No. 18-

IN THE

Supreme Court of the United States

ACESHUNN BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an *attempt* to commit a violent felony, in this case second-degree New York robbery, is a violent felony under the force clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA") when the attempt statute differs substantively from the underlying offense, and does not have as an element the use, attempted use or threatened use of physical force?
2. Whether a conviction for an attempt to commit a robbery under New York Penal Law § 160.10(1) is a violent felony when the elements of the statute can be met by aiding another person present, including serving as a lookout, and without the defendant using, attempting to use, or threatening to use physical force?

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The summary order of the United States Court of Appeals for the Second Circuit is not published, but can be found at 752 Fed. Appx. 108 and appears in the Petitioner's Appendix as Document 1. The opinion of the United States District Court for the Eastern District of New York is reported at 257 F. Supp. 3d 330 and appears in the Petitioner's Appendix as Document 3.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. §3231 and entered a judgment on May 26, 2017. The Second Circuit had jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742, and reversed the judgment in an order dated February 14, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 922(g) provides:

> (g) It shall be unlawful for any person--
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The ACCA, 18 U.S.C. § 924(e), provides:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection--
>
> . . .

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives . . . .

N.Y. Penal Law § 160.10 provides:

> A person is guilty of robbery in the second degree when he forcibly steals property and when:
>
> 1. He is aided by another person actually present; or
>
> 2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . .

N.Y. Penal Law § 160.00 provides:

> Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 110.00 provides:

> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

28 U.S.C. § 2255(a) provides:

> 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.

STATEMENT OF THE CASE

In 2008, Aceshunn Brown pled guilty to being a felon in possession of a weapon in violation of 18 U.S.C. § 922(g), which typically carries a statutory maximum penalty of 10 years in prison. *See* 18 U.S.C. § 924(a)(2). However, the ACCA provides for a mandatory minimum term of imprisonment of 15 years for a defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e). The ACCA contains three clauses that define which prior felonies qualify as violent: (1) the "force" or "elements" clause, which covers any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another," (2) the "enumerated offenses" clause, which covers any crime that "is burglary, arson, or extortion, [or] involves use of explosives;" and 3) the "residual clause," which applies to any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e). In *Johnson v. United States*, 135 S.Ct. 2551 (2015) ("*Johnson II*"), this Court held that the residual clause violates the United States Constitution's guarantee of due process because it is overly vague. In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court held that *Johnson II* was retroactive to cases involving ACCA-enhanced sentences on collateral review.

Mr. Brown was initially sentenced to 15 years because he had a prior drug conviction and two prior convictions for attempted second-degree robbery in New York, which the District Court found qualified as violent felonies under the ACCA. *See* Appendix, Doc. 4. As set forth

in the certificates of disposition for Brown's prior convictions, one of Brown's prior convictions was for attempted second-degree robbery under N.Y. Penal Law § 160.10(1), and the other was for attempted second-degree robbery under N.Y. Penal Law § 160.10(2)(a). *See* Appendix, Doc. 6. When sentencing Mr. Brown, the District Court did not specify upon which clause of ACCA it was relying. *See* Appendix, Doc. 5.

Following this Court's decision in *Johnson* II, Brown, like numerous other similarly-situated defendants, filed a 28 U.S.C. § 2255 motion in the District Court, arguing that under *Johnson* II, his two prior convictions for attempted second-degree robbery in New York state no longer qualified as "violent felonies" under ACCA, entitling him to sentencing relief, because: 1) they were not enumerated felonies; 2) they were not categorically violent felonies under the elements clause of the ACCA following the Supreme Court's decisions in *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson* I"), which held that a violent felony under ACCA required "*violent* force—that is, force capable of causing physical pain or injury to another person;" and 3) after *Johnson* II, they no longer qualified as ACCA predicates under the unconstitutional residual clause. *See* Brown's Letter Motion, EDNY Case No. 1:07-cr-00202 (JBW), ECF No. 144. The District Court granted Brown relief, finding that at least one of Brown's prior convictions for attempted second-degree robbery did not qualify as a "violent felony" under the ACCA following *Johnson* I and *Johnson* II, and therefore Brown did not qualify for the sentencing enhancement. *See* Appendix, Doc. 3. The District Court did not analyze whether an *attempted* robbery could ever constitute a violent felony because it found, without having to reach the attempt issue, that the elements of second-degree robbery could be satisfied absent any "violent force." *See id.* Because Brown had already served the ten-year statutory maximum sentence for being a felon in possession of a weapon under 18 U.S.C. §

922(g), Brown was resentenced to time-served, and released from prison pending the Government's appeal. *See* Appendix, Docs. 2 and 3.

The Government filed a timely appeal of the District Court's decision with the Second Circuit. The Government argued that, even after *Johnson I* and *Johnson II*, attempted second-degree robbery under New York law constitutes a violent felony because the "forcibly stealing" element of the robbery statute in itself involves the use of "force capable of causing physical pain or injury to another person" as required under *Johnson I* to qualify as a violent felony. *See* Second Circuit Docket, Case No, 17-1943, Doc. 34, pg. 13. The Government further argued that it should make no difference to the analysis that Mr. Brown was convicted of *attempted* robbery, rather than robbery, because, in the Government's view, the ACCA "includes crimes that have as an element the 'attempted' use of force" because "[a]n individual who attempts, but fails to complete, a robbery is in no less need of deterrence than one who succeeds." *Id*. at pg. 25, n. 11.

Brown argued, in response, that the District Court had correctly determined that an attempted robbery offense in New York was not a "violent felony" under the ACCA, and that the Government's position was inconsistent with *Johnson I*, the decisions of New York courts interpreting New York's robbery statute, and the vast majority of federal courts that had considered the issue. Second Circuit Docket, Case No, 17-1943, Doc. 58, pg. 4. Brown also argued that his attempted second-degree robbery conviction fell even further from *Johnson I*'s definition of violent force because it was an *attempt*. *Id*. at pg. 15. Because New York's attempt statute, N.Y. Penal Law 110.10, does not require the use, attempted use, or threatened use of physical force, attempting to commit robbery cannot constitute a violent felony under the ACCA and Supreme Court precedent. *See id*.

On February 14, 2019, the Second Circuit reversed the District Court's decision granting Brown's § 2255 motion, and remanded for the District Court to reinstate the original sentence. *See* Appendix, Doc. 1. The Second Circuit reasoned that, pursuant to this Court's recent decision in *Stokeling v. United States*, 139 S.Ct. 544 (2019) and the Second Circuit's recent decisions in *United States v. Thrower*, 914 F.3d 770 (2d Cir. 2019) (per curiam) and *United States v. Pereira-Gomez*, 903 F.3d 155 (2d Cir. 2018), all of which were decided after the appeal in Brown was briefed and argued, attempted robbery qualifies as a violent felony under the ACCA. *Id*. The Second Circuit's decision was an unpublished summary order and contained very little analysis. *Id*. The one Supreme Court decision upon which the Second Circuit relied, *Stokeling*, did not involve attempt. On the attempt issue, the Second Circuit merely referred to its previous decision in *Pereira-Gomez*, which held that attempted robbery qualifies as a "crime of violence" under the comparable force clause in the 2014 Sentencing Guidelines because the New York Court of Appeals has held that attempt requires "that the action taken by an accused be 'so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference.'" Appendix, Doc. 1; *Pereira-Gomez*, 903 F.3d at 166 (*citing* the dissent in *People v. Mahboubian*, 74 N.Y.2d 174, 196 (1989)). Notably, the Second Circuit did not rely upon the majority opinion in that case which stated that to be guilty of attempt, "the defendants' act 'need not be the final one toward the completion of the offense.'" *Mahboubian*, 74 N.Y.2d at 190. The Second Circuit also did not employ the categorical approach with respect to its attempt analysis, and did not examine the underlying facts of any New York attempt cases to determine the least of the acts proscribed by the attempt statute, which has substantively different elements than the underlying robbery offense. *Pereira-Gomez*, 903 F.3d at 166; *see also Thrower*, 914 F.3d at 776-777.

Mr. Brown's sentence was reinstated by the Court on April 18, 2019. EDNY Case No. 1:07-cr-00202 (JBW), ECF No. 162.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit Has Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court, Using Reasoning That Conflicts With This Court's Precedent In *Stokeling* and *Johnson I*

In this case, the Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court – whether an attempt to commit a violent felony, in this case second-degree New York robbery, is in itself a violent felony under the ACCA, when the separate attempt statute differs substantively from the underlying offense, and does not have as an element the use, attempted use or threatened use of physical force. The Second Circuit's sweeping conclusion that "all degrees of New York robbery, including attempted robbery, qualify as 'crimes of violence,'" was undertaken with minimal analysis and without employing the requisite categorical approach. *See* Appendix, Doc. 1. The conclusion has broad implications for petitioners challenging their ACCA sentencing enhancements in the wake of Johnson *II*, for Sentencing Guidelines calculations, and for immigration and criminal cases relying upon the definition of "crime of violence" in 18 U.S.C. § 16, which contains language nearly identical to the ACCA. Additionally, the Second Circuit's analysis conflicts with this Court's decisions in *Johnson* I and *Stokeling*, upon which the Second Circuit purports to rely in this case, and this conflict should be rectified by this Court.

1. The Second Circuit's Analysis Was Cursory, But Has Broad Application

The Second Circuit, in this case, held that *attempted* second-degree robbery qualifies as a violent felony under the force clause in the ACCA, relying upon its decision in *Pereira-Gomez*. Appendix, Doc. 1. The Second Circuit held in *Pereira-Gomez* that attempted robbery qualifies

as a "crime of violence" under the comparable force clause in the 2014 Sentencing Guidelines. 903 F.3d at 166.[1] The Second Circuit dismissed Pereira-Gomez's argument that attempted robbery does not qualify as a crime of violence because it can be committed without the defendant using, attempting to use, or threatening to use physical force. *Id*. Instead, the Second Circuit reasoned that, because the New York Court of Appeals has held that attempt requires "that the action taken by an accused be 'so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference,'" attempting to commit robbery must qualify as a crime of violence. *Id*. (*citing* the dissent in *Mahboubian*, 74 N.Y.2d at 196 (1989)). The Second Circuit did not reference the majority opinion in that case, which stated that to be guilty of attempt, "the defendants' act 'need not be the final one toward the completion of the offense.'" *Mahboubian*, 74 N.Y.2d at 190. Nor did the Second Circuit conduct an analysis of how New York's *attempted* robbery has been applied, and whether it categorically requires the use, attempted use or threatened use of force. *Pereira-Gomez*, 903 F.3d at 166.

