NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

RODRECUS SMITH,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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

APPENDIX

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(6th Cir. July 15, 2021)
(Motion for Certificate of Appealability)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RODRECUS SMITH,	)	
Petitioner-Appellant,	)	
	)	
v.	)	**No. 21-5618**
	)	
UNITED STATES OF AMERICA	)	
Respondent-Appellee.	)	

MOTION FOR CERTIFICATE OF APPEALABILITY

Under Rule 22(b)(1), Rodrecus Smith moves this Court to certify three issues.

1. Was Smith's guilty plea knowing and intelligent where everyone—the court, the prosecutor, defense counsel, and consequently Smith himself—misunderstood one of the elements of the offense?

2. Did Smith's lawyers provide ineffective assistance because they misunderstood the interstate-commerce element and hence failed to inform Smith about a valid commerce defense he had at trial—and because, moreover, they failed to find and identify readily-available impeachment evidence that would have strengthened that defense?

3. Did the district court abuse its discretion by denying relief without holding an evidentiary hearing?

Factual Background

To streamline the presentation, Smith will discuss, within this background section, legal developments crucial to understanding his claims.

A. Smith was charged with Hobbs Act violations based on the government's broad interpretation of *Taylor*.

In October 2013, Maurice Payne's federal probation officer found ammunition in Payne's home. (Payne Notice, R.21-1, PageID# 154.) On October 30, the probation officer reported this incident to the district court but recommended "no action," pointing out that "Mr. Payne has been employed at Tire Plus since October 2012." (*Id.* PageID# 155.)

On the night of October 30, Payne won some money playing dice at the home of Timothy Oglesby. (Presentence Report (PSR) at 8, No. 3:15-cr-147, R.739.)[1] As he left the game, he was robbed of all his money at gunpoint by petitioner Rodrecus Smith. (*Id.*) Just then, a man sped from the scene in a van, passing close to Smith. (*Id.*) Smith turned and fired the gun twice. (*Id.*) One bullet entered the van and killed Mario McKnight, who was in the back of the van, out of sight. (*See id.*) Smith fled. (*Id.* at 9.)

[1] Smith moved the district court to take judicial notice of the pleadings and documents filed in his underlying criminal case, No. 3:15-cr-147, and he likewise moves this Court to do so.

Later, Payne told police what he knew of the crime. (Payne Tr., R.24-2, PageID# 220.) Payne repeatedly said he wanted to help prosecute because McKnight was "like family". (*Id.* PageID# 228.) He said the following in a recorded interview that was not transcribed until 2021.

- He had come to the area to pick up laundry, and while waiting he saw the dice game and decided to join it. (*Id.* PageID# 222-23.)
- He thought he "won about $700," but he started with "about 400, 300 to 400" dollars, and so he was robbed of "probably about $1,200." (*Id.* PageID# 242.)
- He did not know the man who robbed him, even though he was robbed face-to-face and thought he could recognize a photograph of the robber. (*Id.* PageID# 225, 235, 258.)
- After the robbery, he demanded that others at the dice game tell him who the robber was, and one of them said it was "Lil Rod." (*Id.* PageID# 234-35, 259.)
- Even then, he didn't know who "Lil Rod" was. (*Id.* PageID# 234-35.)

About ten months later, federal authorities interview Payne again. (Payne ATF Int., R.21-2, PageID# 157.) For reasons unexplained by the agent's memorandum, Payne suddenly claimed the loss of a much bigger sum, claiming he

started with "approximately $1100 or $1,200 and won $4,000 to $5,000." (*Id.* PageID# 158.)

Another year and a half passed. In March 2016, federal agents interviewed Payne again, who this time said the following.

- As of October 2013, he sold marijuana and cocaine in sales of unstated frequency and magnitude.
- He resupplied himself with drugs about once each week.
- At the October 30 dice game, he did not possess or sell any drugs.
- Some of the money he gambled that day had been earned from selling drugs.
- He "won approximately $6,000" at dice.
- He would have spent about $4,000 of that $6,000 on drugs for resale.

(Payne Second Int., R.21-4, PageID# 162-63.) He did not claim to know Smith; did not claim to have any reason to think Smith knew him; and he did not claim to have any reason to think Smith targeted him for any reason other than to steal the money he had just won gambling. (*Id.*)

On June 6, 2016, the U.S. Supreme Court issued *Taylor v. United States*, 136 S. Ct. 2074 (2016). *Taylor* essentially held that because the Commerce Clause lets the federal government regulate drug dealing, it likewise lets the government punish, through the Hobbs Act, a robbery that "target[s] a [drug] dealer's drugs or illegal proceeds":

> [*Gonzales v.*] *Raich* established that the purely intrastate production and sale of marijuana is commerce over which the Federal Government has jurisdiction. Therefore, if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected.

Id. at 2080-81.

Later that month, Payne signed an affidavit, swearing to what he told the federal agents in March 2016. (Payne Aff., R.21-5, PageID# 164.) On June 29, 2016, the government got a superseding indictment charging Smith with three crimes that required the government to prove Smith's robbery of Payne was a violation of the Hobbs Act, *viz.*, Count 1 (Hobbs Act conspiracy), Count 2 (Hobbs Act robbery), and Count 3 (discharging a firearm during and in relation to a Hobbs Act robbery). (Superseding Indictment, No. 3:15-cr-147, R.95, PageID# 270-72.) It pursued the alleged Hobbs Act violations based on the following theory of commerce-clause jurisdiction.

- As of October 2013, Payne was a cocaine dealer.
- On October 30, Payne gambled drug proceeds.
- Although Payne started with less than $1,000, he ended with about $6,000.
- Payne would have spent about two-thirds of that money on drugs for resale.
- Smith did not have to know any of this about Payne; Smith only had to know he was robbing Payne of money; it sufficed that the money had

happened to come partly from drug proceeds and would be partly used by a drug dealer to buy drugs for resale.

(Gov't Trial Br., No. 3:15-cr-147, R.540, PageID# 1535; Joint Proposed Jury Instructions, No. 3:15-cr-147, R.583, PageID# 1720-21.) In other words, the government proceeded on a theory that interpreted *Taylor* as applying very broadly, such that, despite what *Taylor* said, it would *not* be necessary to "prove[] beyond a reasonable doubt that a robber *targeted* a [drug] dealer's *drugs or illegal proceeds*." *Taylor*, 136 S. Ct. at 2080-81 (italics added).

B. *Wang* foreclosed a broad interpretation of *Taylor*.

The vast majority of Hobbs Act robbery cases involve the robbery of a physical place of "business[] engaged in interstate commerce," such as a restaurant or retail store. *United States v. Wang*, 222 F.3d 234, 238 (6th Cir. 2000). Even if involving a small sum, such a robbery, because targeted at interstate commerce, can be "viewed in the aggregate" with other robberies targeted at such businesses, and can thereby be said to "substantially affect[] interstate commerce." *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 561 (1995)). And so, even though robbery is a "quintessential" state crime, *United States v. Perrotta*, 313 F.3d 33, 37 (2d Cir. 2002), robberies directed at interstate commerce can be punished by the federal government. "But where, as here, the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated," and thus presents

a special question. *Wang,* 222 F.3d at 238. Consider two situations that fall on each side of the jurisdictional divide.

First, consider the situation where the victim, who works in interstate commerce, is robbed away from the workplace, and is *not* targeted for commercial assets. In that case, the commerce element is not satisfied even when the robber takes assets that turn out to be tied to interstate commerce and even when the robbery turns out to disrupt interstate commerce by interfering with the victim's work. *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994) (employee robbed at home of assets and equipment that happened to be tied to business).

Second, consider the situation where the victim, who works in interstate commerce, is robbed away from the workplace *but is targeted for commercial assets*. In that case, the commerce element is satisfied because the robbery is essentially a robbery of a business. *United States v. Powell*, 693 F.3d 398, 399 (3d Cir. 2012) ("defendants determined . . . to rob business owners by following them from their retail stores to their homes, reasoning that there would be less security, fewer witnesses, and more money from the business in owners' houses than in their stores" since these particular owners were known to store business assets at home).

This Court's decision in *United States v. Wang*, 222 F.3d 234 (6th Cir. 2000) established the precedential principle that explains the line that divides *Collins* and

Powell. In *Wang*, Mr. and Mrs. Tsai operated the China Star restaurant. *Id.* at 236. Wang, a former employee of the China Star, knew the Tsais. *Id.* He broke into their home while they were at work and waited for them to come home. *Id.* They drove home in the evening after closing their restaurant, carrying "$1,200 from the cash register, $900 of which [Mrs. Tsai] intended to deposit in the restaurant's bank account the next morning." *Id.* Wang robbed them of that money, plus another "$3,000 that [Mrs. Tsai] had earlier withdrawn from her personal account." *Id.* Wang was convicted at trial of Hobbs Act robbery.

This Court, citing *Collins* and "reviewing the evidence in the light most favorable to the prosecution," held the evidence failed to establish the commerce element. *Id.* at 237, 238. It failed because, even though Wang knew the Tsais from the restaurant, the government had failed to show that the "connection between [the] individual victim and [the] business engaged in interstate commerce" was anything but "fortuitous." *Id.* at 239. That is, the government had failed to show that Wang was "motivated" to rob the Tsais due to their "connection to interstate commerce," *id.* at 240, unlike in *Powell* where the defendants "deliberately selected store owners as their victims, seeking to steal the stores' earnings and assets." *Powell*, 693 F.3d at 403. For all the *Wang* record showed (even when viewed in the light most favorable to the prosecution), Wang merely robbed his former employers because he thought they would have money. Thus, under *Wang*,

when the robbery is of an individual away from his or her workplace, the commerce element is not satisfied unless the defendant *targeted the victim due to the victim's connection* to interstate commerce and *for the purpose* of obtaining commercial assets.

When the *Taylor* Court held that drug dealers are protected from robberies under the Hobbs Act just like any other interstate-commerce business, it indicated this target/purpose principle was necessary to justify federal jurisdiction. In *Taylor*, the defendants had "committed a series of home invasion robberies targeting drug dealers" since, "[f]or obvious reasons, drug dealers are more likely than ordinary citizens to keep large quantities of cash and illegal drugs in their homes and are less likely to report robberies to the police." *Id.* at 2078. The *Taylor* Court emphasized the *targeting* of the victims due to their drug dealing and for the purpose of getting drugs or proceeds.

- The defendants "targeted the home of Josh Whorley, having obtained information that Whorley dealt 'exotic and high grade' marijuana" and thus they "expected to find both drugs and money in Whorley's home." *Id.* at 462.
- "If the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds," the commerce element is satisfied. *Id.* at 2080-81.

- "[T]he Government met its burden by introducing evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds." *Id.* at 2081.
- "By targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction." *Id.* at 462.

The *Taylor* Court closed by stating its holding was limited: "Our holding today is limited to cases in which the defendant *targets* drug dealers *for the purpose* of stealing drugs or drug proceeds." *Id.* at 2082 (italics added).

Wang foreclosed an interpretation of *Taylor* any broader than *Taylor*'s expressly limited holding. That is so because *Wang* makes the *targeting* of a victim due to interstate commerce status and *for the purpose* of stealing commercial assets necessary for federal jurisdiction. Indeed, under *Wang*, it does not suffice to simply know the victim has that status (as Wang knew the Tsais were restaurant operators) and to thus be able to surmise they might have those kinds of assets: the deliberate targeting of commercial assets is crucial. *See also Taylor*, 136 S. Ct. at 2080-82.

