

No. ___

IN THE

Supreme Court of the United States



TYRONE SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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September 1, 2021

QUESTION PRESENTED FOR REVIEW

Whether attempted Hobbs Act robbery meets the definition of "crime of violence" in 18 U.S.C. §924 (c) (3) (A) .

RELATED PROCEEDINGS

United States District Court for the Southern District of New York

United States v. Simmons,
08-cr-1133 (AKH), ECF 97 (S.D.N.Y. Nov. 22, 2010)
(Judgment and Commitment).

Simmons v. United States,
16-cv-4797 (AKH), ECF 1 (S.D.N.Y. June 22, 2016).
(Motion to vacate pursuant to 28 U.S.C. §2255).

Simmons v. United States,
16-cv-4797 (AKH), ECF 15 (S.D.N.Y. Nov. 15, 2019).
(Order denying petition for habeas corpus).

Simmons v. United States,
16-cv-4797 (AKH), ECF 16 (S.D.N.Y. Nov. 19, 2019)
(Order granting Certificate of Appealability)

United States Court of Appeal for the Second Circuit

United States v. Simmons,
10-4888, ECF 49 (2d Cir. July 12, 2011).
(Mandate).

Simmons v. United States,
20-11-pr (2d Cir. June 7, 2021) (Second Circuit Summary Order).

Simmons v. United States,
20-11-pr, 2021 WL 2308831 (2d Cir. June 7, 2021).
(Second Circuit unpublished decision).

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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2021

TYRONE SIMMONS,
Petitioner,

-v-

THE UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner Tyrone Simmons respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in Case No. 20-11-pr.

OPINION OF THE COURT BELOW

The United States Court of Appeals for the Second Circuit issued a Summary Order in this case. 1a-7a. The Summary Order has no official citation. The unofficial

citation is *United States v. Simmons*, --- F.App'x ---, 20-11-pr, 2021 WL 2308831 (2d Cir. June 7, 2021).

JURISDICTION

On June 7, 2021, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming petitioner's conviction. 1a-7a.

This Court has jurisdiction to decide this petition pursuant to 28 United States Code ("U.S.C.") §1254(1), which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 924(c) of Title 18 of the United States Code provides in pertinent part as follows:

(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than five years.

- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Section 1951 of Title 18 of the United States Code provides:

- (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
- (b) As used in this section—
 - (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

This case presents an issue that arises frequently in the Courts of the United States: whether attempted Hobbs Act robbery can serve as the predicate crime of violence for a prosecution under 18 U.S.C. §924(c). A Circuit split has developed on this question,¹ and this Court granted certiorari to review the issue in *United States v. Taylor*, 20-1459, 2021 WL 2742792 (July 2, 2021).

The Prosecution Against Mr. Simmons

Petitioner Tyrone Simmons was indicted in the United States District Court for the Southern District of New York on November 18, 2008, for charges arising from his participation in a series of home-invasion robberies. He ultimately pled guilty, pursuant to a written agreement with the government, to three charges: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. §1951 (Count One), attempt to commit Hobbs Act robbery in violation of

¹ See *United States v. Walker*, 990 F.3d 316, 329 (3rd Cir. 2021); *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021); *United States v. Ingram*, 947 F.3d 1021, 1026 (7th Cir. 2020); *United States v. St. Hubert*, 909 F.3d 335, 351-353 (11th Cir. 2019) (finding that attempted Hobbs Act robbery is a crime of violence); contrast *United States v. Taylor*, 979 F.3d 203, 204 (4th Cir. 2020), cert. granted, *United States v. Taylor*, 20-1459, 2021 WL 2742792 (July 2, 2021) (concluding that attempted Hobbs Act robbery is not a crime of violence).

18 U.S.C. §1951 (Count Two), and using, carrying and possessing firearms that were brandished during the robbery conspiracy charged in Count One in violation of 18 U.S.C. §924(c) (1) (A) (ii) and 18 U.S.C. §2 (Count Three).

On November 10, 2010, the District Court (Alvin K. Hellerstein) sentenced Mr. Simmons, *inter alia*, to two concurrent 135-month terms of incarceration on Counts One and Two and a consecutive term of incarceration of 84 months on Count Three, the firearms offense. 35a. The Court ordered that 24 months of the 135-month terms run concurrently with a previously imposed state sentence. *Id.* Mr. Simmons filed a time notice of appeal in the United States Court of Appeals for the Second Circuit. He subsequently moved for and was granted permission to withdraw that appeal. *United States v. Simmons*, 10-4888, ECF 49 (2d Cir. July 11, 2011). 33a.

Mr. Simmons' Motion Pursuant to 28 U.S.C. §2255

On June 22, 2016, Mr. Simmons, through counsel, filed a motion pursuant to 28 U.S.C. §2255, seeking to vacate his conviction under 18 U.S.C. §924(c) (1) (A) (ii), relying on this Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015) (finding the residual clause of the Armed Career Criminal Act, "ACCA", unconstitutionally vague), and *Welsh v. United States*, 578 U.S. ---, 136 S.Ct. 1257 (2016) (holding that *Johnson* announced a substantive rule

that applied retroactively on collateral review). 18a. At counsel's request, the District Court stayed briefing on Mr. Simmons' §2255 motion pending decision by this Court in *Sessions v. Dimaya*, 584 U.S. ---, 138 S.Ct. 1204 (2018), which presented the question of whether the definition of crime of violence in 18 U.S.C. §16(b), which mirrored almost exactly the residual clause of ACCA, was unconstitutionally vague.