Although the decision was reached with minimal analysis, the Second Circuit has applied its holding in *Pereira-Gomez* to Brown's case under ACCA, and to over a dozen other cases to date in a variety of contexts, principally through summary orders, demonstrating that its reasoning, though cursory, flawed and inconsistent with New York law and this Court's decisions in *Stokeling* and *Johnson* I, will have broad applicability, and thus can and should be corrected by this Court. *See*, *e.g*., *United States v. Dupree*, No. 17-1846-CR, 2019 WL 1785591, at *3 (2d Cir. Apr. 24, 2019) (*citing Pereira-Gomez* and noting that "the fact that Dupree's convictions were for attempted robbery is inconsequential."); *United States v. Love*, No. 17-

[1] Although this Court denied Petitioner Pereira-Gomez certiorari, the petition for certiorari in *Pereira-Gomez* did not raise the issue of attempt.

2193-CR, 2019 WL 1890752, at *1 (2d Cir. Apr. 29, 2019) (citing *Pereira-Gomez* and finding that attempted second-degree, and third-degree robbery were predicate crimes of violence as defined in U.S.S.G. § 4B1.2(a)(1)); *United States v. Johnson*, No. 16-1832-CR, 2019 WL 1276462, at *2 (2d Cir. Mar. 19, 2019) (relying on *Pereira-Gomez*'s discussion of attempt and noting that "[t]he district court therefore correctly categorized Johnson's prior convictions for attempted New York robbery in the second degree as "crimes of violence" when calculating his sentence."); *United States v. Pena*, No. 17-4116-CR, 2019 WL 643525, at *2 (2d Cir. Feb. 15, 2019) (citing *Pereira-Gomez* and noting, "[t]here is no dispute that attempted second-degree robbery and third-degree robbery constitute 'crimes of violence.'"); *United States v. Santos*, 748 F. App'x 428, 429 (2d Cir. 2019) ("*Periera-Gomez* also squarely held that *attempted* robbery under New York law is a crime of violence under the force requirement of the Guidelines."); *United States v. Rivera*, 743 F. App'x 483, 483 (2d Cir. 2018) ("Rivera's argument, however, is foreclosed by this Court's recent decision in *United States v. Pereira-Gomez*, which held that all degrees of New York robbery and attempted robbery qualify as crimes of violence . . . ."); *United States v. Santos*, No. 16-CR-302(WFK), 2019 WL 1306074, at *4 (E.D.N.Y. Mar. 21, 2019) ("Because *Pereira-Gomez* squarely held attempted robbery under New York State law is a crime of violence under the force clause of the Guidelines, its conclusion governs this case."); *United States v. Thomas*, No. 17-4022-CR, 2019 WL 1299705, at *4 (2d Cir. Mar. 20, 2019) ("Cases decided after Thomas's sentencing make clear that all degrees of robbery and attempted robbery under New York law constitute violent felonies within the meaning of the ACCA."); *Boone v. United States*, 750 F. App'x 64, 65 (2d Cir. 2019) ("Given these decisions [in *Stokeling*, *Pereira-Gomez* and *Thrower*], Boone can no longer maintain that his convictions for second-degree and attempted second-degree robbery under New York law do not qualify as ACCA

predicates."); *Brown v. Whitaker*, 748 F. App'x 411, 412 (2d Cir. 2019) (citing *Pereira-Gomez* and noting that "because Brown's conviction for attempted second-degree robbery under NYPL Sections 110.00 and 160.10 necessarily included the use of violent force as an element, it categorically constitutes an aggravated felony crime of violence as defined in 18 U.S.C. § 16(a), and the agency did not err in denying Brown's motion to terminate his removal proceedings."); *Coleman v. United States*, 748 F. App'x 403, 404 (2d Cir. 2019) (noting that Coleman's challenge to sentencing enhancement "is foreclosed by this Court's recent decision in *United States v. Pereira-Gomez*, which stated that all degrees of New York robbery and attempted robbery qualify as crimes of violence under the November 1, 2014 edition of the U.S. Sentencing Guidelines.")

Other Circuits have also struggled with whether an attempt to commit a violent felony is in itself necessarily a violent felony, and the Court's guidance in this case would resolve the broader confusion. For instance, in *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019), a divided Eleventh Circuit declined to hear a case deciding whether an attempt to commit a violent felony is necessarily in and of itself a violent felony. In a dissenting opinion, Circuit Judge Jill Pryor wrote, in reasoning equally applicable to this case:

> We can easily imagine that a person may engage in an overt act—in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block from the bank, and approaching the bank's door before being thwarted—without having used, attempted to use, or threatened to use force. Would this would-be robber have *intended* to use, attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? No. So an individual's conduct may satisfy all the elements of an attempt to commit an elements-clause offense without anything more than intent to use elements-clause force and some act (in furtherance of the intended offense) that does not involve the use, attempted use, or threatened use of such force. The panel opinion's conclusion that an attempt to commit a crime of violence necessarily is itself a crime of violence simply does not hold up.

A decision to grant certiorari in this case would thus have broad applicability on a critical issue being debated throughout the Circuits, even beyond the immediate impact of the Second Circuit's decision in this case, which relied on *Pereira-Gomez*.

2. The Second Circuit's Decision Is Inconsistent with New York Law

A person is guilty of *attempted* robbery in the second degree "when, with intent to commit [robbery in the second degree], he engages in conduct which tends to effect the commission of such crime." N.Y. Penal Law § 110.00. New York's highest court has specifically stated that it does not follow the "strictest possible approach to defining attempt" and to meet the elements of attempt, "the defendants' act 'need not be the final one toward the completion of the offense.'" *Mahboubian*, 74 N.Y.2d at 190. Although New York courts have often stated that "for a defendant to be guilty of an attempted crime, the defendant 'must have engaged in conduct that came dangerously near commission of the completed crime,'" *People v. Denson*, 26 N.Y.3d 179, 189 (2015), a defendant can come dangerously close to committing robbery by engaging in conduct that does not involve using, attempting to use, or threatening to use physical force.

New York cases show that attempted robbery in New York can encompass activities such as lying in wait, surveilling a location to rob, and possession of tools or materials to aid in the commission of the crime, acts which fall short of the use, attempted use, or threatened use of physical force. For instance, in *People v. Lamont*, the Court of Appeals found that the evidence was sufficient to sustain an attempted second-degree robbery conviction where the defendants knocked on the back door of a fast food restaurant early in the morning wearing gloves and masks and carrying what appeared to be firearms, but the defendants had no contact with any potential victims. 25 N.Y.3d 315, 319 (2015). Likewise, in *People v. Colp*, New York's Fourth

Department affirmed a defendant's attempted robbery conviction where his accomplice "observ[ed] the station from across the street for a substantial period of time, . . . crossed the street, entered upon the premises of the gasoline station, and, carrying a loaded gun in his pocket, walked directly toward the shelter housing the cash register and the attendant," but where there was no indication by the Court that the accomplice ever spoke to or made any contact with the attendant. 147 A.D.2d 964 (4th Dep't 1989). These cases demonstrate that there are real-world scenarios where New York's attempted robbery statute can be satisfied without the use, attempted use or threatened use of physical force.[2]

New York cases analyzing attempt as applied to other underlying statutes also demonstrate that a defendant can be found guilty of attempt in New York when he stops short of meeting the conduct elements of the underlying statute. In *People v. Cano*, 12 N.Y.3d 876, 877 (2009), the New York Court of Appeals found that, "[t]he proof of defendant's intent and extensive preparation followed by his travel to the intended crime scene showed that he was close to achieving his illegal goal and justified his convictions for attempt." In *People v. Wright*, 191 A.D.2d 226, 227 (1st Dep't 1993), the defendant was found guilty of attempted burglary in the third degree. Under N.Y. Penal Law § 140.20, "[a] person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." The Appellate Division, First Department, concluded that the defendant was "dangerously near" to the completion of the burglary when he used a stick to break the lock of a delicatessen, as an accomplice stood at the corner, discarded the lock and stick, lifted the security gate, and walked back and forth in front of the store, even though he never entered or remained

[2] *See also United States v. Alfonso*, No. 3:17CR128 (JBA), 2019 WL 1916199, at *3 (D. Conn. Apr. 30, 2019) (since a "substantial step" under Connecticut attempt could include activities like "lying in wait, ... reconnoitering the place contemplated for the commission of the crime[,] ... [or] possession of materials to be employed in the commission of the crime," the "statute itself makes clear that the elements of attempt to commit robbery could clearly be met without any use, attempted use, or threatened use of violence whatsoever.")

on the premises. In *People v. Naradzay*, 11 N.Y.3d 460, 467 (2008), the Court of Appeals found the defendant guilty of attempted murder when he engaged in conduct that was "potentially and immediately dangerous," where he borrowed a vehicle, obtained a shotgun and ammunition and drove several miles to the immediate vicinity of the victim's house, and emerged from the shrubbery with a shotgun 20 feet from her house. These cases demonstrate how the "dangerously near" standard "does not…mandate that the defendant take 'the final step necessary' to complete the offense," and even when the underlying statute requires the use, attempted use, or threatened use of force, the attempt statute does not. *Naradzay*, 11 N.Y.3d at 466.

While the Second Circuit has foreclosed a careful analysis of these New York attempt cases through its widespread application of *Pereira-Gomez* through summary orders, this Court can and should undertake such an analysis.