C. Defense counsel accepted the government's unacceptably broad interpretation of *Taylor*, thereby missing an important defense.

As Smith showed in more detail in the district court, the government adopted a broad interpretation of *Taylor* in its prosecution of Smith, and Smith's defense

counsel accepted that interpretation as accurate. (Pet. Reply, R.21, PageID# 138-43.)

The government stated its view of *Taylor* in its pretrial brief, stating:

> Here, [Payne] will testify that he was a cocaine dealer, and that he would have used a substantial portion of the cash that the defendant took from him in this armed robbery to purchase more cocaine for resale. Therefore, this robbery affected interstate commerce. . . . Here, the jurisdictional fact of the Hobbs Act is that [Payne] was a cocaine dealer and would have used the cash the defendant took in the robbery to obtain more cocaine for resale. *Those facts need not have been known by the defendant to establish his violation of the charged Hobbs Act offenses.*

(Gov't Trial Br., No. 3:15-cr-147, R.540, PageID# 1535-36 (italics added).) Simply put, the government asserted that the only requirement to satisfy the commerce element under *Taylor* was objective: if the victim happened to be a drug dealer, and if the robbery proceeds happened to be drugs or drug proceeds (or even proceeds from something else but earmarked for buying drugs for resale), then the commerce element was satisfied, even if the defendant was ignorant of those facts and consequently not motivated by those facts. Thus, the government renounced any requirement that it show the defendant targeted an interstate-commerce actor for the purpose of obtaining commercial assets.

Defense counsel accepted this view of *Taylor* as accurate. Counsel did not contest this point made by the government in its pretrial brief; counsel joined in with the government in submitting jury instructions amenable to the government's view of *Taylor*; and counsel let the government explain the law to the jury in

opening argument in these terms without objection. (Agreed Joint Instructions, No. 3:15-cr-147, R.583, PageID# 1720-21; Pretrial Hr'g Tr., No. 3:15-cr-147, R.755, PageID# 3327-28; Opening Arg. Tr., R.773, PageID# 3860, 3868.) Defense counsel thought their only hope of defending against the commerce element would be proving that Payne wasn't actually a drug dealer and the money stolen wasn't actually tied to drug dealing. (Bruno Aff., R.16-2, PageID# 119; Arnkoff Aff., R.16-1, PageID# 114.) In short, defense counsel thought the only defense to the commerce element was objective in nature (*viz.*, whether the stolen assets were in fact tied to drug dealing), not subjective (*viz.*, whether Smith targeted drug proceeds).

Due to this mistaken view of *Taylor,* defense counsel did not understand how far Smith's defense to the commerce element was advanced by two simple facts: (1) that Smith did not even know Payne, much less did he know he was a drug dealer who supposedly would spend his gambling winnings on drugs for resale (this is clear because Payne had no clue who Smith was even after learning he was "Lil Rod"; clearly, the two men simply did not know each other); and (2) that Payne had just won at gambling, which is what obviously made him a desirable target for a robbery. These two facts went very far to *affirmatively showing* that Smith probably targeted Payne simply to rob him of gambling winnings, rather than "target[ing]" Smith as a "drug dealer[] for the purpose of

stealing drugs or drug proceeds." *Taylor*, 136 S. Ct. at 2082. Thus, these two facts necessarily went far in stopping the government from proving the commerce element beyond a reasonable doubt.

Plus, there was substantial impeachment of Smith: (1) he had lied about the amount of money stolen (first he said it was $1,200, and he later said it was $6,000, and so one was a lie); and, (2) he lied about being lawfully employed (first he convinced his federal probation officer he was employed lawfully employed at a tire shop for a full year up to October 2013, and he later gave the impression he was simply a drug dealer, and so one was a lie). *See* pp. 2-4 *supra.* That is, the key witness about supposed drug proceeds was a demonstrable liar, who was motivated to lie to get "justice . . . for [his] friend." (Payne Tr., R.24-2, PageID# 222.) The foregoing facts and law added up to a strong commerce-clause defense that could be presented to the jury and, failing there, in a Rule 29 motion.

Notably, defense counsel never even got the readily-available proof showing that Payne had lied either about being a drug dealer or having a job, and defense counsel never informed Smith that documents and the recorded interview conclusively proved Payne had lied about the money involved. (Pet. Reply, R.21, PageID# 149 & n.8; Smith Aff., R.24-1, PageID# 218.)

D. Defense counsel got Smith to plead guilty, dropping his commerce defense without getting any tangible benefit in return.

Smith wanted to stand trial. (Smith Aff., R.24-1, PageID# 218.) But midway through trial, his lawyers persuaded him, over his "resist[ance"], to plead guilty to all charges (*id.*), without getting any tangible benefit in return. (*See* Pet. Reply, R.21, PageID# 149-50.)

By pleading guilty, Smith would give up his commerce defense, which, if successful would have prevented a conviction on Counts 1 through 3 and a mandatory consecutive sentence on Count 3 of ten years. Due to defense counsel's erroneous understanding of the law (*see* pp. 11-13 *supra*), counsel did not explain the commerce element to Smith correctly and hence did not explain to him that he had a viable defense to that element. (Smith Aff., R.24-1, PageID# 218.) They gave him inaccurate advice, and they used that inaccurate advice and the fear they instilled in his mother to persuade him to plead guilty, getting nothing in return. (*Id.*)

When Smith pled guilty, no one corrected the view of the commerce element that had governed his litigation: namely, that the commerce element called for a strictly objective inquiry, and that consequently it would be satisfied even if Smith were ignorant of Payne's status as a drug dealer and even if he was not motivated to steal drugs or drug proceeds. (*See* Smith Aff., R.24-1, PageID# 218.) Indeed, it appears that everyone—the district court, the prosecutor, and defense counsel—all

subscribed to that view, as the government's position on the law went unchallenged at any point. (*See* pp. 12-13 *supra*.) Thus, Smith pleaded guilty based on a misunderstanding of the commerce element.

The district court imposed a total effective sentence of 34 years. (Judgment, R.736, PageID# 2753.)

When Smith appealed, new counsel filed an *Anders* brief, and this Court denied relief. *See United States v. Smith*, 2020 U.S. App. LEXIS 25854 (6th Cir. Aug. 13, 2020).

Smith timely filed a *pro se* motion for relief under 28 U.S.C. § 2255. (Motion, R.1, PageID# 1.) Upon appointment, counsel developed, *inter alia*, the foregoing claims through pleadings, and counsel expressly sought an evidentiary hearing to more fully prove the claims by, *e.g.,* questioning defense counsel, both of whom had submitted affidavits making various allegations. (Pet. Reply, R.21, PageID# 152.)

The district court denied relief without a hearing. (Op., R.25, PageID# 276.) With respect to the commerce element, it held that the commerce element is in fact a strictly objective test when it comes to the robbery of drug dealers, and so the prosecutor, defense counsel and the district court itself had made no mistake with respect to that element. (*Id.* PageID# 291-92.) Regarding the impeachment materials, the district court failed to address the fact that counsel didn't obtain the

proof of Payne lying about how he normally earned his money. (*See id.* PageID# 296.) And the district court faulted Smith personally for not figuring out himself that Payne had lied about the money involved since documents and a video in discovery established those lies. (*Id.*) The district court declined to certify any issue for appeal. (*Id.*)

Legal Argument

To obtain a certificate of appealability (COA) on certain issues, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner of that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

I. The commerce issue is central to the first two issues up for certification.

If, as Smith claims, everyone at the plea hearing misunderstood the law on the commerce element of the Hobbs Act charges, then it is clear his plea was not knowing and intelligent. *See Bousley v. United States*, 523 U.S. 614, 618 (1998); *Waucaush v. United States,* 380 F.3d 251 (6th Cir. 2004) (holding plea unintelligent when defendant admitted interstate-commerce element based on everyone's mistaken belief about the law regarding that element). And if, as Smith claims, defense counsel misunderstood the commerce element and hence failed to

recognize that he did in fact have a strong defense to that element, it is clear they failed to give him "competent advice" regarding an element of the offense. *Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012); *Smith v. United States*, 348 F.3d 545, 553 (6th Cir. 2003) (defense counsel must at least "review the charges with [the defendant] by explaining the elements necessary for the government to secure a conviction [and] discuss the evidence as it bears on those elements[.]"); *Byrd v. Skipper*, 940 F.3d 248, 253-54, 257-58 (6th Cir. 2019) (holding that counsel's "lack of comprehension regarding the pertinent law" and his resulting "inaccurate advice" about the viability of a trial defense "is sufficient to deem [counsel's] performance constitutionally inadequate."). It is also clear that counsel's inaccurate advice on that point was prejudicial since Smith personally wanted to stand trial and since the guilty plea garnered nothing tangible in exchange. *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985).

So the central question is whether the strictly objective view of the commerce element in *Taylor* was correct. For brevity's sake, Smith will not explain again why that view is incorrect. (*See* pp. 7-11 *supra; see also* Pet. Reply, R.21, PageID# 135-144.) But, simply put, if there were no requirement of a subjective showing of targeting or purpose—if there were no requirement that the defendant *targeted* the victim *as a person engaged in interstate commerce for the purpose of commercial assets*—then the reach of the Hobbs Act would be virtually

unlimited, and it would cover the robbery of the victims in *Collins* and *Wang*, but *Wang* has held, in published precedent, the opposite.

Yet the district court disposed of Smith's claims by saying that, no, the strictly objective view of the commerce element is correct for drug dealers, as supposedly proven by *United States v. Vichitvongsa*, 819 F.3d 260 (6th Cir. 2016). (Op., R.25, PageID# 291-92.)[2] In *Vichitvongsa*, the defendants robbed two drug dealers in their respective homes. When undertaking the first robbery, the defendants "believed [the home] contained hundreds of thousands of dollars and several kilograms of cocaine." *Id.* at 265. When undertaking the second, they believed the home contained "$300,000" and "extensive amounts of marijuana." *Id.* Thus, in *Vichitvongsa*, the targeting/purpose requirement was satisfied, and this Court could not, by sustaining their convictions, overrule *Wang*'s holding that requires targeting or purpose when a person is robbed away from the workplace. Indeed, the drug dealers' homes in *Vichitvongsa* were seen as instrumental work sites (e.g., the place where the business owner stored his profits and supplies), and

[2] Undermining this stance, the district court also suggested that a lawyer could only be expected to correctly understand *Wang* and *Taylor*'s requirement of showing a targeting or purpose if the lawyer were "ensconced in the calm environment of an Ivory tower" and looking at the legal issue in retrospect, like a "'Monday morning quarterback.'" (Op. R.25, PageID# 291.) But a defense lawyer is not always standing in a courtroom. Part of the job is to sit in one's office (the "Ivory tower") and read case law in order to accurately inform a client of the elements of the offense. *Smith*, 348 F.3d at 553. And there is nothing retrospective about the analysis here because *Wang* and *Taylor* predated Smith's indictment.

thus the robberies were no different than robberies of, for example, a commercial warehouse, which is plainly covered by the Hobbs Act.

Moreover, *Vichitvongsa* predated *Taylor*. *Taylor,* as explained above (pp. 10-11), emphasized the importance of a showing of targeting or purpose. Nothing *Vichitvongsa* said could undercut that aspect of *Taylor*, especially since its dicta on that point would be issued without the benefit of *Taylor*'s guidance.

