FILED: June 27, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7917
(1:09-cr-00179-LO-1)
(1:14-cv-00496-LO)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MIRWAIS MOHAMADI, a/k/a O, a/k/a Omar

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Pet App. B1

FILED: August 30, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7917
(1:09-cr-00179-LO-1)
(1:14-cv-00496-LO)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MIRWAIS MOHAMADI, a/k/a O, a/k/a Omar

Defendant - Appellant

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Motz, Judge King and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

Pet. App. A

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MIRWAIS MOHAMADI, a/k/a O, a/k/a Omar, Defendant - Appellant.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2022 U.S. App. LEXIS 17620

No. 20-7917

June 27, 2022, Decided

May 25, 2022, Submitted

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2022 U.S. App. LEXIS 1}Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:09-cr-00179-LO-1; 1:14-cv-00496-LO). Liam O'Grady, Senior District Judge.

Disposition:

DISMISSED.

Counsel Mirwais Mohamadi, Appellant, Pro se.

Judges: Before MOTZ and KING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Opinion

PER CURIAM:

Mirwais Mohamadi seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2255 motion. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 137 S. Ct. 759, 773-74, 197 L. Ed. 2d 1 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)).

We have independently reviewed the record and conclude that Mohamadi has not made the requisite showing. Accordingly,{2022 U.S. App. LEXIS 2} we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

Pet. App. B2

FILE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA, v. MIRWAIS MOHAMADI, *Defendant-Petitioner.*	Case No. 1:09-cr-179 Hon. Liam O'Grady

ORDER

Before the Court is Petitioner's motion for reconsideration of the Court's prior decision upholding his designation as an armed career criminal under the Armed Career Criminal Act ("ACCA"). Dkt. 327. Also before the Court is the Government's motion to hold Petitioner's case in abeyance. Dkt. 328. Both motions were filed in response to the Fourth Circuit's recent decision in *United States v. Taylor*, which held that attempted Hobbs Act robbery is not a "crime of violence" for purposes of 18 U.S.C. § 924(c). *See* 979 F.3d 203, 205 (4th Cir. 2020).

Petitioner argues that his prior convictions for attempted Virginia common law robbery do not constitute valid predicate offenses under the ACCA based on *Taylor*. *See generally* Dkt. 327. The Government, for its part, does not dispute Petitioner's contention, but expresses disagreement with *Taylor*'s holding. It notes that it "recently filed a petition for en banc review" in *Taylor* and asks the Court to "hold Petitioner's motion for reconsideration in abeyance pending the resolution of [that] petition." Dkt. 328, at 1.

Unlike Petitioner and the Government, the Court does not read *Taylor* as inconsistent with its prior decision. *See* Dkt. 325, at 5–8.

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The elements of Hobbs Act robbery and Virginia common law robbery are inconsistent. *Compare* 18 U.S.C. § 1951(b)(1), *with Pierce v. Commonwealth*, 138 S.E.2d 28, 31 (Va. 1964). The former emphasizes "threatened force," whereas the latter, at minimum, requires intimidation that has the potential to overcome the victim's resistance. *Cf. Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) ("The overlap between 'force' and 'violence' at common law is reflected in modern legal and colloquial usage of these terms. 'Force' means 'power, violence, or *pressure directed against a person or thing*[.]'") (citing Black's Law Dictionary 656 (7th ed. 1999)); *see also id.* at 550 ("If [the victim] resists the attempt to rob him, and his resistance is overcome, there is sufficient *violence* to make the taking robbery, however slight the resistance.") (emphasis in original).

The Court understands that this distinction is subtle. But *Taylor* suggests that, no matter how small, the distinction matters. *See* 979 F.3d at 209 & n.3. If Virginia common law robbery, by its nature, involves conduct that invariably overcomes a victim's resistance, it must follow that such an act is inherently forceful or violent. *See Stokeling*, 139 S. Ct. at 550–51. Thus, an attempt thereof represents "an attempt to use force." *See Taylor*, 979 F.3d at 209.

The Court does not endeavor to perform verbal acrobatics, nor does it seek to gerrymander its reading of the elements of Virginia common law robbery to harmonize its earlier holding with *Taylor*. On the contrary, the Court takes explicit direction from the conspicuous contrast *Taylor* draws between Hobbs Act robbery and common law robbery. *See id.* at 209 n.3 ("[T]he Government contends that *Stokeling* . . . supports its view that attempted Hobbs Act robbery constitutes a crime of violence. *Stokeling* is of no aid to the Government because *Stokeling* considered only whether *common law* robbery constitutes a 'violent felony'; it held it did because common law robbery 'requires the criminal to overcome the victim's resistance.'")

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(citing 139 S. Ct. at 550) (emphasis in original). The Court's position is also buttressed by contemporary Fourth Circuit opinions implying that common law robbery, by its nature, is a crime of violence. *See United States v. Rumley*, 952 F.3d 538, 551 (4th Cir. 2020); *United States v. Dinkins*, 928 F.3d 349, 355 (4th Cir. 2019); *see also Williams v. United States*, 462 F. Supp. 3d 625, 634 (E.D. Va. 2020) (Brinkema, J.); *but see Winston v. United States*, 850 F.3d 677, 684–85 (4th Cir. 2017). Again, if Virginia common law robbery is inherently violent, then an attempt to commit it must qualify as a valid predicate offense under the ACCA.

The Court fully appreciates the importance of reaching the correct legal decision in this matter. Petitioner is absolutely entitled to a proper classification under the ACCA, even if only for dignitary reasons. But the Court reiterates that it ran Petitioner's 15-year mandatory minimum sentence under the ACCA concurrently with his other sentences for his other Counts. Thus, Petitioner's time of incarceration is not being impacted by his designation as an armed career criminal. Regardless, the Court stands by its prior decision that attempted Virginia common law robbery is a crime of violence under the ACCA's force clause. Accordingly, Petitioner's motion for reconsideration (Dkt. 327) is **DENIED** and the Government's motion to hold this action in abeyance (Dkt. 328) is **DENIED**.

It is **SO ORDERED**.

December 1, 2020
Alexandria, Virginia

Liam O'Grady
United States District Judge

Pet. App. C 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA, v. MIRWAIS MOHAMADI, *Defendant-Petitioner.*	Case No. 1:09-cr-179 Hon. Liam O'Grady

ORDER

This matter comes before the Court on remand from the United States Court of Appeals for the Fourth Circuit. *See* Dkt. 323. For the reasons stated below, Petitioner's outstanding claim in his 28 U.S.C. § 2255 motion must be denied.

I. BACKGROUND

On April 9, 2009, a grand jury sitting in the Eastern District of Virginia indicted Petitioner Mirwais Mohamadi. The indictment alleged that he committed the following offenses: two counts of armed robbery in violation of the Hobbs Act, 18 U.S.C. § 1951 (Counts 1 and 2); two counts of using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Counts 3 and 4); one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Count 5); two counts of solicitation to commit murder for hire in violation of 18 U.S.C. § 373 (Counts 6 and 7); one count of murder for hire in violation of 18 U.S.C. § 1958 (Count 8); and two counts of witness tampering in violation of 18 U.S.C. § 1512(b)(1), (3) (Counts 9 and 10).

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On March 18, 2010, Petitioner was convicted of Counts 1, 2, 3, 4, 7, 8, 9, and 10 by a jury. He was acquitted of Count 6. As to Count 5, he waived a jury trial. This Court convicted Petitioner of Count 5 following a bench trial. On June 18, 2010, Mohamadi was sentenced to a total term of 684 months of imprisonment, consisting of 180 months on Counts 1, 2, 5, 9, and 10, to run concurrently; 60 months on Count 7, to run concurrently with the counts above; 120 months on Count 8, to run consecutively to all other counts; 84 months on Count 3, to run consecutively to all other counts; and 300 months on Count 4, to run consecutively to all other counts.

Petitioner appealed the judgment, and the Fourth Circuit Court of Appeals affirmed each of his convictions. *See* Dkt. 232. The United States Supreme Court denied certiorari. *Mohamadi v. United States*, 133 S. Ct. 2020 (2013).

Petitioner then filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on May 2, 2014. Dkt. 240. The government opposed the motion, Dkt. 245, and Petitioner filed a reply, Dkt. 249, and two supplements, Dkts. 257, 258. This Court entered an Order denying the motion on May 5, 2017. Dkt. 262. Petitioner appealed, arguing that the Court failed to address four of his claims: (1) that he received ineffective assistance of trial counsel; (2) that he was denied the right to represent himself; (3) that he was denied his right to have a jury determine each element of his two 18 U.S.C. § 924(c) convictions beyond a reasonable doubt, and; (4) that he received an unconstitutional sentence under *Johnson v. United States*, 576 U.S. 591 (2015). *See* Dkt. 271, at 2.

