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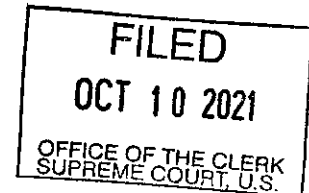
ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

TERRILL KINCHEN  
Petitioner,

VS.

UNITED STATES OF AMERICA  
Respondent.



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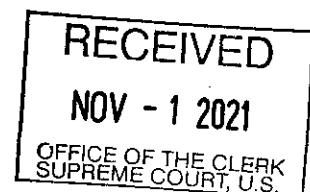
On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

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Petition For Writ Of Certiorari

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TERRILL KINCHEN c13799-104  
FEDERAL CORRECTIONAL  
COMPLEX, COLEMAN USP1  
P.O. BOX 1033  
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QUESTION PRESENT FOR REVIEW

I.

IF THE DISTRICT COURT SENTENCED  
A DEFENDANT TO A AGREED PLEA  
AGREEMENT BETWEEN PARTIES. CAN  
THE DISTRICT COURT NOW DETERMINE  
THAT THE DEFENDANT WAS NOT SENTENCE  
AS A CAREER OFFENDER BASED ON THE  
PLEA AGREEMENT?

### INTERESTED PARTIES

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1(a)(3) and 26.1-3, the undersigned certifies that the list set forth below is a complete list of the persons and untities perviously included in the appellants CIP, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the appellant's CIP.

Fajardo Orshan, Ariana  
Family Dollar Store Subsidiary Of Dollar Tree (DLTR)  
Fernandez, Eloisa Delgado  
Ferrer, Wifredo A.  
Fleisher, Bruce Harris  
Garber, Hon. Barry L.  
Gonzalez, Juan Antonio  
Goodman, Hon. Jonathan  
Graham, Hon. Donald L.  
Greenberg, Benjamin G.  
Horowitz, Phillip R.  
Kinchin, Terrill  
Levin, Albert Z.  
Levine, Mark Alan  
Middlebrooks, Hon. Donald M.  
Nelson, Andrew  
Noto, Kenneth  
O'sullivan, Hon. John J.  
Patanzo, Peter Thomas

Terrill Kinchen v. United States, Case No. 21-10960-A

United States' Notice concerning Certificate Of Interested Person  
and Corporate Disclosure Statement (con'd)

Pearson, Leon  
People's Choice Credit Union  
Puerto Habana Dollar Market Store  
Reid, Hon Lisette M.  
Robinson, Jarvis  
Rosenbaum, Joseph S.  
Simonton, Hon. Andrea M.  
Smachetti, Emily M.  
Soloman, Harry Martin  
Stafford, Steven A.  
Torres, Hon. Edwin G.  
Turnoff, Hon. William G.  
Vasquez, Ignacio Jesus  
White, Kenneth H.  
White, Hon. Patrick A.

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
INTERESTED PARTIES.....	ii,iii
TABLE OF AUTHORITIES.....	v
RULES OF PROCEDURE.....	vi
PETITION.....	1
OPINION BELOW.....	2
STATEMENT OF JURISDICTION.....	2
STATUTORY AND OTHER PROVISIONS INVOLVED.....	2,3
STATEMENT OF CASE.....	3
REASON FOR GRANTING THE WRIT.....	4,5,6,7,8,9
CONCLUSION.....	9
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS....	10
CERTIFICATE OF SERVICE.....	11
DECLARATION VERIFYING TIMELY FILING.....	12
APPENDIX	
DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT UNITED STATES V. TERRILL KINCHEN, NO.: 21-10960-C (11TH CIR. 07/07/2021).....	13
STATUTES.....	vi