Finally, what *Vichitvongsa* did say is underwhelming. It said that *Wang*'s principles are not controlling when the victim, *like the victims in that case*, is a "drug dealer who can be 'legitimately characterized as engaged in business'" at the time of the robbery. *Vichitvongsa,* 819 F.3d at 271. The victims in *Vichitvongsa* were just like the victims in *Powell, supra*: although they conducted retail business outside the home, they were known to use their homes to store important commercial assets, and hence they were still "engaged in business" when robbed at home. *Id.* By making its point about the drug dealers in the case before it, *Vichitvongsa* did not somehow abrogate the holding in *Wang,* which of course it could not do since *Wang* preceded it. Nor did it abrogate *Taylor*'s not-yet-issued and superior guidance regarding targeting and purpose. The district court erred to give *Vichitvongsa* such controlling significance.[3]

[3] AUSA Wehby, who litigated both *Vichitvongsa* and Smith's § 2255 case, refrained from ever claiming *Vichitvongsa* had any bearing at all on Smith's case.

At a minimum, reasonable jurists could certainly debate how *Wang*'s principles apply in the context of robberies of drug dealers. Accordingly, reasonable jurists could likewise debate whether Smith's guilty plea was entered knowingly since it was entered based on everyone's misconception of the commerce element. Similarly, reasonable jurists could likewise debate whether Smith's defense counsel was ineffective for failing to understand the viable defense he had based on the commerce element—and also based on the undeniable fact that Payne and Smith didn't know each other, and Payne was a robbery target due to winning at gambling. Finally, reasonable jurists could debate whether appellate counsel was ineffective for missing the viable issues based on the commerce clause. *See Sylvester v. United States*, 868 F.3d 503, 511 (6th Cir. 2017) (finding appellate counsel performed deficiently under *Strickland* for only vaguely raising, rather than specifically raising, a meritorious claim).

II. For an additional reason, the Court should certify the claim of ineffective assistance of trial counsel.

As mentioned, at a minimum, defense counsel must "discuss the evidence as it bears on th[e] elements" of the charged offenses. *Smith*, 348 F.3d at 553. Here, defense counsel failed to do so when they failed to explain that Payne had given seriously conflicting statements about the money robbed from him, saying one thing in the initial recorded interview and worse things in the later interviews with federal agents that were reduced to memoranda. In the same vein, defense counsel

also failed to investigate because they failed to uncover—from the publicly accessible file for Payne in the district court's PACER site—the supervised-release violation petitions showing that Payne had told his probation officer and the prosecutor two different and significantly contradictory stories about his normal source of money as of October 2013. *See Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Combs v. Coyle,* 205 F.3d 269, 288 (6th Cir. 2000).

Each of these facts would significantly undermine the credibility of Payne's claim about the nature of the money stolen from him on October 30. Thus, each of these facts would significantly advance a defense to the commerce element—even if the district court, government, and defense counsel were correct that it calls for a strictly objective inquiry. These failures by counsel were deficient performance. *Id.* They were also prejudicial because the undiscovered and unremarked evidence could support a significant defense, meaning that there is a reasonable probability that Payne, who resisted pleading guilty and who got nothing tangible from pleading guilty, would have decided to stand trial had he been informed he could defend himself by attacking Payne's claims about the money. *See Hill*, 474 U.S. at 59-60.

The district court rejected this claim. But it failed to even address Smith's point about Payne's supervised-release petition, leaving that point utterly unrebutted. As for the Payne's contradictory statements, the district court said it

would "presum[e]" that Smith would have learned of those through an independent review of discovery. (Op. R.25, PageID# 296.) But that presumption is especially unsound because Payne's initial interview was only in the form of a recorded interview (*see* Notice of Filing, R.24, PageID# 216, 274), and it is not safe to presume Smith could review a recording in pretrial detention. Plus, it is the lawyer's job to identify evidence bearing on a defense, not the defendant's.

Finally, the district court suggests this impeachment evidence of Payne can't be considered significant because Payne could already be impeached for having a criminal history for drug dealing. (Op., R.25, PageID# 296.) That is beside the point. Part of the government's case was precisely that Payne was a drug dealer; the impeachment materials at issue were significant because they showed Payne might have lied to claim he was a drug dealer with drug proceeds as of October 2013. Similarly, the district court suggests that, because the due process clause doesn't require a prosecutor to disclose impeachment evidence before a defendant pleads guilty, defense counsel is somehow absolved of the duty, mid-trial, to explain any viable defense to the defendant as part of a guilty-plea calculation, including a defense that involves impeaching a witness. (*Id.* PageID# 296 (citing *United States v. Ruiz,* 536 U.S. 622, 629 (2002).) That suggestion, however, compares apples to oranges, and has no footing in the law on ineffective assistance of counsel.

The Court should grant a certificate on the second issue for this independent reason.

III. The Court should certify the issue regarding an evidentiary hearing.

Smith's claims turned on certain factual premises.

1. His lawyers believed the commerce element called for a strictly objective analysis, and they advised Smith accordingly.

2. His lawyers were unaware of Payne's supervised-release petition and its usefulness for impeachment.

3. His lawyers didn't tell Smith about, and perhaps didn't even notice, the contradictions in Payne's initial story and his ultimate story.

4. His lawyers had to persuade Smith, even pulling his mother into the effort, in order to get Smith to plead guilty mid-trial.

It seems the district court aimed to resolve Smith's petition without a hearing by assuming all of these premises were correct. Smith agrees that they are all correct, and he believes he proved them, and so he believes the best course is for this Court to assume they are correct and to grant relief on that record.

But, in the alternative, Smith had sought, and still seeks, an evidentiary hearing insofar as these premises were not fully accepted—*e.g.*, when the district court presumed Smith personally would have recognized the contradictions in Payne's initial story and his ultimate story. Because the district court has made that

presumption and perhaps others against him (recall that the district court believed the commerce-clause analysis is an instance of Monday morning quarterbacking, when there would seem to be no factual basis for that belief), it was an abuse of discretion to deny relief without an evidentiary hearing.

One final matter bears addressing in this context. In the plea colloquy, Smith admitted to this assertion made by the government: that he "knew and believed Maurice Payne . . . was a drug dealer who frequently used drug proceeds to play in these dice games." (Plea Tr., No. 3:15-cr-147, R.711, PageID# 2604.) That was not true; Smith had no such knowledge or belief, and he agreed to it only to go along with plea process. Smith has submitted a sworn affidavit saying at "at the time the robbery was committed, [he] didn't know Payne and didn't know he was a drug dealer and didn't know he was a person who often had drug proceeds." (Smith Aff., R.24-1, PageID# 218.) His sworn assertion finds significant circumstantial support in the undeniable fact that Payne had no clue who Smith was, even after learning he was called Lil Rod, and that Payne was an obvious robbery target not due to supposed drug dealing but rather due to having just won at dice. Yet the district court held that putative admission to knowing Payne's identity and his supposed vocation against Smith without holding an evidentiary hearing to determine whether his sworn affidavit was in fact correct, as circumstantial evidence indicated. (Op., R.25, PageID# 295-96.) It was an abuse of discretion to

resolve that factual dispute against Smith without a hearing. *Martin v. United States*, 889 F.3d 827, 832-33 (6th Cir. 2018) (so holding where petitioner's sworn allegations were not inherently incredible and were supported by circumstantial evidence).

Nonetheless, Smith should make it entirely clear that his position is that his plea-colloquy admission of that putative knowledge makes no difference. (*See* Pet. Reply, R.21, PageID# 145-46 & n.7.) Even if he really did know Payne was a drug dealer who often had drug proceeds, he would be no different from the defendant in *Wang* who, as a former employee of the victims, knew they were restauranteurs and hence frequently had commercial assets. Despite that putative knowledge, the record nonetheless fell short of establishing that Smith targeted Payne as a drug dealer for the purpose of getting drugs or drug proceeds, as required under *Wang* and *Taylor*. That is, even assuming this inaccurate admission was accurate, the commerce clause would not be satisfied. Nonetheless, if this inaccurate admission were deemed significant, an evidentiary hearing would be necessary to determine whether it was in fact inaccurate and what role his lawyers and the prosecutor played in procuring it.

CONCLUSION

Rodrecus Smith seeks only the restoration of his right to trial. His lawyers, misunderstanding the elements of the Hobbs Act offenses and overlooking

important impeachment evidence, gave him inaccurate advice and persuaded him to plead guilty in exchange for nothing. The Court should certify these issues for appeal.

Respectfully submitted,

s/ *Michael C. Holley*
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Counsel for Rodrecus Smith

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2021, I electronically filed the foregoing *Motion for Certificate of Appealability* with the Clerk, U.S. Court of Appeals for the Sixth Circuit, by using the CM/ECF system, which will send a Notice of Electronic Filing to the following: Philip H. Wehby, Office of the U.S. Attorney, 110 Ninth Avenue, South, Suite A-961, Nashville, TN 37203.

s/ *Michael C. Holley*
MICHAEL C. HOLLEY

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(2)(A), Federal Rules of Appellate Procedure, I certify that this motion contains 5,839 words. In certifying the number of words in the brief I have relied on the word count of the word-processing system used to prepare the brief. I have filed a motion to accept this motion exceeding 5,200 words.

s/ *Michael C. Holley*
MICHAEL C. HOLLEY

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 3:15-CR-00147
	)	CHIEF JUDGE CRENSHAW
[3] RODRECUS M. SMITH	)	
a/k/a LIL ROD	)	

UNITED STATES' TRIAL BRIEF

I. Introduction. This case arises out of the robbery of M.P. and the homicide of Mario McKnight which occurred on October 30, 2013 on Argyle Avenue, in the Edgehill area of Nashville. McKnight's death ultimately lead to multiple shootings and other violent crimes in and around the JC Napier public housing development in Nashville. The investigation was largely conducted by ATF agents and MNPD officers, and involved substantial grand jury investigation. All other defendants in this case have pled guilty, leaving Smith as the sole defendant.

II. Statement of Charges

Rodrecus Smith, a/k/a Lil Rod is charged with the following counts:

Count One- conspiracy to commit Hobbs Act robbery, in violation of Title 18, United States Code, Sections 1951 and 2.

Count Two- Hobbs Act robbery, in violation of Title 18, United States Code, Sections 1951 and 2.

Count Three- using, carrying, brandishing, and discharging a firearm during a Hobbs Act robbery, resulting in the death of Mario McKnight, in violation of Title 18, United States Code, Sections 924(c)(1)(A), 924(j), and 2.

Count Four- felon in possession of ammunition, in violation of Title 18, United States Code, Sections 922(g)(1) and 924.

Count Five- witness tampering, in violation of Title 18, United States Code, Section 1512(b)(3).

III. Statement of the Facts - The following is a brief synopsis of the facts surrounding the charges. Not all facts or evidence is included herein. Rather, this is meant to be a general overview.

On October 30, 2013, M.P. was at a high-stakes dice game outside T.O.'s home on Argyle Avenue in Nashville, Tennessee. Such dice games frequently occurred at that location, and those dice games were often frequented by people known to be drug dealers. M.P., who routinely played in the dice games, was in fact a drug dealer and had brought cash to that dice game. Part of that cash was proceeds from M.P.'s drug dealing. M.P. won over $5,000 cash at the dice game, and would have invested a substantial amount of that cash into obtaining more controlled substances for resale.

Rodrecus Smith, a/k/a Lil Rod, arrived at that dice game, and specifically targeted M.P. for an armed robbery. Smith brandished a firearm with an extended magazine, robbed M.P. of several thousand dollars in cash, and ordered others to remain where they were, rather than interfering with this armed robbery.