The Fourth Circuit found that the Court adequately addressed Petitioner's first and second claims but remanded for further consideration on his third and fourth claims. *Id.* at 2–3. On remand, this Court dismissed Petitioner's remaining two claims. Dkt. 309. Petitioner

appealed this decision to the Fourth Circuit, Dkt. 319, which again remanded for further consideration of Petitioner's final claim that his sentence was unconstitutional under *Johnson*.

II. STANDARD OF REVIEW

A motion under 28 U.S.C. § 2255 provides for collateral attack on a conviction or sentence that was imposed in violation of the United States Constitution or laws, where (1) the court lacked jurisdiction to impose the sentence; (2) the sentence was in excess of the maximum sentence authorized; or (3) the sentence or conviction is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255. To prevail, a movant bears the burden of proving the grounds for collateral relief by a preponderance of the evidence. *See Vanater v. Boles*, 377 F.2d 898, 900 (4th Cir. 1967). Relief under § 2255 is designed to correct for fundamental constitutional, jurisdictional, or other errors, and is therefore reserved for situations where failing to grant relief would "inherently result[] in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). Moreover, a motion pursuant to § 2255 "may not do service for an appeal," and claims that have been waived by a failure to appeal are therefore procedurally defaulted unless the movant can show cause and actual prejudice. *United States v. Frady*, 456 U.S. 152, 165–67 (1982); *United States v. Maybeck*, 23 F.3d 888, 891–92 (4th Cir. 1994) (applying standard to unappealed guilty pleas).

III. DISCUSSION

Petitioner's final claim asserts that he was improperly sentenced on Count 5 to a mandatory minimum of fifteen years as an armed career criminal under the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). He argues that the U.S. Supreme Court struck down the ACCA's residual clause in *Johnson* on vagueness grounds. Dkt. 257, at 5–6. Thus, he insists that his three predicate felonies for Virginia common law robbery

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and attempted common law robbery were improperly factored at his sentencing to increase his term of imprisonment by "five years more than the maximum . . . allowed." *See id.* at 5. Petitioner's claim fails for two reasons.

First, while it is true that Petitioner was sentenced to fifteen years on Count 5, that sentence ran *concurrently* with Counts 1, 2, 9, and 10. Petitioner was properly sentenced to fifteen years on those counts independent of the ACCA. Thus, even if Petitioner was wrongfully sentenced under the ACCA's residual clause, it would not have affected his sentence. His claim that he was sentenced to "five years more than the maximum . . . allowed" is incorrect.

Second, even if Petitioner's sentence for Count 5 did not run concurrently with the sentences he received for Counts 1, 2, 9, and 10, he was properly classified as an armed career criminal under the ACCA.

A defendant qualifies as an armed career criminal by having "three prior convictions for 'a violent felony or a serious drug offense, or both, committed on occasions different from one another.'" *Williams v. United States*, 2020 WL 2773530, at *3 (E.D. Va. May 27, 2020). At the time of Petitioner's sentencing, the ACCA defined the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

- Ha[d] as an element the use, attempted use, or threatened use of physical force against the person of another [the force clause]; or
- [was] burglary, arson, or extortion, involve[d] use of explosives [enumerated crimes clause], or otherwise involve[d] conduct that presents a serious potential risk of physical injury to another [residual clause].

18 U.S.C. § 924(e)(2)(B) (2006). The U.S. Supreme Court struck down the ACCA's residual clause as unconstitutionally vague in 2015. *See Johnson*, 576 U.S. at 593–97. However, it left intact the ACCA's force clause and enumerated crimes clause. *See id.* Consequently, if a crime does not implicate the enumerated crimes clause by involving burglary, arson, extortion, or the

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use of explosives, it can still validly qualify as a "violent felony" under the ACCA if it has as an element "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

Here, Petitioner was convicted as an adult, Dkt. 186, at 18, on felony charges in three separate prosecutions in Fairfax County, Virginia:

1. Common law robbery occurring on June 15, 1998 (case Number 94440). *See id.* at 19–20.
2. Attempted common law robbery occurring on June 17, 1998 (case Number 94439). *See id.* at 23.
3. Attempted common law robbery occurring on June 29, 1998 (case Number 94438). *See id.* at 24–25.

Virginia common law robbery is defined as the "taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."[1] *See Pierce v. Commonwealth*, 138 S.E.2d 28, 31 (Va. 1964). Because this definition "sets out a single . . . set of elements to define a single crime," the Court finds that

[1] The Court has investigated Petitioner's prior convictions scrupulously and has worked with the U.S. Probation Office to obtain Fairfax County state court records from 1998 detailing Petitioner's prior convictions that were not contained in Petitioner's original presentence report (Dkt. 186). Nothing in these records indicates that Petitioner was charged with violating the *prohibitions* of Va. Code. § 18.2-58 ("If any person commit robbery by partial strangulation, or suffocation, or by striking or beating, or by other violence to the person, or by assault or otherwise putting a person in fear of serious bodily harm, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever . . . "), rather than being *punished* under Va. Code. § 18.2-58's terms for common law robbery, *see id.* (". . . he shall be guilty of a felony and shall be punished by confinement in a state correctional facility for life or any term not less than five years."). *See United States v. Winston*, 850 F.3d 677, 680 n.1 (4th Cir. 2017) (noting that Virginia common law robbery is punished under Va. Code. § 18.2-58).

Still, even if Petitioner was convicted under Va. Code § 18.2-58's *prohibitions*, the Court would nonetheless find that he committed a violent felony under either the categorical approach or the modified categorical approach. *See United States v. Allred*, 942 F.3d 641, 648 (4th Cir. 2019). If the traditional categorical approach applied because Va. Code. § 18.2-58 lists "alternative means" of committing robbery, *Allred*, 942 F.3d at 648, the Court would find that each "alternative means" in Va. Code § 18.2-58 has an element "the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). Alternatively, if the modified categorical approach applied, the Court would find through a "limited consultation" of documents related to Petitioner's convictions, *Allred*, 942 F.3d at 648. that if Petitioner was convicted under Va. Code § 18.2-58's prohibitions, it would be for "commit[ing] [or attempting to commit] robbery . . . by the threat or presenting of firearms." Va. Code § 18.2-58; *see* Dkt. 186, at 19–25. That is enough for Va. Code § 18.2-58 to qualify as a "violent felony" under the modified categorical approach. *See* 18 U.S.C. § 924(e)(2)(B)(i). In either case, if Petitioner was previously convicted on three separate occasions under Va. Code § 18.2-58's *prohibitions*, the Court would find that he was validly classified as an armed career criminal under the ACCA.

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Virginia common law robbery is an "indivisible crime." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *see also United States v. Winston*, 850 F.3d 677, 683 & n.5 (4th Cir. 2017). To analyze whether an indivisible crime qualifies as a "violent felony" for purposes of the ACCA, the Court uses the "categorical approach." The categorical approach focuses on the elements of a crime and the fact of conviction, but not on the defendant's conduct. *See United States v. Allred*, 942 F.3d 641, 647 (4th Cir. 2019) (citing *United States v. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016)). Thus, the Court looks to whether Virginia common law robbery has as an element the "use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The Court finds that it does. Though the Fourth Circuit initially held that Petitioner's crimes did not qualify as "crimes of violence" under the force clause, the weight of authority has now shifted.

In the immediate aftermath of *Johnson*, the Fourth Circuit found in *Winston v. United States* that Virginia common law robbery and, by extension, attempted robbery[2] "requires only a 'slight' degree of violence" that "need not harm a victim." 850 F.3d 677, 684–85 (4th Cir. 2017). Based on *Winston*'s survey of Virginia state prosecutions for common law robbery, the panel determined that the offense required only minimum conduct that did not rise to the level of "violent force . . . capable of causing physical pain or injury to another person." *See id.* at 685. Thus, the Court concluded that Virginia common law robbery did not constitute a "violent felony" under the ACCA. *Id.*

[2] The fact that two of Petitioner's three convictions were for *attempted* robbery, rather than robbery, does not alter the Court's analysis. The ACCA's force clause applies to crimes that have as an element the "*attempted* use . . . of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added); *see also United States v. Pereira-Gomez*, 903 F.3d 155, 166 (2d Cir. 2018); *Payne v. United States*, 2017 WL 9476849, at *2 (M.D.N.C. June 22, 2017).

Recent decisions cast doubt on the correctness of *Winston*'s holding. In *Stokeling v. United States*, the U.S. Supreme Court held that Florida common law robbery, an offense with elements nearly identical to those of Virginia common law robbery, is "the quintessential ACCA-predicate crime." 139 S. Ct. 544, 554 (2019). Drawing a distinction between the criminal battery at issue in *Johnson* and Florida common law robbery, *Stokeling* makes clear that "the degree of force necessary to satisfy the ACCA force clause need not be 'substantial,'" nor must there be "any particular degree of likelihood or probability that the force used will cause physical pain or injury." *See Williams*, 2020 WL 2773530, at *4 (citing *Stokeling*, 139 S. Ct. at 553–54). Rather, "only potentiality" is required. *Stokeling*, 139 S. Ct. at 554; *see also id.* ("By contrast, the force necessary to overcome a victim's physical resistance [for robbery] is inherently 'violent' in the sense contemplated by *Johnson* . . . .").