3. The Second Circuit's Decision Conflicts With This Court's Precedents in *Stokeling* and *Johnson I*

In *Stokeling*, this Court held that "the elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance." *Stokeling*, 139 S. Ct. at 550. But *Stokeling* never reached the question of whether *attempt* to commit a robbery, when that attempt statute itself does not require the criminal to overcome the victim's resistance, is a violent felony for purposes of ACCA. Indeed, such a finding would be inconsistent with *Stokeling* and *Johnson* I, as *Stokeling* reaffirmed the holding in *Johnson* I that, under ACCA, physical force means "*violent* force—that is, force capable of causing physical pain or injury to another person," that must be "exerted by and through concrete bodies" as opposed to "intellectual force or emotional force." *Id*. at 552-53. Since attempt under New York law does not require the defendant to overcome the victim's resistance, and does not otherwise require the use, attempted use or

threatened use of "force capable of causing physical pain or injury to another person," *Johnson I*, 559 U.S. at 140, the Second Circuit's holding that attempted robbery in New York is a violent felony conflicts with *Stokeling* and *Johnson* I and must be corrected.

B. A New York State Conviction For Second-Degree Robbery, Which Can Apply To Defendants Who Merely Serve As A "Lookout," Does Not Categorically Qualify As A Crime Of Violence Under The ACCA.

The Second Circuit's conclusion in this case that all degrees of New York robbery constitute violent felonies was also an overly broad interpretation of this Court's decision in *Stokeling*, which can and should be rectified by this Court.

As explained above, the ACCA's force clause states that a prior felony is considered violent if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). When determining whether an offense falls within this clause, a court must apply a modified categorial approach to determine under which elements of the statute the defendant was convicted where, as here, the state statute at issue is divisible. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Under this approach, courts look to a limited class of documents to determine what crime, with what elements, a defendant was convicted of. *Id*. Courts then use the categorical approach to compare that crime with the relevant statutory provision to determine whether it qualifies as a violent felony under the ACCA. *Id*. A defendant's "actual conduct is irrelevant to the inquiry," because "the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized'" under the state statute. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (*quoting Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)).

Brown's certificates of conviction show he was convicted of attempted second-degree robbery under N.Y. Penal Law § 160.10(1). Appendix, Doc. 6. The case law in New York

makes clear that defendants are often convicted of second-degree robbery under N.Y. Penal Law § 160.10(1) for "aiding another" in a robbery by serving as a "lookout" or providing other assistance which in no way involves the use, attempted use or threatened use of force against another. *See, e.g. People v. Reid*, 287 A.D.2d 387, 388 (1st Dep't 2001) (affirming conviction of second degree robbery where defendant served as a lookout and was in close proximity to his codefendant who committed the crime which satisfied the "aided by another person actually present" element of Penal Law 160.10[1]); *People v. Harris*, 271 A.D.2d 258, 259 (1st Dep't 2000) ("Since the evidence provided a basis from which to infer that [the defendant] acted as a lookout, in addition to proving that [the defendant] acted in concert with [his codefendant], it also proved that [the defendant] was 'actually present', supporting his conviction of robbery in the second degree (Penal Law § 160.10[1])"); *People v. Suarez*, 162 A.D.2d 302, 302 (1st Dep't 1990) (affirming second-degree robbery conviction where "the evidence at trial demonstrated that as a look out, [defendant] was properly convicted of robbery in the second degree under the theory of an accomplice 'actually present' during the commission of the robbery herein within the meaning of Penal Law Sec. 160.10(1)"); *People v. Wooten*, 214 A.D.2d 596, 596 (2nd Dep't 1995) (affirming conviction of first and second degree robbery where "[t]he victim was robbed while the defendant stood across the street and acted as a lookout.") In fact, in *Suarez*, New York's First Appellate Department noted that the defendant, who was convicted of second-degree robbery for merely serving as a lookout, "as . . . accomplice, [bore] criminal liability for the same offense" as his codefendants who actually committed the crime. 162 A.D.2d at 302.

In *Johnson* I, the Supreme Court held that the phrase "physical force" in the "force clause" of the ACCA "means violent force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. This definition was reaffirmed in *Stokeling,* 139 S.

Ct. at 552-553. As explained above, violating N.Y. Penal Law § 160.10(1) by "assisting another", such as serving as a lookout or driving a getaway car, often does not involve the use of violent physical force, as defined in *Johnson* I. Therefore, second-degree robbery under New York Penal Law 160.10(1) for merely "aiding another" does not necessarily involve physical force and hence cannot categorically constitute a violent felony under the ACCA. The Second Circuit's overly broad reading of *Stokeling* should be corrected by this Court.

For these reasons, attempted second-degree robbery under N.Y. Penal Law § 160.10(1) cannot be deemed to be a "violent felony" under the ACCA, and the Second Circuit's decision in this case should be reversed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Dated: New York, New York
May 15, 2019

Respectfully submitted,

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APPENDIX

DOCUMENT 1

752 Fed.Appx. 108 (Mem)
This case was not selected for
publication in West's Federal Reporter.

United States Court of Appeals, Second Circuit.

Aceshunn BROWN, Petitioner-Appellee,
v.
UNITED STATES of America,
Respondent-Appellant.

No. 17-1943
|
February 14, 2019

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

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the grant of the 28 U.S.C. § 2255 motion is **REVERSED**, the amended judgment entered on June 1, 2017, is **VACATED**, and the cause **REMANDED** for the District Court to reinstate the original sentence.

Attorneys and Law Firms

FOR APPELLANT: David K. Kessler (Amy Busa, on the brief), for Richard P. Donoghue, United States Attorney for the Eastern District of New York, Brooklyn, NY.

FOR APPELLEE: Elizabeth E. Macedonio, Esq., New York, NY.

PRESENT: Gerard E. Lynch, Susan L. Carney, Christopher F. Droney, Circuit Judges,

SUMMARY ORDER

The government appeals from an order entered on May 31, 2017, and amended judgment entered on June 1, 2017, that (1) granted Aceshunn Brown's second and successive motion under 28 U.S.C. § 2255, (2) reduced his sentence from the mandatory minimum of 180 months to time served, and (3) ordered his immediate release from prison. We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to which we refer only as necessary to explain our decision to reverse the District Court's grant of Brown's § 2255 motion, vacate the amended judgment, and remand the cause for the District Court to reinstate Brown's original sentence.

The government argues that the District Court erred in concluding that Brown's two prior convictions for the New York offense of attempted second-degree robbery, in violation of New York Penal Law §§ 160.10 and 110, did not qualify as "violent felon[ies]" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). We review de novo the District Court's ruling on this question. *See United States v. Brown*, 629 F.3d 290, 294 (2d Cir. 2011) (per curiam).

The recent Supreme Court decision in *Stokeling v. United States*, —— U.S. ——, 139 S.Ct. 544, —— L.Ed.2d —— (2019), and our recent decisions in *United States v. Thrower*, 914 F.3d 770 (2d Cir. 2019) (per curiam), and *United States v. Pereira-Gomez*, 903 F.3d 155 (2d Cir. 2018), resolve this case in the government's favor. In *Stokeling*, the Supreme Court held that the "the term 'physical force' in the ACCA encompasses the degree of force necessary ***109** to commit common-law robbery"—it is "the amount of force necessary to overcome a victim's resistance." 139 S.Ct. at 555. In *Thrower*, we held that New York robbery in the first and third degrees, "which like every degree of robbery in New York require[ ] the common law element of 'forcible stealing,' " are "violent felon[ies]" under the ACCA. 914 F.3d at 776. We further held in *Pereira-Gomez* that *all* degrees of New York robbery, including attempted robbery, qualify as "crimes of violence" under the 2014 Sentencing Guidelines' nearly identical force clause. 903 F.3d at 166; *compare* U.S.S.G. § 2L1.2, cmt. n.1(b)(iii) (2014), *with* 18 U.S.C. § 924(e)(2)(B)(i).

In light of these decisions, it is evident that Brown's prior convictions under New York law for attempted second-degree robbery qualify as violent felonies under the ACCA.[1] Accordingly, the District Court erred in granting Brown's § 2255 motion and reducing his sentence to time served.

* * *

We therefore REVERSE the District Court's grant of Brown's § 2255 motion, VACATE the amended judgment, and REMAND the cause for the District Court to reinstate Brown's original sentence.

All Citations

752 Fed.Appx. 108 (Mem)

Footnotes

1 In light of this disposition, we do not reach the government's arguments that Brown's claim for relief under § 2255 is procedurally barred.

DOCUMENT 2

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

UNITED STATES OF AMERICA
V.
ACESHUNN BROWN

JUDGMENT IN A CRIMINAL CASE

Case Number: CR07-202 (JBW)

USM Number: 74958-053

ROBERT MOORE 128 AVON PLACE W. HEMPSTEAD NY
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1 OF THE INDICTMENT AUSA-RICHARD LUNGER

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 922(g)(1) and 924(e)(1)	FELON IN POSSESSION OF A FIREARM		1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/21/2008
Date of Imposition of Judgment

Signature of Judge

JACK B. WEINSTEIN SR. U.S.D.J.
Name of Judge Title of Judge

4/30/2008
Date

DEFENDANT: ACESHUNN BROWN
CASE NUMBER: CR07-202 (JBW)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

15 YEARS

☑ The court makes the following recommendations to the Bureau of Prisons:

THAT THE DEFENDANT BE INCARCERATED AT A FACILITY IN OR AS CLOSE TO NEW YORK CITY PREFERABLY AT FORT DIX NEW JERSEY OR OTISVILLE NEW YORK.
THE DEFENDANT IS TO PARTICIPATE IN A DRUG, PSYCHIATRIC AND ALCOHOL TREATMENT PROGRAM.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

ADDITIONAL IMPRISONMENT TERMS

THE DEFENDANT IS TO PARTICIPATE IN CLASSES TOWARDS EARNING A GED DEGREE AND LEARNING TO USE COMPUTERS.