Mario McKnight, a/k/a Rio, was in the area of that armed robbery to pick up his dry-cleaning from M.F., who was using a van for those deliveries. While the defendant was robbing M.P., McKnight got into the back of that van, and urged M.F. to leave the robbery area, apparently because McKnight had seen the robbery. M.F. began to drive away from the scene with McKnight in the back, and passed near the defendant. Smith then intentionally shot at the van as M.F. and McKnight were trying to leave the area of the robbery. One bullet penetrated the side of the van, and struck McKnight. Martez Parham, who was at the scene of the robbery with C.M. in a Nissan Murano, then immediately drove an armed Smith away from the scene of this robbery and shooting, enabling Smith to keep the robbery proceeds, avoid arrest, and prevent the seizure of the firearm and the ammunition within that firearm.

M.F. realized Mario McKnight had been shot in his van, parked the van a few blocks away from the scene of the robbery, tried to render emergency aid to McKnight, and called 911. Metro Nashville Police Department (MNPD) officers responded, and found McKnight in the back of the van. An autopsy determined that McKnight was killed by a gunshot wound to the torso, and listed the cause of death as homicide.

The MNPD Identification Unit collected the following evidence from the person of McKnight: (1) $2,091 cash (located in his right front pocket and in his bottom right pocket); (2) approximately 3.5 grams of crack cocaine (located in his anal cavity); and (3) McKnight's clothing and wallet. It should be noted that McKnight had a criminal history and had recently been released from prison. The defense has advised the United States that they would not introduce evidence of McKnight's past conduct or convictions, but may attempt to elicit testimony about what was seized at the scene.

M.F. told police where the shooting had occurred on Argyle Avenue. Officers responded to that location, and found two FC 9mm Luger casings. A qualified ATF interstate nexus expert determined that this ammunition was not manufactured in the State of Tennessee, and so had been possessed in and affecting interstate commerce.

Smith and Parham were both previously convicted felons at the time of the above described robbery and shooting, and their conduct was within the investigative and criminal jurisdiction of the United States since the armed robbery of M.P., a drug dealer, had at least the potential to affect interstate commerce, and the use and possession of firearms and ammunition by previously convicted felons violates federal law.

In the weeks after this robbery and shooting, Smith threatened to harm or kill T.O., the resident at the location where the robbery and shooting occurred, in an effort to intimidate T.O. from cooperating with law enforcement authorities regarding the events described above.

Smith was indicted in March, 2014, on state robbery and homicide charges based on these events. The U.S. Marshal's Fugitive Task Force conducted a fugitive investigation and attempted to arrest the defendant at a residence in May, 2014. The defendant successfully fled from those officers, but was eventually arrested in June, 2014, hiding in a closet under a comforter at his cousin's residence.

IV. Elements of the Charged Offenses

The parties have jointly submitted an agreed complete set of jury instructions, which contain the elements of the offenses. The United States has also submitted additional proposed jury instructions. These additional instructions relate to the lesser included offense for Count Three, *i.e.*, a firearms offense *not* resulting in death, and an instruction on flight and consciousness of guilt.

V. Stipulations

Based on discussions with defense counsel, the United States anticipates that the parties will enter into stipulations regarding: (1) the defendant's status as a felon, and (2) the interstate nexus of the recovered ammunition. The United States has provided those stipulations to defense counsel to be signed by the defense.

VI. Potential Legal Issues

A. The United States need not prove the defendant intended to kill McKnight or anyone else.

18 U.S.C. §924(j) provides that a person who, in the course of a violation of 18 U.S.C. §924(c), causes the death of another person through the use of a firearm, shall be

punished by death, imprisonment for any term of years, or life imprisonment if the killing is a murder as defined in 18 U.S.C. §1111. Section 1111 provides that murder is the unlawful killing of a human being with malice aforethought, and classifies murder as being either first or second degree murder. First degree murder includes any kind of willful, deliberate, malicious, and premeditated killing *or* any murder committed in the perpetration or attempted perpetration of any robbery, which includes the escape phase immediately after the robbery. 18 U.S.C. §1111(a); *United States v. Smith*, 915 F.2d 1574 (6th Cir. 1990)(escape phase is part of the actual robbery). Any other murder is murder in the second degree, which includes a killing resulting from callous disregard for human life. 18 U.S.C. §1111;.*United States v. Chagra*, 807 F.2d 398, 402 (5th Cir. 1986)("The first error is said to be the instruction that malice aforethought included 'an intent willfully to act in callous and wanton disregard of the consequences of human life'; that the court's instruction did not demand proof of intent to kill but only reckless acts causing the death of another. This, however, is the correct definition of malice."); Fifth Circuit Pattern Jury Instruction, 2018, 2.52 Murder (Second Degree)(18 U.S.C. §1111).

Here, the defendant's killing of Mario McKnight was first degree murder under the felony murder rule contained in 18 U.S.C. §1111 because it was committed while he was robbing and attempting to leave the robbery scene with the robbery proceeds. The defendant's killing of McKnight was also at least second degree murder because he exhibited a callous disregard for life when he intentionally fired and struck the van driven by M.F. The bullet strike was about one foot from the driver's seat occupied by M.F., and penetrated the van. M.F could have been killed by the defendant; Mario McKnight was actually killed by the defendant. Additionally, at least one child, as well as other adults

were in the immediate vicinity when the defendant shot, thereby further demonstrating the defendant's callous disregard for life.

The discharge of a firearm need not be intentional to violate Section 924(c). *United States v. Dean*, 556 U.S. 568, 576 (2009)("An individual who brings a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally." Section 924(c) "requires no separate proof of intent" and a discharge of a firearm, either "on purpose or by accident" violates that statute).

The defendant may attempt to claim that he shot his firearm in self-defense out of fear that the van might hit him. That, however, is not a legally viable defense, and should not be permitted by the Court. *United States v. Thomas*, 34 F.3d 44, 47-48 (2d Cir. 1994)(undercover officer was killed by defendants who tried to rob him in a drug-related robbery: "defendants were not entitled, as a matter of law, under the circumstances, to relay on the defense of self-defense" because "their need to defend themselves arose out of their own armed aggression" even if the undercover officer was the first to draw his gun and the defendant believed that the undercover officer would have killed the defendant.). *See United States v. Poindexter*, 942 F.2d 354 (6th Cir. 1991)("Self-defense, however, is not relevant in determining whether a defendant used or carried a firearm under section 924(c). 'Use' and 'carry' have been broadly construed to cover... ready access to a firearm in a place where drug trafficking occurs."). *See, e.g., United States v. Sloley*, 19 F.3d 149, 153 (4th Cir. 1994)("As a matter of law, 'self-defense is irrelevant to a section 924(c) violation.'"); *United States v. Johnson*, 977 F.2d 1360, 1378 (10th Cir. 1992)("[O]nce the association between the use of firearms and drug trafficking is shown, any additional finding that self-defense motivated use of the firearms is not relevant to a conviction under

§ 924."). This rule also makes common sense – robbers often have firearms to intimidate others into complying with their robbery demands, rather than intending to shoot the victim of the robbery. But if the robber's original plan goes awry and someone at the scene of the robbery resists, the robber may end up firing his gun and injuring or killing another person, just as the defendant did in this case. Therefore, the defendant cannot be permitted to claim some sort of self-defense in this case under the theory that he thought he was going to be struck by the van in the course of committing the armed robbery of M.P.

Therefore, the defendant caused the death of Mario McKnight, and that killing was first degree murder, even if he did not mean to shoot, and even if he did not even know that McKnight was in the van, since he discharged the firearm and caused that death during the perpetration of a robbery and his effort to escape from that area. Here, the defendant robbed M.P. at gunpoint, warned others not to interfere in the robbery or his escape from that scene, and intentionally discharged that firearm at the van, resulting in McKnight's murder. Whether first or second degree murder, the killing of Mario McKnight by the defendant is murder as defined by Section 1111, and the defendant is subject to up to life imprisonment, regardless of whether the jury determines it was a first or second degree murder.

B. The United States need not prove the defendant intended to have any effect on interstate commerce.

Here, M.P. will testify that he was a cocaine dealer, and that he would have used a substantial portion of the cash that the defendant took from him in this armed robbery to purchase more cocaine for resale. Therefore, this robbery affected interstate commerce. *United States v. Taylor*, 136 S.Ct. 2074, 2080 (2016)("It therefore follows as a simple matter of logic that a robber who affects *or* attempts to affect even the intrastate sale of

marijuana grown within the State affects *or* attempts to affect commerce over which the United States has jurisdiction.")(emphasis added). *See also, United States v. Feola*, 420 U.S. 671, 677 n. 9 (1975)(prosecution need not prove that jurisdictional elements are committed with a particular *mens rea*; "[t]he existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.") This would include proof of the Commerce Clause element, such as in a Hobbs Act prosecution. *United States v. Staszcuk,* 517 F.2d 53, 59 (7th Cir. 1975)(Hobbs Act extortion case, citing *Feola:* the prosecution need not prove that a Hobbs Act extortion was actually intended to obstruct or affect interstate commerce; the Commerce Act element of the Hobbs Act is jurisdictional, and so need not be known or intended by the defendant.) Here, the jurisdictional fact of the Hobbs Act is that M.P. was a cocaine dealer and would have used the cash the defendant took in the robbery to obtain more cocaine for resale. Those facts need not have been known by the defendant to establish his violation of the charged Hobbs Act offenses.

C. Flight and Continued Efforts to Tamper with Witnesses are admissible to prove consciousness of guilt.

a. Flight and efforts to evade arrest: Evidence of a defendant's flight and efforts to evade arrest are admissible to prove consciousness of guilt. *See United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); *United States v. Dillon*, 870 F.2d 1125 (6th Cir. 1989). The United States has submitted a proposed jury instruction on this subject.

Here, the defendant was indicted in March 2014 for state offenses relating to the robbery of MP and the homicide of McKnight. The U.S. Marshal's Service Fugitive Task Force sought the defendant on those warrants beginning in April, 2014, and had communication with the defendant's mother and other associates in their efforts to locate and

arrest the defendant. Eventually, Task Force officers went to a residence on May 5, 2014 to arrest the defendant, but he successfully fled on foot. Task Force officers then learned that the defendant was at another residence on June 18, 2014. They knocked and announced, leading a female resident to answer the door. The officers learned that the defendant was in the residence, and found him hiding under some covers in a bedroom closet. The defendant would not show his hands to the arresting officers, and passively resisted their efforts to handcuff him.

b. Recent recorded jail calls by Smith: Spoliation evidence such as efforts to prevent witnesses from cooperating with the prosecution or seeking a witness's absence from trial shows consciousness of guilt and is admissible in evidence. *United States v. Fortson*, 194 F.3d 730 (6th Cir. 1999); *United States v. Mendez-Ortiz*, 810 F.2d 76 (6th Cir. 1986). "[S]poliation evidence, including evidence that defendant attempted to bribe and threatened a witness, is admissible to show consciousness of guilt," and "[b]ecause spoliation evidence tends to establish consciousness of guilt without any inference as to the character of the spoliator, its admission does not violate Rule 404(b)." *Mendez–Ortiz*, 810 F.2d at 79; *see also, United States v. Copeland*, 321 F.3d 582, 598 (6th Cir.2003) (citing *United States v. Okayfor*, 996 F.2d 116, 120 (6th Cir.1993)) ("[E]vidence that has the tendency to demonstrate a defendant's consciousness of wrongdoing is admissible to establish the defendant's guilt."). Further, because such evidence is not subject to Rule 404(b), it is also unnecessary for the district court to determine whether the threat actually occurred. See *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir.1991) ("The claim that the district court was required to make a finding that the threat occurred before admitting the evidence is without merit. There is no general rule that a judge must believe evidence to be true prior to

allowing evidence in."). Thus, so long as the probative value of such threats is not substantially outweighed by its prejudicial effect, evidence of threats against witnesses is generally admissible. *Copeland*, 321 F.3d at 597; *United States v. Smith*, 139 Fed.Appx. 681 (6th Cir. 2005).