## TABLE OF AUTHORITIES

### CASE.

UNITED STATES V. EASON

953 F.3d 1184 (11TH CIR. 2020).....7,9

DESCAMPS V. UNITED STATES

570,U.S. 254,261,133 S. CT. 2276,186 L. Ed.2d 438(2013)...8

MONCRIEFFE V. HOLDER

569,U.S. 184,190-91,133 S. CT. 1678,185 L. Ed.2d 727(2013)..8

## RULES OF PROCEDURE

SUP.CT. R.13.1.....	2
SUP.CT. R. PART III.....	2
SUP.CT. R.29.1.....	11,12
SUP.CT. R.39.1-2.....	10

## STATUTES

28 U.S.C. 1254.....	2
28 U.S.C. 1291.....	2
18 U.S.C. 3742.....	2
28 U.S.C. 1746.....	10,12
18 U.S.C. 3006A AND 3006a(d)(6)....	10
18 U.S.C. 1951.....	2,8
18 U.S.C. 4B1.2.....	2,4,5,6,7,8
28 U.S.C. 2255.....	3,5
18 U.S.C. 924(c)(3)(a)....	6,8

IN THE  
SUPREME COURT OF THE UNITED STATES

NO: 21-10960-C  
TERRILL KINCHEN  
Petitioner,

v.

UNITED STATES OF AMERICA  
Respondent.

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On Petition For Writ Of Certiorari To  
The United States Court Of Appeal For  
The Eleventh Circuit

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Petition For Writ Of Certiorari

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Terrill Kinchen respectfully petitions the Supreme Court Of The United States for a Writ Of Certiorari to review the judgement of the United States Court Of Appeals For The Eleventh Circuit, rendered and enter in case number 21-10960-c in that court on August 11, 2021, United States V. Terrill Kinchen, which affirmed the judgement and commitment of the United States District Court For The Southern District Of Florida.



### OPINION BELOW

A copy of the decision of the United States Court Of Appeals For The Eleventh Circuit, which affirmed the judgement and commitment of the United States District Court For The Southern District Of Florida, is contained in the Appendix (A-1).

### STATEMENT OF JURISDICTION

Jurisdiction of this court is invoked under 28 u.s.c. B1254-(1) and part III of the rules of the Supreme Court Of The United States. The decision of the Court Of Appeals was entered around August 11, 2021. This Petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of Appeals had jurisdiction pursuant to 28 u.s.c. 1291 and 18 u.s.c. 3742, which provide that court of Appeals shall have jurisdiction for all final decisions of United States District Courts.

### STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinance and regulation:

Title 18, United States Code, Section 1951 under 4b1.2  
a crime of violence is a felony that:

(A) Has as an element the use, attempted use, or threatened use of physical force against the person of another

For purposes of this subsection, the term "career offender",  
(1) He is at least 18 years old at the time of the offense of  
conviction; (2) The "offense of conviction is a felony that  
is either a crime of violence or a controlled substance offense";  
and (3) The defendant has at least two prior felony convictions  
of either a crime of violence or a controlled substance offense".

#### STATEMENT OF CASE

In early 2019, Kinchen filed his timely motion to vacate  
DE-11 on June 24, 2019. The government responded to Kinchen  
motion to vacate in opposition DE-15. On October 22, 2019 Kinchen  
filed a reply to the government opposition DE-21.

The court allowed Kinchen to supplement his claims for  
relief (DE-23, DE-24), to which the government filed a supplemen-  
tal response in opposition DE-26. June 3, 2020, Kinchen filed  
a Motion For Leave To Amend his Motion to Vacate in Light Of  
Eason v. United States (DE-27), which the government filed an  
opposition to (DE-28) and Kinchen filed a reply to the government  
opposition (DE-29).

On March 9, 2021, the District Court entered an order Deny-  
ing Motion To Vacate pursuant to 28 u.s.c. B2255 (DE-CR 400).  
On March 27, 2021, Kinchen filed an Notice Of Appeal. On July  
7, 2021 the United States Court Of Appeal For The Eleventh Cir.  
Denied Kinchen Certificate Of Appealability. On July 21, 2021,  
Kinchen filed a Motion To Reconsider The Denial Of Kinchen's  
COA. On August 11, 2021, the Appeal Court entered an order deny-  
ing Motion To Reconsider.

