO ORDERED.

Dated: November 29, 2020



Lewis A. Kaplan
United States District Judge

S.D.N.Y. – N.Y.C.
93-cr-180
Kaplan, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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 13th day of May, two thousand twenty-one.

Present:

Guido Calabresi,
Rosemary S. Pooler,
Michael H. Park,
Circuit Judges.

United States of America,

Appellee,

v.

20-2720 (L),
20-3832 (Con)

Mahmud Abouhalima,
AKA Mahmoud Abu Halima, et al.,

Defendants,

Nidal Ayyad,

Defendant-Appellant.

Appellant, pro se, moves for a certificate of appealability (“COA”) and appointment of counsel. Upon due consideration, it is hereby ORDERED that, as to the appeal docketed under 20-2720 (L), the motions are DENIED and the appeal is DISMISSED because Appellant has not “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

It is further ORDERED that, as to the appeal docketed under 20-3832 (Con) challenging the denial of de novo resentencing after one of Appellant’s convictions was vacated, the COA motion is DENIED as unnecessary. *See Illarramendi v. United States*, 906 F.3d 268, 270 (2d Cir. 2018)

(per curiam) (“[A] COA is not required when appealing from orders in a habeas proceeding that are collateral to the merits of the habeas claim itself . . .”). It is further ORDERED that the motion for appointment of counsel is GRANTED in 20-3832 (Con). The Clerk’s Office shall appoint counsel pursuant to the Criminal Justice Act.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

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 17th day of March, two thousand twenty-three.

United States of America,

Appellee,

v.

Mahmud Abouhalima, AKA Mahmoud Abu Halima, et al.,

Defendants,

ORDER

Docket Nos: 20-2720 (Lead)
20-3832 (Con)

Nidal Ayyad,

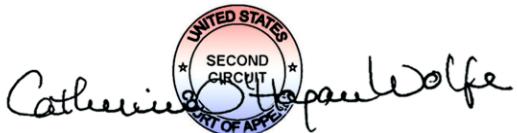
Defendant - Appellant.

Appellant, Nidal Ayyad, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