Here, the United States has located and disclosed recorded jail calls from July 2018, in which the defendant, in effect, tells others to tell T.O. and M.L., who was also at the scene of the robbery and had seen the defendant, not to cooperate in his prosecution. These calls were made by the defendant to his sister, who then relayed or "three-wayed" the calls to others. The defendant then told those recipients to tell T.O. and M.L. to "fall back," "keep that shit real," and "keep it 100," which the witnesses involved in those calls (including the defendant's sister), and the intended recipients of those messages have advised they understood to be requests by the defendant that they not provide truthful testimony in this prosecution. Thus, these calls demonstrate the defendant's continued efforts to prevent witnesses from testifying truthfully at his trial, and are admissible as evidence of the defendant's consciousness of guilt,

Respectfully submitted,

DONALD Q. COCHRAN
UNITED STATES ATTORNEY
Middle District of Tennessee

s/ Sunny A.M. Koshy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been forwarded via the Court's Electronic Filing system to Lawrence Arnkoff and Paul Bruno, Counsel for Defendant Rodrecus Smith on October 26, 2018.

s/ Sunny A.M. Koshy
SUNNY A.M. KOSHY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RODRECUS M. SMITH	)	
	)	
v.	)	Case No. 3:20-cv-00791
	)	Chief Judge Waverly D. Crenshaw, Jr.
UNITED STATES OF AMERICA	)	

DECLARATION OF RODRECUS SMITH

1. I, Rodrecus Smith, am over the age of eighteen and reside in federal prison at USP Hazelton in West Virginia. I am fully competent to testify to the facts contained within this affidavit. I was prosecuted in this Court in case number 3:15-cr-147.

2. During the third day of trial, my trial lawyers, Lawrence Arnkoff and Paul Bruno, urged me to plead guilty to all of the charges. They said I would have a better chance of getting a break at sentencing if I pleaded guilty. They said that the trial was just going to get worse and that I was going to lose the trial. They did not say there was any defense that they thought might work.

3. I wanted to continue with the trial. I resisted pleading guilty. My lawyers spoke to my mother, and then she spoke to me and told me I should take their advice and plead guilty. She said that based on what my lawyers said, she was worried that if I didn't plead guilty, she would never see me again outside of prison. Due to all of this pressure, I finally agreed to plead guilty.

4. Prior to trial, my trial lawyers and I spoke about whether this case should really be a federal case. One thing they told me is that it was a federal case because it involved the robbery of a drug dealer. But at the time the robbery was committed, I didn't know Payne and didn't know he was a drug dealer and didn't know he was a person who often had drug proceeds.

5. In my current case, my amended motion describes a case called *United States v. Wang*, 222 F.3d 234 (6th Cir. 2000). My trial lawyers did not tell me about *Wang*, and they did not describe it to me. If they had described *Wang* to me, I would have understood that I had a good defense to the idea of my case even being a federal case, and I would not have given in to the pressure to plead guilty. Instead, I would have continued with my plan to stand trial.

6. I'm also bothered that my lawyers failed to tell me that Maurice Payne could be impeached by showing that he had changed his story over time by changing the amount of money he had and by eventually adding the claim that his gambling winnings would be spent on drugs to resell. Those facts about impeachment also would have led me to not plead guilty.

7. Pursuant to 28 U.S.C. § 1746, I, Rodrecus Smith, declare under penalty of perjury that the foregoing is true and correct.

Apr. 20, 21
Date

Rodrecus Smith
Rodrecus Smith

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RODRECUS SMITH	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:20-cv-00791**
	)	**(Crim. Case No.**
UNITED STATES OF AMERICA	)	**3:15-cr-00147-3)**
	)	
Defendant.	)	

MEMORANDUM OPINION

Three days into his trial on charges relating to a Hobbs Act robbery and the resultant murder of Mario McKnight, Rodrecus Smith pled guilty to all of the charges against him in the Third Superseding Indictment (Doc. No. 570). Contending primarily that his trial lawyers were ineffective in many ways because, among other things, they: (1) did not understand or adequately explain to him the interstate nexus requirement of Hobbs Act robbery; (2) persuaded him to plead guilty without the requisite nexus; and (3) had him admit "damning" allegations regarding his intent, Smith, through appointed counsel, filed a "Supplemental Motion to Vacate, Set Aside or Correct Sentence in accordance with 28 U.S.C. § 2255" (Doc. No. 6). That Motion and Smith's *pro se* Motion to Vacate, Set Aside or Correct Sentence (Doc. No. 1), raising claims under Rehaif v. United States, 139 S. Ct. 2191 (2019) and United States v. Davis, 139 S. Ct. 2319 (2019), have been fully briefed by the parties. (Doc. Nos. 2, 6, 16, 21). For the reasons that follow, both motions will be denied without a hearing.

I. Background[1]

Initially charged with six others in a fourteen-count Superseding Indictment, Smith was charged in the Third Superseding Indictment with six counts. Specifically, he was charged with conspiracy to commit Hobbs Act robbery (Count One); Hobbs Act robbery (Count Two); using, carrying, brandishing, and discharging a firearm in a crime of violence resulting in death (Count Three); being a felon in possession of ammunition (Count Four); and two counts of intimidating a witness, or attempting to do so (Counts Five and Six). All of those charges stemmed from the robbery of a participant in an illegal dice game.

In 2013, Timothy Oglesby regularly ran high-stakes dice games outside his home on Argyle Avenue in the Edgehill area of Nashville, Tennessee. It was common knowledge in the area that drug traffickers used illegal drug proceeds to gamble in those games. Smith had previously been at some of those games. However, in mid-October, 2013, Oglesby asked Smith not to come around anymore because some of the participants were concerned about Smith's reputation as an armed robber.

On October 30, 2013, Maurice Payne participated in one of Oglesby's dice games, winning $5,000 in cash. Towards the end of the game, Smith and two friends arrived, but the friends decided to go Halloween shopping, and left the area. After the dice game broke up, Smith, armed with a large MAC or TEK style firearm,[2] robbed Payne of his winnings, which Payne had thrown on the ground in response to Smith's robbery demands. Smith also pointed the weapon at other people

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[1] The facts are drawn from the trial testimony and the statement of facts supporting Smith's guilty pleas.

[2] The weapon had an extended magazine capable of holding approximately 30 rounds.

present, warning that he would shoot them if they interfered with the ongoing robbery.

As the robbery was unfolding, Martin Frierson was across the street in a commercial dry-cleaning van that he used to pick up and deliver laundry to people in the area. McKnight was there to pick-up dry cleaning from Frierson but, seeing the robbery in progress, jumped into the van and told Frierson to drive off. As the van was passing by, Smith opened fire. McKnight, who was lying on the floor of the van, was struck.

Frierson heard McKnight exclaim that he had been shot, drove a few blocks, pulled over, called 911, and attended to McKnight's wound. Despite Frierson's efforts and those of responding emergency medical personnel, McKnight died from a bullet that struck his spleen, nicked his spine, and ruptured his aorta.

Smith fled by jumping into the back seat of a Nissan Murano driven by co-defendant Martez Parham. Later that evening Parham drove Smith to a gas station in Green Hills, where he got into a vehicle occupied by several others and disappeared.

In November 2013, Smith called Oglesby several times in an effort to keep him from cooperating with the authorities. In the initial calls, Smith told Oglesby to "keep it real," which Oglesby understood to be an instruction not to provide information to law enforcement. After these calls, Smith learned Oglesby had identified him in a photo spread, and told Oglesby that he would kill Oglesby, Payne, and Frierson in order to prevent Oglesby and the others from providing information about the robbery and homicide. Later, Smith told Oglesby that he would not kill him if Oglesby would kill Frierson and Payne.

In March 2014, Smith was charged in state court with robbery and homicide. He was not apprehended until he was found by the United States Marshal's Fugitive Task Force on June 18,

2014, hiding in a closet in a room containing a small child. The state charges were dropped in favor of federal charges.

In July 2018, Smith was in the Robertson County Detention Facility awaiting trial on the federal charges. While there, he made multiple recorded jail calls in an effort to convince potential witnesses from testifying. Three-way calls were placed through his sister, during which Smith asked Oglesby's son, Floyd Hughes, to tell his father to "fall back" and "keep this shit real." Smith also called Marco Lewis'[3] wife and told her to tell her husband to "keep that shit real," "keep that shit loyal man," and to "keep that shit 100."

As noted at the outset, Smith pled guilty mid-trial. At the sentencing hearing on October 24, 2019, the Government sought the life sentence that the advisory Guidelines suggested for a defendant with an offense level of 43, and a criminal history category VI. Smith argued that a downward variance to sentence in the neighborhood of twenty years would be appropriate because he had no idea McKnight was in the van, and he had been subjected to physical and emotional abuse at the hands of his father while a child. Ultimately, the Court sentenced Smith to 408 months' (34 years) imprisonment, as follows: 240 months on Counts One, Two, Five and Six, to run concurrently with each other; 120 months on Count Three, to run consecutively to all other counts; and 48 months on Count Four, also to run consecutively to Counts One, Two, Five and Six.

The Government's theory at trial was that Smith committed a Hobbs Act robbery because Payne was a drug dealer who was gambling drug proceeds and would have reinvested his winnings to purchase more drugs. It is this supposedly ill-conceived theory that serve as the basis for the bulk

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[3] Lewis was present during the robbery, knew both Smith and Parham, and would have been able to identify them.

of Smith's claims in his supplemental motion to vacate. First, however, the Court considers the motion filed by Smith *pro se*.

II. Initial Motion to Vacate or Correct Sentence

In his *pro se* motion, Smith makes three arguments: (1) Hobbs Act robbery is not a predicate crime of violence under Davis for purposes of Section 924(c); (2) he lacked the requisite knowledge under Rehaif for purposes of his felon in possession of ammunition conviction; and (3) counsel were ineffective because they "forced" him to plead guilty. None of these arguments have merit.

A. Hobbs Act Robbery Charge

The Supreme Court in Davis dealt with the residual clause of Section 924(c), which includes felonies "that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). This is distinct from the elements (or use of force) clause that increases punishment for 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." Id. The Supreme Court found the residual clause of section 924(c) unconstitutional, just as it had with the residual clause defining "crime of violence" under the Immigration and Nationality Act in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), and just as it had with the residual clause under the Armed Career Criminal Act in Johnson v. United States, 576 U.S. 591 (2015). None of this helps Smith, however.

Smith was charged with, and pled guilty to, Hobbs Act robbery. That crime "still qualifies as a crime of violence under § 924(c)(3)(A), which was unaffected by Davis." Bright v. United States, No. 20-6089, 2021 WL 1100448, at *1 (6th Cir. Feb. 4, 2021) (citing United States v. Gooch, 850 F.3d 285, 292 (6th Cir. 2017)). In other words, the Davis "decision left § 924(c)(3)(A)'s

elements clause definition of 'crime of violence' intact." United States v. Holmes, 797 F. App'x 912, 918 (6th Cir. 2019); see also, Porter v. United States, 959 F.3d 800, 802 (6th Cir. 2020) ("Both history and common sense suggest that robbery with a deadly weapon involves an element of physical force," and "[p]recedent holds the same.").