In the wake of *Stokeling*, the Fourth Circuit has hinted at *Winston*'s potential abrogation. *See United States v. Rumley*, 952 F.3d 538, 551 (4th Cir. 2020) ("Because we agree with the district court that [the defendant] has three qualifying ACCA predicates without counting his 1982 Virginia conviction for robbery, we do not reach the government's *persuasive* argument that *Stokeling* abrogated this court's decision in *United States v. Winston*, 850 F.3d 677, 679 (4th Cir. 2017).") (emphasis added). Moreover, the Fourth Circuit has recognized that other state common law robbery offenses like Virginia common law robbery do qualify as predicate crimes of violence under the ACCA's force clause. *See United States v. Dinkins*, 928 F.3d 349, 355 (4th Cir. 2019) (holding that North Carolina common law robbery is a "crime of violence" under the ACCA's force clause).

Given these developments in the case law, the Court finds that Petitioner's convictions for Virginia common law robbery and attempted common law robbery qualify as predicate offenses for his designation as an armed career criminal under the ACCA.

IV. CONCLUSION

For the reasons stated above and for good cause shown, it is hereby **ORDERED** that Petitioner's 28 U.S.C. § 2255 motion (Dkt. 240) is **DENIED** and his petition is **DISMISSED.**

This is a final order for purposes of appeal. To appeal, Petitioner must file a written notice of appeal with the Clerk's Office within sixty (60) days of the date of this Order. *See* Fed. R. App. P. 4(a)(1)(B). A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order that Petitioner wishes to appeal. Petitioner need not explain the grounds for appeal until so directed by the court. Petitioner must also request a certificate of appealability from a circuit judge. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b). For the reasons stated above, this Court expressly declines to issue such a certificate.

It is **SO ORDERED.**

October 20, 2020
Alexandria, Virginia

Liam O'Grady
United States District Judge

Pet. App. D8

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6097

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIRWAIS MOHAMADI, a/k/a O, a/k/a Omar,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, Senior District Judge. (1:09-cr-00179-LO-1; 1:14-cv-00496-LO)

Submitted: September 9, 2020 Decided: September 21, 2020

Before MOTZ, KING, and FLOYD, Circuit Judges.

Dismissed and remanded by unpublished per curiam opinion.

Mirwais Mohamadi, Appellant Pro Se. Joseph Attias, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Pet-App. ∈ 1

PER CURIAM:

Mirwais Mohamadi seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2255 motion.[1] The district court first denied Mohamadi's motion in 2017, and Mohamadi timely appealed. We dismissed the appeal as interlocutory and remanded to the district court for consideration of two unresolved claims: (1) whether Mohamadi's sentence is unconstitutional under *Johnson v. United States*, 576 U.S. 591 (2015) (holding residual clause of Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), unconstitutionally vague), and (2) whether Mohamadi was denied the right to have a jury determine each element of his convictions beyond a reasonable doubt. *United States v. Mohamadi*, 733 F. App'x 703, 704 (4th Cir. 2018) (No. 17-7395).

On remand, the district court issued a new order purportedly denying Mohamadi's two remaining claims. The district court described the first claim as a question of whether Mohamadi's 18 U.S.C. § 924(c) convictions were unconstitutional under *Johnson*. The district court denied this claim, determining that the convictions remained valid because they were predicated on the offense of Hobbs Act robbery, which this court has determined is a crime of violence under § 924(c)(3)(A)'s force clause.

The district court did not, however, address Mohamadi's claim regarding the impact of *Johnson* on the constitutionality of his sentence. Specifically, Mohamadi claimed in his first supplement to his § 2255 motion that his sentence enhancement under the ACCA was

[1] Mohamadi's § 2255 motion comprises the original motion and two supplements, which the district court accepted and reviewed along with the original motion.

Pet App. E 2

unconstitutional because, under *Johnson*, he no longer had three predicate convictions that qualified as violent felonies. *See* 18 U.S.C. § 924(e). The district court has yet to dispose of this claim.[2]

This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292; Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). "Ordinarily, a district court order is not final until it has resolved *all* claims as to all parties." *Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015) (internal quotation marks omitted). We conclude that, because the district court has not addressed Mohamadi's claim regarding the constitutionality of his ACCA sentence enhancement, the order Mohamadi seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we dismiss the appeal for lack of jurisdiction and remand to the district court for consideration of the unresolved claim. *Id.* at 699.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED AND REMANDED

[2] The district court did dispose of Mohamadi's other remaining claim, but we cannot address the merits of the court's decision on that claim until the court issues a final order.

Pet. App. E 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	Crim. No. 1:09-cr-179
v.	Civil No. 1:14-cv-496
MIRWAIS MOHAMADI,	Hon. Liam O'Grady
Defendant-Petitioner.	

ORDER

This matter comes before the Court on remand from the United States Court of Appeals for the Fourth Circuit. *See* Dkt. 271; Dkt. 272; Dkt. 273. This Court's Order of May 5, 2017, dismissed Petitioner Mirwais Mohamadi's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Dkt. 262. The Court of Appeals remanded with instructions to address Petitioner's claims that his sentence was unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015) and second, that he was denied the right to have a jury determine each element of his 18 U.S.C. § 924(c) convictions beyond a reasonable doubt. *United States v. Mohamadi*, 733 F. App'x 703, 704 (4th Cir. 2018). These issues have been fully briefed, and for the reasons stated below Petitioner's § 2255 motion will be dismissed.

I. Background

On April 9, 2009, a grand jury sitting in the Eastern District of Virginia indicted Petitioner. The indictment alleged that he committed the following offenses: two counts of armed robbery in violation of the Hobbs Act, 18 U.S.C. § 1951 (Counts 1 and 2); two counts of

using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Counts 3 and 4); one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (Count 5); two counts of solicitation to commit murder for hire in violation of 18 U.S.C. § 373 (Counts 6 and 7); one count of murder for hire in violation of 18 U.S.C. § 1958 (Count 8); and two counts of witness tampering in violation of 18 U.S.C. §§ 1512(b)(1), (3) (Counts 9 and 10).

On March 18, 2010, Petitioner was convicted of Counts 1, 2, 3, 4, 7, 8, 9, and 10 by a jury. He was acquitted of Count 6. As to Count 5, he had waived a jury trial. This Court convicted Petitioner of Count 5 following a bench trial. On June 18, 2010, the Court sentenced him to a total term of 684 months of imprisonment, consisting of 180 months on Counts 1, 2, 5, 9, and 10, to run concurrently; 60 months on Count 7, to run concurrently with the counts above; 120 months on Count 8, to run consecutively to all other counts; 84 months on Count 3, to run consecutively to all other counts; and 300 months on Count 4, to run consecutively to all other counts.

Petitioner appealed the judgment, and the Fourth Circuit Court of Appeals affirmed each of the convictions. *See United States v. Mohamadi*, 461 F. App'x 328 (4th Cir. 2012) (per curiam). The United States Supreme Court denied certiorari. *Mohamadi v. United States*, 133 S. Ct. 2020 (2013).

Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 on May 2, 2014. Dkt. 240. The government opposed the motion, Dkt. 245, and Petitioner filed a reply, Dkt. 249, and supplement, Dkt. 257. This Court entered an Order denying the motion on May 5, 2017. Dkt. 262. Petitioner appealed.

The Fourth Circuit remanded to this Court for consideration of two unresolved claims. *United States v. Mohamadi*, 733 F. App'x 703, 704 (4th Cir. 2018). The issues are: 1) whether

Petitioner's sentence was unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and 2) whether Petitioner was denied the right to have a jury determine each element of his 18 U.S.C. § 924(c) convictions beyond a reasonable doubt.

Following remand, this Court stayed further proceedings pending the Fourth Circuit's decision in *United States v. Simms*, No. 15-4640. *Simms* involved an application of *Johnson*, where the Supreme Court found a statutory definition unconstitutionally vague. On January 24, 2019, the Fourth Circuit decided *Simms*, and found 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague. *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc). The Circuit Court's mandate was, however, stayed pending the Supreme Court's decision on the same issue in *United States v. Davis*, No. 18-431. The Supreme Court decided *Davis* on June 24, 2019, and in accord with *Simms*, invalidated 18 U.S.C. § 924(c)(3)(B) on vagueness grounds. *United States v. Davis*, 139 S. Ct. 2319 (2019).

The Fourth Circuit's *Simms* mandate issued on July 22, 2019. The Government and Petitioner, through CJA counsel, have fully briefed the remanded issues. Dkt. 296; Dkt. 297; Dkt. 307; Dkt. 308. The issues are now ripe for decision.