While Mr. Simmons' petition was stayed, this Court granted certiorari in *United States v. Davis*, 18-431. In *Davis*, the government sought review in this Court of the Fifth Circuit's determination that the residual clause in the definition of crime of violence that applied to prosecutions under 18 U.S.C. §924(c) was unconstitutionally vague. This Court ultimately held that the residual clause of the definitional statute of §924(c)(3)(B) - "a felony that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense[]" - was unconstitutionally vague under the due-process and separation-of-powers principles. *United States v. Davis*, 139 S.Ct. 2319, 2236 (2019).

After this Court's June 24, 2019, decision in *Davis* was issued, the parties in this case requested that the District Court vacate the stay in Mr. Simmons' case. In his

brief in the District Court, Mr. Simmons argued, in part, that under this Court's decision in *Davis* and the Second Circuit's decision, following remand from this Court, in *United States v. Barrett*, 937 F.3d 126, 130 (2d Cir. 2019) (finding the residual clause in 18 U.S.C. §924(c)(3)(B) unconstitutionally vague in light of *Davis*), his conviction for brandishing a firearm during a crime of violence had to be vacated.

The government conceded that Mr. Simmons' conviction for conspiracy to commit Hobbs Act robbery could no longer serve as a predicate offense for the §924(c) charge but argued that attempted Hobbs Act robbery offense he pled guilty to remained a valid predicate for the §924(c) prosecution. Although Mr. Simmons' plea agreement recited only Hobbs Act robbery conspiracy as the basis for the firearm charge, Mr. Simmons admission during the Rule 11 hearing that he had attempted to commit Hobbs Act robbery provided a sufficient basis for his conviction under 18 U.S.C. §924(c).

The District Court agreed with the government. By order dated November 15, 2019, the District Court (Alvin K. Hellerstein) denied Mr. Simmons' petition. 10a. However, the Court granted a certificate of appealability on two issues: Whether both Hobbs Act robbery conspiracy and attempted Hobbs Act robbery were the underlying predicates

for Mr. Simmons' §924(c) plea and whether attempted Hobbs Act robbery is a crime of violence within the meaning of 18 U.S.C. §924(C) (3) (A). 8a.

Mr. Simmons filed a timely notice of appeal in the United States Court of Appeals for the Second Circuit. He made the same two claims in the Second Circuit: The sole predicate for his plea to violating 18 U.S.C. §924(c) was conspiracy to commit Hobbs Act robbery, and that attempted Hobbs Act robbery was not a crime of violence on which a prosecution under 18 U.S.C. §924(c) could be based.

The Second Circuit's Decision in this Case

By order dated June 7, 2021, the Second Circuit rejected both of Mr. Simmons' arguments. 1a, 5a. With respect to Mr. Simmons' assertion that attempted Hobbs Act robbery is not a crime of violence, the Circuit relied on its recent decision in *United States v. McCoy*, 995 F.3d 32, 55 (2d Cir. 2021). In *McCoy*, the Second Circuit concluded that an attempt to commit a Hobbs Act robbery categorically qualifies as a crime of violence under the force clause in 18 U.S.C. §924(c) (3) (A). The Court had previously held in *United States v. Hill*, 890 F.3d 51, 53, 60 (2d Cir. 2018), that substantive Hobbs Act robbery is categorically a crime of violence. The *McCoy* Court reasoned "that it follows as a matter of logic that an 'attempt[]' to commit Hobbs Act robbery - which the statute also expressly prohibits, see

18 U.S.C. §1951(a) - categorically qualifies as a crime of violence." *McCoy*. 995 F.3d at 55. In so finding, the Court specifically relied on the Third Circuit's decision in *United States v. Walker*, 990 F.3d 316, 324-25 (3rd Cir. 2021); the Ninth Circuit's decision in *United States v. Dominguez*, 954 F.3d 1251, 1261-62 (9th Cir. 2020); the Seventh Circuit's decision in *United States v. Ingram*, 947 F.3d 1021, 1025-26 (7th Cir. 2020); and the Eleventh Circuit's holding in *United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018), which all had found that attempted Hobbs Act robbery is a crime of violence. While the Second Circuit in *McCoy* made reference to the Fourth Circuit's contrary decision in *United States v. Taylor*; 979 F.3d 203, 209 (4th Cir. 2020); the Second Circuit made no effort to distinguish *Taylor*.

In *McCoy* the Second Circuit also found no merit to the appellant's second argument: that because it is possible to commit substantive Hobbs Act robbery by use of threat, it is possible to commit attempted Hobbs Act robbery by attempting to threaten force. This argument held no sway, the Second Circuit found, because although what *McCoy* proposed was theoretically possible, he had not shown that there was a realistic probability that the statute would be used to prosecute such conduct. *McCoy*, 995 F.3d at 57.

Applying *McCoy*, the Second Circuit rejected Mr. Simmons' argument that attempted Hobbs Act robbery is not a crime of violence that can support a prosecution under 18 U.S.C. §924(c). 4a. The Circuit Court also found that Mr. Simmons' conviction for violating §924(c) was based on both Hobbs Act robbery conspiracy and attempted Hobbs Act robbery. *Id.*

REASONS FOR GRANTING THE PETITION

On July 2, 2021, this Court, undoubtedly recognizing a Circuit split, granted the government's petition for writ of certiorari in *United States v. Taylor*, 20-1459. *United States v. Taylor*, 20-1459, 2021 WL 2742792 (July 2, 2021).² *Taylor* presents the same question for review that is presented in this case: Does attempted Hobbs Act robbery in violation of 18 U.S.C. §1951(a) constitute a "crime of violence" as defined by 18 U.S.C. §924(c)(3)(A). Thus, this Court's decision in *Taylor* will resolve this case as well.