B. Felon in Possession of Ammunition Charge

In Rehaif, the Supreme Court held that "the word 'knowingly' [in Section 922(g)] applies both to the defendant's conduct and to the defendant's status" as a prohibited person. 139 S. Ct. at 2194. That is, the Government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it," id., such as being a convicted felon.

Rehaif was decided between the time that Smith pled guilty and his sentencing. However, after the Court acknowledged that decision at the sentencing hearing, the following exchanges between the Court and Smith occurred:

> THE COURT: But he still–so, Mr. Smith, I apologize. I should have done this earlier. You and your counsel have talked about the effect of a recent Supreme Court case that the government would have to prove you had knowledge of the fact you were a felon at the time you came into possession of this firearm. Correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you have the right to require the government to go back and to file a new indictment so that element, that essential element, would be in the indictment and presented to you in that fashion. Do you want to waive that right and proceed today with sentencing as it has to do with the felon in possession of ammunition?
>
> (Respite.)
>
> MR. BRUNO [Defense Counsel]: Your Honor, you can ask Mr. Smith himself. But he is willing to waive any issue related to that. He wants to move forward with the sentencing today.

THE COURT: All right. Is that true, Mr. Smith?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Anything else from the government on that one point?

MR. KOSHY [AUSA]: No, sir.

THE COURT: All right. Well, I think that takes care of the defect. And again, I apologize for not bringing that forward.

(Case No. 3:15-cr-00147-3, Sentencing Transcript at 144-5).

"[W]aiver is the intentional relinquishment or abandonment of a known right," United States v. Olano, 507 U.S. 725, 733 (1993), and a defendant can waive his right to be indicted on the knowledge element of Rehaif. United States v. Franklin, 834 F. App'x 233, 234 (6th Cir. 2021). As the above excerpts show, Smith waived his right to re-indictment under Rehaif. Furthermore, a guilty plea "cures all non-jurisdictional defects," United States v. Mendez-Santana, 645 F.3d 822, 828 (6th Cir. 2011) (citation omitted), and a Rehaif error is non-jurisdictional, United States v. Hobbs, 953 F.3d 853, 857 (6th Cir. 2020).

C. Voluntariness of Guilty Plea/Ineffective Assistance of Counsel

Smith argues that his trial counsel were ineffective because they "coerced [him] into a plea bargain," and "would not take 'no' for an answer." (Doc. No. 1-1 at 18). He further claims that he "wanted to proceed to trial," and that "had he gone to trial, his results would have been different and any reasonable fact finder would have seen that." (Id.). According to Smith, had he "been giving [sic] the opportunity to go to trial, [he] would have received more than likely a lesser sentence," but, instead, was given a "dummy deal plea bargain." Id. Leaving aside that Smith did go to trial but chose to abort the trial mid-stream, the record does not bear out his contentions.

"[G]uilty pleas must be entered knowingly, voluntarily, and intelligently in order to be constitutionally effective." Fitzpatrick v. Robinson, 723 F.3d 624, 639 (6th Cir. 2013) (citing Brady v. United States, 397 U.S. 742, 748 (1970)). "Such a determination is made after considering all of the relevant circumstances surrounding the plea or waiver." Id. "For a guilty plea to be valid, the defendant is required to understand the nature of the charges against him and the consequences of pleading guilty, including the possible punishments and loss of other rights." Id. Thus, "[t]he longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant," Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citation omitted), and a voluntary plea occurs when it is "entered by one fully aware of the direct consequences." Brady, 397 U.S. at 748.

As evidenced by the thorough plea colloquy, Smith was fully aware of the nature of the charges, the potential punishment, and the direct consequences of his plea. He also affirmatively stated that choosing to plead guilty was of his own volition. After informing the Court that he had plenty of time to discuss his plea with counsel and that he had no complaints about their services to that point, and after the charges and potential penalties and sentencing guidelines were fully explained to him, the following exchange occurred between the Court and Smith:

> THE COURT: All right. Mr. Smith, as you know, we're actually in the middle of your trial, and you have every right to let that trial proceed to verdict. As I've told you previously, you–and as you know already, you'll be here–you'll continue to be here to see all the evidence presented by the government and through your lawyers to challenge that evidence. And you'll make the determination and tell your lawyers, after considering their opinion, whether you want to testify or not testify. If you decide not to testify, I'll tell the jury when I give them the final instructions that you have a right–and you've already heard me tell them this in the preliminary instruction–you have a right not to testify, and if you choose not to testify, they cannot hold that against you, they cannot even consider it when they go back in your deliberations because you have an absolute constitutional right not to testify, if you

so choose. Any questions about that?

THE DEFENDANT: No, sir.

THE COURT: Also, if you proceeded through the trial and you were not successful, Mr. Smith, you would have an absolute right to go to the Court of Appeals and challenge that decision. And you could go to the Court of Appeals through your attorney and tell the Court of Appeals, the jury got it wrong and tell them why. You could tell them the Court made error and why. You could make whatever arguments you want, all toward the goal of having the adverse jury verdict of guilt set aside. But if I accept your guilty plea here today, you will not be able to go to a Court of Appeals, or for that matter any court, and say, I'm not guilty of Count Six. Your guilty plea on Count Six will be forever. Understood?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And what that means is you can't come back later today, you can't come back tomorrow, next month, or any time and say, "Judge, I've changed my mind. I think we need to proceed with the trial. I want to see this thing through." All of the things that you're entitled to a trial will be gone, and they're going to be gone forever. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And is that what you want to do?

THE DEFENDANT: Yes, sir.

THE COURT: And you've had enough time to think about it and decide this is what is in Mr. Smith's best interest?

THE DEFENDANT: Yes, sir.

(Case 3:15-cr-00147, Doc. No. 757, Plea Hearing at 91-93). After confirming that Smith had not had any drugs or alcohol in the preceding 24 hours, and confirming that Smith was not on any prescription medications, the following exchange regarding the voluntariness of the plea occurred:

THE COURT: Has anyone pressured you, other than yourself, to enter a plea of guilty here today?

THE DEFENDANT: No, sir.

> THE COURT: Has anyone threatened you that if you don't enter a plea something bad may happen to you, may happen to your family, may happen to your children, or may happen to anyone who's close to you?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: And are you telling me that you and you alone made the final decision to plead guilty to these six counts?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you did so after consulting with your lawyers and making up your own mind that this is what you wanted to do?
>
> THE DEFENDANT: Yes, sir.

(Id. at 93-94).[4] At the conclusion of the change of plea hearing, the Court found that there was a factual basis for the plea, that Smith waived his constitutional right to a trial, and that he pled guilty knowingly, intelligently voluntarily. (Id.. at 114).

"Solemn declarations in open court carry a strong presumption of verity," and "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 74 (1977). Thus, "where the court has scrupulously followed the required procedure [under Fed. R. Crim. P. 11], the defendant is bound by his statements in response to that court's inquiry. Ramos v. Rogers, 170 F.3d 560, 563 (6th Cir. 1999) (citation omitted). Smith's present conclusory assertions do not come close to overcoming the presumption of verity or show that he was coerced into pleading guilty. See Maldonado v. Campbell, No. 20-1345, 2020 WL 6194595, at *2 (6th Cir. Aug. 17, 2020) ("Maldonado's plea and

[4] Similarly, in a Plea Petition, signed under the pains and penalties of perjury, Smith averred that he was satisfied with counsels' representation to that point, and that he was pleading guilty "freely and voluntarily and of [his] own accord[.]" (Case No. 3:15-cr-00147, Doc. No. 610, Plea Petition at 4).

his express satisfaction with his counsel negates his subsequent claims that he pleaded no-contest due to his attorney's alleged promises or threats."); Curry v. United States, 39 F. App'x 993, 994 (6th Cir. 2002) ("Curry's conclusory allegations that his counsel misadvised him or pressured him to acknowledge his intent are subject to summary dismissal because they are unsupported by specifics and are wholly incredible in the face of the record.").

III. Supplemental Motion to Vacate or Correct Sentence

The bulk of Smith's Supplemental Motion is based upon the supposed interplay between the Sixth Circuit's decision in Wang v. United States, 222 F.3d 234 (6th Cir. 2010) and the Supreme Court's decision in Taylor v. United States, 136 S. Ct. 2074 (2016). According to Smith, "Wang foreclosed the government's broad interpretation of Taylor, which is something defense counsel failed to appreciate" (Doc. No. 21 at 6), with "the gist of his argument" being the following:

> Granted, when a defendant "targets drug dealers for the purpose of stealing drugs or drug proceeds," the commerce element of the Hobbs Act is satisfied, just as it is satisfied when a defendant targets any interstate-commerce business for robbery. But Smith targeted Maurice Payne for a robbery solely because Payne had won money gambling. Smith did not know Payne, and he did not rob him "for the purpose of stealing drugs or drug proceeds." At the time of Smith's trial, Sixth Circuit precedent made it clear that when such targeting is absent—i.e., when the robber does not target drug proceeds but instead robs money that only "fortuitous[ly]" turns out to be drug proceeds—the commerce element is not satisfied. But Smith's lawyers never explained that Wang principle to him. And Smith was prosecuted under the theory that no such targeting was required, but rather that it would suffice that Smith had robbed gambling winnings from someone who happened to be a drug dealer, who happened to frequently use drug proceeds to gamble, and who happened to intend to spend two thirds of his gambling winnings on drugs for resale. But that theory was wrong under Taylor and Wang. Under a correct understanding of Taylor and Wang, Smith had a sound defense to the commerce element of the Hobbs Act charges because he did not know Payne or anything about him except that he had just won at gambling, and his lawyers gave him deficient advice by telling him to plead guilty to all counts, rather than telling him he had a sound defense. For these reasons, his conviction is invalid, his plea was not knowing and intelligent, and he was provided ineffective assistance of counsel.

(Id. at 1-2) (citation omitted).

In the Court's view, Smith reads Taylor too narrowly and Wang too broadly. Wang involved the robbery of an individual at her home, who also happened to be a restaurant owner. According to the evidence introduced at trial, defendant had previously worked for the Tsais, who owned the China Star Restaurant in Cookeville, Tennessee. After closing the restaurant on September 11, 1995, Mrs. Tsai drove home, taking with her $1,200 from the cash register, $900 of which she intended to deposit in the restaurant's bank account the following morning. Upon arrival, Mrs. Tsai found defendant lurking in the bedroom, who then struck, threatened, and handcuffed her. Meanwhile, Mr. Tsai, who had driven separately from the restaurant, pulled into the garage and was attacked by defendant's accomplice. The duo made off with the $1,200 Mrs. Tai was carrying, along with $3,000 she had withdrawn from her personal account and left in an envelope on the dining room table.

After a bench trial, defendant was convicted of several crimes including Hobbs Act robbery, although "the district court expressed a certain level of discomfort with its conclusion" because "there [wa]s no evidence of an effect upon interstate commerce." Wang, 222 F.3d at 237. On appeal, the Sixth Circuit began by observing that, "[h]istorically, we have erected a rather low threshold for determining whether robbery directed at a business establishment will give rise to federal criminal jurisdiction." Id. at 237. The court also pointedly observed that "[t]his is not to say that criminal acts directed at private citizens will never create jurisdiction under the Hobbs Act," but "when the Government seeks to satisfy the Act's jurisdictional nexus by showing a connection between an individual victim and a business engaged in interstate commerce, that connection must be a substantial one–not one that is fortuitous or speculative." Id. at 239-40. Such was not the case

where defendant "robbed private citizens in a private residence of approximately $4,200, a mere $1,200 or which belonged to a restaurant doing business in interstate commerce." Id. at 240.