DEFENDANT: ACESHUNN BROWN
CASE NUMBER: CR07-202 (JBW)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 YEARS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ACESHUNN BROWN
CASE NUMBER: CR07-202 (JBW)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

PAYABLE IMMEDIATELY

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DOCUMENT 3

257 F.Supp.3d 330
United States District Court, E.D. New York.

UNITED STATES of America,
v.
Aceshunn BROWN, Defendant.
Aceshunn Brown, Petitioner,
v.
United States of America, Respondent.

07–CR–202
|
16–CV–2932
|
Filed 05/26/2017

Synopsis

Background: Defendant convicted of being a felon in possession of a firearm and sentenced under Armed Career Criminal Act (ACCA) filed motion to vacate, set aside, or correct sentence on the ground that his prior New York conviction for attempted second-degree robbery no longer qualifies as a violent felony under the ACCA.

Holdings: The District Court, Jack B. Weinstein, Senior District Judge, held that:

defendant's prior New York conviction of attempted second-degree robbery did not qualify as a violent felony under the "enumerated offense" clause of the ACCA, and

defendant's prior New York conviction of attempted second-degree robbery did not qualify as a violent felony under the "force" clause of the ACCA.

Motion granted.

Attorneys and Law Firms

***331** David K. Kessler, United States Attorney's Office, Brooklyn, NY, for Plaintiff.

MEMORANDUM AND ORDER ON PETITIONER'S REQUEST FOR SENTENCING RELIEF PURSUANT TO 28 U.S.C. § 2255

Jack B. Weinstein, Senior United States District Judge:

Aceshunn Brown, an inmate at a federal prison, timely filed the instant motion for sentencing relief on the ground that his a prior conviction for attempted second-degree robbery in New York State no longer qualifies as a "violent felony" under the Armed Career Criminal Act ("ACCA"). Because his federal sentence was premised on that state conviction being classified as a violent felony, he believes he is entitled to sentencing relief. For the reasons stated below, Brown's motion is granted. He is resentenced as detailed below.

In 2008, Brown pled guilty to a violation of 18 U.S.C. § 922(g), a crime which normally carries a maximum sentence of 10 years in prison. Brown was subject to an enhanced mandatory minimum sentence of 15 years in prison under the ACCA because "Brown was convicted of three violent felonies or serious drug crimes." *See* ECF No. 79 [1] at 2–3. Two of the three relevant convictions were convictions for second-degree armed robbery in violation of New York Penal Law § 160.10. *See* Exh. A to ECF No. 144.

The ACCA requires that a person convicted of violating 18 U.S.C. § 922(g) be "imprisoned not less than fifteen years" if the person "has three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The statute defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that has as an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(i)–(ii).

In *Johnson v. United States,* the Supreme Court held that the ACCA's "residual clause"—the portion of the statute providing for an enhanced statute if a person is convicted of a felony that "otherwise involves conduct that present a serious potential risk of physical injury to another—is unconstitutionally vague and "[i]ncreasing a defendant's sentence under the clause denies due process of law." —— U.S. ——, 135 S.Ct. 2551, 2557, 192 L.Ed.2d 569 (2015) ("*Johnson I*"). The Court later held that this ruling applies retroactively to cases on collateral review. *Welch v. United States*, —— U.S. ——, 136 S.Ct. 1257, 1265, 194 L.Ed.2d 387 (2016).

On June 6, 2016, Brown filed pro se a motion for sentencing relief pursuant to 18 U.S.C. § 2255, arguing that at least one of his two prior convictions for attempted second-degree robbery in New York state no longer qualify as "violent felonies" under the ACCA after *Johnson I.* Brown ***332** thereafter obtained counsel and received permission from the Court of Appeals for the Second Circuit to file a successive § 2255 petition. The motion was transferred back to this court, and this court was directed to "stay the proceeding pending the [decision by the Court of Appeals for the Second Circuit] in *United States v. Jones*, 2d Cir. 15–1518." ECF No. 142. The appellate court gave this court the discretion to terminate the stay sua sponte or upon a motion. *Id.* Following the transfer of this motion, the defendant moved in this court for sentencing relief, and after receiving briefing from both parties, the court held a hearing on the motion.

Brown is correct that the ACCA sentencing enhancement does not apply to his 2008 conviction for violating 18 U.S.C. § 922(g). The "residual clause" is unconstitutionally vague, and robbery is not one of the offenses enumerated in the ACCA. The enhancement could only apply to him if second-degree robbery in New York is a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The requisite "physical force" is "violent force—that is, force capable of causing physical pain or injury to another person." *United States v. Johnson*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) ("*Johnson II*").

In New York, "[a] person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law."

N.Y. Penal Law § 160.10. Because elements of this offense are listed in the alternative, the statute is divisible and the modified categorical approach must be used. The court may look to certain documents—rather than just the statute itself—to determine which elements of the statute Brown ran afoul of when he was convicted. Once that is determined, the categorical approach is used to determine if the crime of conviction is a "violent felony" under the ACCA. *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). Under the categorical approach, "we focus on the nature of the offense rather than on the circumstances of the particular crime. Consequently, only the minimum criminal conduct necessary for conviction under a particular statute is relevant." *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006); *see also United States v. Barrow*, 230 F.Supp.3d 116, 121, 2017 WL 519305, at *3 (E.D.N.Y. 2017) (holding that a prior conviction is not a predicate offense under the Sentencing Guidelines if the statute that provides the basis for the prior conviction "sweeps more broadly than the generic crime described in the Guidelines") (alteration omitted).

According to his certificates of disposition, one of Brown's convictions was based on clause 1 of N.Y. Penal Law § 160.10, and one of his convictions was based on clause 2(a). Exh. A to ECF No. 144. Examining the conviction premised on a violation of clause 1, the only element of the crime that could possibly involve "violent force" is the requirement that a person convicted under the statute "forcibly steal[ ] property." The force necessary to "forcibly steal" in New York does not rise ***333** to the level of force that must be used for a crime to be a "violent felony" under the ACCA. *United States v. Moncrieffe*, 167 F.Supp.3d 383, 403 (E.D.N.Y. 2016) ("New York courts have explained that the 'physical

force' threatened or employed can be minimal, including a bump, a brief tug-of-war over property, or even the minimal threatened force exerted in 'blocking' someone from pursuit by simply standing in their way."); *Thrower v. United States,* 234 F.Supp.3d 372, 384, 2017 WL 1102871, at *9 (E.D.N.Y. 2017) ("[U]nder New York law, a defendant can be convicted of robbery when he uses force sufficient to overcome a victim's resistance without necessarily putting the victim at risk of pain or injury."); *United States v. Johnson*, 220 F.Supp.3d 264, 272 (E.D.N.Y. 2016) ("[New York] Appellate Division decisions demonstrate that robbery in New York does not necessarily involve force 'capable of causing physical pain or injury to another,' as is required under *Johnson I*."). Brown's conviction for violating N.Y. Penal Law § 160.10, cl. 1, is not a conviction for a "violent felony" under the ACCA.

Brown did not have three convictions for "violent felonies" under the ACCA when he was convicted for violating 18 U.S.C. § 922(g). His motion for sentencing relief pursuant to 18 U.S.C. § 2255 is granted. Brown has already served ten years in custody, the maximum sentence permitted for a violation of 18 U.S.C. § 922(g). Brown is re-sentenced to time served in custody. All aspects of his original sentence—other than the term of incarceration—remain unchanged. *See* ECF No. 79. This sentence is "sufficient, but not greater than necessary" to advance the deterrence, incapacitation, and rehabilitative purposes of sentencing. 18 U.S.C. § 3553(a).

Brown shall be released forthwith. The government shall provide him with transportation to Orlando, Florida. Once in Orlando, he shall report to the United States Probation Office for the Middle District of Florida within 72 hours. The United States Probation Office for the Middle District of Florida shall be responsible for supervising Brown during his period of supervised release, which shall begin when he reports to that office following his release.

SO ORDERED.

All Citations

257 F.Supp.3d 330

Footnotes

1 All references are to the criminal docket in this case, 07–CR–202.

DOCUMENT 4

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA

v.

ACESHUNN BROWN

Date of Original Judgment: 4/30/2008
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: CR07-202 (JBW)

USM Number: 74958-053

Elizabeth Macedonio- 40 Fulton Street NYC 10038
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☑ Direct Motion to District Court Pursuant ☑ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☑ pleaded guilty to count(s) 1 of the indictment — AUSA- David Kessler
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 922(g)(1)	Felon in possession of a fireman		1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/21/2008 (Amended 5/25/2017)
Date of Imposition of Judgment

Signature of Judge
Jack B. Weinstein Sr. USDJ
Name and Title of Judge

5/26/2017
Date

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ MAY 26 2017 ★
BROOKLYN OFFICE

DEFENDANT: ACESHUNN BROWN
CASE NUMBER: CR07-202 (JBW)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

TIME SERVED

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ACESHUNN BROWN
CASE NUMBER: CR07-202 (JBW)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 5 YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ACESHUNN BROWN
CASE NUMBER: CR07-202 (JBW)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ACESHUNN BROWN
CASE NUMBER: CR07-202 (JBW)

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$	$

Payable Immediately

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DOCUMENT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

Plaintiff,

versus

ACESHUNN BROWN,

Defendant.
----------x

Docket No.:
07 CR 202

U.S. Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

April 21, 2008
10:48 a.m.

Transcript of Criminal Cause for Sentencing

Before: HONORABLE JACK B. WEINSTEIN,
District Court Senior Judge

APPEARANCES

For the Government: BENTON J. CAMPBELL, ESQ.
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: RICHARD LUNGER, ESQ.,
Assistant U.S. Attorney

For the Defendant: ROBERT L. MOORE, ESQ.
128 Avon Place
West Hempstead, New York 11552

Also Present: MS. SHAYNA BRYANT, Probation

Court Reporter: MICHELE NARDONE, CSR, RPR
Official Court Reporter
225 Cadman Plaza East
Brooklyn, New York 11201
Phone: 718-613-2601
Fax: 718-613-2631

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

THE CLERK: Criminal cause for sentencing, USA versus Aceshunn Brown.