CONCLUSION

For the above-stated reasons, petitioner Tyrone Simmons requests that this Court hold a decision on this petition in abeyance pending its decision in *Taylor*.

² The Solicitor General's merits brief is due on September 7, 2021. The deadline for the respondent's brief is October 22, 2021.

Dated: New York, New York
August 31, 2021

Respectfully submitted,

/s/
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APPENDIX

20-11-pr

Simmons v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of June, two thousand twenty-one.

PRESENT: ROBERT D. SACK,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

-----x
TYRONE SIMMONS,
Plaintiff-Appellant,

-v-

20-11-pr

UNITED STATES OF AMERICA,
Defendant-Appellee.

-----x
FOR PLAINTIFF-APPELLANT: STEPHANIE M. CARVLIN, Law Office of
Stephanie M. Carvlin, New York, New York.

FOR DEFENDANT-APPELLEE:

ROBERT B. SOBELMAN, Assistant United States Attorney (Karl Metzner, Assistant United States Attorney, *on the brief*), *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Hellerstein, *J.*).

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED**.

Plaintiff-appellant Tyrone Simmons appeals from an order of the district court, entered November 15, 2019, denying his motion for relief under 28 U.S.C. § 2255. On appeal, Simmons argues that his conviction for brandishing a firearm in furtherance of a "crime of violence" in violation of 18 U.S.C. § 924(c) should be vacated because: (1) the only predicate offense referenced in his plea agreement was a conspiracy to commit a Hobbs Act robbery, which does not constitute a "crime of violence" under 18 U.S.C. § 924(c); and (2) attempted Hobbs Act robbery was not a proper predicate offense for the 18 U.S.C. § 924(c) firearms charge because it was not referenced in his plea agreement and does not qualify as a "crime of violence" under 18 U.S.C. § 924(c). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Between July and December 2007, Tyrone Simmons, together with co-conspirators, attempted and committed multiple robberies against individuals and businesses. One especially violent incident occurred on or about July 14, 2007, when Simmons and others attempted to commit an armed robbery of a suspected drug dealer at an apartment in Yonkers, New York. Simmons and his co-conspirators restrained a male victim and searched the apartment for narcotics and money. Simmons then raped a female victim at the apartment.

In September 2010, Simmons was charged in a three-count Information with: (1) conspiracy to commit Hobbs Act robbery ("Count One"); (2) attempted Hobbs Act robbery ("Count Two"); and (3) violation of 18 U.S.C. § 924(c) by using a firearm in furtherance of a crime of violence -- specifically, in furtherance of Counts One and Two ("Count Three"). Simmons's plea agreement, however, only recited "the robbery conspiracy charged in Count One" as the predicate for Count Three. App'x at 17. Similarly, at Simmons's plea allocution, the government only recited the conspiracy count as the predicate for Count Three. But in pleading guilty to all three counts of the Information -- referenced throughout the plea allocution -- Simmons admitted that for the "robberies or attempted robberies between July 14, 2007 and December 10, 2007," App'x at 45, he used guns "[i]n all of them," including "the Yonkers one," for which he was "inside the apartment," "ha[d] a gun," "show[ed] that gun," and "use[d] that gun in effect to scare the person into compliance with what [Simmons] wanted to do," *id.* at 46.

Following his guilty plea, Simmons was sentenced to concurrent terms of 135 months' imprisonment for Counts One and Two and a consecutive term of 84 months' imprisonment for Count Three. On June 22, 2016, Simmons moved under 28 U.S.C. § 2255 to vacate his § 924(c) conviction. The district court denied the motion as noted above, and this appeal followed.

We review a district court's denial of a 28 U.S.C. § 2255 motion *de novo*.

McCloud v. United States, 987 F.3d 261, 264 (2d Cir. 2021). As relevant here, a § 924(c) conviction "does not require the defendant to be convicted of (or even charged with) the predicate crime, so long as there is legally sufficient proof that the predicate crime was, in fact, committed." *Johnson v. United States*, 779 F.3d 125, 129 (2d Cir. 2015).

Here, although the plea agreement listed only the conspiracy count as the predicate for Simmons's § 924(c) conviction, Simmons admitted at his plea hearing that he committed attempted Hobbs Act robbery with a firearm and he pleaded guilty to Count Two, which charged him with attempted Hobbs Act robbery. This constitutes legally sufficient proof that Simmons committed the predicate crime of attempted Hobbs Act robbery. Accordingly, the district court did not err in concluding that "[t]he Information gave clear notice to Petitioner that both the Hobbs Act Conspiracy and the Hobbs Act Attempt were predicates for Count Three, the § 924(c) Count," and that "[Simmons's] allocution made it even clearer that the [§] 924(c) Count was, in fact, predicated upon the attempt." App'x at 162-63.