Taylor involved the home invasion robbery of marijuana dealers, with the question being what the government must prove to satisfy the Hobbs Act's commerce element when a defendant commits such a robbery. The answer to this question was "straightforward and dictated by [Supreme Court] precedent":

> We held in Gonzales v. Raich, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed. 2d 1 (2005) that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance. Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug theft. And since the Hobbs Act criminalizes robberies and attempted robberies that affect any commerce "over which the United States has jurisdiction," § 1951(b)(3), the prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. By targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction.

Taylor, 136 S. Ct. at 2077–78.

Smith appears to take Wang's requirement that the connection between an individual victim and interstate commerce be "substantial" and not "fortuitous or speculative" and graft it onto Taylor's requirement that a drug dealer be "targeted" to arrive at the conclusion that he did not commit a Hobbs Act robbery because he did not know that Payne was a drug dealer. All he knew was that Payne had made money gambling, and he robbed him of those winnings. Merely because Payne was a drug dealer gambling drug money is simply too fortuitous in Smith's view to support federal jurisdiction. Ignoring for the moment those are not the facts that Smith agreed to in his plea agreement and before the Court, Smith tortures and conflates the holdings of both Wang and Taylor.

As the Sixth Circuit in Wang made clear, its singular concern was with the personal robbery of an individual who just happened to be a business owner, with the court fully "anticipate[ing] . . . that the 'overwhelming majority' of Hobbs Act cases brought before the federal courts will continue to be ones in which the victims are businesses directly engaged in interstate commerce." Wang 222 F.3d at 240. Taylor, on the other hand, was merely a logical extension of Gonzales and, hence, "where a robber attempts to steal [drugs or drug] proceeds from a [drug] dealer, proof of such an attempt in itself supports the conclusion that the robber attempted to affect interstate commerce, and the robber is therefore convictable under the Hobbs Act." United States v. Lee, 834 F.3d 145, 152 (2d Cir. 2016). In other words, Taylor "establishes that, pursuant to its power under the Commerce Clause, Congress may proscribe violent conduct when such conduct interferes with or otherwise affects commerce over which Congress has jurisdiction," and this is true–in contrast to Wang– "even when the conduct itself has a 'minimal' effect on such commerce." United States v. Hill, 927 F.3d 188, 199 (4th Cir. 2019).

With this backdrop, Smith's assorted claims of ineffective assistance of counsel necessarily fail, particularly given the highly deferential standard of review set forth by Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To establish an ineffectiveness of counsel claim, a defendant must first show that counsel's performance was deficient: "[a]n attorney's performance is deficient if it is objectively unreasonable under prevailing professional norms." Hodges v. Colson, 727 F.3d 517, 534 (6th Cir. 2013). In this regard, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689. In fact, "[t]he Strickland Court held

that petitioner must show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Sylvester v. United States, 868 F.3d 503, 510 (6th Cir. 2017) (quoting Strickland, 466 U.S. at 687).

Under Strickland, "a defendant must [also] 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Lafler v. Cooper, 566 U.S. 156, 163 (2012) (quoting Strickland, 466 U.S. at 694)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Harrington v. Richter, 562 U.S. 82, 105 (2011). "In making this showing, '[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.'" Sylvester, 868 F.3d at 510 (quoting Strickland, 466 U.S. at 693). Rather, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

In a declaration, Smith avers that his "trial lawyers did not tell [him] about Wang," did not describe it to him, and claims that, if they had, he would have continued with the trial because he "had a good defense to the idea of [his] case even being a federal case[.]" (Doc. No. 29-1 at 1). This theme continues in both his supplemental memorandum and reply brief. In the former, he writes: "Just like the restaurant owner in Wang a drug dealer is a 'private citizen when not at work' . . . . And so just as in Wang, the robbery of Payne did not satisfy the commerce element to make the robbery a federal crime even assuming he regularly earned money by selling drugs." (Doc. No. 6 at 11) (internal citation to Wang omitted). In the latter, he again discusses Wang, reiterates that "'where, as here, the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated,' and thus presents a special question." (Doc. No. 21 at 6) (quoting Wang, 222 F.3d at 238). He then cites as examples two out-of-circuit cases that "fall on

each side of the jurisdictional divide." (Id.).

Safely ensconced in the calm environment of an Ivory tower, it is easy enough for post-conviction counsel to find fault with trial counsel's tactics and advice (or non-advice), but a court's role is not to act as a "Monday morning quarterback." Fountain v. United States, 211 F.3d 429, 434 (7th Cir. 2000); Schumacher v. Hopkins, 83 F.3d 1034, 1037 (8th Cir. 1996). Strickland itself says that the review must be highly deferential, because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all to easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Besides, Smith cites no authority holding that counsel must discuss cases with his client that present inapposite facts in order to be effective, even though those cases could theoretical provide a defense. Worse yet, Smith does not acknowledge that his present theory had clearly been undercut by controlling authority prior to his trial.

In United States v. Vichitvongsa, 819 F.3d 260 (6th Cir. 2016), the Sixth Circuit discussed Wang and its requirements that the connection to interstate commerce not be "fortuitous or attenuated," but went on to hold:

> [W]e view private citizens engaged in drug crimes differently. "[I]llegal commerce counts as commerce for Hobbs Act purposes." More specifically, "robbing drug dealers is a proper basis for conviction under the Hobbs Act." Robbing drug dealers who can be "legitimately characterized as engaged in business". . . does not fall within Wang's "private individual exception," and thus the government need only show a *de minimis* connection to interstate commerce.

Id. at 271 (internal citations omitted). The court went on to discuss a number of Sixth Circuit cases that stood for the proposition that "Wang's private individual exception did not apply" when a

defendant targets and robs a drug dealer of his or her drug proceeds. Id. at 271-72.

Given the case law that had developed in the area, counsel were ineffective if they failed to consider, or to discuss Wang with Smith prior to trial.[5] This resolves Smith's claims that counsel was ineffective in (1) failing to seek a jury instruction incorporating Wang into the rule announced in Taylor; (2) advising Smith to plead guilty rather than continue with the trial due to the available defense of challenging the commerce element; and (3) failing to advise Smith to withdraw his guilty plea because of the lack of a sufficient interstate commerce connection. It also resolves Smith's claims that appellate counsel was ineffective in filing an Anders brief in lieu of filing a brief asserting that: (1) Smith's plea was unintelligent in light of Wang; and 2) trial counsel was ineffective in (a) not seeking a jury instruction incorporating Wang into Taylor, and (b) allowing petitioner to plead guilty. It also precludes Smith's claims that his guilty plea was unintelligent or violated the Due Process clause because, according to him, the "provable facts" would not satisfy the commerce clause element as required by Wang.

Smith's remaining claims fare no better. He claims counsel was ineffective in allowing him

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[5] In an affidavit attached to the Government's response, Paul Bruno, one of Smith's trial lawyers, indicates that he considered Wang and Taylor, but did not submit an instruction on the commerce issue prior to trial so as to not prematurely show Smith's hand to the Government. Similarly, Larry Arnkoff, Smith's other lawyer, states in his affidavit that he and Bruno did not want to preview Smith's case to the Government. Instead, if the proof adduced at trial supported it, Bruno intended to submit a proposed instruction that stated if Payne was robbed of gambling proceeds and those moneys "had nothing to do with drugs and/or drug dealing, the government would not have proven the interstate commerce element." Bruno also claims he discussed that strategy with Smith prior to trial. This could be a valid defense strategy that Strickland instructs is not subject to second-guessing. See Tackett v. Trierweiler, 956 F.3d 358, 374 (6th Cir. 2020) (citation omitted) ("A trial counsel's 'tactical decisions are particularly difficult to attack,' meaning that a defendant 'attacking his lawyer's performance must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'"). Further, because Defendant pled guilty, there is no way of knowing whether counsel would have requested the instruction they suggest. In any event, the proper instructions actually given to the jury would be determined by the Court, not counsel.

to admit the "damning" allegation that he intentionally shot at the van when he did not know McKnight was lying in the back. There was nothing ineffective about this. The proof was clear at trial that Smith did intentionally fire the weapon he used in the robbery, whether it was reflexive or not. This admission did not preclude counsel from seeking a departure or variance from first degree to second degree under the Sentencing Guidelines due to the alleged lack of intent or premeditation, and counsel in fact made the argument.

Similarly, Smith claims that counsel was ineffective in allowing him to admit during his guilty plea that he threatened to kill Oglesby and solicited him to commit murder because "(1) it was not necessary to admit any such facts in order to enter his guilty plea, and (2) Smith has always denied that the alleged facts were true, and he would personally deny those facts through sentencing." (Doc. No. 6 at 14-15). Smith further claims that "neither of those damning admissions would have been made, and the underlying allegations would not have been proven." (Id. at 15).

A fundamental problem with Smith's argument is that Oglesby testified at trial that Smith called him several times after the robbery/murder, telling him to "keep it in the streets," "keep it 100," and said he was "going to shoot up my house, kill me, kill Maurice Payne, and kill the laundry man [Frierson]." (Case No. 3:15-cr-00147, Doc. No. 621, Transcript at 73-4). This obviously went a long way towards establishing that Smith had threatened to kill Oglesby as alleged in Count Five. As for Count Six and the assertion that he asked Oglesby to kill on his behalf, Smith is not in a position to say that the allegations could not have been proven because the Government never had the opportunity to finish its proof.

Moreover, contrary to Smith's claims that the allegations were unnecessary, it is incumbent on the Court to have a factual basis before accepting a plea. Count Five was straightforward–it

charged that Smith intimidated and directly threatened to kill Oglesby. Count Six was more generic– it alleged that Smith committed witness tampering or attempted witness tampering by attempting to have Oglesby hinder, delay or prevent further communications to law enforcement related to the robbery/homicide. Clearly, the agreed statement submitted in support of the plea agreement was intended to supply the necessary factual basis for the Court to accept the plea.

In addition to the various reasons already discussed, Smith's voluntary plea and his agreed statement doom the vast majority of his claims. They also obviate the need for an evidentiary hearing.

The decision on whether to hold an evidentiary hearing on a Section 2255 petition is a matter of discretion. Huff v. United States, 734 F.3d 600, 607 (6th Cir. 2013). Recently, the Sixth Circuit has summarized the guideposts used for exercising that discretion:

> An evidentiary hearing "is required unless the record conclusively shows that the petitioner is entitled to no relief." Campbell v. United States, 686 F.3d 353, 357 (6th Cir. 2012) (quoting Arredondo v. United States, 178 F.3d 778, 782 (6th Cir. 1999)); see also 28 U.S.C. § 2255(b). The burden "for establishing an entitlement to an evidentiary hearing is relatively light," and "[w]here there is a factual dispute, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." Turner v. United States, 183 F.3d 474, 477 (6th Cir. 1999). A petitioner's "mere assertion of his innocence," without more, does not entitle him to an evidentiary hearing. Valentine v. United States, 488 F.3d 325, 334 (6th Cir. 2007); see also Turner, 183 F.3d at 477. But when presented with factual allegations, "a district court may only forego a hearing where 'the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" MacLloyd v. United States, 684 Fed. Appx. 555, 559 (6th Cir. 2017) (internal quotation marks omitted) (quoting Arredondo, 178 F.3d at 782). "[W]hen a defendant presents an affidavit containing a factual narrative of the events that is neither contradicted by the record nor inherently incredible and the government offers nothing more than contrary representations to contradict it, the defendant is entitled to an evidentiary hearing." Huff, 734 F.3d at 607 (citation and internal quotation marks omitted).