REASONS FOR GRANTING THE WRIT

I.

IF THE DISTRICT COURT SENTENCED A DEFENDANT  
TO A AGREED PLEA AGREEMENT BETWEEN PARTIES.  
CAN THE DISTRICT COURT NOW DETERMINE THAT  
THE DEFENDANT WAS NOT SENTENCED AS A CAREER  
OFFENDER BASED ON THE PLEA AGREEMENT?

On November 30, 2016, Kinchen entered a guilty plea pursuant to a written plea agreement with the government (DE-231, 353). The court accepted Kinchen's guilty plea. (DE-353-18-19) and set sentencing in the matter. In the plea agreement, the defendant plea guilty to count 1 (Hobbs Act Conspiracy) count 6 and 20 (two counts of brandishing a firearm), On January 9, 2017, the probation disclosed the Presentence Investigation Report DE-264. In reviewing the PSI, the probation officer in using the 2016 Sentencing Guideline Manual classified Kinchen as a career offender:

"KinchenN is a career offender because (1) at the time he committed the instant offense he was at least 18 years old; (2) the instant offense of conviction is a felony of a crime of violence; and (3) he has at least two prior felony conviction of either a crime of violence or a controlled substance offense (see dkts. F05- 022975 and F06-42060). As the offense level is 32, pursuant to 4b1.1(b)(3)." See exhibit A.

As in which the instant offense of conviction is count 1 (Hobbs Act Conspiracy) that the court used as a felony of a crime of violence". As the offense statutory maximum is 20 years, the offense level is 32, pursuant to B4b1.1(b)(3). In which Kinchen's offense level was upgraded from based offense level 22 (see PSR, paragraph 73) to career offender based offense level 32, pursuant to 4b1.1(b)(3), but decreased by 3 levels, for acceptance of responsibility and timely notifying the government- resulting in a total offense level of 29, criminal history VI, sentencing guideline 151-188 months. A probation officer classified Kinchen as a career offender based in part on his Hobbs Act Conspiracy conviction, using the 2016 sentencing guideline manual. On a 2255 Kinchen argued that he was sentence as a career offender, due to the fact that Hobbs Act Conspiracy does not qualify as a crime of violence under U.S.S.G. B4b1.2(a). The guidelines define "crime of violence" to mean any offense under federal or state law, punishable by imprisonment for a term exceeding one year, "that either (1)Has an element the use, attempted use, or threatened use of physical force against the person of another"- a definition known as the "element clause"1-or(2) is one of a number of listed offense in the "enumerated offense clause", which includes robbery and extortion. In light of the career offender enhancement, the court further found that in light of the career offender enhancement yielding a total guideline sentence of 535 months that a reasonable sentence

in this case was what the parties agreed to in the plea agreement 420 months, which the court agreed to. (see DE-349:9:18-25).

"THE COURT: All right. I have consider the statement of all parties, the Pre-sentence Report which contains the advisory guidelines, and the statutory factors. The offense level is 29, the criminal history category is 6. The PSI states their view that a minimum guideline sentence was 535-(Based on the career offender enhancement). However, in the plea agreement the parties agree to recommended 420 months, and in light of all of the factors, I find that to be reasonable".

In Eason, the eleventh circuit explained that "there is nothing incongruous about holding that Hobbs Act Robbery is a crime of violence for purposes of...(the element clause in) B924(c)(3)(a), which includes force against a person or property, but not for purposes of (The elements clause in) U.S.S.G 4b1.2(A)(1), which is limited to force against person. More importantly, Eason does apply to Kinchen's case because Hobb's Act Conspiracy serve as the "crime of violence" for his career offender status under U.S.S.G 4B1.2(a)(1). Pursuant to the Presentence Investigation Report, under chapter four enhancements, "Kinchen had previously been convicted for one "crime of violence" and one Controll substance", for second-degree cocaine sell and third-degree aggravated assault with a deadly weapon under Florida law, which remain a crime of violence and a controlled substance. The PSR indicate under "chapter four enhancements" that the Hobbs Act Conspiracy of count one served as the "crime of violence" that

made Kinchen a career offender within the meanings of U.S.S.G. 4B1.1. So, the convicted charged Hobbs Act Conspiracy had a role in Kinchen's career offender status under the guidelines.