II. Standard of Review

A motion under 28 U.S.C. § 2255 provides for collateral attack on a conviction or sentence that was imposed in violation of the United States Constitution or laws, where (1) the court lacked jurisdiction to impose the sentence; (2) the sentence was in excess of the maximum authorized; or (3) the sentence or conviction is otherwise subject to collateral attack. *See* § 2255. To prevail, a movant bears the burden of proving the grounds for collateral relief by a preponderance of the evidence. *See Vanater v. Boles*, 377 F.2d 898, 900 (4th Cir. 1967). Relief under § 2255 is designed to correct for fundamental constitutional, jurisdictional, or other errors,

and is therefore reserved for situations where failing to grant relief would "inherently result[] in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). Moreover, a motion pursuant to § 2255 "may not do service for an appeal," and claims that have been waived by a failure to appeal are therefore procedurally defaulted unless the movant can show cause and actual prejudice. *United States v. Frady*, 456 U.S. 152, 165–67 (1982); *United States v. Maybeck*, 23 F.3d 888, 891–92 (4th Cir. 1994) (applying standard to unappealed guilty pleas). An exception applies when a defendant brings a claim of constitutionally ineffective assistance of counsel, which can be raised in a collateral attack on his conviction or sentence. *See United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998); *United States v. DeFusco*, 949 F.2d 114, 120–21 (4th Cir. 1991).

III. Discussion

This Court is presented with two issues. The Court must "address Mohamadi's claim that his sentence was unconstitutional under *Johnson* [and] Mohamadi's claim that he was denied the right to have a jury determine each element of his convictions beyond a reasonable doubt." *United States v. Mohamadi*, 733 F. App'x 703, 704 (4th Cir. 2018).

The first issue is whether Petitioner's convictions on Counts 3 and 4 resulted in an unconstitutional sentence under *Johnson* and its progeny. Counts 3 and 4 charged Petitioner with violations of 18 U.S.C. § 924(c)(1). That statute forbids the use, carrying, or brandishing of a firearm "during and in relation to any crime of violence." § 924(c)(1)(A). It defines a "crime of violence" as any felony that, (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (B), "by its nature . . . involves a substantial risk that physical force against the person or property of another may be used in the

course of committing the offense." § 924(c)(3). Subsection (A) of the definition is known as the "force" clause, and subsection (B) is known as the "residual" clause.

Because *Davis* invalidated the residual clause, that clause cannot support a § 924(c) conviction. The force clause, subsection (A), remains valid. Thus, Petitioner's convictions are valid, and his sentence is constitutional, if Counts 3 and 4 were predicated upon a force clause crime of violence.

Here, Petitioner's § 924(c) convictions were predicated upon substantive Hobbs Act robberies in violation of 18 U.S.C. § 1951. The Fourth Circuit has squarely held "that Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)." *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019) (footnote and citations omitted). Because Petitioner's convictions were predicated on Hobbs Act robbery, and substantive Hobbs Act robbery categorically qualifies as a crime of violence under § 924(c)(3) force clause, Petitioner's convictions are valid.

The second issue is whether Petitioner's § 924(c) convictions are unconstitutional because he was denied the right to have a jury determine each element of the crime beyond a reasonable doubt. At the time of sentencing, controlling precedent permitted a judge to find any fact which increased a mandatory minimum sentence by a preponderance of the evidence. *See Harris v. United States*, 536 U.S. 545, 568-69 (2002). Shortly after Petitioner was denied certiorari, the Supreme Court held in *Alleyne v. United States*, 570 U.S. 99 (2013), that any fact which increases a mandatory minimum sentence is an element which must be decided by the jury. Petitioner asserts that a judicial finding in his case unconstitutionally raised his mandatory minimum.

This claim fails because Petitioner's judgement of conviction became final before *Alleyne* was decided, and *Alleyne* does not apply retroactively. "[T]he judgment of conviction of a prisoner who has petitioned for certiorari becomes final for purposes of the one-year period of limitation in § 2255 ¶ 6(1) when the Supreme Court denies certiorari after a prisoner's direct appeal." *United States v. Segers*, 271 F.3d 181, 186 (4th Cir. 2001). The Supreme Court denied certiorari in Petitioner's case, and his judgment therefore became final, on April 29, 2013. *Mohamadi v. United States*, 569 U.S. 959 (2013). The Supreme Court decided *Alleyne* two months later, on June 17, 2013. 570 U.S. 99 (2013). Accordingly, Petitioner's *Alleyne* claim can prevail only if the rule declared in that case applies retroactively. *See Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). Petitioner has not cited any authority providing for *Alleyne* to apply retroactively, and the Fourth Circuit has noted in an unpublished per curiam opinion that it does not. *See United States v. Stewart*, 540 F. App'x 171, 172 (4th Cir. 2013) (per curiam). Accordingly, Petitioner's *Alleyne* claim must fail.

IV. Conclusion

For the reasons stated above and for good cause shown, it is hereby **ORDERED** that Petitioner's motion made pursuant to 28 U.S.C. § 2255, Dkt. 240, is **DENIED** and the petition is **DISMISSED**.

This is a final order for purposes of appeal. To appeal, Defendant must file a written notice of appeal with the Clerk's Office within sixty (60) days of the date of this Order. *See* Fed. R. App. P. 4(a)(1)(B). A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order that Petitioner wishes to appeal. Petitioner need not

explain the grounds for appeal until so directed by the court. Petitioner must also request a certificate of appealability from a circuit judge. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b). For the reasons stated above, this Court expressly declines to issue such a certificate.

It is **SO ORDERED.**

November 25, 2019
Alexandria, Virginia

Liam O'Grady
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7395

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIRWAIS MOHAMADI, a/k/a O, a/k/a Omar,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:09-cr-00179-LO-1; 1:14-cv-00496-LO)

Submitted: April 30, 2018 Decided: May 16, 2018

Before MOTZ, KING, and FLOYD, Circuit Judges.

Dismissed and remanded by unpublished per curiam opinion.

Brandon Creighton Sample, BRANDON SAMPLE, PLC, Rutland, Vermont, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Mirwais Mohamadi seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. Before addressing the merits of Mohamadi's appeal, we must first be assured that we have jurisdiction. *Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015). We may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2012), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2012); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949). "Ordinarily, a district court order is not final until it has resolved *all* claims as to all parties." *Porter*, 803 F.3d at 696 (internal quotation marks omitted); *see* Fed. R. Civ. P. 54(b). "Regardless of the label given a district court decision, if it appears from the record that the district court has not adjudicated all of the issues in a case, then there is no final order." *Porter*, 803 F.3d at 696.

Mohamadi asserts that the district court failed to address four of the claims he raised in his 28 U.S.C. § 2255 motion: (1) ineffective assistance of trial counsel for failing to seek the return of Mohamadi's funds from a former counsel; (2) denial of Mohamadi's right to represent himself; (3) unconstitutional sentence under *Johnson v. United States*, 135 S. Ct. 2551 (2015); and (4) denial of Mohamadi's right to have a jury determine each element of his 18 U.S.C. § 924(c) (2012) convictions beyond a reasonable doubt.

Our review of the record convinces us that, even liberally construing Mohamadi's 28 U.S.C. § 2255 motion, memorandum in support, and two supplemental briefs, Mohamadi never raised a claim that trial counsel was ineffective for failing to seek the

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return of Mohamadi's funds. We further conclude that the district court sufficiently addressed Mohamadi's claim that he was denied the right to represent himself. We do agree, however, that the district court did not address Mohamadi's claim that his sentence was unconstitutional under *Johnson* or Mohamadi's claim that he was denied the right to have a jury determine each element of his convictions beyond a reasonable doubt. The district court, therefore, "never issued a final decision." *Porter*, 803 F.3d at 699.

Accordingly, we dismiss the appeal as interlocutory and remand to the district court for consideration of Mohamadi's unresolved claims. We express no opinion regarding the merits of any of Mohamadi's claims. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MIRWAIS MOHAMADI, Petitioner, -v- UNITED STATES OF AMERICA, Respondent.	Criminal No. 1:09-cr-179 Civil Case No. 1:14-cv-496 Hon. Liam O'Grady

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the *pro se* Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Dkt. No. 240). Since filing this motion, Petitioner has also filed a motion for production of transcripts (Dkt. No. 252), a motion for discovery (Dkt. No. 253), a motion to expand the record (Dkt. No. 254), and a motion for an evidentiary hearing (Dkt. No. 255). Petitioner's motion to expand the record with certain affidavits and exhibits (Dkt. No. 254) is **GRANTED**, however, that ruling has no practical effect on his petition. All of Petitioner's other motions are hereby **DENIED**, and his petition is hereby **DISMISSED**.

I. BACKGROUND

On April 9, 2009, a grand jury sitting in the Eastern District of Virginia indicted Mirwais Mohamadi ("Mohamadi" or "Petitioner"). The indictment alleged that Mohamadi committed the following offenses: two counts of armed robbery in violation of the Hobbs Act, 18 U.S.C. § 1951 (Counts 1 and 2); two counts of using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Counts 3 and 4); one count of being a felon in possession of a

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firearm in violation of 18 U.S.C. § 922(g) (Count 5); two counts of solicitation to commit murder for hire in violation of 18 U.S.C. § 373 (Counts 6 and 7); one count of murder for hire in violation of 18 U.S.C. § 1958 (Count 8); and two counts of witness tampering in violation of 18 U.S.C. §§ 1512(b)(1), (3) (Counts 9 and 10).

On March 18, 2010, a jury convicted Mohamadi of Counts 1, 2, 3, 4, 7, 8, 9, and 10. He was acquitted of Count 6. With respect to Count 5, Mohamadi had waived a jury trial. Following a bench trial, this Court convicted Mohamadi of Count 5. On June 18, 2010, the Court sentenced Mohamadi to a total term of 684 months of imprisonment, consisting of 180 months on Counts 1, 2, 5, 9, and 10, to run concurrently to each other; 60 months on Count 7, to turn concurrently with the above counts; 120 months on Count 8, to run consecutively with all other counts; 84 months on Count 3, to run consecutively with all other counts; and 300 months on Count 4, to run consecutively to all other counts.

Mohamadi appealed the judgment of conviction to the United States Court of Appeals for the Fourth Circuit. By unpublished opinion dated January 13, 2012, the Fourth Circuit affirmed each of the petitioner's convictions. *See United States v. Mohamadi*, 461 F. App'x 328 (4th Cir. Jan. 13, 2012) (per curiam). Petitioner's subsequent petition for a writ of *certiorari* to the United States Supreme Court was denied on April 29, 2013. *See Mohamadi v. United States*, 133 S. Ct. 2020, 185 L. Ed. 2d 888 (2013).

On June 20, 2014, Mohamadi filed the instant motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Dkt. No. 240). At the Court's direction, the Government responded to this motion (Dkt. No. 245), and Petitioner has replied (Dkt. No. 249). Petitioner has also filed two supplemental briefs in support of his motion. (Dkt. Nos. 257, 258). After reviewing these filings, the motion is now ripe for resolution.

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II. STANDARD OF REVIEW

Petitioner is entitled to relief under 28 U.S.C. § 2255 if he demonstrates that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the sentencing court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. Petitioner bears the burden of proving his grounds for collateral relief by a preponderance of the evidence. *See Vanater v. Boles*, 377 F.2d 898, 900 (4th Cir. 1967).

Relief under § 2255 is designed to correct for fundamental constitutional, jurisdictional, or other errors, and it is therefore reserved for situations in which failing to grant relief would otherwise "inherently result[ ] in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 442, 428 (1962)). A motion pursuant to § 2255 "may not do service for an appeal," and claims that have been waived by a failure to appeal are therefore procedurally defaulted unless the movant can show cause and actual prejudice. *United States v. Frady*, 456 U.S. 152, 165–67 (1982); *United States v. Maybeck*, 23 F.3d 888, 891–92 (4th Cir. 1994) (applying standard to unappealed guilty pleas). An exception applies, however, when a defendant brings a claim of constitutionally ineffective assistance of counsel, which can be raised in a collateral attack on his conviction or sentence. *See United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998); *United States v. DeFusco*, 949 F.2d 114, 120–21 (4th Cir. 1991); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997).

III. DISCUSSION

Mohamadi has alleged 21 "grounds" for relief. All of them appear to make some iteration of a Sixth Amendment "ineffective assistance of counsel" argument. *See generally*

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Petr's Mem. in Supp. None of these grounds meet the standard for ineffective assistance of counsel.

To establish ineffective assistance of counsel, Mohamadi must satisfy the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), which requires showing "that counsel's representation fell below an objective standard of reasonableness" and that the defendant suffered prejudice from that substandard performance. *Id.* at 687–688. Because it "is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence" and because a wide range of legitimate defense strategies are possible in a given case, "scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "Once counsel conducts a reasonable investigation of law and facts in a particular case, his strategic decisions are virtually unchallengeable." *Powell v. Kelly*, 562 F.3d 656, 670 (4th Cir. 2009). To show prejudice, Mohamadi must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*; *see also id.* at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). The burden of proving both prongs is on the petitioner, who must do so by a preponderance of the evidence. *See Strickland*, 466 U.S. 668 at 696-97; *Berry v. United States*, 884 F. Supp. 2d 453, 457 (E.D. Va. 2012).

In large part, Mohamadi's claims contain arguments that are either duplicative or otherwise seek to re-litigate issues that were raised, or should have been raised, on appeal. Thus, where appropriate, the Court will group these claims together and address them summarily. Nonetheless, there are a few categories of claims that warrant additional attention. They are the: (1) "counsel of choice" argument; (2) the "failure to investigate" argument; and (3) the *Brady*/evidentiary arguments. The Court will address these arguments in turn.

A. Counsel of Choice

Mohamadi argues that he was denied effective assistance of counsel because he was unable to obtain his counsel of choice. *See* Petr's Mem. in Supp. at 3–5. After he was indicted, Mohamadi retained attorney Frank Salvato as defense counsel. Mohamadi alleges that he and Mr. Salvato had an agreement under which Mohamadi would put $40,000 in a trust account to pay for Mr. Salvato's services, and Mr. Salvato would return unused money. Specifically, when Mohamadi chose to terminate Mr. Salvato's representation, Mr. Salvato was to return $20,000 to Mohamadi. Evidently Mr. Salvato failed to do so.

Initially, it is worth noting that Mr. Salvato was not Mohamadi's trial counsel. Instead, the Federal Public Defender personally handled Mohamadi's defense, with the help of two experienced assistants. This defense team filed numerous pre-trial motions, and was successful in suppressing prejudicial videotape evidence of some of Mohamadi's incarcerated conversations. On appeal, Mohamadi was represented by Matthew Robinson, who raised both procedural and substantive challenges to his convictions. Thus, the record reveals that Mohamadi's counsel zealously defended him at every stage of the proceedings.

Nonetheless, Mohamadi argues that he was unable to obtain counsel of his choice because he lacked funds due to Mr. Salvato's failure to return the $20,000. In support of his argument, he cites to the following cases: *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006); *United States v. Inman*, 483 F. 2d 738 (4th Cir. 1973); and *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), aff'd 541 F.3d 130 (2d Cir. 2008). *See* Petr's Mem. in Supp. at 5. These cases are all distinguishable.

In *Gonzalez-Lopez*, the Supreme Court held

> Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a

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> Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.

Gonzalez-Lopez, 548 U.S. at 149.

In that case, the district court denied the applications for *pro hac vice* admission filed by the attorney the defendant wished to have as his counsel. *Id.* at 142. The Eighth Circuit vacated the conviction because the defendant's Sixth Amendment right to counsel of his choice was violated by the district court's refusal to grant *pro hac vice* admission under the circumstances. *Id.* at 143–144. The Supreme Court affirmed the Eighth Circuit. *Id.* at 152.

Gonzalez-Lopez is entirely distinguishable from the instant case. This Court did not refuse to grant *pro hac vice* admission to the attorney of Mohamadi's choice. Indeed, the Court did not interfere in any way with Mohamadi's relationship with Mr. Salvato; it was Mohamadi who fired Mr. Salvato. The Court played no part in that decision. Mohamadi's sole claim is that Mr. Salvato's failure to return the $20,000 precluded Mohamadi from hiring other counsel. But Mr. Salvato's failure to return Mohamadi's money is in no way attributable to this Court or to the Government. Indeed, Mohamadi's claim appears to be no more than a breach of contract case against his former lawyer. Thus, this case is different from the facts presented in *Gonzalez-Lopez*, and the Court concludes that it does not amount to the Government denying access to Mohamadi's counsel of choice.

In *Stein*, the Second Circuit affirmed the district court's dismissal of the indictment due to violation of defendants' right to counsel of choice. There, the defendants claimed that the government "unjustifiably interfered with their relationship with counsel" when the Government pressured a company to stop paying its employees' attorneys' fees. *Stein*, 541 F.3d at 155 (2d Cir. 2008). There is no allegation in the instant case that the government caused Mr. Salvato to

refuse to return Mohamadi's money, and there is no governmental bar to Mohamadi seeking to recover his money directly from Mr. Salvato. Accordingly, *Stein* is also thoroughly distinguishable.

The third case cited by Mohamadi, *Inman*, is similarly distinct. In that case, the defendant was appointed counsel. *Inman*, 483 F.2d at 739. Approximately one week before trial was set to begin, defendant's mother retained private counsel to represent defendant. *Id.* Six days before trial, retained counsel suggested that the trial date be continued. *Id.* The district judge declined to grant a continuance and ruled that appointed counsel would continue to represent the defendant. *Id.* Retained counsel did not file a formal motion for continuance until the morning of trial, at which time, the motion was denied. *Id.* The trial went forward with appointed counsel representing the defendant. The Fourth Circuit affirmed the district court's exercise of discretion under the circumstances.

Mohamadi makes no allegation that he sought to receive a continuance after having retained new counsel. Indeed, he argues elsewhere in his motion that the Court improperly granted continuances to the Federal Public Defender appointed to represent him after Mr. Salvato withdrew. Accordingly, *Inman* provides no support for Mohamadi's position. For these reasons, Mohamadi has failed to show that his right to choice of counsel was violated.

Mohamadi makes the same assertion with respect to his appellate counsel's failure to raise his counsel of choice argument on appeal. Petr's Mem. in Supp. at 31–34. Mohamadi now argues that the Court "blocked [his] access to [his] money," thereby preventing him from obtaining counsel of choice. *Id.* at 31. However, he does not contend that the Court restrained his assets.[1] Rather, Mohamadi's argument is that, because of restrictions on his ability to

[1] Indeed, Mohamadi now appears to contend that he had assets including money, jewelry, and a vehicle, the implication being that he could have used these assets to hire a lawyer. Petr's Mem. in Supp. at 31. This is directly

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communicate with people outside of the jail, he was constructively denied access to his money. *See id.* at 32 ("[N]o matter how much money you have if the Courts block all forms of communication there is no way to use your money in your defense.").

More broadly, he alleges that the communication restraints he experienced while incarcerated prevented him from accessing counsel. Mohamadi filed a *pro se* pretrial motion to dismiss the indictment or alternatively to continue the trial and modify restrictions of his confinement pending trial on the ground that these restrictions violated his Sixth Amendment rights. (Dkt. No. 146). The Court denied the motion and Mohamadi did not address this decision on appeal. In this vein, it is worth recalling that Mohamadi was indicted for obstruction of justice and for soliciting murder while in prison. Thus, the restrictions on Mohamadi's communications were made as a matter of security rather than a means of punishment. Moreover, the Marshals' service never impeded Mohamadi's access to counsel, and the Federal Public Defender represented him at every stage of the trial. Because there is no evidence that the security restrictions imposed on Mohamadi in jail prevented him from retaining a lawyer, the Court finds there was no ineffective assistance of appellate counsel.

Mohamadi also argues that counsel was ineffective by failing to raise on appeal that his right to self-representation was violated when the Court denied Mohamadi's motion to proceed *pro se*. Because the Court does not believe Mohamadi's right to self-representation was violated, Mohamadi has shown neither deficient performance nor prejudice.

B. Failure to Investigate and Obtain Evidence

Mohamadi also argues that counsel failed to investigate or uncover favorable evidence pertaining to the robbery charges (Counts 1 and 2) and the charges of murder for hire and

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contradictory to his argument that he was without money to hire a lawyer due to Mr. Salvato's failure to return the $20,000.

witness tampering that occurred while Mohamadi was in jail (Counts 6, 7, 8, 9, 10).[2] *See* Petr's Mem. in Supp. at 7–10.

1. *Video Recordings*

Mohamadi first argues that counsel failed to obtain video recordings from "Steve's Bar Room" in Washington, D.C. He believes these videos would have rebutted statements by a prostitute, Ms. Riley, who claimed that she and Mohamadi were at the bar together. In support, Mohamadi attached to his motion the affidavit of a building manager at Steve's Bar Room. *See* "Ex. F" (Dkt. No. 240-2). However, the affidavit is fatal to Mohamadi's argument, because it would not have been reasonable for defense attorneys to obtain the video footage in the time allotted. The bar employee swore in his affidavit that the building had security cameras which would have been produced had the government or the defense requested the videos. *Id.* However, he also stated that the recordings were only available for 2 years. Ms. Riley testified that she and Mohamadi went to the bar very early in the morning on May 27, 2007, meaning the relevant footage would not have been available past May 27, 2009.[3] Mohamadi was not indicted until April 9, 2009, and the Federal Public Defender was appointed on April 13, 2009. Defense counsel's alleged failure to obtain the video recordings within approximately a month and a half of joining the case does not fall below an objectively reasonable standard of performance. Accordingly, Mohamadi has failed to satisfy the performance prong of *Strickland*.

Moreover, given the "overwhelming evidence of Mohamadi's guilt on each offense on which he was convicted," *Mohamadi*, 461 F. App'x at 333 n.6, the Court has reason to doubt that the security footage would have provided anything beneficial to Mohamadi's defense. Indeed,

[2] Mohamadi was acquitted of Count 6, yet strangely he argues that defense counsel performed deficiently with respect to this Count as well.

[3] The affiant incorrectly refers to "Labor Day" weekend, but the events in question occurred on Memorial Day weekend.

even if the security camera did not clearly show him at the bar, the jury could have concluded that it simply did not capture him on that night. Thus, he has not met the prejudice prong of the *Strickland* test either.

2. *Cell Phone Information*

Mohamadi also argues that counsel failed to obtain the "cell site location for [his] phone" and "cell site location of [the victims'] phones." Petr's Mem. in Supp. at 8. The argument is mentioned in a parenthetical and Mohamadi does not elaborate on why such information would have helped his defense. Absent more information as to why Mohamadi believes this constituted deficient performance and what the effect of this evidence may have been, the Court cannot make a determination regarding ineffective assistance of counsel.

3. *Fingerprint Examiner*

Mohamadi makes a very brief argument concerning counsel's alleged failure to "investigate" the fingerprint examiner. Petr's Mem. in Supp. at 8. Mohamadi's argument spans two sentences with no supporting information. He has therefore failed to carry his burden to show deficient performance and prejudice and by a preponderance of the evidence.

C. **Brady Violations and Discovery Motions**

Mohamadi next argues that counsel failed to raise arguments regarding the Government's alleged *Brady* violations. Petr's Mem. in Supp. at 16–19. Mohamadi previously raised this issue in a *pro se* motions on March 2, 2010 (Dkt. No. 125), and again on April 22, 2010. (Dkt. No. 172). The Court found that these objections had no merit and denied the motions. Mohamadi did not raise the issue again on appeal, and therefore he has procedurally defaulted on the claims.

This argument leads directly into Petitioner's additional post-appeal motions. These are: a motion to add certain affidavits and exhibits to the record (Dkt. No. 254), a motion for

production of transcripts (Dkt. No. 252), a motion for discovery (Dkt. No. 253), a motion to expand the record, and a motion for an evidentiary hearing (Dkt. No. 255). Initially, the Court GRANTS Mohamadi's motion to expand the record. Indeed, the discussion above shows that the Court readily considered and analyzed the exhibits and affidavits that he submitted in support of his petition. That ruling, however, does nothing to change the disposition of his petition.

In large part, these motions all seek to expand the record to address factual challenges to his conviction. For example, the motion for discovery states that he will seek evidence to prove that "Joseph Battista and the A.T.F. paid Richard Bryan to set up Petitioner." Mot. for Discov. ¶ 3. The time for this sort of factual challenge was at trial. Motions under § 2255 do not exist to explore every potential defense that petitioners might have raised, but are instead to protect against "a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 442, 428 (1962)). In this case, the only evidence that Mohamadi adduces to support his factual claims comes in the form of his own unsupported statements. *See* Mohamadi Aff. (Dkt. No. 240-2).

Because Mohamadi took the stand in his own defense, the jury had ample opportunity to consider his side of the story, and the Court therefore finds that Mohamadi has not met the high burden of showing any miscarriage of justice in the failure to consider or further develop his allegations. For the same reasons, the Court finds that an evidentiary hearing is not necessary.

The motion for transcripts is denied on similar logic. First, these transcripts were available to Mohamadi beginning on March 25, 2011, when the Court notified the parties that it had released the official transcript for appeal. (Dkt. No. 230). Second, Petitioner only filed this motion after fully briefing his § 2255 and fully responding to the Government's opposition. He has even filed two supplemental briefs after those filings. Thus, he has exhausted his

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opportunity to file briefs in support this motion, and any addition filing would likely constitute a successive § 2255 petition, for which prior approval is required. *See* 28 U.S.C. § 2244(b)(3)(A); *United States v. Winestock*, 340 F. 3d 200, 207 (4th Cir. 2003) (setting forth the standard for determining whether a motion qualifies as a successive § 2255). Thus, the availability of these transcripts would not serve any legitimate purpose.

D. Procedural Default and Prejudice Under *Strickland*

Underlying the Court's consideration of these issues is the fact that the arguments Mohamadi raised on appeal (or should have raised on appeal) cannot be re-litigated here. *See Frady*, 456 U.S. at 165–67. On appeal, the Fourth Circuit specifically stated that: "Put simply . . . there was overwhelming evidence of Mohamadi's guilt on each offense on which he was convicted." *Mohamadi*, 461 F. App'x at 333 n.6. In affirming Mohamadi's conviction, the Fourth Circuit specifically considered and rejected arguments regarding (1) whether the charges were appropriately joined; (2) the admission of incriminating jailhouse statements; (3) venue; and (4) sufficiency of the evidence for Hobbs Act robbery. *Id.* at 331–32. In addition, the court summarily rejected a variety of arguments, including: (1) the admission of a photographic line-up identification; (2) the difference between the allegations in the indictment and the jury instructions; and (3) alleged violations of the Speedy Trial Act. *Id.* at 332 n.4. Thus, to the extent Mohamadi raises any of these issues in this Motion (as opposed to Sixth Amendment claims), he must be able to allege "cause" and "prejudice" in order to levy a proper collateral challenge against his conviction. *See Bousley v. United States*, 523 U.S. 614, 622 (1998).

Moreover, in light of the Fourth Circuit's finding that "there was overwhelming evidence of Mohamadi's guilt," the burden of showing prejudice is extremely high. *Mohamadi*, 461 F. App'x at 333 n.4. This means that, in order to succeed, Mohamadi must do more than suggest

that his counsel was inadequate because it failed to persuade the Court that it should grant Mohamadi's motions. He must instead point to specific evidence of misconduct or inadequacies in order to maintain his burden. In this case, he has failed to do so. Under these principles, the Court can summarily reject many of Mohamadi's arguments.

1. *Speedy Trial*

Mohamadi argues that counsel failed to secure a speedy trial. Petr's Mem. in Supp. at 5–6. The Fourth Circuit has already rejected Mohamadi's arguments regarding speedy trial. *See Mohamadi*, 461 F. App'x at 332 n. 4 ("Mohamadi asserts that his speedy trial rights were contravened. This contention is...baseless."). Because there was no speedy trial violation, Mohamadi cannot show ineffective assistance of counsel in this regard.

2. *Actual Innocence*

Mohamadi argues that he is actually and factually innocent of the crimes of conviction. Petr's Mem. in Supp. at 37–41. This portion of Mohamadi's memorandum is largely duplicative of his previous arguments, and it fails to assert any plausible claim of ineffective assistance of counsel. Moreover, it runs directly contrary to the Fourth Circuit's statement that there was overwhelming evidence to support each conviction.

3. *Jury Challenge*

Mohamadi also argues that counsel failed to raise on appeal the denial of his motion to challenge the jury selection procedures. Petr's Mem. in Supp. at 24. Mohamadi makes baseless assertions that Hispanics, blacks, and "blue collar citizens" were excluded from the jury. *Id.* Because these assertions are without merit and devoid of supporting evidence, the Court concludes Mohamadi has failed to show deficient performance or prejudice.

4. *Failure to Object*

Mohamadi's next assertion is that counsel failed to object to this Court's "constructive amendment" of the indictment. Petr's Mem. in Supp. at 10. Mohamadi argues that the Court lacked jurisdiction to sentence him for Counts 6 and 7, the solicitation to commit murder for hire charges, and counsel improperly failed to object. *See id.* at 25 – 26. With respect to Count 6, the argument is obviously moot, since Mohamadi was acquitted of that Count. With respect to Count 7, the Court summarily rejects the argument that jurisdiction was lacking. Accordingly, counsel could not be deficient.

5. *Sufficiency of the Indictment*

Mohamadi contends that counsel failed to challenge the deficiency of the indictment with respect to Counts 1 and 2, the Hobbs Act robbery charges. *See* Petr's Mem. in Supp. at 26–29. Specifically, he challenges this Court lacked jurisdiction and venue over the crimes. Mohamadi is wrong that counsel failed to raise these arguments—indeed, counsel filed a motion for acquittal arguing that the Court lacked jurisdiction on Counts 1–4 and lacked venue on Counts 1–3. The Court rejected the arguments. For this reasons, the ineffective assistance of counsel argument is rejected for these counts.

6. *Suppression*

Mohamadi argues that his counsel was ineffective in failing to achieve suppression of certain video recordings of Mohamadi making statements to a jailhouse informant. He does not contend, and he cannot contend, that counsel failed to argue for suppression. Mohamadi readily admits, and the record discloses, that counsel filed several pretrial motions to suppress, including a motion to suppress the statements made to the jailhouse informant (Dkt. No. 21) and a

supplemental motion arguing for, among other things, suppression of the statements to the jailhouse informant. (Dkt. No. 93).

Rather, Mohamadi argues that counsel misunderstood the relevant case law and failed to cite a controlling case, *Kansas v. Ventris*, 556 U.S. 586 (2009), which elaborated on the meaning of *Massiah*. The Court does not believe that counsel performed deficiently because this particular case was not cited, nor has prejudice been shown.

Mohamadi then asserts that appellate counsel was deficient for the same reason as trial counsel. Petr's Mem. in Supp. at 29–31. The Fourth Circuit has already rejected Mohamadi's *Massiah* arguments. Again, he argues merely that counsel failed to cite *Ventris* in making the *Massiah* argument to the Fourth Circuit. Mohamadi is essentially attempting to collaterally attack the appellate court's ruling under the guise of ineffective assistance of counsel. The Court does not believe appellate counsel was deficient, nor is there any showing that the Fourth Circuit likely would have ruled otherwise had *Ventris* been cited.

7. Grand Jury Testimony

Mohamadi contends that counsel failed to object to allegedly false grand jury testimony by Riley. Petr's Mem. in Supp. at 20–21. The Court previously rejected a pre-trial *pro se* motion for production of grand jury material, finding that Mohamadi demonstrated no cause for the production. (Dkt. No. 143). Accordingly, no claim for ineffective performance of counsel arises on this ground. To the extent Mohamadi renews his request for grand jury material, the Court denies the request for failure to show cause pursuant to Fed. R. Crim. P. 6(e)(3)(E)(ii) and *U.S. v. Wallace*, 528 F.2d 863, 865 (4th Cir. 1976).

8. *Diminished Capacity*

Mohamadi also argues that counsel failed to "pursue a diminished capacity defense" to the murder for hire and witness tampering charges. Petr's Mem. in Supp. at 9. This argument is belied by the record, which shows that the Court granted Mohamadi's motion for a psychiatric exam (Dkt. No. 54) and found him competent to stand trial. The evidence therefore does not support these contentions, and further discussion of the issue is not warranted.

IV. CONCLUSION

For the reasons stated above, and for good cause shown, it is hereby

ORDERED that Petitioner's motion to vacate pursuant to 28 U.S.C. § 2255 (Dkt. No. 240) is **DENIED** and the petition is **DISMISSED.**

This is a final order for purposes of appeal. To appeal, petitioner must file a written notice of appeal with the Clerk's Office within sixty (60) days of the date of this Order. *See* Fed. R. App. P. 4(a)(1)(B). A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order that Petitioner wishes to appeal. Petitioner need not explain the grounds for appeal until so directed by the court. Petitioner must also request a certificate of appealability from a circuit judge. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b). For the reasons stated above, this Court expressly declines to issue such a certificate.

The Clerk is **DIRECTED** to forward a copy of this Order to the *pro se* petitioner.

May 5, 2017
Alexandria, Virginia

Liam O'Grady
United States District Judge

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Count 1

(Hobbs Act Robbery)

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges and incorporates the GENERAL ALLEGATIONS of this Indictment.

2. On or about May 26, 2007, and continuing to or through on or about May 27, 2007, in Alexandria, Virginia, in the Eastern District of Virginia, and elsewhere, the defendant, MIRWAIS MOHAMADI, also known as "Omar," and "O," did unlawfully obstruct, delay and affect, and attempt to obstruct, delay and affect, commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery as that term is defined in Title 18, United States Code, Section 1951, in that he did unlawfully attempt to take and obtain personal property consisting of United States currency, belonging to K. R., against her will by means of actual and threatened force, violence, and fear of immediate and future injury to her person, while K.R. was engaged in commercial activities, prostitution and acting as an escort, a business that was engaged in and that affects interstate commerce.

(In violation of Title 18, United States Code, Section 1951.)

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(b)

Count 3

(Use and Carry Firearm in Crime of Violence)

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges and incorporates the GENERAL ALLEGATIONS of this Indictment.

2. On or about May 26, 2007, and continuing to May 27, 2007, in Alexandria, Virginia, in the Eastern District of Virginia, and elsewhere; the defendant, MIRWAIS MOHAMADI, also known as "Omar," and "O," did knowingly and unlawfully use, carry and brandish a firearm, to-wit: a handgun, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to-wit: interference with commerce by violence, in violation of Title 18, United States Code, Section 1951, as set forth in Count 1 of this indictment, which description of said crime of violence is realleged and incorporated by reference as if set forth in full herein. (In violation of Title 18, United States Code, Section 924(c)(1)(A)(ii).)

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(8)

Count 5

(Felon in Possession of Firearm)

THE GRAND JURY FURTHER CHARGES THAT:

1. The Grand Jury realleges and incorporates the GENERAL ALLEGATIONS of this Indictment.

2. On or about May 26, 2007 and continuing through May 27, 2007, in Alexandria, Virginia, in the Eastern District of Virginia, and elsewhere, the defendant, MIRWAIS MOHAMADI, also known as "Omar," and "O," having been convicted on September 15, 1998, in the Circuit Court of Fairfax County, Virginia, of one count of Robbery, three counts of Attempted Robbery and one count of Grand Larceny, all five counts felonies, crimes punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess in and affecting commerce a firearm, such firearm having been shipped and transported in interstate and foreign commerce.

(In violation of Title 18, United States Code, Section 922(g)(1).)

AO 245B (Rev. 12/03)(VAED rev. 2) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA

V.

MIRWAIS MOHAMADI
a/k/a "O"; Omar
Defendant.

Case Number: 1:09CR00179-001

USM Number: 73533-083

Defendant's Attorney:
Michael Nachmanoff, Esquire, Whitney Minter, Esquire, and Jeffrey Corey, Esquire

JUDGMENT IN A CRIMINAL CASE

The defendant is adjudicated guilty of these offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 USC § 1951	Hobbs Act Armed Robbery	Felony	May 27, 2007	1
18 USC § 1951	Hobbs Act Armed Robbery	Felony	May 27, 2007	2
18 USC § 924(c)(1)(A)(ii)	Using a Firearm During and in Relation to a Crime of Violence	Felony	May 27, 2007	3
18 USC § 924(c)(1)(A)(ii)	Using a Firearm During and in Relation to a Crime of Violence	Felony	May 27, 2007	4
18 USC § 922(g)(1)	Felon in Possession	Felony	May 27, 2007	5
18 USC § 373	Solicitation to Commit Murder for Hire	Felony	November 1, 2007	7
18 USC §1958	Murder for Hire	Felony	November 12, 2008	8
18 USC §1512(b)(3)	Witness Tampering	Felony	December 8, 2008	9
18 USC §1512(b)(1)	Witness Tampering	Felony	March 5, 2009	10

The defendant has been found not guilty on Count 6 of the Indictment.

As pronounced on June 18, 2010, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Signed this 17th day of June 2010.

/s/
Liam O'Grady
United States District Judge

Judgement in Case 6 pages
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Defendant's Name: MIRWAIS MOHAMADI
Case Number: 1:09CR00179-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

Count	Assessment	Fine	Restitution
1	$100.00	$0.00	$0.00
2	$100.00	$0.00	$0.00
3	$100.00	$0.00	$0.00
4	$100.00	$0.00	$0.00
5	$100.00	$0.00	$0.00
7	$100.00	$0.00	$0.00
8	$100.00	$0.00	$0.00
9	$100.00	$0.00	$0.00
10	$100.00	$0.00	$0.00
TOTALS:	**$900.00**	**$0.00**	**$0.00**

No fines have been imposed in this case.
The Court waives the cost of prosecution, incarceration, and supervised release.

THE COURT: All right, they will be preserved.

MR. COREY: As for the Rule 29 motion, Your Honor, we are of course aware of the high standard here, and we believe that even under that standard if you view the evidence in the light most favorable to the Government, the Government has failed to produce evidence from which you could find the defendant guilty.

I would like to address several very specific issues though. First of all, with respect to Count 1, the allegation here, Your Honor, is that of an attempt crime. The indictment states that Mr. Mohamadi did unlawfully attempt to take and obtain personal property consisting of United States currency belonging to Kimberly Riley.

The Government, Your Honor, has failed to make a sufficient showing with respect to Count 1. The Government put on evidence of a completed crime. And the elements, of course, for an attempt crime and a completed crime are different in the sense that an attempt crime is a crime that has not been completed.

So, with respect to Count 1, Your Honor, we believe that's a basis for dismissing Count 1.

Also, with respect to Count 1-- One moment, Your Honor.

We would like to reraise the issue of venue, which I know has been briefed and argued before. Your Honor, the

evidence even when viewed in the light most favorable to the Government shows that venue is lacking with respect to Count 1.

The robbery itself, of course, this is the Kimberly Riley robbery, occurred in D.C. There is no evidence of any plan originating in Virginia to rob Ms. Riley. The evidence showed that at most the purpose of the trip was to go to D.C. to visit some clubs.

Ms. Riley in fact stated that she did not fear or have any concern at the time they left Virginia to go to D.C. with respect to being in anyone's presence. In fact, she stated that she did not have any fear until pulling into the alley and thinking at that point in time the robbery was occurring.

So, the robbery itself is a very defined act limited to a few minutes and moments in the District of Columbia. And, therefore, as a result of the evidence that the Government has put on, we believe that the crime itself is wholly contained within the District of Columbia and that there is no jurisdiction here in the Eastern District of Virginia.

THE COURT: What about the evidence that the gun was taken from the apartment by Mr. Mohamadi and brought into the District of Columbia and then used in the robbery?

MR. COREY: Well, Your Honor, there is nothing to

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March 16, 2011

objection, vociferous objection to the Government's version is preserved.

But he would note, and I agree entirely, that Count 1 as was noted in the Rule 29 is charged as an attempt. And although the Government addressed the fact that the substantive offense was addressed higher up in the indictment, I would ask the Court to look at that.

If the Court concludes it's charged as an attempt, as we think it is, the instruction needs to conform to that so that everything is consistent. That is a charging decision the Government made. Why they made it, I don't know. Clearly this is a case where they have proved from their view a completed robbery, but that word was inserted. And I think they have to live with what the grand jury was put on notice of.

The final issue which I think is important for Mr. Mohamadi to know is what the Court intends to rule with regard to the Government's ability to impeach him with his prior convictions should he take the stand.

The Court may be aware that he has prior felony convictions. All five of those felony convictions fall outside of the ten-year time period of 609(b).

THE COURT: In what respect? The charges, the convictions, or the time that he spent incarcerated.

MR. NACHMANOFF: Let me separate them out. They

Pet. App. K2

dated, it has been followed pretty closely. And because of the fact that he was convicted of armed robbery and then now stands charged with two counts of armed robbery, that the potential prejudice outweighs the probative value.

I do think that when you look at the balancing test, that it would be unduly prejudicial.

On the other hand, of course, the conviction itself goes to the credibility, and I think is clearly admissible for that purpose.

So, absent something happening during examination which somehow changed the equation, that's my ruling on that.

A couple of other housekeeping matters. The jury instructions, I am conforming them to the Hobbs Act as pled in the indictment. There was an attempt in one, but it was an attempt and obtain.

And, of course, attempt is a lesser included offense in the completed robbery. I don't know that it is of any great moment or what counsel is prepared to do with it, but I think it's important to conform the instructions to the actual indictment.

You had an eyewitness instruction in your group. We didn't talk about that yesterday. You want that from Horn, which is almost exactly that contained in the O'Malley instructions. Do you still want that eyewitness identification instruction?

Pet. App. K-3

Amendments to the Constitution

ARTICLES IN ADDITION TO, AND AMENDMENTS OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION[11]

Amendment [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment [II]

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment [III]

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[11]The amendments themselves are formally titled articles, following the pattern of the first 10 to be ratified. Only the 13th, 14th, 15th, and 16th had numbers assigned to them when ratified. The first ten amendments are known as the Bill of Rights, and they were part of 12 articles proposed to the legislatures of the states by the First Congress in 1789. The first article concerned the apportionment of Representatives and was never ratified. The second article effectively forced a two-year wait for voted pay increases for Senators and Representatives to take effect, until there was an intervening election for Representatives. This article, having no time limit for its ratification, became the 27th Amendment in 1992, after ratification by three-fourths of the 50 states.

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment [VII]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment [VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment [IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment [X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pet. App. 1

§ 2255. Federal custody; remedies on motion attacking sentence

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

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 924. Penalties [Caution: See prospective amendment notes below.]

(a) (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929 [18 USCS § 929], whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.] or in applying for any license or exemption or relief from disability under the provisions of this chapter [18 USCS §§ 921 et seq.];

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922 [18 USCS § 922];

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l) [18 USCS § 922(1)]; or

(D) willfully violates any other provision of this chapter [18 USCS §§ 921 et seq.],

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (h), (i), (j), or (o) of section 922 [18 USCS § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.], or

(B) violates subsection (m) of section 922 [18 USCS § 922],

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) [18 USCS § 922(q)] shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

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

(i) be sentenced to a term of imprisonment of not less than 5 years;

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

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

USCS §§ 921 et seq.], the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter [18 USCS §§ 921 et seq.] or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title [18 USCS § 924(c)(3)] [subsec. (c)(3) of this section];

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title [18 USCS § 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3)] where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title [18 USCS § 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3)];

(D) any offense described in section 922(d) of this title [18 USCS § 922(d)] where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title [18 USCS § 922(i), 922(j), 922(l), 922(n), or 924(b)];

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition; and

(G) any offense under section 932 or 933 [18 USCS § 932 or 933].

(e) (1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)]

and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 USCS § 922(g)].

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.], for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.