Note your appearances, please. For the United States?

MR. LUNGER: Richard Lunger for the United States.

MR. MOORE: For Mr. Brown, Robert Moore.

THE COURT: Good morning, Mr. Brown.

THE CLERK: For probation?

MS. BRYANT: Shayna Bryant, probation. Good morning.

THE COURT: How are you feeling this morning?

THE DEFENDANT: So-so, nervous.

THE COURT: Nervous. Are you under any drugs?

THE DEFENDANT: No, sir.

THE COURT: Medication?

THE DEFENDANT: No, sir.

THE COURT: Do you have your wife here or some member of the family?

THE DEFENDANT: Yes.

MR. MOORE: The whole family, judge.

THE COURT: Who is here for the family, the mother?

MR. MOORE: His mother and his stepfather.

THE COURT: Okay. The mother, the stepfather, and who else?

THE DEFENDANT: My grandmother and my aunt.

THE COURT: Your grandmother and aunt. Well, just the mother and the stepfather come up. Sit down here, please, if

you don't mind.

Now, this defendant has made some objections on the ground that he wasn't properly advised, in effect.

MR. MOORE: I don't believe that's --

THE COURT: No?

MR. MOORE: No. Just let me get my copy out. Sorry.

THE COURT: I have the docket sheet and I have the government's letter of April 18, and I have the minutes of the plea of January 7. I have the minutes before me of October 9, 2007 -- October 7, 2007, I believe -- 2008.

I have my order on competency hearing dated September 10, 2007; a letter of the Department of Justice dated September 6, 2007; evaluation by William J. Ryan, Ph.D.; and Cristina, C-R-I-S-T-I-N-A, Liberati, L-I-B-E-R-A-T-I, Ph.D., acting chief psychologist, undated, but based on evaluations of July 25, 30th, and 31st, 2007, August 1, 2nd, 6th, 21st of 2007; the addendum to the presentence report of March 19, 2008; the presentence investigation report prepared March 4, 2006 -- 8; the letter of Quesada, Q-U-E-S-A-D-A, Moore dated March 13, 2008; the letter of the defendant filed January 28 -- 29, 2008; various certificates of conviction.

Mark them as Court Exhibit 1.

MR. LUNGER: Your Honor, I have the original certificates of conviction, if the Court would prefer to mark those.

THE COURT: Yes.

MR. LUNGER: I will hand them up.

(So marked.)

THE COURT: The letter of Mr. Moore dated April 17, 2008.

What is his contention now?

MR. MOORE: May it please the Court, first, if we can just take care --

THE COURT: Swear the defendant.

THE CLERK: Yes, your Honor.

Stand and raise your right hand.

(The defendant was sworn.)

THE CLERK: Give your name.

THE DEFENDANT: Aceshunn Brown.

THE CLERK: Be seated.

THE COURT: Do you understand? Do you require an interpreter?

THE DEFENDANT: No, sir.

THE COURT: Is that correct?

MR. MOORE: That's correct, your Honor.

THE COURT: The Court observes the defendant's demeanor. He appears to be able to understand these proceedings.

Do you agree?

MR. MOORE: Yes, sir, I do agree. I have no doubt

whatever that he understands what's going on, sir.

THE COURT: All right.

MR. MOORE: May it please the Court, first, there was an order that you had asked me to prepare, an order for your signature, which I have, based on the letter Mr. Brown sent regarding his family matters, regarding having a paternity test done by MDC to determine the paternity of his child.

THE COURT: No. I signed an order dated April 21, 2008.

MR. MOORE: Yes. That's the order that I submitted.

THE COURT: That's for visitation and also to test paternity.

MR. MOORE: Yes, right, that's correct, and then --

THE COURT: That's signed.

MR. MOORE: That's signed. Okay, very good. Thank you, sir.

The second thing is defendant has entered a plea of guilty. I have reviewed those minutes with him. He has had a copy of the minutes to go over, and there were no objections to the minutes. At least they are correct as transcribed.

THE COURT: What is his objection? He is making some objections at the moment?

MR. MOORE: I have submitted to the Court a memorandum, which was -- the March 21 memorandum, which the government has replied to.

MR. LUNGER: March 19.

MR. MOORE: March 23 -- March 13, I'm sorry, March 13, 2008.

Thereafter, on April 17, I submitted, on behalf of the defendant, his objections, his particular objection to the presentence investigation report, some of which are contained in my memorandum letter. So he is making those objections, and that was my letter of April 17, 2008.

THE COURT: Well, he wishes to challenge the armed career criminal designation.

MR. MOORE: Yes, sir, that's correct. That's my March 13 memorandum of law to the Court that's challenging. Well, he is not -- he has challenged that in a different way. My memorandum of law argues that the government has effectively -- has effectively charged him in the indictment.

One second, Judge. The argument goes, your Honor, that the government has effectively charged him with sections 922(g)(1) and 924(e)(1). And what I wish to mark as an exhibit for the Court is a copy of the plea agreement, which had originally been made to defendant, which he did not sign but which is signed by the government; and that is -- paragraph one is defendant will plead guilty to the above-captioned indictment, charging a violation of 18 U.S. Code sections 922(g)(1) and 924(e)(1) and that this count carries the statutory penalties of mandatory minimum of 15 years.

THE COURT: Well, that was not signed.

MR. MOORE: No, it was not. Judge, what I'm saying is it's signed by the government and therefore binding upon them.

THE COURT: No, it's not. It's not binding on anybody until it's signed by both parties and accepted by the Court. It's an offer.

MR. MOORE: Yes.

THE COURT: I am ruling it is not binding on the government, and it certainly is not binding on this Court.

MR. MOORE: The argument made on March 13, judge, is basically that the government has charged him with 924(e)(1) as a crime. Now, I understand the general rule, judge, that it's generally a sentencing factor. I understand that. I understand the cases that deal with the sentencing factor cases, James, which are in here, James. In U.S. against James and U.S. -- and Almendarez-Torres versus United States, both Supreme Court cases, which the government has responded to.

It's my position, judge, and it may be a case of first impression here, but the government has opted to charge him with 924(e)(1) as a crime. They were obligated to prove that at trial or to have him admit to it on his plea. This was not done.

THE COURT: Okay. He is claiming he has to admit it.

MR. MOORE: Yes.

THE COURT: And he hasn't admitted it.

MR. MOORE: He has not, that's correct.

THE COURT: And your position is that the conviction record, although the cases indicate that I can rely on it and it's not a jury question, is not sufficient, correct?

MR. MOORE: Yes, sir.

THE COURT: All right. If he wants to withdraw his plea, he can withdraw it, and I will send it down for trial. I am not going to allow this case to go up on that point.

If that's your position, that he is not subject to the 15-year minimum, then I am going to allow him to withdraw his plea, and we will try him and he will be subject to whatever he is subject to as a result of the trial. It doesn't seem to me appropriate for me to send up to the Court of Appeals an issue which is as frivolous as I think this issue is, when the defendant feels that he is being unfairly treated, as I understand from your papers.

If he does, I will permit him to withdraw his plea. He can go to trial, and he will be subject to whatever the verdict, if there is a guilty verdict, and the ensuing sentence will be. I don't want this case left with dangling lines. I want it decided firmly.

MR. MOORE: Judge, it's not my intention -- and I say this with all due respect that I can muster up here -- to leave anything dangling. It's always been my view -- if I can proceed, your Honor, it's always been my view in this case that

his defense in the sense was the motion to suppress, which was decided; and I believe personally, judge, that this is an issue on appeal.

THE COURT: Is it going up on that?

MR. LUNGER: Yes, your Honor.

MR. MOORE: Yes.

THE COURT: That I understand, and that I think the government properly is agreeing to go up on that conditional order.

MR. LUNGER: Yes, your Honor.

THE COURT: And I agree there was an issue.

MR. MOORE: We have it signed, and I think this should be marked as an exhibit, your Honor.

MR. LUNGER: No objection.

THE COURT: Mark it.

(So marked.)

MR. MOORE: That's my only copy.

THE COURT: Make a copy, please. For the record, dated March 11, 2008, "The government agrees pursuant to rule 11(e)(a)(2) of the federal rules of criminal procedure the defendant reserves the right to appellate review of the order of this Court which denies the defendant's motion to suppress." Signed -- did you sign that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Did you know what you were signing?

THE DEFENDANT: Yes.

THE COURT: Did you explain it to him?

MR. MOORE: Yes, I did, sir.

THE COURT: All right. That's appropriate. It goes up on that ground. I'm not going to send it up on any other ground.

MR. MOORE: Judge, if I can just comment -- and I don't mean to belabor a point or to beat a dead horse -- we made a decision here, the defendant and I and his parents, and we had a session with his parents on whether to plead guilty or go to trial. That's a decision I advised him to do based on everything I knew about the case and based on my feeling about how successful or not he would be on a trial.

And I particularly noted there was a Court of Appeals case. It was United States against Paul, which is cited in some of the papers we have here, where the issue of an innocent possession case. On that case the facts there were stronger, in my view, than the defendant's case. In that case an individual wrestled the gun away from somebody and was on his way to the police station to turn it in, and the Court of Appeals said you are still guilty of possession of a weapon, in 922(g).

I now think it's wrong, but that's the Court and the Court is bound by it too.

THE COURT: I didn't think it was a good decision

myself.

MR. MOORE: I know, judge.

THE COURT: But these were different facts, and I was bound by them in any event and I made my finding.

MR. MOORE: My feeling is based on the investigation I did and how my knowledge of the trial preparation situation as it was that his best option was to plead guilty and to therefore avail himself of acceptance points and not if he testified at trial, being at that point the only witness who could give this defense subject to possible enhancement for obstruction. So I thought this was my advice to him and this is what he accepted and his parents were out here, who are here right now, felt the same way, I believe.

Now, given this, I still have this visceral feeling that this, understanding the career criminal laws and I have dealt with this my whole career even as a prosecutor, that it just seemed to me really harsh for having a gun in a bodega, which he fully admits to, to have a 15-year minimum. I'm searching as far as I can to do something about it.

Looking at 294(e), I looked a long time to look to see if there was some way to fashion something about that, and that met with a dead end. There is nothing I can do on this, and sometimes on the defense bar we have to push the envelope and a lot of times it comes back return to sender, I understand that; and I just thought this idea, judge, if you think it's

frivolous --

THE COURT: It's a good idea. You are a terrific attorney.

MR. MOORE: Thank you, sir.

THE COURT: But if the defendant believes that he is being unfairly charged under that section, I'm perfectly willing to give him a trial.

MR. MOORE: I don't think personally that that's in his best interest to do, the trial, based on my knowledge of state, of whatever evidence he could present to a jury. That's my view of things. Okay.

THE COURT: Well, I'm going to find that he is effectively a career criminal.

MR. MOORE: Judge, I understand your finding that, and it will then be a decision about whether the issue I presented here -- and I understand your position, judge, and I respect it. I want you to know that I respect it.

THE COURT: It doesn't make any difference. That's what the law is, as I understand it.

MR. MOORE: Judge, I understand. What I'm saying is sometimes we are pushing the envelope, and I'm pushing it.

THE COURT: I'm perfectly happy to see the envelope pushed, but if it's based upon this defendant's feeling that he is being unfairly prejudiced by this decision, which will in effect give him a 15-year minimum, then I will give him a full

trial. That's different, a legal, technical argument that you are making.

MR. MOORE: I understand, but I think it's --

THE COURT: You can consult with him.

MR. MOORE: All right.

THE COURT: And if he wants a trial I will give it to him.

MR. MOORE: It's my view, judge, that a technical point here is being made, and I think someone else should handle the appeal here, obviously, when it goes up.

THE COURT: What does he want to do? Does he want to go to trial knowing that he is going to get a 15-year minimum, because I don't agree with your analysis under the cases?

MR. MOORE: We had discussed this, and about -- and I discussed with him, you know, the probabilities of what your ruling would be, and I understand that this was probably going to happen. I understand that, judge.

I have made arguments in some other cases about the cocaine/crack statutory minimums, and I know what's going to happen in the district court there too, but I'm making it anyway and I'm pushing that envelope too because I think it needs to be pushed.

THE COURT: Does he want a trial?

MR. MOORE: I think we need to discuss that.

THE COURT: Okay. Put it on for 2 o'clock.

MR. MOORE: Oh, God.

THE COURT: When are you available?

(Pause.)

THE COURT: Put it on for 12 o'clock.

MR. MOORE: 12 o'clock, all right, sir.

THE COURT: We should finish Zyprexa by 12:00. All right. Consult.

MR. MOORE: He would like, since his family was with him when we first did the plea, I would like permission of the marshals if they will allow his family to come down and talk with him again, because he is asking again.

THE COURT: What is the marshals' view?

THE MARSHAL: We have to call down to a supervisor. We can't make that call now.

THE COURT: Take him down. If the marshals can arrange it, they will. Otherwise I'm not going to interfere with the marshals handling of the prisoners in the building, not in view of the problems we have had.

MR. MOORE: All right.

THE COURT: All right. Thank you. 12 o'clock.

MR. LUNGER: Thank you, your Honor.

(Recess.)

(In open court.

(Defendant present.)

THE COURT: What does your client want to do?

MR. MOORE: He does not wish to withdraw his plea, your Honor.

THE COURT: Okay.

MR. MOORE: This is after -- again, I want to thank the United States Marshals systems to allow his parents and his fiance to speak with him on this issue as well as me.

THE COURT: All right. His parents can come up here. Swear the defendant, please.

MR. MOORE: He has already been sworn.

THE COURT: You are still under oath, sir.

THE DEFENDANT: Yes.

THE COURT: Have you read the presentence report or had it explained to you by your attorney?

THE DEFENDANT: Yes.

THE COURT: Did you understand it?

THE DEFENDANT: Yes.

THE COURT: Are you ready to be sentenced?

THE DEFENDANT: Yes.

THE COURT: Of what country are you a citizen?

THE DEFENDANT: United States.

THE COURT: Are you satisfied with your attorney?

THE DEFENDANT: To a certain extent.

THE COURT: To what extent are you not satisfied?

THE DEFENDANT: I mean I feel that he could have done more better of a job, but what's previously been done I'm --

it's acceptable.

THE COURT: Are you moving for a new attorney?

THE DEFENDANT: Yes.

THE COURT: Do you want a new attorney for the sentence?

THE DEFENDANT: For?

THE COURT: Do you want a new attorney on the sentence?

THE DEFENDANT: Oh, no, no.

THE COURT: Does the sentence have a conflict -- does the attorney have a conflict?

MR. MOORE: I have no conflicts, judge.

THE COURT: Are there any unresolved motions?

MR. MOORE: I would just like to read to the Court a letter, if I can do this.

THE COURT: Yes.

MR. MOORE: It is a short letter that comes from Mr. Brown's grandmother.

"Honorable Judge Weinstein, I am writing on behalf of my grandson Aceshunn Brown, comma, I know he is coming up for sentencing, period. I pray that you will give him a second chance to come home and this a new life with his family -- and start a new life with his family. Being his grandmother, I would like to see him come home and be the man I know he can be."

THE COURT: Thank you. Are you moving for a downward departure?

MR. MOORE: No, sir.

THE COURT: Does anybody object to the video recording?

MR. LUNGER: No, your Honor.

MR. MOORE: No, your Honor.

THE COURT: Did both sides use the proper guidelines manual?

MR. LUNGER: Yes, your Honor.

MR. MOORE: Yes.

THE COURT: The Court observes the defendant's demeanor. He appears to be capable of understanding these proceedings.

Does counsel agree?

MR. MOORE: I do, your Honor.

MR. LUNGER: Yes, your Honor.

THE COURT: Where did you put the transcript?

MR. MOORE: I have a copy, your Honor.

THE COURT: Did you read the minutes of the January 7, 2008 transcript before the magistrate judge, sir?

THE DEFENDANT: Yes.

THE COURT: Did you understand it?

THE DEFENDANT: Yes, I did.

THE COURT: Was everything there truthful?

THE DEFENDANT: Yes.

THE COURT: Did anybody make any threats or promises to induce you to say what you said?

THE DEFENDANT: No, your Honor.

THE COURT: Was it entirely voluntarily?

THE DEFENDANT: Yes.

THE COURT: Do you still wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: How do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Based on the information before me, I accept the plea.

Do you wish a Fatico hearing?

MR. MOORE: No, sir.

THE COURT: Do you wish a jury trial on any issue?

MR. MOORE: No, sir.

THE COURT: You can address the Court yourself, sir.

THE DEFENDANT: Yes.

THE COURT: You can have witnesses on your behalf, and your attorney can address the Court.

Is there any objection to the presentence report?

MR. MOORE: One second judge, please. If it please the Court, I have made some objections to the --

THE COURT: Make them again orally, please.

MR. MOORE: Yes. The claim that Mr. Brown's actions

at the time of the arrest caused a grave risk of death to the police officers, we had a very extensive hearing on this matter, and the police officer, Officer Pichardo, said, I believe, that her fear was what prompted her to make the search in the first place, and there were three other police officers who were there at the time.

I don't think any of the circumstances of being patted down and getting the gun created any kind of grave risk of death that there should be any guidelines enhancement for that, and I certainly take objection to that finding from the department of probation.

THE COURT: How is that reflected in the guideline?

MS. BRYANT: I believe there is a two-level enhancement for resisting arrest.

THE COURT: Obstruction of justice?

MS. BRYANT: Yes.

THE COURT: Based on my hearing, I don't find that there was an obstruction. He gets two points off.

What else?

MR. MOORE: There is --

MR. LUNGER: Your Honor --

THE COURT: Paragraph 14?

MR. MOORE: Paragraph 51 of the PSR, the presentence report, probation claims he was a member of the Bloods street gang in 1988. He was born January July 2, 1981. That would

make him about the youngest Blood member in history.

THE COURT: What paragraph?

MR. MOORE: Paragraph 51.

THE COURT: Do you wish to strike that?

MR. MOORE: Yes, sir.

MS. BRYANT: I'm sorry, Mr. Moore, which sentence?

MR. MOORE: That's 51. I'm sorry. Let me find it.

MS. BRYANT: The first sentence?

MR. MOORE: Let me see. I'm sorry. It's paragraph 51, at page 13. It does say here that during the prior New York City Department of Probation presentence investigation, the defendant disclosed that he became a member of Bloods street gang in 1988.

THE COURT: I don't see it in paragraph 51.

MR. MOORE: It's right at the bottom, sir. It's the last four sentences of paragraph 51.

THE COURT: In 1988?

MR. MOORE: Right.

THE COURT: Do you want that stricken?

MR. MOORE: He was a member of Blood, because it may have been something he said. It's claiming he said.

THE COURT: Excuse me. Do you wish to put evidence in on this issue?

MR. MOORE: I have no evidence to offer today, your Honor.

THE COURT: All right. That sentence will be stricken. What else?

MR. MOORE: This is item number 12 on the notation I sent on April 17, 2008 to the Court, which were Mr. Brown's specific allegations. He, Mr. Brown, challenges assertions in the addendum to the PSR labeling it as false -- false is his word -- and that they, quote, racially profiled him to be someone he is not, claims that the claim of fondling, for all he is aware, has never been written up, never been charged with him and he claims the other charges by the MDC were a result of the incident where he was assaulted by staff, and because he has filed a civil suit against that individual as well as against Warden Cameron Lindsey.

He is just challenging some --

THE COURT: What do you want stricken from the addendum?

MR. MOORE: The top of page 2 it says, "The clinical records," in the third sentence, "The clinical records indicate that he had been reprimanded of fondling himself in front of female staff and appears to be for the purpose of sexual gratification." This is a surmise, I think I would describe that.

THE COURT: You want to take that sentence out?

MR. MOORE: Yes, I do.

THE COURT: Are you prepared to prove it?

MR. LUNGER: No, your Honor.

THE COURT: All right. Strike it.

MR. MOORE: Thank you. That's all, judge. Thank you for your patience.

THE COURT: Anything else on the presentence report?

MR. MOORE: No, sir.

MR. LUNGER: Your Honor, the government had an objection to one portion of the PSR, but I think it may have been resolved in speaking with probation. The government had objected in paragraph 31 of the report probation had written that the defendant's possession of cocaine conviction in Richmond, Virginia reflected an additional charge that was filed against the defendant for the same offense. In other words, that that conviction for possession of cocaine was related to another conviction for possession of cocaine with the intent to distribute; and the government objected to that because the possession of cocaine, it's the government's position, that that's a separate offense, and the government has submitted portions of the criminal plea in the Richmond, Virginia, which then sets it out as a separate and distinct offense, and I believe probation concurs with that and resulted in three additional criminal history points.

I'm not sure if it will make a difference in the defendant's final sentence, but I wanted the record to reflect the government's information.

THE COURT: He is in level one?

MR. MOORE: He is.

MR. LUNGER: He is in criminal history category four.

MS. BRYANT: Because of his armed, he has been placed in criminal history category of four.

THE COURT: And if this three were added?

MS. BRYANT: He would remain in the same category four.

THE COURT: He would remain in the category.

MS. BRYANT: Yes, but we do concur with the government's assessment of the criminal history calculation, and it would be assigned three points.

THE COURT: Do you agree with it, the defendant?

MR. MOORE: We agree with the original assessment of probation.

THE COURT: They have changed it.

MR. MOORE: I understand. I object to that, and I think the original assessment is correct.

THE COURT: Let me see it.

MR. LUNGER: This is the transcript in its entirety, your Honor. We cited to pages --

THE COURT: What page?

MR. LUNGER: We had cited to pages 7 through 9, in which the crime is described.

THE COURT: Well, I don't understand, both 26 and 32,

33 are possession of cocaine counts.

MR. LUNGER: The earlier possession of cocaine count, your Honor, was that possession of cocaine with the intent to distribute, and as described by probation in paragraph 27, it involved interdiction at a bus depot.

THE COURT: It involved what?

MR. LUNGER: It was interdiction at a bus depot in which 67 small bags of cocaine were obtained from the defendant. That would be -- that's described in paragraph 27 of the PSR and the offense that -- the government's position is a separate and distinct offense is described in the transcript that I just submitted to your Honor, which is a subsequent offense.

THE COURT: But it was all discovered at the same time, wasn't it?

MR. LUNGER: No, your Honor. Actually, what happened was the drug -- the seizure of cocaine at the bus depot occurred on June 28 of 2000.

THE COURT: I see.

MR. LUNGER: The subsequent offense in which cocaine was found that was secreted in an Ace bandage, that offense actually took place, I believe, in the fall.

MS. BRYANT: September 5, 2000.

MR. MOORE: Where is that?

MR. LUNGER: That's the problem, actually. This 9/6,

paragraph 32, 9/6/00, that's the arrest date for possession of -- for the subsequent possession of cocaine. He was already in custody at the time.

THE COURT: Yes.

MR. MOORE: Well, your Honor, most respectfully, Mr. Brown maintains this was found in the yard where other people are and it was found on the ground. They just put it on him I guess.

THE COURT: I see.

MR. MOORE: I would just object.

THE COURT: Then he didn't commit the crime?

MR. MOORE: No.

THE COURT: That's not the issue. The issue is whether they were separate crimes. Assuming he did commit the first crime, they were separate crimes.

MR. MOORE: I understand that.

THE COURT: Well, what's his position?

MR. MOORE: His position is he didn't commit the second crime.

THE COURT: He didn't commit the second crime?

MR. MOORE: No.

THE COURT: But he pleaded guilty to the second crime.

MR. LUNGER: That's his allocution there, Mr. Moore.

MR. MOORE: May I see it, please? That's pages 8 and 9.

MR. LUNGER: I referred you to pages 8 and 9. That's where the crime is described.

MR. MOORE: Thank you, judge. I have read the plea minutes, and the plea minutes confirm what the government is saying.

THE COURT: All right. That won't change the evaluation, but there is three points additional in paragraph number 32, but the category is still four.

MS. BRYANT: It still remains the same at four.

THE COURT: All right. The Court so finds, based on the evidence, a four.

Any particularized findings of fact or law either side wishes?

MR. MOORE: No, your Honor.

THE COURT: The government?

MR. LUNGER: No, your Honor.

THE COURT: You do not wish a jury trial on this?

MR. MOORE: No, sir.

THE COURT: Are the calculations otherwise correct?

MR. MOORE: Yes, sir.

THE COURT: I have the power to depart.

No safety valve here, correct?

MR. LUNGER: No, your Honor.

THE COURT: No concurrence is required, correct?

MR. LUNGER: Correct.

THE COURT: Taking out obstruction of justice, correct?

MR. LUNGER: That's correct, your Honor.

THE COURT: Where would you like to be incarcerated, sir?

MR. MOORE: We have discussed that, your Honor, and he would like, so his family can visit him, to either Fort Dix Correctional Facility or Otisville.

THE COURT: I so recommend it.

Do you have any assets?

THE DEFENDANT: No, sir. No, your Honor.

THE COURT: No, fine. $100 special assessment payable forthwith.

MR. MOORE: Your Honor, on this record Mr. Brown advised me that he has already paid $75 of that and has a receipt for that. I will talk to the family about that for the other $25.

THE COURT: The gun has been forfeited?

MR. LUNGER: I believe it's been disposed of on the state level, your Honor, not federally.

THE COURT: Any application?

MR. MOORE: No, sir.

THE COURT: Supervised release, five years, is that possible?

MS. BRYANT: Yes, it is, your Honor.

THE COURT: So ordered. Additional 5D1.3(a)(c)(d), 5D1.3(e). Do you take drugs?

THE DEFENDANT: Excuse me? Can you repeat that?

THE COURT: Do you take drugs?

THE DEFENDANT: No.

THE COURT: Did you ever take drugs?

THE DEFENDANT: Yes.

THE COURT: The Court recommends drug treatment, psychiatric treatment.

Do you take alcohol?

THE DEFENDANT: Yes.

THE COURT: Alcohol treatment.

Do you gamble?

THE DEFENDANT: No.

THE COURT: What do you want to study while you are in prison?

THE DEFENDANT: Everything that I possibly can, your Honor.

THE COURT: You have a GED?

THE DEFENDANT: No, your Honor.

THE COURT: Recommend that he take a GED.

Any form of vocational training you wish?

THE DEFENDANT: No, your Honor, not that I -- just computers.

THE COURT: Computer training.

You would have no guns during the supervised release period and have nothing to do with any criminals, do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you want me to read the conditions?

MR. MOORE: We will get them in writing. I will be sure that he gets them, your Honor.

THE COURT: Thank you.

Was any of your property taken when you were arrested?

THE DEFENDANT: No, your Honor.

THE COURT: Have you explained to him his right to appeal?

MR. MOORE: Yes. I will file a notice of appeal directly, as this proceeding is concluded.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Any open charges?

MR. LUNGER: Not federally, your Honor.

THE COURT: All right. I will hear you on witnesses or argument. Go ahead.

MR. MOORE: I understand, judge, that the Court is disposed to disagree with my March 13 memorandum. I understand it fully, and I expected that, to be honest.

I don't wish to take the Court's time with frivolous motions, that's the last thing in the world I want to do, and

I'm trying to find some space for him. I understand there is a mandatory minimum of 15 years and under the Armed Career Criminal Act and under 924(e)(1) to the extent that the -- if the guidelines are above the 15-year minimum I ask under all the circumstances, under 18 3553, that the Court sentence him to just 15 and not above 15.

THE COURT: The offense level now is what, 29 instead of 41?

MS. BRYANT: I believe so, your Honor.

THE COURT: Okay, 29. Criminal history category four, 130 -- 121 to 151. Am I correct?

MS. BRYANT: That is correct.

THE COURT: I find 29 is the appropriate guideline offense level. Criminal history category four, 121 to 151 months is the guidelines.

MR. MOORE: Guidelines are below the 15-year minimum, so the Court appears bound to the 15-year minimum.

THE COURT: Yes, I understand that. Nevertheless I still have to find the guideline range under the Court of Appeals Second Circuit decision.

MR. MOORE: I understand.

THE COURT: Do you want to argue or put on any witnesses?

MR. MOORE: On the guidelines issue, I had of course made a legal argument regarding the 15-year minimum, which I

understand has been rejected; but if in fact it was not, if it were -- if the offense was simply the 922(g)(1) the base offense level would be 20 with a reduction of two points for acceptance, and the total offense level would be 18 with a criminal history of four would set the guideline sentence range at 41 to 51 months; and I propose in light of all of the facts of the case, in light of the fact that his prior record was committed when he was a juvenile under federal law, that fairness would indicate that the 41 to 51 months would be the appropriate sentence.

THE COURT: Excuse me. It was 31 reduced. I had history category four. That would be 121 to 150. Correct?

MR. MOORE: Under that calculation, yes, I understand that.

THE COURT: Okay. Well, that's what I find.

MR. MOORE: Yes.

THE COURT: Anything else you would like to say on Booker issue?

MR. MOORE: No, sir. I don't think there is any Booker implications on the case other than what we have discussed. I don't think there is any, judge. I think the defendant would like to make a statement.

THE COURT: All right.

THE DEFENDANT: Your Honor --

MR. MOORE: May he remain seated, judge?

THE DEFENDANT: Your Honor, I just want to address the Court and apologize to the Court, but before I do that I would like to apologize to my mother and my father for putting them through this situation. I know I'm dearly sorry. I'm sorry because I know I could see it in your face that it's hurting you and I'm really sorry and I just -- I know you know me and you know what I have been through and you know where my heart is at. I just ask that you bear with me. I truly didn't mean to put you through anything.

Daddy, I love you and I apologize for putting you through this. To my grandmother, I love you. I love you so much, and I'm truly sorry. I'm sorry for putting you through this too. And to my fiancee, thank you for being with me, and I promise I will be -- and I'm sorry. I'm sorry for everything, you know.

And, your Honor, I apologize for you having to take so much time into this case and deal with this situation. I accept full responsibility for possessing the firearm, but I also look at this situation as I was -- I didn't know what to do. And I know I was a felon in possession of the firearm. I am guilty of that, but I might have saved a life. I just might have.

And to prosecution, I thank you for doing your job, you know, it's -- I can't be upset with you for doing what you are doing because you are just trying to get criminals off the

street, and I respect that and I apologize to you as well.

To my attorney for doing his job, thank you for fighting for me, you know. It's real hard.

I mean I'm trying, I'm trying. I didn't mean to hurt anything, anybody, I wasn't trying to. I feel like if I had no other options and if the Court can assist me in explaining if in the near future this situation should ever arise again, what I'm supposed to do, I mean I take that into consideration.

All I can do is apologize for possessing the gun and that's it. I tried.

THE COURT: Thank you very much. I appreciate there is a lot of good in you.

Now, you are going to make what kind of finding with respect to the 15-year minimum?

MR. LUNGER: Your Honor, the government takes the position that it's applicable in this case.

THE COURT: On what ground?

MR. LUNGER: The government has set forth in its April 18 letter the fact that under Supreme Court and Second Circuit precedent that the three -- the four priors in fact that this defendant has, three prior convictions, fit the criteria.

THE COURT: What criteria?

MR. LUNGER: 924(e), the criteria of the definition of a serious narcotics offense, your Honor, in particular under

924(e)(2), the definition of serious drug offense and the definition of violent felony and the certificates of conviction that the Court has marked as Court Exhibit 1 I believe today. The government believes fits those criteria. Two of the certificates are for attempted robbery offenses, which the government believes fits the violent felony definition, and two of the certificates deal with controlled substances offenses that fit the definition of serious drug offense.

THE COURT: Are you resting on the three previous convictions?

MR. LUNGER: We are, your Honor, we have --

THE COURT: (e)(1)?

MR. LUNGER: Yes, (e)(1) and (e)(2) are the applicable subsections.

THE COURT: Serious drug offense under (e)(2)(a) and (1).

MR. LUNGER: That's correct, your Honor, and then under (e)(2)(b) there are two violent felonies. Those are the attempted robberies.

THE COURT: There are two reasons for hold -- there are three reasons for holding him to the 15-year minimum, correct?

MR. LUNGER: Correct, your Honor.

THE COURT: I find all three of them exist, requiring a 15-year minimum sentence, and a guideline range accordingly

would be 15 years as well. I see no reason to go above 15 years.

I have considered all elements of 3553(a), Title 18. It's a serious offense. I have considered the history of the defendant, and I think the terms are effected by a 15-years sentence, adequate general deterrence and specific deterrences effectuated. Educational or vocational training as I have already indicated is useful.

The Court has considered all kinds of sentences available, the sentencing range, policy statements of the sentencing commission, and given substantial weight to the guideline range as modified by the 15-year minimum. There is also a career offender guideline section, 4B1.1, and 28 U.S. Code section 944 (h). We have prior violent or drug felonies.

I state that I have given respectful attention to the policies but that a sentence at or near the maximum sentence provided by law is an appropriate for the reasons stated. See United States v. Sanchez, S-A-N-C-H-E-Z, Second Circuit, February 29, 2008.

So I impose a sentence under the guidelines of 15 years, without departure, and I find the facts as I have already indicated appropriate to support this sentence.

Imprisonment will be 15 years, supervised release five years. No fine. He has no assets and will not foreseeably have any. No restitution. Supervised release five years,

special assessment $100. No deportation.

Any other finding of fact or law the government wishes?

MR. LUNGER: No, your Honor.

THE COURT: Defendant?

MR. MOORE: No, sir.

THE COURT: Good luck.

MR. MOORE: I would like to order the minutes of the sentencing --

THE COURT: It shall be provided.

MR. MOORE: -- under CJA.

THE COURT: You want them daily?

MR. MOORE: No, they don't have to be daily, just regular.

Just one other matter, your Honor, and it again involves the prison situation of Mr. Brown; and we are aware of the disciplinary charges and all of that. Mr. Brown advises me and his family advises me that there is no mail for him. His family has sent mail to him that he has not received. He has sent mail to his family that they have not received.

THE COURT: Will you inquire and make sure that that situation is straightened out?

MR. MOORE: We have the order signed by the Court, and I thank the Court for that.

THE COURT: Thank you very much. Good luck to you.

THE DEFENDANT: For the record, your Honor, I have been sending mail to another judge and within the family court and, for the record, is there -- he is not -- he hasn't received it. The mail that I have been sending my family, as well as my family sending me mail, it hasn't been -- I haven't been receiving it.

I have asked MDC Brooklyn to provide me with information as to why my mail is being monitored. Within their policy of MDC Brooklyn they have to allow me the knowledge of why they are reading my mail or monitoring it, and they haven't done so and I'm not receiving it. And it's causing problems between the family court and me and I can end up losing rights as a father. I'm trying to turn my rights over to my mother while I'm incarcerated.

THE COURT: Would you check on that and make sure his correspondence with another federal judge --

MR. LUNGER: Is it a federal judge?

THE DEFENDANT: It's a state family court judge.

MR. LUNGER: Do you know the name?

THE DEFENDANT: Clark Richardson, Judge Clark Richardson.

MR. LUNGER: Clark Richardson, okay.

THE COURT: And see that all his other mail is provided.

MR. LUNGER: I will inquire, your Honor.

THE DEFENDANT: Also, I was told by my case manager that in order for me to be wedded or married to my fiancee I have to get approval from as well as the prosecutor to find out to make sure there is no objections with it, and I just want --

MR. LUNGER: Bev looked into it, judge, and the government has no objection.

THE COURT: I will submit an order then.

MR. MOORE: I will, sir.

THE COURT: Okay. Thank you. Good luck.

MR. MOORE: Thank you, judge.

THE COURT: Immediate copy because we need it to prepare. Immediate copy under CJA.

(End of proceedings.)

DOCUMENT 6

SUPREME COURT OF THE STATE OF NEW YORK NO FEE
BRONX COUNTY
851 GRAND CONCOURSE
BRONX, NY 10451

CERTIFICATE OF DISPOSITION - SUPERIOR COURT INFORMATION

DATE: 02/28/2007

CERTIFICATE OF DISPOSITION NUMBER: 14195

PEOPLE OF THE STATE OF NEW YORK
VS.

BROWN, ACEHUNN
DEFENDANT

CASE NUMBER:	SCI-6908-98
LOWER COURT NUMBER(S):	98X064883
DATE OF ARREST:	10/09/1998
ARREST #:	B98067173
NYSID #:	8942313R
DATE OF BIRTH:	07/22/1981

I HEREBY CERTIFY THAT IT APPEARS FROM AN EXAMINATION OF THE RECORDS ON FILE IN THIS OFFICE THAT ON 10/14/1998 BEFORE THE HONORABLE SAFER-ESPINOZA,L THEN A JUDGE OF THIS COURT, THE ABOVE NAMED DEFENDANT ENTERED A PLEA OF GUILTY TO THE CRIME(S) OF

ATTEMPTED ROBBERY 2nd DEGREE PL 110-160.10 01 DF

THAT ON 05/08/2001 THE ABOVE NAMED DEFENDANT WAS SENTENCED BY THE HON. SAFER-ESPINOZA,L ,THEN A JUDGE OF THIS COURT TO

ATTEMPTED ROBBERY 2nd DEGREE PL 110-160.10 01 DF
IMPRISONMENT = 1 YEAR(S)
ORDER OF PROTECTION = 5 YEAR(S)

SURCHARGE = $155 (NOT PAID)

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL ON THIS DATE 02/28/2007.

Hector Diaz
COURT CLERK

SUPREME COURT OF THE STATE OF NEW YORK NO FEE
BRONX COUNTY
851 GRAND CONCOURSE
BRONX, NY 10451

CERTIFICATE OF DISPOSITION - SUPERIOR COURT INFORMATION

DATE: 02/28/2007

CERTIFICATE OF DISPOSITION NUMBER: 14196

PEOPLE OF THE STATE OF NEW YORK
VS.

BROWN,ACESHUM

DEFENDANT

CASE NUMBER:	SCI-7429-98
LOWER COURT NUMBER(S):	98X067318
DATE OF ARREST:	10/21/1998
ARREST #:	B98069742
NYSID #:	8942313R
DATE OF BIRTH:	07/22/1981

I HEREBY CERTIFY THAT IT APPEARS FROM AN EXAMINATION OF THE RECORDS ON FILE IN THIS OFFICE THAT ON 11/09/1998 BEFORE THE HONORABLE SAFER-ESPINOZA,L THEN A JUDGE OF THIS COURT, THE ABOVE NAMED DEFENDANT ENTERED A PLEA OF GUILTY TO THE CRIME(S) OF

ATTEMPTED ROBBERY 2nd DEGREE PL 110-160.10 2A DF

THAT ON 05/08/2001 THE ABOVE NAMED DEFENDANT WAS SENTENCED BY THE HON. SAFER-ESPINOZA,L ,THEN A JUDGE OF THIS COURT TO

ATTEMPTED ROBBERY 2nd DEGREE PL 110-160.10 2A DF
IMPRISONMENT = 1 YEAR(S)
ORDER OF PROTECTION = 5 YEAR(S)
CONCURRENT TO: 6908-98

SURCHARGE = $155 (NOT PAID)

IN WITNESS WHEREOF,I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL ON THIS DATE 02/28/2007.

Hector Diaz
COURT CLERK