On March 24, 2020, The Eleventh Circuit issued a published opinion, United States v. Eason, 953 F.3d 1184 (11th Cir. 2020), stating "Hobbs Act Robbery does not qualify as a crime of violence under the current version of U.S.S.G. 4B1.2(A). A conviction for Hobbs Act Robbery therefore cannot serve as a predicate for a career offender sentencing enhancement. On June 3, 2020, Kinchen filed a Motion To Amend his timely Motion To Amend his timely Motion To Vacate, based on Eason. On March 9, 2021, the District Court denied Kinchen's Eason claim, holding "Kinchen was not sentence as a career offender", and the career offender guidelines range of 535 to 572 months had no impact on his sentence. The record showed Kinchen was determined a career offender based on the 2016 Sentencing Guidelines. The probation officer used the Hobbs Act Conspiracy as the instant offense of conviction is a felony of a crime of violence. "He was entitled to relief, because the Eleventh Circuit held in Eason, "The residual clause was removed from the guideline in 2016, the "crime of violence" definition no longer captures Hobbs Act Robbery. See 83 fed. Reg. 65400, 65411-12 (Dec 20, 2018), (discussing the "concern that...Hobbs Act Robbery...no longer constitute(s) a crime of violence under 4B1.2(A), as amended in 2016...).

First, Kinchen was convicted of Hobbs Act Conspiracy and two counts of brandishing a firearm, in violation of 18 U.S.C.

1951(A) and 18 U.S.C. 924(C)(A)(ii), and sentenced to 420 months in prison. The sentenced the district court imposed sat 115 months below the bottom end of the applicable guideline range- factoring in the career offender guideline 535 to 572 months. Had the career-offender Guideline not applied to Kinchen, the guideline range calculated by the district court would have been significantly lower: 447 to 462. There is no meaningful way in which the guideline exerted less effect on Kinchen sentenced than did the statute setting his minimum and maximum terms of imprisonment; indeed, it was the guidelines, not just the statute, that "fix(ed)" Kinchen "sentenc(e)" in every meaningful way.

Secondly, applying the framework to this case, we must compare the scope of the conduct covered by the elements of Hobbs Act Robbery with the definitions of "crime of violence" in U.S.S.G. 4B1.2(a). If the statute sweeps more broadly than the 4B1.2(a) definition, then any Hobbs Act Robbery "cannot count" as a crime of violence. Descamps v. United States, 570 U.S. 254, 261, 133 S. Ct. 2276, 186 L. Ed. 2d 438(2013). "Because this court suppose to examine what (a Hobbs Act Conspiracy) conviction necessarily involved, not the facts underlying (each) case, this court must presume that the (defendant) convictions rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by" the crime of violence definition. Moncrieffe v. Holder, 569 U.S. 184, 190-91, 133 S. Ct. 1678, 185 L. Ed. 2d 727(2013).

(Robbery is) 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.

Therefore, Hobbs Acts Robbery is broader than the generic definition of robbery because, as I discussed above, it can be violated with threats of force to property. "Hobbs Acts Robbery reaches conduct directed at property" because the statute specifically say so.

So, more importantly, if this court look more into Kinchen's Eason claim his arguments is justified and backed up by the opinions of the district court in United States v. Eason, 953 F.3d 1184, and Kinchen should have been granted relief. Based on Kinchen being classified as a career offender.

#### CONCLUSION

As a concluding point, The district court never stated as much, explaining that had the guideline not applied, He would not have imprisoned Kinchen to 420 months in prison. Years of Kinchen life thus turned solely on whether the career-offender guideline applied. Therefore, Kinchen Writ Of Certiorari should be granted.