In his brief on appeal, which was filed before our recent decision in *United States v. McCoy*, 995 F.3d 32 (2d Cir. 2021), Simmons argued that attempted Hobbs Act robbery does not qualify as a "crime of violence" under 18 U.S.C. § 924. In *McCoy*, we rejected that argument, holding that "an attempt to commit Hobbs Act robbery . . . categorically qualifies as a crime of violence." 995 F.3d at 55 (internal quotation marks and alterations omitted). Hence, Simmons's argument fails.

* * *

We have considered Simmons's remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the order of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

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

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: June 07, 2021
Docket #: 20-11pr
Short Title: Simmons v. United States of America

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 16-cv-4797
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Hellerstein

BILL OF COSTS INSTRUCTIONS

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

The bill of costs must:

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

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

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: June 07, 2021
Docket #: 20-11pr
Short Title: Simmons v. United States of America

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 16-cv-4797
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Hellerstein

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

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

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TYRONE SIMMONS,

Petitioner,
-against-

UNITED STATES OF AMERICA,

Respondent.

ALVIN K. HELLERSTEIN, U.S.D.J.:

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: <u>11/19/19</u>

**ORDER ISSUING CERTIFICATE
OF APPEALABILITY**

16 Civ. 4797 (AKH)
08 Cr. 1133 (AKH)

X

On November 15, 2019, I issued an order denying Petitioner Tyrone Simmons's 28 U.S.C. § 2255 petition to vacate his conviction for brandishing a firearm in furtherance of a crime of violence. *See* ECF No. 164. Now before me is Petitioner's request that the Court issue a certificate of appealability ("COA") pursuant to Federal Rule of Appellate Procedure 22. *See* ECF No. 165; Fed. R. App. P. 22(b) ([I]n a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a . . . district judge issues a [COA] under 28 U.S.C. § 2253(c)); Second Circuit Local Rule 22.1. Petitioner seeks a COA as to two of the Court's rulings:

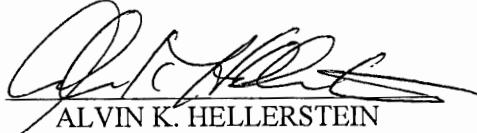
1. First, the Court's holding "that the underlying predicates for Mr. Simmons' [18 U.S.C.] § 924(c) plea were both Hobbs Act robbery conspiracy and attempted Hobbs Act robbery. Although the plea agreement recited only Hobbs Act robbery conspiracy as the underlying offense [with respect to the § 924(c) charge], the charging document recited both as the bases for the 924(c) charge." ECF No. 165, at 2.
2. Second, the Court's holding "that attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)." ECF No. 165, at 2.

Petitioner's request for a COA is granted. Although I believe that my rulings are correct, "reasonable jurists," as Petitioner argues in his November 15 letter, *see* ECF No. 165, might find otherwise. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (reasonable jurists need only find the matter "debatable"); *see Miller-El v. Cockrell*, 537 U.S. 322, 337 ("[A] COA does not require a showing that the appeal will succeed.").

I hereby issue a COA on the two issues described above, permitting Petitioner to appeal these issues to the Second Circuit. The Clerk is directed to terminate the open motion (ECF No. 165) and close the case.

SO ORDERED.

Dated: November 19, 2019
New York, New York



ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TYRONE SIMMONS,

Petitioner,
-against-

UNITED STATES OF AMERICA,

Respondent.

X :
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USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: 111519
DATE FILED: 11/15/19

**ORDER DENYING PETITION
FOR HABEAS CORPUS**

16 Civ. 4797 (AKH)
08 Cr. 1133 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Petitioner Tyrone Simmons filed this petition on June 22, 2016, pursuant to 28 U.S.C. § 2255, to vacate his conviction for brandishing a firearm in furtherance of a “crime of violence,” in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *See* ECF No. 1. Petitioner argues that his conviction was predicated upon a charge of conspiracy to commit a Hobbs Act robbery, and that this predicate has been held invalid by the Supreme Court and the Second Circuit. Petitioner also argues that a charge of attempt to commit a Hobbs Act robbery, a crime to which he also pleaded guilty, cannot act as a § 924(c) predicate.

The petition is denied. Petitioner pleaded to brandishing a firearm in furtherance of an attempt to commit a Hobbs Act robbery, and attempt remains a valid § 924(c) predicate.

Background

On September 15, 2010, Petitioner was charged in a three-count information (the “Information”) with (1) conspiracy to commit Hobbs Act robbery, *see* 18 U.S.C. § 1951(b); (2) attempted Hobbs Act Robbery, *see id.*; and (3) carrying and use of a firearm in furtherance of both the charged Hobbs Act conspiracy and Hobbs Act attempt, *see* 18 U.S.C. § 924(c)(1). *See* 8-cr-1133, ECF No. 81. As to the charged attempt, the Information alleged:

On or about July 14, 2007, in the Southern District of New York, Tyrone Simmons, the defendant, unlawfully, and knowingly did attempt to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), and would thereby have obstructed, delayed, and affected commerce

and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, Simmons, along with others not named as defendants herein, attempted to commit an armed robbery of a suspected narcotics trafficker . . .

8-cr-1133, ECF No. 81, at 4. As to the charged § 924(c) offense, the Information charged:

From in or about July 2007 through in or about December 2007, in the Southern District of New York, Tyrone Simmons, the defendant, unlawfully, willfully, and knowingly, during and in relation to crimes of violence for which he may be prosecuted in a court of the United States, namely, the robbery conspiracy charged in Count One of this Information and the attempted robbery charged in Count Two of this Information, did use and carry firearms, and in furtherance of such crime, did possess firearms, and did aid and abet the use, carrying, and possession of firearms, which were brandished.

Id. at 4-5. Petitioner pleaded guilty to all three Counts in the Information pursuant to a plea agreement dated September 8, 2010, and signed by Petitioner and his attorney on September 15, 2010. *See* Pl. Br. Ex. B., at 1.

The plea agreement described the § 924(c) firearm count, Count Three, in relation to the robbery conspiracy charged in Count One:

Count Three of the Information charges the defendant with using, carrying, and possessing firearms, and aiding and abetting the same, which were brandished during and in relation to the robbery conspiracy charged in Count One . . .

Id. at 1-2.

At Petitioner's plea allocution taken September 15, 2010, the government described Count Three consistently with the plea agreement, *i.e.*, as a brandishing of a firearm "in furtherance of the crime of violence charged in Count One of the information; that is, the robbery conspiracy":

Count Three, which is the gun charge, has two elements: First, that on or about the date charged in the information; that is, July 14, 2007, the defendant knowingly brandished or aided and abetted the brandishing of a firearm by another; And, second, that the defendant possessed or used the firearm which was brandished or aided and abetted the brandishing of a firearm by another in furtherance of the crime of violence charged in Count One of the information; that is, the robbery conspiracy.

Pl. Br. Ex. C, at 11:12-21.

However, Petitioner allocuted, not to the conspiracy alleged in Count One of the Information, but rather to the attempted robberies alleged in Count Two. *See id.* The following exchange took place:

The Court: Tell me what you did. To make it easier for you, there is a table set out . . . showing dates of [twelve] robberies or attempted robberies between July 14, 2007 and December 10, 2007. Were you involved in each and all of those robberies—

The Defendant: Yes.

The Court: —or attempted robberies? And with respect to the Yonkers one in item A, were you inside the apartment?

The Defendant: Yes.

The Court: Did you have a gun?

The Defendant: Yes.

The Court: Did you show that gun?

The Defendant: Yes.

The Court: Did you use that gun in effect to scare the person into compliance with what you wanted to do?

The Defendant: Yes.

The Court: Did you have a gun at any of the other robberies or attempted robberies?

The Defendant: Yes, there w[ere] guns used.

The Court: There were guns used. In all of them?

The Defendant: Yes.

Id. at 15:21-16:17.

On November 18, 2010, I sentenced Petitioner to 219 months' imprisonment: 135 months concurrently on Counts One and Two, and, consecutively, 84 months, on Count Three. *See* 8-cr-1133, ECF No. 97, at 2.

Petitioner filed this § 2255 action in June 2016. *See* ECF No. 1. With the consent of the parties, I stayed the case to await decisions in ongoing Second Circuit and Supreme Court litigation bearing on Petitioner's claims. After *United States v. Davis*, 139 S. Ct. 2319 (2019), holding that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, and *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019), holding that a conspiracy to commit a Hobbs Act robbery is not a "crime of violence" sufficient to be predicate offense to § 924(c), I lifted the stay.

Discussion

When a § 924(c) conviction rests upon both a conspiracy to commit Hobbs Act robbery and a separate valid § 924(c) predicate offense, the conviction remains valid, even after *Davis* and *Barrett*. *See, e.g., United States v. Walker*, --- F. App'x ---, 2019 WL 4896839, at *2 (Oct. 4, 2019); *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019) ("[A]lthough Navarro pled guilty to conspiracy to commit Hobbs Act robbery and a § 924(c) violation, his plea agreement and the attendant factual proffer more broadly establish that his § 924(c) charge was predicated both on conspiracy to commit Hobbs Act robbery and [a valid predicate offense].").

There are two questions to be decided: (1) is an attempt to commit a Hobbs Act robbery a "crime of violence" under 18 U.S.C. § 924(c); and (2) was the Information to which Petitioner pleaded narrowed by his plea agreement and/or the description of the § 924(c) offense provided by the government at his plea hearing. I hold that attempt to commit Hobbs Act robbery is a crime of violence and that, notwithstanding the plea agreement and description of

the § 924(c) offense at his plea, Petitioner pleaded to brandishing a firearm in furtherance of an attempt to commit Hobbs Act robbery.¹

A. Attempt to Commit a Hobbs Act Robbery is a § 924(c) Crime of Violence

Section 924(c) defines a “crime of violence” as a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). In order to decide if an offense is a “crime of violence” under this clause, courts apply the so-called “categorical approach,” which entails determining the “minimum criminal conduct necessary for conviction under a particular statute.” *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018) (quotation marks omitted). In Petitioner’s case, the relevant offense is the Hobbs Act. *See* 8-cr-1133, ECF No. 81. The Hobbs Act provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). The Hobbs Act defines “robbery” as

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . .

Id. at § 1951(b)(1).

To “establish attempt, the government must prove that a defendant had the intent to commit the underlying crime and that he took a substantial step toward its completion.”

United States v. Gagliardi, 506 F.3d 140, 150 (2d Cir. 2007). Conspiracy, on the other hand,

¹ In several recent orders, I rejected the government’s argument that petitioners in comparable situations to that of the Petitioner here procedurally defaulted on their respective § 2255 challenges. *See Camacho v. United States*, 17-cv-5199, ECF No. 675; *Roman v. United States*, 16-cv-4829, ECF No. 12; *Jimenez v. United States*, 16-cv-4653, ECF No. 6. For the same reasons outlined in those orders, I reject the government’s contention here that Petitioner has procedurally defaulted. *See* ECF No. 13, at 4. Accordingly, I proceed to the merits.

requires “an agreement by two or more persons to commit any offense against the United States and an overt act to effect the object of the conspiracy.” *United States v. Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985). Thus, whereas attempt requires that a defendant take a substantial step toward completion of the underlying crime, conspiracy does not.

In a recent case before the Eastern District of New York, Judge Matsumoto held that an attempt to commit a Hobbs Act robbery is a crime of violence under § 924(c), reasoning in relevant part as follows:

[T]he Second Circuit has squarely held that substantive Hobbs Act robbery qualifies as a crime of violence

[T]he Second Circuit has yet to determine whether attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c) Nor has any district court in the Second Circuit ruled on this specific question, as of the date of this Memorandum and Order.

The Second Circuit has, however, indicated that where a substantive offense is a crime of violence under § 924(c), an attempt to commit that offense similarly qualifies This is in line with precedent around the country.

United States v. Jefferys, No. 18-cr-359, 2019 WL 5103822, at *5-7 (E.D.N.Y. Oct. 11, 2019) (internal citations omitted); *see also, e.g., United States v. St. Hubert*, 909 F.3d 335, 351 (11th Cir. 2018) (“Like completed Hobbs Act robbery, attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)”).²

I agree with Judge Matsumoto’s analysis. Section 924(c) expressly includes “attempted use” of force in its definition, and Hobbs Act robbery requires the taking of property by “actual or threatened force, or violence, or fear of injury,” 18 U.S.C. § 1951(b). Taking a substantial step toward completion of such a robbery categorically involves the attempted or

² Petitioner attempts in a footnote to distinguish *Jefferys* by arguing that Judge Matsumoto “explicitly noted in her ruling that the defendant’s brief did not contain the necessary analysis to support his position,” and that this missing “analysis is present here.” Pl. Reply, 8-cr-1133, ECF No. 163, at 7 n.5. This claim omits that Judge Matsumoto also stated that despite defendant’s failure to “provide a persuasive analysis” or “apply the categorical approach,” she would “nonetheless address the defendant’s argument” on the merits. *Jefferys*, 2019 WL 5103822, at *6.

threatened use of force. And as Judge Matsumoto observed, this Circuit has found Hobbs Act robbery to be a crime of violence, *see United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018) and this Circuit and others have found that attempts to commit crimes of violence are themselves crimes of violence. *See, e.g., United States v. Pereira-Gomez*, 903 F.3d 155, 166 (2d Cir. 2018); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016) (“The ‘attempt’ portion of [the] conviction does not alter our determination that the conviction is a crime of violence.”).

B. Neither the Plea Agreement nor the Prosecutor’s Explanation of the § 924(c) Offense at Petitioner’s Plea Hearing Narrowed the Information

Petitioner pleaded guilty to all three Counts in the Information: the § 924(c) gun count (Count Three), and both charged predicates, *i.e.*, attempt to commit a Hobbs Act robbery (Count Two) and conspiracy to commit a Hobbs Act robbery (Count One). The Information specified that Count Three was predicated upon both the conspiracy and the attempt Counts. And Petitioner’s allocution was a clear confession to brandishing a firearm in furtherance of an attempt to commit Hobbs Act robbery. Petitioner testified that during at least one robbery attempt he brandished a firearm to frighten a would-be victim into compliance, and that he used a gun in every single one of the charged robberies.³

The Information was not amended, constructively or otherwise. Although the plea agreement described the § 924(c) offense as based on the Hobbs Act conspiracy alleged in Count One of the Information and not the attempt alleged in Count Two, and although the government’s description of the § 924(c) offense at Petitioner’s plea hearing was consistent with the plea agreement, Petitioner also pleaded guilty to the attempt charge alleged in Count Two of the Information, separately and as a predicate to Count Three. The Information gave clear notice

³ This case is, therefore, in stark contrast to several recent *Davis*-motivated habeas petitions addressed by this Court, in which I observed that the allocutions therein failed to address any potential predicate offense aside from Hobbs Act robbery conspiracy. *See supra* note 1. I note that in those cases, the defendants also had *not* pleaded guilty to attempted Hobbs Act robbery or another valid predicate. *See Camacho*, 17-cv-5199, ECF No. 13, at 1-2; *Roman*, 16-cv-4829, ECF No. 12, at 1-2; *Jimenez*, 16-cv-4653, ECF No. 6, at 1-2.

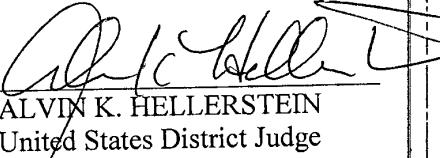
to Petitioner that both the Hobbs Act Conspiracy and the Hobbs Act Attempt were predicates for Count Three, the § 924(c) Count. His allocution made it even clearer that the 924(c) Count was, in fact, predicated upon the attempt. The government's descriptions did not amend, or narrow, the Information. *Cf., e.g., United States v. Bastian*, 770 F.3d 212, 220 (2d Cir. 2014) ("Not every divergence from the terms of an indictment, however, qualifies as a constructive amendment."); *id.* ("We have consistently permitted significant flexibility in proof adduced at trial to support a defendant's conviction, provided that the defendant was given notice of the core criminality to be proven against him.") (quotation marks omitted).

Conclusion

For all the foregoing reasons, the § 2255 petition is denied. The Clerk shall terminate the open motion (8-cr-1133, ECF No. 131).

SO ORDERED.

Dated: November 15, 2019
New York, New York



ALVIN K. HELLERSTEIN
United States District Judge

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

United States District Court	District Southern District of New York
Name (under which you were convicted): Tyrone Simmons	Docket or Case No.: 08-cr-1133
Place of Confinement: Five Points CF, Caller Box 400, Romulus, NY 14541	Prisoner No.: 12A5564
UNITED STATES OF AMERICA	Movant <u>include</u> name under which you were convicted Tyrone Simmons

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
United States District Court, Southern District of New York
500 Pearl Street
New York, NY 10007
2. (a) Date of the judgment of conviction (if you know): 11/22/2010

(b) Date of sentencing: 11/18/2010
3. Length of sentence: Counts 1 and 2 = 135 months, Count 3 = 84 months consecutive.
4. Nature of crime (all counts):
Count One: Hobbs Act Conspiracy
Count Two: Attempted Hobbs Act
Count Three: Brandishing a weapon during Hobbs Act Conspiracy.
5. (a) What was your plea? (Check one)
(1) Not guilty (2) Guilty (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
Pled to all counts.
6. If you went to trial, what kind of trial did you have? (Check one) Jury Judge

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following:

- Name of court: United States Court of Appeals for the Second Circuit.
- Docket or case number (if you know): 10-4888-cr
- Result: I withdrew my appeal.
- Date of result (if you know):
- Citation to the case (if you know):
- Grounds raised:

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

- Docket or case number (if you know):
- Result:
- Date of result (if you know):
- Citation to the case (if you know):
- Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

- (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes No

(2) Second petition: Yes No

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
Mr. Simmons was convicted of violating 18 U.S.C. 924(c) based on brandishing a weapon during a Hobbs Act Conspiracy.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:
He withdrew his appeal.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

The sole ground Mr. Simmons raises in this motion is that his conviction for violating 18 U.S.C. 924(c), which was based on his commission of a Hobbs Act Conspiracy, is invalid in light of the United States Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2016). *Johnson* was decided after Mr. Simmons' appeal was filed and subsequently withdrawn.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:

kAvraham Moskowitz, Moskowitz & Book, 345 Seventh Avenue, 21st Floor, New York, NY 10001

(c) At trial:

(d) At sentencing:

kAvraham Moskowitz, Moskowitz & Book, 345 Seventh Avenue, 21st Floor, New York, NY 10001

(e) On appeal:
Stephanie Carvlin, 111 Broadway, 19th Floor, New York, NY 10006

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: I am currently serving a previously imposed state court sentence, imposed by County Court Westchester County. The District Court in this case imposed a 135-month sentence on Counts One and Two to be served partially concurrently with this sentence (24 months).

(b) Give the date the other sentence was imposed: 10/16/2009

(c) Give the length of the other sentence: 21 years.

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes No

18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

Mr. Simmons' motion arises from the United States Supreme Court's June 26, 2016 decision in *Johnson v. United States*, 135 S.Ct. 2551 (2016). In *Welch v. United States*, 136 S.Ct. 1257 (2016), the United States Supreme Court found that Johnson announced a new rule of substantive law that should be applied retroactively to case pending on collateral review. Thus this motion, grounded in Johnson, is timely.

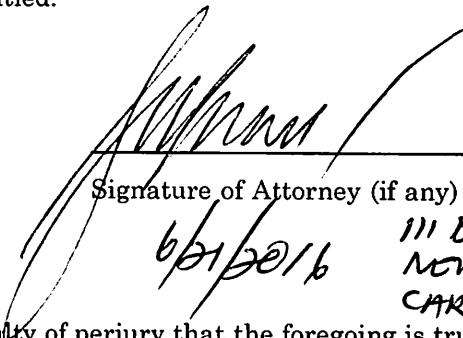
* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:
Vacate his judgment of conviction on Count Three of the indictment (violation of 18 USC 924(c)) and the corresponding sentence of 84 months.

or any other relief to which movant may be entitled.



Signature of Attorney (if any)

6/21/2016

111 BROADWAY, 19TH FL
NEW YORK, NY 10006
CARVLINE@HOTMAIL.COM

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on (month, date, year).

Executed (signed) on _____ (date).



Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

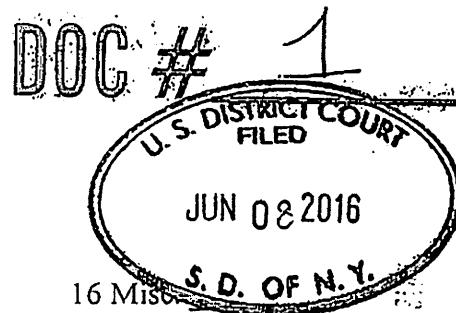
I, Stephanie Carvlin, am the attorney for Petitioner Tyrone Simmons. I file this petition in accordance with the terms of SDNY Standing Order 16 Misc. 217, attached hereto.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

PETITIONS UNDER 28 U.S.C. §§ 2255 and 2241
IN LIGHT OF *JOHNSON V. UNITED STATES*

-----X



STANDING ORDER

In light of the United States Supreme Court decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015) and the fact that several hundred petitions will be filed by federal prisoners seeking relief under 28 U.S.C. §§ 2255 and 2241 before the one-year anniversary of the decision on June 27, 2016, this order is issued to facilitate the orderly administrative of justice.

As agreed by the United States Attorney's Office and the Federal Defenders of New York (who were appointed to represent eligible prisoners in a previous Standing Order, 15 Misc. 373), and in order to afford the effective representation of counsel, to allow the Court of Appeals to clarify the application of *Johnson* to particular issues so that the District Court may render consistent rulings, and to avoid the District Court and the parties from being overwhelmed by the filing of hundreds of habeas petitions on this issue at one time, the Federal Defenders of New York and other counsel appointed for *Johnson* matters under the Criminal Justice Act, will be permitted to file initial petitions under 28 U.S.C. § 2255 on or before June 27, 2016, utilizing the Court's form petition as a "placeholder" petition. The petitions are to be supplemented on a future date by a brief that more fully sets forth the basis for the requested relief. It is further

suggested that individual judges defer any consideration of such petitions until the filing of the supplemental or until a briefing schedule is requested by a party or parties.

Dated: June 8, 2016
New York, New York



Hon.
Chief, U.S. District Judge
Southern District of New York

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of July, two thousand and eleven.

United States of America,

ORDER

Appellee,

Docket No. 10-4888(L); 11-583(con)

v.

Tyrone Simmons, Darryl Grady,

Defendants-Appellants.

IT IS HEREBY ORDERED that the motion by Appellant Tyrone Simmons to withdraw his appeal with prejudice is GRANTED. Darryl Grady's appeal, docket no. 11-583, shall proceed as an individual appeal.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk

Catherine O'Hagan Wolfe



A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe



MANDATE ISSUED ON 07/12/2011

UNITED STATES DISTRICT COURT

SOUTHERN

District of

NEW YORK

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

Tyrone Simmons

Case Number: S2 08 Cr. 01133-01(AKH)

USM Number: 61617-054

Avraham Moskowitz/ AUSAs, Amy Lester & Jillian Berman
Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s) 1,2,3 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:

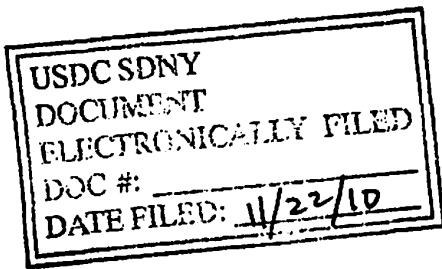
Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1951	Conspiracy to commit hobbs act robberies	12/31/2007	1
18 USC 1951 and 2	Attempted Hobbs Act Robbery	7/14/2007	2
18 USC 924(c)(1)(A)(ii) and 2	Using and carrying a firearm in relation to a crime of violence	12/31/2007	3

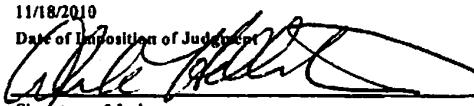
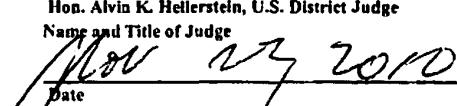
The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

<input checked="" type="checkbox"/> Count(s) <u>All open counts</u>	<input type="checkbox"/> is <input checked="" type="checkbox"/> are dismissed on the motion of the United States.
<input type="checkbox"/> Underlying	<input type="checkbox"/> is <input type="checkbox"/> are dismissed on the motion of the United States.
<input type="checkbox"/> Motion(s)	<input type="checkbox"/> is <input type="checkbox"/> are denied as moot.

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.



11/18/2010
Date of Imposition of Judgment

Signature of Judge
Hon. Alvin K. Hellerstein, U.S. District Judge
Name and Title of Judge

Date

DEFENDANT: **Tyrone Simmons**
CASE NUMBER: **S2 08 Cr. 01133-01(AKH)**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **135 months concurrent on counts 1 and 2, of which the 24 months already served shall be concurrent with his state sentence; and 84 months consecutive on count 3.** The defendant is notified of his right to appeal.

The court makes the following recommendations to the Bureau of Prisons:
that the defendant be confined at a facility as close to Bronx county as possible to promote family visits.

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 _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **Tyrone Simmons**CASE NUMBER: **S2 08 Cr. 01133-01(AKH)****SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **3 years concurrent on all counts.**

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 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: Tyrone Simmons
CASE NUMBER: S2 08 Cr. 01133-01(AKH)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to research pursuant to this condition.
2. The defendant shall pay restitution in the amount of \$6,480.00 which is owed jointly and severally with co-defendants. Payments shall be made on the 30th day of each month to begin 30 days after release at a rate of 15% of monthly net income without interest as long as payments are made timely.
3. The defendant shall supervised by the district of residence.

DEFENDANT:
CASE NUMBER:Tyrone Simmons
S2 08 Cr. 01133-01(AKH)

CRIMINAL MONETARY PENALTIES

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

TOTALS	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 300.00	\$	\$ 6,480.00

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Clerk, U.S. District Court, for disbursement to the victims of Act	\$6,480.00	\$6,480.00	

TOTALS	\$ <u> \$6,480.00 </u>	\$ <u> \$6,480.00 </u>
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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 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 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.

DEFENDANT: Tyrone Simmons
CASE NUMBER: S2 08 Cr. 01133-01(AKH)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of \$ 300.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time;

F Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay restitution in the amount of \$6,480.00 which is owed jointly and severally with co-defendants. Payments shall be made on the 30th day of each month to begin 30 days after release at a rate of 15% of monthly net income without interest as long as payments are made timely.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.