Martin v. United States, 889 F.3d 827, 832 (6th Cir. 2018).

In his declaration, Smith begins by claiming that he was forced to plead guilty, a matter which this Court has already addressed and rejected. To this, the Court simply notes that, having sat through the first three days of trial, the Court disagrees with post-conviction counsel's suggestion that things were going well for Smith given "Oglesby's somewhat favorable testimony." (Doc. No. 6 at 7). To the contrary, the evidence against Smith was very strong and a conviction seemed all but a foregone conclusion by the time Oglesby finished testifying. This is so even considering that Oglesby provided Smith with a great argument for a lower sentence, *i.e.*, that Smith fired at the van because it was driving towards him and he was defending himself.

Next, Smith claims that he did not know Payne, did not know he was a drug dealer, and did not know he often had drug proceeds on his person. (Doc. No. 21-9, Smith Decl. ¶ 4). Smith also asserts that counsel did not tell him about Wang, and that he would not have plead guilty had he known about that case.

The Court has already discussed the implications of Wang. As for Smith's knowledge about robbing a drug dealer of drug proceeds, he agreed to, and is bound by, the following factual statement from his plea hearing:

> Smith knew and believed Maurice Payne, also known as Pill, hereafter referred to as Payne, was a drug dealer who frequently used drug proceeds to play in these dice games. Payne was then on federal supervised release after a federal drug trafficking conviction.
>
> On October 30, 2013, Payne gambled drug proceeds at the dice game, won well over $5,000 in cash, and would have re-invested a sizeable portion of those winnings into obtaining more controlled substances, particularly cocaine, for re-sale. The armed robbery described herein prevented Payne from doing so, and thereby interfered with commerce.

(Case No. 3:-cr-00147-3, Doc. No. 757, Transcript at 96). Given the solemnity of his plea, the Court

will not afford Smith an evidentiary hearing so that he can try to take back what he already said.

Finally, Smith asserts that he is "also bothered that my lawyers failed to tell me that Maurice Payne could be impeached by showing that he had changed his story over time by changing the amount of money he had and by eventually adding the claim that his gambling winnings would be spent on drugs to resell." (Doc. No. 21-9, Smith Decl. ¶ 6). He goes on to claim that "[t]hose facts about impeachment also would have led me to not plead guilty." Id. Even if this is true, Smith has not come close to showing the prejudice required by Strickland.

"[I]mpeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficient[ly] aware')." United States v. Ruiz, 536 U.S. 622, 629 (2002) (emphasis in original). Indeed, "it is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty." Id. at 630. Further, Payne's various statements were presumably part of the discovery provided by the Government, and Smith does not claim in his declaration that his lawyers failed to share that discovery with him. Regardless, in his plea colloquy, Smith admitted he knew Payne as a drug dealer, and he also knew from the statement of agreed facts that Payne was a convicted drug felon who was participating in an illegal dice game, all of which would provide more than adequate fodder for impeachment. Davis v. Booker, 589 F.3d 302, 309 (6th Cir. 2009) "[U]ndisclosed impeachment evidence is cumulative 'when the witness has already been sufficiently impeached at trial.") (internal citation and quotation omitted). Of course, how effective counsel would have been on cross-examination will never be known because Smith voluntarily chose to plead guilty before Payne was called to testify.

IV. Conclusion

"The Sixth Amendment guarantees reasonable competence, not perfect litigation." United States v. Munoz, 605 F.3d 359, 381 (6th Cir. 2010). "[I]n some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,'" but "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Harrington v. Richter, 562 U.S. 86, 111 (2011) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)). Counsel's performance through three days of trial and the sentencing hearing was commendable, and Smith has not come close to showing any egregious and prejudicial error. Accordingly, and for all of the reasons stated, Smith's Motion and Supplemental Motion to Vacate, Set Aside, or Correct Sentence will be denied. Further, because a reasonable jurist would not debate this Court's conclusions and Smith's claims are unworthy of further review, a certificate of appealability will not issue.

An appropriate Order will enter.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE

No. 21-5618

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RODRECUS M. SMITH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: SILER, Circuit Judge.

Rodrecus M. Smith, a federal prisoner proceeding through counsel, appeals a district court judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. Smith requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

In the midst of a jury trial and without the benefit of a plea agreement, Smith pleaded guilty to conspiracy and attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951 and 2; Hobbs Act robbery, in violation of 18 U.S.C. § 1951; using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence resulting in death, in violation of 18 U.S.C. § 924(j); possessing ammunition by a felon, in violation of 18 U.S.C. § 922(g)(1); witness tampering and attempting to do so through intimidation and threats, in violation of 18 U.S.C. § 1512(b)(3); and witness tampering and attempting to do so through corrupt persuasion in connection with a criminal trial, in violation of 18 U.S.C. § 1512(b)(3) and (j). He was sentenced to serve a total of 408 months in prison followed by five years of supervised release and ordered to pay restitution in the amount of $7,716.24. This court granted counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirmed the district court's judgment. *United States v. Smith*, No. 19-6264 (6th Cir. Aug. 13, 2020).

In his motion to vacate, as supplemented, Smith asserted that (1) "he lacked the knowledge element" required to support his ammunition-possession conviction in view of *Rehaif v. United States*, 139 S. Ct. 2191 (2019); (2) Hobbs Act robbery is no longer a "crime of violence" in view of *United States v. Davis*, 139 S. Ct. 2319 (2019); (3) trial counsel was ineffective (a) for failing to request a jury instruction "regarding the commerce element of the Hobbs Act"; (b) for advising him "to plead guilty rather than continue with the trial" because he had a "defense to the commerce element" of the Hobbs Act and firearm offenses; (c) for failing "to advise [him] to withdraw his guilty plea"; (d) for advising him to admit certain damaging facts at sentencing; and (e) for failing to advise him to appeal "the validity of his guilty plea"; (4) his guilty pleas to the Hobbs Act and firearm offenses "were unintelligent because the commerce element was lacking"; (5) his convictions for the Hobbs Act and firearm offenses violate due process "because the commerce element was lacking"; and (6) he was denied effective assistance of appellate counsel. The district court denied Smith's motion to vacate and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability analysis is not the same as "a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the certificate of appealability analysis is limited "to a threshold inquiry into the underlying merit of [the] claims," and whether "the District Court's decision was debatable." *Id.* at 774 (alteration in original) (quoting *Miller-El*, 537 U.S. at 327, 348).

Smith has abandoned all but the ineffective-assistance-of-trial counsel claim asserted in claim (3)(b) and the invalid-guilty-plea claim asserted in claim (4) because he does not request a certificate of appealability for any other claims. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

The district court rejected Smith's claim that his guilty plea to the Hobbs Act and firearm offenses was invalid because he misunderstood the commerce element of those offenses based on

unsound advice of counsel. Although the victim of Smith's robbery was a private citizen, the district court concluded that Smith could be convicted of Hobbs Act robbery under the admitted facts of the case and established case law. Because Smith did not have a defense to the commerce element of the Hobbs Act offenses, the district court concluded that trial counsel was not ineffective for advising him to plead guilty rather than continuing with the trial that was in progress.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In the context of a guilty plea, the prejudice inquiry requires the defendant to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

To establish a violation of the Hobbs Act, "the Government must prove two elements: (1) interference with interstate commerce (2) in the course of a substantive criminal act." *United States v. Ostrander*, 411 F.3d 684, 691 (6th Cir. 2005). The interstate-commerce element "is satisfied by a showing of even a *de minimis* effect on interstate commerce." *United States v. Ford*, 761 F.3d 641, 650 (6th Cir. 2014). When a defendant robs a private individual, the connection to interstate commerce is more attenuated, and the government is required to show that the connection between the victim and interstate commerce is substantial, not merely "fortuitous or speculative." *United States v. Wang*, 222 F.3d 234, 239-40 (6th Cir. 2000). But when the individual victim of a robbery is a drug dealer, "it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds," even if "any actual or threatened effect on commerce in a particular case is minimal." *Taylor v. United States*, 136 S. Ct. 2074, 2081 (2016); *see United States v. Vichitvongsa*, 819 F.3d 260, 271 (6th Cir. 2016). This is because, "as a matter of law, the market for illegal drugs is 'commerce over which United States has jurisdiction.'" *Taylor*, 136 S. Ct. at 2081 (concluding that the government sufficiently established the interstate-commerce element of the Hobbs Act

with proof that "robberies were committed with the express intent to obtain illegal drugs and the proceeds from the sale of illegal drugs").

Relevant here, at the change-of-plea hearing, Smith agreed to the following facts: "Timothy Oglesby regularly hosted high-stakes dice games" attended by drug dealers; Smith had attended dice games at Oglesby's home; Smith "knew and believed" that the victim, Maurice Payne, "was a drug dealer who frequently used drug proceeds to play in these dice games" and that Payne had been convicted of a federal drug-trafficking offense and was on supervised release at the time of the robbery; on the day of the robbery, "Payne gambled drug proceeds at the dice game, won well over $5,000 in cash, and would have re-invested a sizeable portion of those winnings into obtaining more controlled substances, particularly cocaine, for re-sale"; Smith's armed robbery of Payne prevented Payne from obtaining more illegal drugs for re-sale, interfering with commerce; and the robbery affected commerce because Smith "targeted Payne, a drug dealer, for the robbery."

Reasonable jurists would not debate the district court's rejection of Smith's invalid-guilty-plea and ineffective-assistance-of-trial-counsel claims based on the commerce element of the Hobbs Act offenses. *See Miller-El*, 537 U.S. at 327. The district court's findings and conclusions are supported by the record, and Smith has not presented any basis for debate. Smith now asserts that he did not know Payne and did not know that he was drug dealer. But Smith admitted, under oath, facts that support the interstate-commerce element of the Hobbs Act offenses, including that he knew that Payne was a drug dealer. "[A] defendant must be bound to the answers he provides during a plea colloquy." *Ramos v. Rogers*, 170 F.3d 560, 566 (6th Cir. 1999); *see Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (noting that a defendant's representations during a guilty plea hearing "constitute a formidable barrier in any subsequent collateral proceedings"). Because the facts as admitted by Smith supported the interstate-commerce element of the Hobbs Act offenses, Smith lacked a defense to that element of the offenses. Counsel was not ineffective for failing to advise Smith of a defense to the Hobbs Act offenses that did not exist. *See Sutton v. Bell*, 645 F.3d

752, 755 (6th Cir. 2011) (noting that counsel is not ineffective for failing to raise a meritless defense or issue).

Smith asserts that an evidentiary hearing was necessary to resolve factual disputes. The district court concluded that an evidentiary hearing was not necessary because Smith's claims were belied by the record. Because "the record refutes [Smith's] factual allegations or otherwise precludes [§ 2255] relief," an evidentiary hearing was not necessary. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (concluding that an evidentiary hearing was not warranted in a 28 U.S.C. § 2254 proceeding); *see Monea v. United States*, 914 F.3d 414, 422 (6th Cir. 2019).

Accordingly, the application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk