NO:

IN THE SUPREME COURT OF THE UNITED STATES

JEROME SIMMONS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

APPENDIX

** PETITIONER IS INDIGENT AND IN CUSTODY **

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[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-13701

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADRIAN HARDY,
JEROME SIMMONS,

Defendants- Appellants.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:17-cr-60119-KAM-2

Before ROSENBAUM, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

In these consolidated appeals, Adrian Hardy and Jerome Simmons challenge the sentences they received upon resentencing for crimes arising from armed robberies of four jewelry stores in Florida and Georgia in March and April of 2017. After careful review, we affirm.

After a jury trial, Hardy was convicted of one count of conspiracy to commit Hobbs Act robbery and one count of Hobbs Act robbery, *see* 18 U.S.C. § 1951(a), two counts of brandishing a firearm in furtherance of a crime of violence, *see* 18 U.S.C. § 924(c)(1)(A), and four counts of kidnapping, *see* 18 U.S.C. § 1201(a)(1). He was originally sentenced to concurrent terms of 312 months on the robbery and kidnapping counts, plus consecutive terms of 84 months each for the brandishing counts, for a total of 480 months of imprisonment. In Hardy's first appeal, we vacated one of his § 924(c) convictions because it was based on kidnapping, which does not qualify as a crime of violence under § 924(c), and we remanded to the district court for resentencing without that conviction. *United States v. Simmons*, 847 F. App'x 589, 593 (11th Cir. 2021). On remand, the district court imposed a total sentence of 432 months, reducing Hardy's overall sentence to account for his "successful[] appeal[] [of] his sentence," though not to the full extent Hardy requested.

For his part, the jury convicted Simmons of one count of conspiracy to commit Hobbs Act robbery and two counts of Hobbs Act robbery, *see id.* § 1951(a), as well as two counts of brandishing a firearm in furtherance of a crime of violence, *see id.* § 924(c)(1)(A). He was originally sentenced to life imprisonment. On appeal, we held that the district court erred in enhancing his sentence under the career-offender guideline, U.S.S.G. § 4B1.1, and the "three-strikes" law, 18 U.S.C. § 3559(c), and we vacated and remanded for resentencing. *See Simmons*, 847 F. App'x at 594–95. On remand, the court recalculated the guideline range and applied enhancements for use of a firearm, abduction, and carjacking, among others. *See* U.S.S.G. §§ 2B3.1(b)(2)(B), (4)(A) & (5).

Hardy appeals his sentence on the ground that the district court violated his due-process right to a resentencing free of vindictiveness by not reducing his sentence by the full 84 months previously imposed for the vacated § 924(c) conviction. Simmons appeals the district court's application of the abduction, carjacking, and firearm enhancements, arguing that the court improperly relied on coconspirator conduct not relevant to his offenses and also double counted certain conduct.[1]

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[1] Both defendants also argue that Hobbs Act robbery does not qualify as a crime of violence for purposes of 18 U.S.C. § 924(c). We rejected this same argument in their first appeal, *see Simmons*, 847 F. App'x at 593, so that decision is law of the case here. *See United States v. Anderson*, 772 F.3d 662, 668 (11th Cir. 2014) (under the law-of-the-case doctrine, an issue decided at one stage of a case is binding at later stages of the same case). Nor has any change

I.

We start with Hardy's challenge to his sentence on the ground that it was unconstitutionally vindictive. We review *de novo* whether a sentence was unconstitutionally vindictive.[2] *United States v. Mathurin*, 868 F.3d 921, 931 (11th Cir. 2017).

On resentencing, a district court is free to unbundle the entire "sentencing package" and resentence a defendant anew as to the surviving counts of conviction. *United States v. Fowler*, 749 F.3d 1010, 1015–16 (11th Cir. 2014). "The thinking is that when a conviction on one or more of the component counts is vacated for good, the district court should be free to reconstruct the sentencing package (even if there is only one sentence left in the package) to ensure that the overall sentence remains consistent with the guidelines, the § 3553(a) factors, and the court's view concerning the proper sentence in light of all the circumstances." *Id.* This Court's vacatur of a sentence "wipes the slate clean" and generally requires

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in the law has occurred since that appeal, so we remain bound by our precedent, which holds that Hobbs Act robbery constitutes a crime of violence for purposes of § 924(c). *See United States v. Eason*, 953 F.3d 1184, 1191 (11th Cir. 2020) (noting our precedent "that Hobbs Act robbery satisfies the elements clause in 18 U.S.C. § 924(c)").

[2] The government says that we review for plain error, despite Hardy's objection to the district court's failure to "take off the full 84" at resentencing, because he did not articulate the objection in terms of due process or vindictiveness. We need not resolve this issue because we agree with the government that his argument fails even under *de novo* review.

the district court to conduct "a resentencing as if no initial sentencing ever occurred." *United States v. Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017).

Nevertheless, a district court's wide discretion at resentencing must not be exercised with the purpose of punishing a successful appeal. *Alabama v. Smith*, 490 U.S. 794, 798 (1989). That is, due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *holding modified by Smith*, 490 U.S. at 798–99.

Under *Pearce*, a presumption of vindictiveness at resentencing arises if two conditions are present: (1) the sentencing judge "imposes a more severe sentence"; and (2) no non-vindictive reasons for doing so "affirmatively appear" in the record. *Fowler*, 749 F.3d at 1019 (quoting *Pearce*, 395 U.S. at 726). For the first inquiry, we apply the "aggregate package approach," comparing the defendant's new total aggregate sentence to his old one. *Id.* at 1023. So long as the new total sentence is less than the old total sentence, no presumption of vindictiveness arises. *See id.*

Where the presumption of vindictiveness does not apply, the defendant must affirmatively prove actual vindictiveness. *Mathurin*, 868 F.3d at 937; *see Wasman v. United States*, 468 U.S. 559, 569 (1984). We have held that a defendant failed to show actual vindictiveness where he offered "no reason to doubt the judge's stated [non-vindictive] rationale" for imposing the sentence, and

there was "no evidence to suggest it was in any way vindictive." *Mathurin*, 868 F.3d at 937.

Here, Hardy has not shown that he was resentenced based on an impermissible vindictive motive. He acknowledges that vindictiveness cannot be presumed here because the district court reduced the length of his overall sentence—from 480 to 432 months. *See Fowler*, 749 F.3d at 1023. And nothing in the record suggests that the sentence was imposed for the purpose of punishing him for his successful appeal.

On the contrary, the district court expressly recognized that Hardy deserved a reduction in his overall sentence for his successful appeal, and it reduced his total sentence by 48 months. Yet the court explained that, in its view, a more "significant sentence" than requested by Hardy was "warranted under the facts of the case" and the § 3553(a) factors, which it discussed in detail. [**Doc. 456 at 33–37**] The court noted that, in originally sentencing Hardy, it had lowered the sentence on the non-brandishing counts to account for the "extra 84 months tagged on to his [g]uideline range." [***Id.* at 37**] These comments show that the court viewed the original sentence as a "package sentence," which it was entitled to reconsider once the § 924(c) conviction and 84-month consecutive sentence were vacated. *See Fowler*, 749 F.3d at 1017–18, 1023. Hardy has offered no reason to doubt the court's stated non-vindictive rationale, nor is there any evidence to suggest that the court's decision was in any way vindictive. *See Mathurin*, 868 F.3d at 937.

Accordingly, we affirm Hardy's sentence.

II.

Simmons challenges the district court's recalculation of his guideline range at resentencing. Simmons contends that the court erred in applying enhancements for abduction and carjacking based solely on a coconspirator's conduct after escaping from the immediate area of the robbery and after Simmons was apprehended. He also says that the court engaged in impermissible double counting when it applied a firearm enhancement based on conduct which, in his view, formed the basis for his § 924(c) convictions. We consider each argument in turn.

A.

"Whether a co-conspirator's act was reasonably foreseeable to the defendant so that it qualifies as relevant conduct is a question of fact reviewed for clear error." *United States v. Valarezo-Orobio*, 635 F.3d 1261, 1264 (11th Cir. 2011). When applying clear-error review, we will affirm the district court unless we are convinced that it made a mistake. *United States v. Gordillo*, 920 F.3d 1292, 1297 (11th Cir. 2019). There is "no clear error in cases in which the record supports the district court's findings." *United States v. Petrie*, 302 F.3d 1280, 1290 (11th Cir. 2002).

For robbery offenses, a four-level increase to the defendant's offense level applies "[i]f any person was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). A two-level increase applies if the offense involved carjacking. *Id.* § 2B3.1(b)(5). The government has the

burden of introducing "sufficient and reliable evidence" to prove the facts necessary to support a challenged sentencing enhancement by a preponderance of the evidence. *United States v. Grady*, 18 F.4th 1275, 1291–92 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 2871 (2022).

When calculating the guideline range, the district court may rely on "all relevant conduct," not just charged conduct. *United States v. Rodriguez*, 751 F.3d 1244, 1256 (11th Cir. 2014) (quotation marks omitted). In the case of jointly undertaken criminal activity, relevant conduct includes "all acts and omissions of others that were (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity," whether those acts occurred in preparation for the offense, during its commission, or to avoid detection or responsibility. U.S.S.G. § 1B1.3(a)(1)(B). All three prongs must be met to be included as relevant conduct. *Id.* § 1B1.3, cmt. n.3(A). In applying this test, we first determine the "scope of criminal activity the defendant agreed to jointly undertake." *Grady*, 18 F.4th at 1292 (quotation marks omitted). Then, we must "consider all reasonably foreseeable acts and omissions of others in the jointly undertaken criminal activity." *Id.* (quotation marks omitted).

1.

The record shows that, on April 13, 2017, Simmons, Hardy, and a coconspirator entered the LSO Jewelers and Repair store armed with firearms, locked the door, ordered employees to the

ground at gunpoint, and began ransacking the store. The gunmen communicated by walkie-talkie with another coconspirator, Christopher Brinson, who was waiting outside in a car ready to act as the getaway driver. After about ten minutes, Brinson notified the robbers that the police had arrived—an off-duty officer had noticed the men enter the store and called the police. Upon seeing the police out front, the robbers dropped the merchandise and fled out the back, going separate directions. Simmons was found hiding in a nearby parking lot. Hardy made it farther, escaping the perimeter established by law enforcement and forcibly entering a nearby residence, where he held the four individuals inside hostage while he planned his escape, all the while checking for police outside. He then forced the victims to drive him from Port Saint Lucie to Fort Lauderdale in their vehicle.

The district court ruled that Hardy's conduct of abducting the victims and commandeering their car during escape from the robbery could be attributed to Simmons as the reasonably foreseeable conduct of a coconspirator in furtherance of the robbery. In the court's view, the jointly undertaken criminal activity included "escape with whatever means were reasonably available to them," and that it was reasonably foreseeable that a coconspirator escaping from an armed robbery upon detection by police would "engage in other criminal conduct in order to effectuate [his] escape." Accordingly, it applied the four-level abduction enhancement, U.S.S.G. § 2B3.1(b)(4)(A), and the two-level carjacking enhancement, *id.* § 2B3.1(b)(5).

2.

Here, the district court did not clearly err in attributing Hardy's abduction and carjacking conduct to Simmons as relevant conduct for purposes of sentencing.

Our decision in *United States v. Cover* is instructive. In *Cover*, as here, the defendant challenged the application of abduction and carjacking sentencing enhancements based on the conduct of a conspirator during escape from an armed robbery. *See* 199 F.3d 1270, 1274–75 (11th Cir. 2000), *superseded by regulation on other grounds as noted in United States v. Diaz*, 248 F.3d 1065, 1107 (11th Cir. 2001). Cover and two accomplices, armed with firearms, took control of a bank by threats of violence, forcing fifteen victims to lie on the floor. *Id.* at 1272. When police responded to a silent alarm, Cover and one accomplice were apprehended attempting to flee, while the other accomplice escaped by carjacking and kidnapping a motorist at gunpoint outside the bank. *Id.* at 1273.

On appeal in *Cover*, we agreed with the district court that the accomplice's escape by means of carjacking and kidnapping was reasonably foreseeable to Cover, given the surrounding circumstances, including the conspirators' actions before the arrival of police. *Id.* at 1274–75. We rejected the argument that the abduction and carjacking were unforeseeable because it was not the getaway the conspirators had planned: "The fact that the co-conspirators agreed to a plan that did not involve carjacking or abduction does not preclude the district court from finding that

carjacking and abduction were reasonably foreseeable if 'the original plan went awry' and the police became involved." *Id.* at 1275.

Here, the record supports the district court's ruling that Hardy's abduction and carjacking were reasonably foreseeable actions within the scope and in furtherance of the jointly undertaken activity. That agreed-upon activity included an armed robbery during which employees of the jewelry store were ordered to the ground at gunpoint. While the conspirators' getaway plans go awry when police arrive, Simmons concedes, relevant conduct in an armed robbery can include an accomplice's resort to violence to escape upon detection. *See id.* at 1274–75. And, given the robbers' conduct preceding detection, the possibility of violence during escape was plainly within the scope of the jointly undertaken activity in this case.

True, the abduction and carjacking conduct in this case was slightly more removed from the robbery than in *Cover*, where that conduct occurred just outside the bank being robbed. The critical question, then, is when the escape phase of the robbery ended. We have recognized that "escape immediately following the taking is a necessary phase of most violent bank robberies." *United States v. Willis*, 559 F.2d 443, 444 (5th Cir. 1977). In other words, the robbery is not over "until the immediate removal phase comes to a halt." *Id.* To be more specific, "the escape continues so long as flight occurs from the possibility of hot pursuit." *United States v. Martin*, 749 F.2d 1514, 1518 (11th Cir. 1985).

We cannot say it was a mistake to conclude that the immediate escape from the robbery was still in progress when the abduction and carjacking here occurred. *See Gordillo*, 920 F.3d at 1297. Although a close call, the record supports the view that Hardy engaged in his conduct during flight from the possibility of hot pursuit, such that Hardy's conduct was, as in *Cover*, sufficiently connected to be considered part of the armed robbery itself. *See Martin*, 749 F.2d at 1518. We therefore affirm the application of the abduction and carjacking enhancements. *See* U.S.S.G. § 2B3.1(b)(4) & (5).

B.

We review *de novo* a claim of impermissible double counting. *United States v. Dudley*, 463 F.3d 1221, 1226 (11th Cir. 2006). "Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *Id.* at 1226–27 (quotation marks omitted).

The robbery guideline requires a six-level enhancement "if a firearm was otherwise used" during the crime. U.S.S.G. § 2B3.1(b)(2)(B). When a defendant is convicted of a § 924(c) violation as well as the predicate crime of violence, however, the defendant's possession of a weapon cannot be used to enhance the offense level of the predicate offense, to prevent double counting the same conduct. *United States v. Le*, 256 F.3d 1229, 1239 (11th

Cir. 2001); *United States v. Diaz*, 248 F.3d 1065, 1107 (11th Cir. 2001).

But that rule against double counting does not apply when a defendant "received weapons enhancements only in connection with the robberies for which he did not receive 18 U.S.C. § 924(c) convictions." *United States v. Pringle*, 350 F.3d 1172, 1180–81 (11th Cir. 2003). In other words, the rule does not bar enhancing a conspiracy sentence for a coconspirator's use of a firearm during robberies that did not form the basis of a defendant's § 924(c) conviction. *Id.* at 1179.

Here, the district court did not err in applying the six-level enhancement for use of a firearm to Simmons's conspiracy count. The court specifically applied the enhancements in connection with the Lily's Jewelers and Bishop's Jewelers robberies, for which Simmons did not receive § 924(c) convictions. Under *Pringle*, therefore, the enhancements did not amount to double counting, even though the conspiracy count covered all four robberies. *See id.* And contrary to Simmons's arguments, the use of a firearm during the Lily's and Bishop's robberies did not need to be alleged in the indictment or found by a jury for purposes of the advisory guideline range. *See United States v. Charles*, 757 F.3d 1222, 1225–26 (11th Cir. 2014) (under an advisory guidelines scheme, a "district court may continue to make guidelines calculations based upon judicial fact findings and may enhance a sentence—so long as its findings do not increase the statutory maximum or minimum authorized by facts determined in a guilty plea or jury verdict").

For these reasons, we affirm Simmons's sentence.

AFFIRMED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12262
Non-Argument Calendar

D.C. Docket No. 0:17-cr-60119-KAM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEROME SIMMONS,

Defendant-Appellant.

No. 19-12263
Non-Argument Calendar

D.C. Docket No. 0:17-cr-60119-KAM-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTOPHER BRINSON,

Defendant-Appellant.

No. 19-12271
Non-Argument Calendar

D.C. Docket No. 0:17-cr-60119-KAM-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADRIAN HARDY,

Defendant-Appellant.

No. 19-12309
Non-Argument Calendar

D.C. Docket No. 0:17-cr-60119-KAM-4

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EMMORY MOORE,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(February 17, 2021)

Before WILLIAM PRYOR, Chief Judge, WILSON and ROSENBAUM, Circuit Judges.

PER CURIAM:

In these consolidated appeals, Jerome Simmons, Christopher Brinson, Adrian Hardy, and Emmory Moore challenge their sentences and multiple convictions arising from the armed robberies of four jewelry stores in Florida and Georgia. Hardy argues that the district court should have evaluated his competency during trial and that it constructively amended his indictment in its jury instructions. He also argues that his conviction of brandishing a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii), should be vacated because federal kidnapping, *id.* § 1201(a), does not qualify as a crime of violence. All four defendants also argue that their convictions of brandishing a firearm in furtherance of a crime of violence, *id.* § 924(c)(1)(A)(ii), should be vacated because Hobbs Act robbery, *id.* § 1951(a), does not qualify as a crime of violence. And all four challenge their classification as career offenders under the Sentencing

Guidelines. *See* United States Sentencing Guidelines Manual § 4B1.1 (Nov. 2018). Simmons and Moore also contest their sentences to life imprisonment as repeat violent offenders under the "three strikes" law, 18 U.S.C. § 3559(c). We affirm in part, and we vacate and remand in part.

Four standards govern our review. We review the denial of a motion for a competency evaluation for abuse of discretion, *United States v. Nickels*, 324 F.3d 1250, 1251 (11th Cir. 2003), and findings of fact about a defendant's competency for clear error, *United States v. Bradley*, 644 F.3d 1213, 1267 (11th Cir. 2011). We review for plain error issues raised for the first time on appeal. *United States v. Olano*, 507 U.S. 725, 732 (1993). We review *de novo* whether a conviction qualifies as a crime of violence under section 924(c), *United States v. Bates*, 960 F.3d 1278, 1285 (11th Cir. 2020), and whether the district court correctly interpreted the Sentencing Guidelines, *United States v. Harris*, 586 F.3d 1283, 1284 (11th Cir. 2009). We review factual findings for sentencing for clear error. *United States v. Castaneda-Pozo*, 877 F.3d 1249, 1251 (11th Cir. 2017).

The district court did not abuse its discretion in denying Hardy's motion for a competency evaluation. The Due Process Clause of the Fifth Amendment prohibits the government from trying a defendant who is incompetent. *United States v. Cometa*, 966 F.3d 1285, 1291 (11th Cir. 2020). "The Due Process Clause also guarantees a right to a competency hearing [if] the court learns of information

that raises a bona fide doubt regarding the defendant's competence." *Id.* (internal quotation marks omitted). "A defendant is competent if he possesses the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Id.* (internal quotation marks omitted). As defense counsel stated during trial, Hardy "understood what was going on in the courtroom." Hardy commented on trial matters, he played a role in his defense by reviewing evidence, making evidentiary motions, and demanding that counsel ask specific questions during cross-examination, and he occasionally accepted his attorney's advice.

Although Hardy had a history of mental health issues, his pattern of strategic disruptions supports the findings by the district court that no bona fide doubt existed about his competency to stand trial and that a mental evaluation was unnecessary. *See id.*; *Indiana v. Edwards*, 554 U.S. 164, 178 (2008) (stating that defendants may be "competent enough to stand trial . . . [yet] still suffer from severe mental illness"). Hardy complained that his trial was unfair, that the government was "railroad[ing]" him, and that counsel was not representing him effectively. He also cursed at and accused witnesses of perjury, argued with the district court, and cut himself with razor blade he smuggled into the courtroom. He used the razor blade after becoming exasperated with adverse rulings and, in the jury's presence, inflicted a minor wound that required only a bandage. The district

court was entitled to find that Hardy's behavior evidenced an intent to manipulate the proceedings.

Hardy also argues that the district court constructively amended his indictment, which charged him with kidnapping the victims "for ransom and reward and otherwise, that is, to commit a robbery," by instructing the jury that it could find Hardy guilty if the kidnapping was conducted for ransom, reward "or other benefit," but Hardy waived any objection to that instruction. "Under the doctrine of invited error, where a party expressly accepts a jury instruction, such action serves to waive his right to challenge the accepted instruction on appeal." *United States v. Baston*, 818 F.3d 651, 661 (11th Cir. 2016) (internal quotation marks omitted and alterations adopted). After the government proposed using the pattern jury instruction on kidnapping, Hardy's attorney agreed to the instruction, which included the "other benefit" language he now challenges. When the government later revised the instruction only to omit language about interstate commerce, Hardy's attorney objected to that revision. But he made clear that he otherwise agreed to the pattern instruction. Hardy cannot now complain about the "other benefit" language that he earlier approved.

The government concedes, and we agree, that the district court erred by convicting Hardy of count 11 in his indictment for brandishing a firearm in furtherance of a kidnapping. Section 924(c) imposes a mandatory minimum

sentence of seven years of imprisonment for "any person who, during and in relation to any crime of violence" brandishes a firearm. 18 U.S.C. § 924(c)(1)(A)(ii). Our recent decision in *United States v. Gillis*, 938 F.3d 1181, 1206 (11th Cir. 2019), makes clear that federal kidnapping, 18 U.S.C. § 1202(a), does not qualify as a crime of violence under section 924(c). So we vacate Hardy's conviction on count 11 and remand for resentencing without that conviction.

The district court did not err by using Hobbs Act robbery as the predicate offense for the defendants' other convictions of brandishing a firearm in relation to a crime of violence. *See id.* § 924(c)(1)(A)(ii). We held in *United States v. St. Hubert*, 909 F.3d 335, 345 (11th Cir. 2018), that Hobbs Act robbery qualifies categorically as a crime of violence under the elements clause in section 924(c)(3)(A). That precedent controls our resolution of this issue.

The government concedes, and we agree, that the district court erred by sentencing Brinson as a career offender. *See* U.S.S.G. § 4B1.1. We recently held in *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020), that Hobbs Act robbery, 18 U.S.C. §1951(a), does not qualify as a crime of violence under the career-offender guideline, U.S.S.G. § 4B1.2(a). We vacate Brinson's sentence and remand for the district court to recalculate his sentence without the career-offender enhancement.

The district court did not plainly err in sentencing Hardy as a career offender. *See id.* § 4B1.1. Although Hardy's conviction for Hobbs Act robbery does not constitute a crime of violence, *see Eason*, 953 F.3d at 1187, it is not plain that his conviction for federal kidnapping, 18 U.S.C. §1201(a), fails to qualify under the enumerated-offenses clause for the career-offender guideline, U.S.S.G. § 4B1.2. "An error is [not] plain [unless] it is clear or obvious—that is, if the explicit language of a statute or rule or precedent from the Supreme Court or this Court directly resolves the issue." *United States v. Innocent*, 977 F.3d 1077, 1081 (11th Cir. 2020) (internal quotation marks and citations omitted) (alteration adopted). Hardy identifies no precedent holding that federal kidnapping is not a crime of violence under section 4B1.1.

The error in sentencing Moore as a career offender was harmless because he received the same sentence of life imprisonment under the "three strikes" law, 18 U.S.C. § 3559(c). Section 3559(c) mandates a sentence of life imprisonment when a defendant is convicted of a serious violent felony and has two or more similar prior convictions. *Id.* § 3559(c)(1). Section 3559 defines "serious violent felony" as "a Federal offense . . . consisting of . . . robbery (as described in section 2111, 2113, or 2118); . . . [or] firearms use . . . ." *Id.* § 3559(c)(2)(F)(1). "[T]he term 'firearms use' means an offense that has as its elements those described in section 924(c) . . ., if the firearm was brandished, discharged, or otherwise used as a

weapon and the crime of violence . . . during and relation to which the firearm was used was subject to prosecution in a court of the United States . . . .” *Id.* § 3559(c)(2)(D). Moore’s conviction of brandishing a firearm in furtherance of a Hobbs Act robbery, *id.* § 924(c)(1)(A)(ii), qualifies as a crime of violence as an offense consisting of firearm use, *id.* § 3559(c)(2)(D), (F)(1). And Moore does not dispute that he had two prior convictions of armed robbery with a firearm in 2001 and 2014 that qualify as serious violent felonies.

Moore’s challenges of his conviction under section 3559 are foreclosed by binding precedent. Moore argues that section 3559(c) is unconstitutional because it improperly shifts the burden to him to disprove that his two prior robbery convictions are qualifying offenses to avoid a sentence of life imprisonment. But in *United States v. Gray*, 260 F.3d 1267, 1279 (11th Cir. 2001), we held that Congress could allocate the burden of proof to the defendant without offending his right to due process. And Moore’s argument that his prior convictions should have been proved to a jury beyond a reasonable doubt is foreclosed by our precedent in *United States v. Harris*, 741 F.3d 1245, 1250 (11th Cir. 2014). Moore also argues that his sentence to life imprisonment violates the Eighth Amendment because he was a juvenile when convicted in 2001 of armed robbery. Although “mandatory life-without-parole sentences for juveniles violate the Eighth Amendment,” *Miller v. Alabama*, 567 U.S. 460, 470 (2012), “repeat-offender laws . . . penaliz[e] only

the last offense committed by the defendant," *Nichols v. United States*, 511 U.S. 738, 747 (1994); *United States v. Rodriguez*, 553 U.S. 377, 386 (2008), and do not offend the Eighth Amendment. *United States v. Hoffman*, 710 F.3d 1228, 1232–33 (11th Cir. 2013). The district court sentenced Moore to life imprisonment as an adult for brandishing a firearm in furtherance of a Hobbs Act robbery, not for his prior conviction for armed robbery. The district court did not err by sentencing Moore to life imprisonment as a repeat violent offender. 18 U.S.C. § 3559(c).

The district court erred by enhancing Simmons's sentence under the career-offender guideline, U.S.S.G. § 4B1.1, and under the "three strikes" law, 18 U.S.C. § 3559(c). Simmons was misclassified as a career offender based on his conviction for Hobbs Act robbery. *See Eason*, 953 F.3d at 1187. And his sentence of life imprisonment is not otherwise salvaged by application of the repeat violent offender law, 18 U.S.C. § 3559(c). Although Simmons's conviction for brandishing a firearm during a crime of violence, *id.* § 924(c)(1)(A)(ii), constitutes a crime of violence under the enumerated-offenses clause of the definition of serious violent felony in section 3559, *id.* § 3559(c)(2)(D), (F)(1), he does not have two other qualifying prior convictions. Simmons did not dispute at sentencing that his conviction in 2010 for robbery with a deadly weapon constituted a serious violent felony. *See id.* But he invoked the affirmative defense provided in section 3559 to prove that his conviction in 2005 for strong-arm robbery did not count as a

strike. *See Gray*, 260 F.3d at 1278. And the district court clearly erred in rejecting Simmons's affirmative defense.

Simmons proved that his prior conviction for strong-arm robbery could "not serve as a basis for sentencing . . . [through] establish[ing] by clear and convincing evidence that (i) no firearm or other dangerous weapon was used in the offense; and (ii) the offense did not result in death or serious bodily injury." 18 U.S.C. § 3559(c)(3)(A). The incident report and victim statement of the robbery established that Simmons's codefendant drove a car into the rear of the victims' vehicle at a low speed, which caused "[o]nly a scratch and [a] fender bend," to lure the victims into the open for Simmons and his cohorts to steal their purses. The district court clearly erred in finding that the car was used as a dangerous weapon. *See Castaneda-Pozo*, 877 F.3d at 1251. Simmons proved that his codefendant did not operate the car in a manner that transformed it into a dangerous weapon by, for example, "us[ing] the car in a way that could have caused, [or] did cause, serious injury." *See United States v. Gumbs*, 964 F.3d 1340, 1351 (11th Cir. 2020). The district court erred by sentencing Simmons as a repeat violent offender under section 3559(c). We vacate Simmons's sentence of life imprisonment and remand for the district court to resentence him without an enhancement based on the career-offender guideline, U.S.S.G. § 4B1.1, or the "three strikes" law, 18 U.S.C. § 3559(c).

We **AFFIRM** Simmons's, Moore's, Hardy's, and Brinson's convictions for brandishing a firearm in relation to Hobbs Act robbery, *id.* § 924(c)(1)(A)(ii), as well as Hardy's convictions of conspiring to commit and committing Hobbs Act robbery, *id.* § 1951(a), and four counts of kidnapping, *id.* § 1201(a). We also **AFFIRM** Moore's sentence. But we **VACATE** Hardy's conviction for brandishing a firearm in furtherance of a kidnapping, *id.* § 924(c)(1)(A)(ii), and Brinson's and Simmons's sentences. We **REMAND** for the district court to resentence Hardy, Brinson, and Simmons consistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 17-CR-60119-Marra

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEROME SIMMONS,

West Palm Beach, FL
October 20, 2021

Defendant.

SENTENCING PROCEEDINGS
BEFORE THE HONORABLE KENNETH A. MARRA
UNITED STATES DISTRICT JUDGE

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THE COURT: Good afternoon, everyone, please be seated.

We are back here in the case of United States of America versus Jerome Simmons,case number 17-60119-CR-Marra. Counsel, state your appearances, please.

MS. ANTON: Good afternoon, your Honor, Jodi Anton on behalf of the United States.

MS. WHITE: Good afternoon, your Honor, Anita White on for the United States. With us at counsel table is Special Agent Elizabeth Morales.

MR. HADDAD: Good afternoon, your Honor, Christopher Haddad on behalf of Jerome Simmons, who is present in court.

THE COURT: Good afternoon. We are back here for resentencing after the appeal taken by Mr. Simmons. Have both sides reviewed the revised Pre-Sentence Investigation Report?

MS. ANTON: Yes, your Honor.

MR. HADDAD: Yes, your Honor.

THE COURT: Has counsel reviewed it with Mr. Simmons?

MR. HADDAD: Yes, your Honor.

THE COURT: You have objections that have been filed, Mr. Haddad?

MR. HADDAD: Yes, your Honor.

THE COURT: I know you have someone you want to have speak. Do you want him to speak first or do you want to do objections first? It is up to you.

MR. HADDAD: I think I would like to do the objections first, your Honor.

THE COURT: All right. You need to get closer to the microphone when you are speaking. You can take your mask off or get closer to the microphone, or both.

MR. HADDAD: Your Honor, may it please the Court, on behalf of Jerome Simmons, I would like to go through the Defendant's objections at this time. That should help, thank you very much.

Your Honor, the first objection is essentially a two-part objection, your Honor, addressing the four level enhancement for the conduct of Adrian Hardy in an abduction and a carjacking as outlined in paragraph 59 of the revised PSI report.

As I have outlined in my argument, your Honor, the Defense position in this matter is that the abduction and kidnapping of the Kendalls that took place by Mr. Hardy was a separate and distinct act. It was not contemplated, it was not part of the course of conduct that the Defendants were prosecuted for, and therefore should not be considered as relevant conduct.

THE COURT: May I interrupt you for a second?

MR. HADDAD: Yes.

THE COURT: I don't recall. Was this objection raised on the original sentencing?

MR. HADDAD: As your Honor will recall, we never got to any of our objections, your Honor -- the Government sought the 3559 three strikes imposition, which the Court granted, and your Honor at that time indicated that we would table all of the objections because they were rendered moot by your Honor's ruling, so we never got to any of these, but many of them were raised and being re-raised now based on the posture of the case at this time.

THE COURT: So I never ruled on this issue the last time?

MR. HADDAD: To my knowledge, no rulings were made on any of the objections.

THE COURT: Okay. Thank you.

MR. HADDAD: Yes, your Honor. Now, in terms of the issue of relevant conduct, under 1B1.3(a)(1)(B), a Defendant is accountable for relevant conduct if three prongs are satisfied: One, the relevant conduct is within the scope of the jointly undertaken criminal activity; two, in furtherance of the criminal activity; and three, reasonably foreseeable in connection with the criminal activity.

As the Guideline points out, 1B1.3, all three prongs of this test must be met.

So the situation -- and, your Honor, I apologize for the late disclosure of a case, but I thought it would be helpful for the Court particularly, and the Government. This

case that I cite, I am referencing is United States versus Barona-Bravo, B-A-R-O-N-A, dash, B-R-A-V-O, an Eleventh Circuit opinion, and it is case number 15-13024.

I believe it is an unpublished opinion, your Honor, but the Court lays out essentially how the Court -- the Appeals Court lays out how this Court should approach the issue of the relevant conduct, and essentially the Court has to make specific findings with regard to the issues, the three prongs.

So, your Honor, we have a situation here where the parties contemplated a robbery, and they contemplated break-ins of these jewelry stores under disguise for the purpose of financial gain, so that is essentially the scope of the conspiracy.

The question arises as to whether a co-defendant who then engages in separate and distinct criminal activity, whether that is -- would be considered relevant conduct, and we would suggest again here that that would not be the case. The issue -- a robbery necessarily entails some plan to get away. We would concede that. That is part and parcel of how a robbery occurs.

So a typical situation -- I believe the case that the Government relied upon talks about a robbery where there were two or three robberies that took place, two co-defendants and -- that fled the scene, one was quickly captured, the other one ended up engaging ultimately in a shootout with a police

officer.

In that case, the Court did find that that could be -- the Court found that that was relevant conduct even for the other co-defendant because, again, of the nature of a robbery and it does entail or envision some sort of plan to elude capture, but our case would be distinguishable from that case, your Honor, in the sense that in this case there are no facts or no evidence to support that the plan envisioned anything beyond the jewelry store robberies.

If in the course of trying to get away Mr. Hardy had acted violently towards somebody, let's say hit somebody or tried to escape, arguably that would be relevant conduct under the case that the Government cites, although it is not an Eleventh Circuit opinion, but our case here entails Mr. Hardy escaping the scene.

My client was already in custody at the time, and again, that is not dispositive, but I think it is relevant, the fact that he is in custody at that time, and the co-defendant then proceeds to gain entry into a private residential community that I believe the testimony was it was a gated community. He hides in the garage of the Kendall's house, and I believe the testimony was the Kendalls were out running errands, and when they came back there was a confrontation in the garage of some sort which then led into the house.

From that point, Mr. Hardy starts devising an

elaborate scheme about how he is going to facilitate the escape, which involves a series of acts that cannot be fairly characterized as jointly undertaken criminal activity.

At that point, he is far beyond simply using some force or violence to elude capture. He goes and, I would respectfully submit, takes it to a far different level of unforeseen, unplanned activity, and even setting aside the foreseeability, there is no evidence to support that that was part of what was jointly undertaken.

So, in terms of the enhancement for the carjacking -- as your Honor is well aware, from there, there is a dispute inside the house which leads to the residence, the Kendalls being abducted, taken at gunpoint down to another county, you know, where fortunately they were released at that time. But, again, that series of events cannot be -- respectfully, cannot be considered to be part of the jointly undertaken criminal activity, and therefore the abduction enhancement should be overruled.

As for the carjacking, the same argument applies with regard to the carjacking, and I would also point out that in regard to the carjacking, there was no finding of guilt, so I would add that point as well, that I believe the jury hung on the carjacking. So there was no founding of guilt on that.

On those bases, your Honor, we -- and the case that I cite talks -- essentially this case involved a drug conspiracy

where a number of individuals were involved and there were -- some portion of the drugs that were involved were hidden, so the evidence was not established that everybody was aware of the full quantity of drugs and as a result, the case was remanded for specific findings in terms of -- again, I have only read the case briefly, but I know it was remanded to determine what could be considered fairly as jointly undertaken in terms of the quantity if the co-defendants had no knowledge of the other drugs that were concealed or hidden.

THE COURT: All right. So, let me see if I can try and figure out how to analyze this under your theory.

You agree that Mr. Simmons and Mr. Hardy and Mr. Moore and Mr. Brinson, they all agreed to engage in the robbery itself at the jewelry store.

MR. HADDAD: Yes, your Honor.

THE COURT: And you agree that in any conspiracy to commit a jewelry store robbery implicit or -- implicit understanding, if not an express understanding, that they were going to try to escape -- all of them were going to try to escape, not just one, but all of them were going to try to escape after they committed the robbery.

MR. HADDAD: I would agree with that, yes, your Honor.

THE COURT: So, since no one knows how things are going to transpire when you are involved in a robbery, you don't know how the escape is going to actually be carried out,

because you don't know whether a police officer is going to come up on them or some citizen is going to interfere somehow. You can't predict how the escape is going to be effectuated, so it depends on the circumstances, but they all agree they are going to try and escape.

MR. HADDAD: Well, if I may, I think they all agreed that there would be these robberies and in the course of the robberies, they would abscond with whatever property they could.

I do not believe there was ever any evidence that there was a discussion about an escape plan or how that would look or how it would unfold. So, there was --

THE COURT: Well, I am sorry to cut you off, but there was an escape plan and Mr. Brinson was going to be waiting in the car outside, they were all going to get in the car and escape. That was the understood escape plan they had intended would work or hoped it would work, right?

MR. HADDAD: Mr. Brinson was contemplated, yes, as the get-away driver.

THE COURT: So, there was an understanding there was going to be an escape, and the plan was that it was going to be with Mr. Brinson driving off after they got the jewelry. Yes?

MR. HADDAD: At least for some of them, yes, your Honor. I don't know that we could say that across the board, but, yes, I agree with that. The plan was that Mr. Brinson

would be the get-away driver.

THE COURT: Right, and all of the three others were going to get in the car. They weren't going to leave one behind and escape, they were all going to get in the car if things went as planned.

MR. HADDAD: Respectfully, your Honor, I would say that that point was never firmly established. It is foreseeable or reasonable to think maybe Brinson would have used one or two to get in the car and maybe had somebody else flee on foot, so, I am not taking issue with what your Honor is saying, I am just saying there is some degree of speculation with regard to making those findings.

THE COURT: Okay. We will leave it at that. All right.

So, you agree, again, that as part of the jointly undertaken criminal activity there was an implicit, if not express, understanding that they were going to escape after the robbery was effectuated.

MR. HADDAD: Yes, your Honor.

THE COURT: All right. And I thought you agreed earlier, but maybe not. You agree that no one knows for sure how things are going to transpire and whether the intended plan of one or two, or maybe three, but not necessarily all three of them getting in Mr. Brinson's car and driving off. They didn't know if that was going to be able to be carried out in that

fashion.

MR. HADDAD: That is correct, your Honor.

THE COURT: But if it didn't work out that way, which is what happened, they weren't able to get into Mr. Brinson's car and escape, then there was at least an implicit understanding that they were going to try to get away any way they could.

MR. HADDAD: That is a fair statement, your Honor.

THE COURT: Okay. And so, once things broke down according to their initial plan and they had to improvise on how to abscond or get away --

MR. HADDAD: Yes.

THE COURT: Are you saying that once things break down and didn't go according to plan, and one of them, in order to abscond, which is part of the overall plan, one of them engages in some criminal act that they never actually discussed because they were hoping to get in Brinson's car and drive off -- and I doubt that they ever sat down and said, well, if Brinson isn't there waiting for us, here is how we are going to do this, here is how we are going to get away, and if things don't go according to that plan, and one of them commits a criminal act and injures someone, then it is never part of the jointly undertaken criminal activity because they never talked about it or discussed it or it is not foreseeable.

MR. HADDAD: No, I am not saying that, your Honor. I

think what I am trying to -- the point I am trying to make is that the plan would have envisioned some sort of escape and that may have entailed the use of some force to effectuate it, but that the nature of what occurred here was not part of any jointly undertaken criminal activity and therefore does not constitute relevant conduct.

THE COURT: So, it's possible that if some citizen had come upon one of them when they were trying to escape and tried to tackle him, or one of them, and in order to avoid the tackle by this citizen, one of the Defendants took a gun and beat him over the head and kicked him and then shot him and ran off, that's part of the jointly undertaken activity or it's not part of the agreed jointly undertaken activity?

MR. HADDAD: The issue there -- I would say that it is very -- it is fact sensitive, your Honor, so my concern is that if we are making a general statement that all robberies necessarily entail the use of violence as an escape means, I think that that is too broad a statement.

THE COURT: I am not making that suggestion. I am giving you a hypothetical of a situation that I want to know from your -- based upon the argument you are making to me, and that hypothetical is that act of trying to avoid capture by a citizen who comes upon one of them as they're running out of the jewelry store who gets injured, shot, killed, you know, whatever description you want on it, is that part of the

jointly undertaken activity, or is that not?

Because they never talked about it or discussed or decided that somebody would have to get away, we are going to shoot anybody that gets in our way, they all get together and say, okay, if we get stopped somehow, we all agree that we are going to shoot to kill in order to get away.

I doubt that that ever happened, but, I mean, if that does happen, without them ever discussing it and specifically agreeing to it, is that covered under this Guideline or is it a separate wrongful act by one Defendant who went off on his own and engaged in some unforeseen activity?

MR. HADDAD: The latter. That would be our position, your Honor, that that would not constitute jointly undertaken criminal activity.

THE COURT: Okay. Why did the case that the Government cite -- how does that fit into this discussion?

MR. HADDAD: Well, in that case, it is not an Eleventh Circuit opinion, I believe it is a Tenth Circuit opinion, but the case was premised on the position -- or the argument that robberies implicitly involve violence as a means of escape and therefore these two individuals were working in concert with one another and shortly -- again, one was captured quickly, and the other one within, I believe, an hour or so engaged in some -- a shootout with a police officer in trying to escape.

So, that -- I acknowledge that that case tends to

support the position that any violence that occurs as part of an escape from a robbery would constitute jointly undertaken activity. I acknowledge that case does support that position.

I don't think the Eleventh Circuit has ever said that, and I cited a case of United States versus Zelaya, Z-E-L-A-Y-A, 114 F.3d 869, which is a Ninth Circuit opinion, also not an Eleventh Circuit, from 1997, that says that that is too general.

My reading of the case is that it says it is too general of a rule to say that all robberies that result in violence would constitute relevant conduct as jointly undertaken criminal activity.

So, I think that -- and then this other case, the Barona-Bravo case, you know, there was a jointly undertaken criminal conspiracy. Granted, there was a different issue with regard to quantity of drugs and knowledge, but again, the Eleventh Circuit didn't say, well, it was just because all the co-defendants were involved in the conspiracy meant that they were all accountable under relevant conduct for the drug quantity, the full drug quantity.

I know they talked about reasonable foreseeability in that opinion as well, which is different than the argument I am making now. I do acknowledge that as well.

Our position is, your Honor, that some violence would be -- reasonably could be construed as jointly undertaken

criminal activity if there is some violence in the course of trying to escape, but the nature of what happened here and the numerous steps and acts that Mr. Hardy took that were not contemplated by any of the parties went beyond simply using some force to escape. This was abduction, carjacking, so we are not dealing with sort of an element or a quasi element of robbery, which is using force to get away.

This is engaging in separate and distinct criminal activity for which, I would also point out, my client was not charged with those offenses. It is our position that that cannot be fairly characterized as jointly undertaken criminal activity under the relevant conduct Guidelines.

THE COURT: Robbery, force of violence is not -- force of violence in escaping a robbery is not an element of the offense. You commit the robbery when you use force to take property of another; you don't commit the robbery while you are escaping and using force.

MR. HADDAD: That is true. That is correct, your Honor, but I believe if somebody takes property without force or violence, and then in the process of trying to escape uses force, that would still constitute robbery, but I am not sure how relevant that is to my argument here. But the force or the violence can come in at different stages in the course of the crime, but these were separate and distinct crimes that the Government is seeking to use to enhance.

THE COURT: But isn't what we are talking about always the -- a separate and distinct crime that is effectuated in the course of trying to escape from the underlying offense? Isn't that what we are discussing, a separate and distinct crime? Isn't it a question of where you draw the line?

MR. HADDAD: Well, to some extent. For example, let's say in the course of escaping somebody engages in an encounter with law enforcement, there could be certain maybe threats that were made or statements that were made that might constitute an enhancement, but not necessarily a separate crime from the underlying offense, I believe, but I would defer to your Honor's knowledge on that.

But I believe that there are examples where somebody's conduct might not include a separate criminal act, but it would be still considered as grounds to enhance under the Guidelines.

THE COURT: All right. Thank you. Ms. Anton or Ms. White, do you want to be heard on this?

MS. ANTON: Yes, Judge, just briefly. Respectfully, we disagree with the Defense, and I would also rely on the pleadings that the Government has filed.

Clearly this was within the scope of the jointly undertaken criminal activity, which was to commit a robbery and to flee from it. If your Honor recalls, the evidence in the case was that they were supposed to go out the front door, they were thwarted and then went out the back door, and all three

went different ways. They had a get-away driver waiting, so they had planned their escape. They were armed with walkie-talkies so that they could communicate with each other during their escape.

The United States v. Patton case that we cited to in the Government's response, although it is from the Tenth, I believe is illustrative for the Court. There was nothing directly on point in the Eleventh. The case that the Defense cited, U.S. v. Barona-Bravo, that was recently provided to the Government, I would argue is very distinguishable.

On page 16 of that opinion, which was a drug case, trafficking on the high seas where there were numerous people involved in a conspiracy, the Court even commented that this was a very unusual case and this was a, quote unquote, odd conspiracy, and certain Defendants may not have known that there were 640 kilos of drugs on the vessel, but I think it was foreseeable.

I think that the case that the Defendant gave you from the Eleventh deals with a very different set of circumstances than we have here.

I would ask the Court to rely on the Patton case, in addition, U.S. v. Quintero from the Seventh, which held that the escape phase is clearly part and parcel of bank robbery.

In this case, you have Hardy fleeing the jewelry store and goes directly across the street with no time elapsed.

Simmons is caught, but immediately thereafter, close by Hardy commits these crimes, and he commits the abduction and the carjacking for the sole purpose of escaping. He commandeers those innocent people to drive him back to Fort Lauderdale, which was probably where they were meeting anyway because that was home for all of the Defendants.

Much like the Patton case where one Defendant was found to be responsible in terms of relevant conduct for the shooting of a police officer which occurred an hour later and two to three miles away, this occurred almost instantaneously, and right across the street, so the Government would ask that you overrule the Defendant's objection.

THE COURT: Anything else, Mr. Haddad?

MR. HADDAD: No, thank you, your Honor.

THE COURT: I am going to overrule the objection. I believe that the act of escape was inherently, if not explicitly -- part of the undertaken criminal activity within the scope of the joint undertaking criminal activity was to escape and to escape with whatever means were reasonably available to them.

Mr. Hardy's actions were in furtherance of that criminal activity to escape and I think it is reasonably foreseeable that when you are engaged in an armed robbery, that if you are detected in some way, it is reasonably foreseeable that you will engage in other criminal conduct in order to

effectuate your escape, and that is what occurred here.

Mr. Hardy used means that I think were reasonably foreseeable to the other co-defendants to attempt to escape, so, I think it meets the definition of relevant conduct, and I will overrule the objection.

MR. HADDAD: Thank you, your Honor. I just want to point out that in my written objection I laid out the three part test and everything. I just wanted to make that clear, your Honor.

The next -- may I go to my next objection?

THE COURT: Yes.

MR. HADDAD: Your Honor, the next objection is the monetary loss enhancement. As your Honor is aware, I was present for Mr. Hardy's sentencing, the issues are pretty identical, there is no major difference. I would adopt Mr. Della Fera's arguments.

I would just add, your Honor, that there was a restitution hearing, and that was canceled. So, essentially, the Government is relying on the trial testimony and the statements in the Pre-Sentence Investigation Report, and it is our position, your Honor, that although there was a sworn declaration in the Lily's case, there was no supporting documentation, for example, purchase receipts, insurance documents, things of that nature, just to establish concretely the amount of loss.

So, I would object on those grounds, and the same with regard to the Bishops. I acknowledge the trial testimony for what it was, I don't take issue with the Government's recitation of that in their pleading, but again that -- it was sworn testimony admittedly, but it wasn't supported with any documentation in terms of purchase receipts or insurance documentation or anything like that.

THE COURT: All right. I am going to be consistent with my ruling earlier today in Mr. Hardy's sentencing and I will overrule the objection.

I am going to find that Ms. Lily Hanssen's declaration of victim losses, which was sworn to and has attached to it an itemized list of the items that were taken, is sufficient to meet the precedent of preponderance of the evidence standard for establishing losses that she sustained, which was $73,852.

I will also point out, which I didn't specifically mention during Mr. Hardy's sentencing, but in the second paragraph of the declaration of victim losses there is the sentence, "My specific losses as a result of this offense are summarized as follows" and then there is a parenthetical, "Please provide documentation of your losses if available and attach additional pages if needed," end of parentheses. And that is what was done by Mrs. Hanssen, she attached the itemized list of the matters that were stolen, and the value attached to each one, very detailed, and I think it's

sufficient to meet the standard.

The same with the Bishop's trial testimony as to the value of the items stolen during the robbery, I believe that is sufficient to meet the preponderance of the evidence standard, and I will find that their losses were approximately $500,000.

So, I will overrule that objection.

MR. HADDAD: Thank you, your Honor.

May I proceed to my next objection?

THE COURT: Yes.

MR. HADDAD: Your Honor, my next objection is the objection for a six level enhancement for firearm being used, and that is 2B3.1(b)(2)(B), that is in paragraphs 67 and 74 of the revised PSI.

Our issue -- our objection is primarily focused here, your Honor, on two things -- I mean we discussed the brandishing versus use of firearm in furtherance of. I adopt the arguments made by Mr. Della Fera, and I am aware of how the Court ruled on that. I don't have any other argument on that.

With regard to the second argument, there were four counts or five counts charged in the case, there was a conspiracy count and then there were two 924(c) counts, and then there were two substantive Hobbs Act robbery counts.

In the two substantive Hobbs Act robbery counts where Mr. Simmons was found guilty, there were 924(c) counts that followed those and he was convicted of those as well, and I

believe the Government is in agreement that obviously those don't qualify for the six level enhancement because he is getting the 924(c) sentence.

So the issue is, on the other ones where there were no substantive charges brought, and essentially the finding of guilt was based on the conspiracy count, whether those support the six level enhancement, and it is our position, your Honor, that those two -- that six level enhancement for those two should be overruled -- the objection should be sustained.

And the reason for that, your Honor, is that if your Honor reviews the indictment, and I laid this out in my written pleading, but the indictment for the conspiracy count, to the best of my recollection, does not allege -- it is a second superseding indictment, it is document 43. Count 1 is the conspiracy count, and it is silent.

It states that by means of actual threat and force, violence and fear, but there is no mention of a firearm being used during that -- for that offense.

Similarly, if your Honor reviews the verdict form, which is Docket Entry 198, Count 1 of the indictment, the Defendant was found guilty, however, there were no questions or interrogatories regarding whether a firearm was used, brandished, or used in furtherance of a crime. Those interrogatories were found in other counts, Counts 2 and 5, but not in Count 1.

So, based on the fact that the Government did not plead the firearm, they did not -- the jury did not return a verdict that a firearm was used, it is our position that -- again, we are talking about the counts where there were no substantive counts brought. In those counts, the six level enhancement should not be imposed.

THE COURT: Well, there were no interrogatories on the conspiracy count. And what was the other count we are talking about?

MR. HADDAD: There was a conspiracy count, which was Count 1, which is Hobbs Act robbery -- I am sorry, I stand corrected, the conspiracy count is Count 3. Let me just double check here.

I'm sorry, your Honor, the conspiracy count is Count 3.

THE COURT: That is one of the counts that you are saying it shouldn't apply to. It should not apply to the conspiracy count and what was the other count?

I know you are saying it shouldn't apply at all, but your alternative argument is that it shouldn't apply to the conspiracy count and what other count?

MR. HADDAD: It shouldn't account to the two robberies that were not substantively charged, which I believe are Lily's and Bishops, so LSO and the one in Georgia were substantively charged. So, it is our position that the enhancement should

not apply to the conspiracy and/or the Lily's and/or Bishops, because those were not substantive charges for which the use of a firearm or brandishing of a firearm was pled, and there was no jury finding that that occurred.

THE COURT: The reason the use of a firearm wasn't pled nor jury verdict interrogatory directed to that in those counts was because they were not elements of the offense; isn't that right?

The firearm was not an element of the offense, so that is why it wasn't pled, or a jury wasn't asked to opine on it.

MR. HADDAD: I agree with that a hundred percent. They had every right to charge it that way and the jury return a verdict, but in terms of the sentencing enhancement, it is our position that the sentencing enhancement should not be imposed because of the manner in which it was charged and what the jury's finding was.

I don't think there was anything to prohibit the Government from charging the firearm as used or brandished, and asking the jury to return a verdict on the conspiracy, you know, to answer the interrogatories about whether it was used, et cetera, but that wasn't done. So, for that reason, the conviction is valid, and the judgment attenuant to the conviction is valid, but the six level enhancement, it is our position, should not be imposed on those counts.

THE COURT: Even though the Government could have

either charged it in the indictment or asked for an interrogatory on those counts, it wasn't necessary, and for sentencing purposes, isn't this a sentencing factor for the Court to decide based upon a preponderance of the evidence and it didn't have to be pled, didn't have to have a jury determination because it is not increasing the statutory maximum, it is not an Apprendi issue, it is a sentencing issue that I can find based upon the evidence after that? Otherwise, every sentencing enhancement requires a pleading in the indictment and a jury finding on the fact?

What is the point of judges making factual decisions on sentencing factors if you have to have the enhancement alleged in the indictment and found by a jury?

MR. HADDAD: Well, I understand your Honor's position on that. It is the Defense position that essentially the Government is asking your Honor to make factual findings and --

THE COURT: Yes, that is true.

MR. HADDAD: -- that are enhancing the Defendant's sentence. So, it would be one thing to ask your Honor to make factual findings, but when those factual findings result in an increased sentence -- and I recognize --

THE COURT: That is what we do all the time. When a judge is asked to determine whether a Defendant is a leader or organizer of a conspiracy or a Defendant is engaged in sophisticated means, any of those enhancements, none of them

are elements of the offense, they don't increase the statutory maximum, and the judges decide based on the evidence that is presented, and make factual findings on those enhancements.

Why doesn't that same analysis apply to this enhancement?

MR. HADDAD: Well, the issue of the role and a Defendant's level of participation or nonparticipation is something that requires your Honor to consider the evidence in the case and then apply legal principles, case law, precedent to determine whether the conduct meets that criteria or not, whether it is a role reduction or a role increase.

I do think that is different than what your Honor is being asked to do here, which is not so much to assess somebody's role as it is to determine whether a specific fact that was not pled and proved to the jury can be used to increase a sentence.

I recognize, your Honor, that the case law -- I think this is somewhat of an evolving area, excuse me, of the law, and I am making this argument to preserve the issue in the event that a higher court subsequently determines that these kinds of enhancements do need to actually be pled and proved.

So, I don't take issue with your Honor's analysis or reasoning, I am just -- I want to preserve the issue for appellate review. In the event that the law changes, I don't want it to be constituted that I waived the issue.

THE COURT: All right. I understand if that is the reason you are making the argument.

All right. I didn't mean to cut you off. Do you have anything else?

MR. HADDAD: The other argument is that relevant conduct -- it's -- in order to impose a firearms enhancement, it seems to me that the Government is asking your Honor to rely on relevant conduct, since -- again, on the counts that we are talking about there was no specific finding that Mr. Simmons carried or used or brandished a gun.

Essentially, the Government is taking the position that whether he had it or not, it is relevant conduct because it was -- you know, the evidence supports that somebody had it, and I cited the Diaz -- United States versus Diaz case in my written pleading, which is 248 F.3d 1065, and that is in my objections, and I would just stand on that to show that, you know, relevant conduct should not be used as a basis to impose a firearms enhancement.

That is the totality of my argument, your Honor, unless the Court has any questions.

THE COURT: No, thank you. I want to check something.

This particular Guideline, 2B3.1, it applies if the firearm was discharged or was used or brandished. It is talking about whether it was used, brandished, or discharged.

MR. HADDAD: Yes.

THE COURT: But during the course of the events, it doesn't have to be the particular Defendant that is being sentenced who used, discharged, or brandished; isn't that correct? Isn't that the law? This is not Defendant specific, it is offense specific.

MR. HADDAD: I believe, your Honor, that the Government cannot rely on relevant conduct, so I believe it is -- it is our position that the Government has to prove that it was this particular Defendant in order to subject him to the six level enhancement.

THE COURT: Well, if we go back to relevant conduct, and what was jointly undertaken, didn't they all know that one or more of them had firearms on them during the course of the robbery, and therefore they jointly undertook and agreed to use firearms in carrying out the robbery, and that it is reasonably foreseeable that during the course of the robbery with firearms somebody might point at one of the victims, or use the firearm to hit one of the victims over the head in order to carry out the robbery? Am I off base here?

I don't remember if Mr. Simmons was one of the ones who actually had a firearm.

MR. HADDAD: Well, the use of -- the Government doesn't -- I agree that the Government did not have to prove that Mr. Simmons carried or used or possessed the firearm to obtain the conviction, and obviously that is exactly what

happened.

But in terms of the enhancement, my concern is that the enhancement is being applied using relevant conduct and without a specific finding that he actually, as your Honor said, used or possessed it, and I think that is our objection. That is the basis of my objection. I would just stand by the written objection that I filed, your Honor.

THE COURT: All right. Thank you.

To the extent that it is necessary to analyze this based on relevant conduct, I am going to opine that the use of the firearm in carrying out the robberies was within the jointly undertaken activity and reasonably foreseeable that it would be used to threaten and actually harm some of the victims, and it was in furtherance of that criminal activity.

And I am going to find that, based upon Lily Hanssen's testimony that when one of the robbers grabbed her by her hair and put the gun on her neck, that was otherwise using the firearm, and when Michelle Bishop testified that one of the robbers was poking her husband with the gun, and that Mr. Bishop testified he was pistol whipped in the face and cheek and back of his head with the firearm, that fits the requirements of otherwise used as opposed to brandish.

So I will overrule that objection.

MR. HADDAD: Yes, your Honor.

May I proceed, your Honor?

THE COURT: Yes, sir.

MR. HADDAD: The next objection deals with paragraph 127 where it indicates -- in the Pre-Sentence Report it indicates no high school diploma.

THE COURT: That was corrected.

MR. HADDAD: I believe that has been corrected.

I showed Mr. Simmons the addendum to the Pre-Sentence Report where that was corrected. He just asked me to ask Probation, U.S. Probation, if there is any way that that can be put into the Probation report, because apparently that is what the Bureau of Prisons gets, and by not having that it curtails his ability to do some programming and get some vocational training, so I respectfully make that request.

THE COURT: So you want Probation to actually put it in the body of the Pre-Sentence Report rather than in the addendum that he is a high school graduate?

MR. HADDAD: If it can be effectuated.

THE COURT: I will ask him to do it.

MR. HADDAD: Thank you very much, your Honor.

THE COURT: Thank you.

MR. HADDAD: My next objection, your Honor, Defense objection, is to paragraphs 58 through 75, we had posed an objection on victim injury. I reviewed the Government's response and the case law they cited, and I was at the hearing earlier today for Mr. Hardy, and I have spoken with Mr. Simmons

about that, and we concede that victim injury was established based on the testimony and the evidence, so we are going to withdraw that objection.

THE COURT: All right.

MR. HADDAD: Next is -- I believe we resolved paragraph 50 where reference to career offender no longer applies, that has been resolved. And we also are objecting to Hobbs Act robbery being designated as a crime of violence under the elements clause.

We acknowledge that case law does not support that position at this point, Hobbs Act robbery under 924(c), however, because the United States Supreme Court has -- to my knowledge, has not specifically addressed that issue, that we make that objection to preserve it for appellate review in the future should it become an issue.

THE COURT: All right. Does that take care of all of your objections?

MR. HADDAD: Yes, it does, your Honor. That sums up all of our objections, your Honor.

THE COURT: All right. I believe we are left with the Guideline calculations that Probation provided; is that right? Which is 235 to 293, plus 84. 400 -- am I correct, is that the Guideline range?

MR. HADDAD: There is actually two 924(c) counts, so it will be 84 plus 84, so I believe -- yes, correct, level 32,

your Honor, if I am not mistaken.

THE COURT: Let me ask Probation. Based upon the rulings I made, what is the advisory guideline calculation?

PROBATION OFFICER: Offense level 34, your Honor, criminal history category V, which is 235 to 293 months, not including the two brandishing or using firearm charges, which are two 84 months.

THE COURT: So the advisory Guideline range is 235 to 293, plus 84, plus 84?

PROBATION OFFICER: Correct.

MR. HADDAD: Yes, your Honor.

THE COURT: You agree that is correct, Mr. Haddad. I understand you don't understand with the rulings, but you agree?

MR. HADDAD: Yes.

THE COURT: The Government agrees?

MS. ANTON: Yes, your Honor.

THE COURT: All right. You want to argue for a variance, Mr. Haddad?

MR. HADDAD: Yes, please, your Honor. I spoke to the Government yesterday, and I sent the motion. Some of these were filed previously, but as I said, we never got to any of this previously obviously.

Docket Entry 269 is Defendant's sentencing memo and motion for variance, Docket Entry 293 is a notice of filing a

DCF report in support of motion for variance, and DCF is Department of Children and Families, and then we also filed at Docket Number 270 the psychological evaluation of Jerome Simmons that was conducted by Dr. Jethro Toomer.

We have two witnesses we would like to call, your Honor, Mr. Simmons' mom and Dr. Toomer. I know Dr. Toomer is waiting, but it might be better to call the mom first just because she --

THE COURT: However you want to go forward, if Dr. Toomer does not mind waiting. He has been waiting quite awhile.

MR. HADDAD: We can call Dr. Toomer.

THE COURT: He looks like he agrees with that.

MR. HADDAD: I think your Honor can work around it I appreciate it.

THE COURT: Good afternoon, sir.

Would you raise your right hand for me, Doctor.

(Thereupon, the witness was duly sworn.)

THE COURTROOM DEPUTY: Please state your name for the record and spell your last name.

THE WITNESS: Jethro W. Toomer, T-O-O-M-E-R.

THE COURT: All right, Mr. Haddad.

DIRECT EXAMINATION

BY MR. HADDAD:

Q. Good afternoon, Dr. Toomer, thank you for your time today.

A. Good afternoon.

Q. Would you please briefly introduce yourself to the Court and tell us a little bit about your education and your work experience, your background, how you got involved in forensic psychology?

A. I have a Bachelor's and Master's and Ph.D. degree in psychology, my Ph.D. is from Temple University in Philadelphia. I completed my residency at Albert Einstein Hospital, I have been engaged in the private practice of clinical and forensic psychology for over 25 years. I am a Diplomate of the American Board of Psychology.

In 1999 or 2000, I retired as a full professor from Florida International University where I directed the graduate training program in mental health, and I engaged in the private practice of clinical and forensic psychology for over 25 years and was a treating consultant with the National Football League and a consultant with the National Basketball Association, and I testified in courts, criminal, civil, State and Federal, around the country over that period of time.

Q. Excellent, thank you for sharing your background with us and for being involved in this case, and for your work at FIU and getting the university really established itself.

Would you tell me how you got involved in this case, please?

A. Um-m-m, I received a call from you sometime in 2019, I

believe, and as a result of that, I went to the Federal Detention Center in Miami where I conducted an evaluation of Mr. Simmons.

Q. Okay. And how did you go about that -- what I mean by that is, what records or things did you review, what interviews did you conduct, and just if you would walk us through the process.

The Judge has your report, so he has reviewed it. If we could get to the salient and highlight points, that would be terrific.

A. Basically, the evaluation consists of four areas. One is the face-to-face, what we call clinical assessment; second is the administration of various protocols, the tests; third is any collateral data that may be available, for instance, in this case DCF records. There is the complaint affidavit, violation of probation affidavit, so collateral data, and then, if available, informants or people who knew the individual during his or her developmental years.

And what we try to do as part of the overall process, we look for corroboration among all sources of data in terms of the conclusions reached.

Q. Okay. Now, one of the things, obviously, that is significant is the criminal -- the case itself in terms of the nature of the charges, and what was your understanding in terms of this case, what had been charged and proved by the Government?

A. Well, his charges included robbery, conspiracy to commit criminal robbery, carrying a firearm, those are the charges that were -- at the time that were leveled against him.
Q. Now, in terms of the work that you did, I believe I sent you some DCF reports and things from Mr. Simmons' early childhood with a focus on his -- from 0 to 18, if you will.
Is that where you focused a lot of your attention with regard to Mr. Simmons?
A. Well, yes, a lot of attention is focused on that area because that time span sort of sets the stage without significant intervention or alteration for what happens later.
In essence, it is not so much that a person has certain experiences. One of the most critical factors is the onset of those experiences.
So, if someone experiences trauma as a five year old, the impact is significantly different than if someone experienced that same trauma at 12 or 13. That age period of 0 to 18 has been the subject of voluminous research over time because that is a critical area, and because of the impact of trauma, what is referred to as early onset trauma, on subsequent dates.
Q. Okay. What did you find with regard to any evidence of early trauma with regard to Mr. Simmons?
A. Well, summarily, in terms of early trauma, I think it goes without saying that his history is one characterized by turmoil, capriciousness, instability, lack of sameness. The

factors that are necessary or critical in terms of one developing, a consistent pattern of behaving, that occurs early on.

If, for example, a person -- during the early developmental years, if a person is exposed to trauma -- and what I am talking about when I talk about trauma, I am talking about persistent trauma, not just one shot kind of traumatic incident, but persistent trauma perpetuated by poverty, crime, violence, exposure to violence, lack of basic necessities, overall instability.

When you have those kinds of factors impacting on an individual during the developmental years, at a very simplistic level what happens is, that individual then is unable to develop the basic, what we call abstract reasoning skills later on that would enable an individual to behave in a consistent pattern.

And over time what you find happening is that the individual is spending all of his effort trying to protect one's self during the early years, trying to protect one's self from further trauma, further abuse, whatever the case might be, and as a result, the kind of skills necessary in order to develop a consistent pattern of thinking, those skills are left by the wayside.

What you have subsequently is, you have an individual, 17, 18, 19, so forth and so on, who is behaving emotionally,

psychologically, behaviorally, cognitively as if they were ten, 11, 12, because that is the gap that is established. They have shown, for example -- we all know about the stress, what stress does to us internally in terms of the effect of ongoing stress on the heart and organs.

Well, what you find happening is that, with the research that has been done, they have shown if you take a child who has been exposed to constant stress over time and you do a scan, a brain scan, and you compare that person's brain to a child who has not been exposed, has grown up in a natural supportive family, there is a difference in the brain structure, so the constant exposure to stress actually changes the structure of the brain.

Q. Okay.

A. So, as a result of that, the issues that we just mentioned in terms of being able to weigh alternatives, project consequences, have the ability to learn from past experiences, all of those skills are gone. Those skills are not there because the individual did not have the opportunity to develop those skills, and so what you have is, you have this impaired individual who has the chronological age of an adult, but whose functioning in terms of decision-making, cognitive processing, and what have you is at a much younger level, and so you get the impairment manifested that is basically influencing behavior.

Q. All right. Did you learn anything about an incident occurring with his mom when he was, I believe, around middle school?

A. Yes, his mother -- I spoke with his mother, and his mother is very remorseful and she has a lot of regret regarding the dysfunctional family unit that existed during the developmental years.

At one point, for example, Jerome was a witness to violence. I mean, he saw violence in terms of his mother and her violence towards others, and the violence of others and abuse towards his mother. He witnessed an instance early on where he saw his mother on fire as a result of an explosion that took place from a water heater at home, but the violence, what I am talking about is part of the trauma that I have been talking about, the violence is part of that phenomena that basically stifles any kind of adaptive functioning skill development, any kind of growth, any kind of what we call abstract reasoning ability that comes into play.

And so, when you put all of this together, the significance of these events is that you have an individual whose behavior reflects a lot of dysfunction both in terms of -- if you want to talk about emotional, you can talk about mood stability, you can talk about unstable, intense inner personal relationships.

If you want to talk about cognitive functioning, you talk about some of the things that we mentioned, individuals unable

to reason abstractly, to project consequences, weigh alternatives, learn from past experiences.

If you want to talk about behavior, you get the poor decision-making and substance abuse. You get all kinds of factors across the board that result from the deficits that we alluded to earlier, deficits both in terms of the relationships that were not established, in terms of the systemic kinds of issues that the individual had to address.

Q. Okay.

A. So, when you get all of those factors coming into play, this is what it leads to.

Q. We want to try to wrap this up.

THE COURT: You need to speak into the microphone.

BY MR. HADDAD:

Q. We are going to try to keep this moving and get this wrapped up. You mentioned that you did testing?

A. Yes.

Q. Was there any significant observations or conclusions you drew from the testing that you mentioned?

A. Well, with regard to the testing, he -- one of the first things you look at is malingering, whether the person is trying to fake the existence of some kind of deficit or what have you, and I didn't find any instances of his malingering or trying to fake the existence of some type of mental illness.

I did not find any existence of symptomatology as suggested

in anti-social personality disorder. He has some personality issues by virtue of the factors we talked about. He is suffering the effects, based on the testing and what I learned from other sources, of post-traumatic stress disorder as a result of his history and as a result of the testing.

The instrument -- the one instrument that I thought stood out, and this is based upon probably the widest of the research projects ever taken to look at how early experiences affect aging, the adverse childhood experiences scale, and what it does basically, it has -- as a result of more than 18,000 subjects, it has identified -- in essence, it has identified ten events that tend to result or -- that tend to result in trauma and that create adverse environmental issues.

For example, some childhood physical abuse, verbal abuse, childhood sexual abuse, domestic violence in the household, domestic violence in the neighborhood, caregivers who are substance abusers, so on and so on. I will not go through the whole list.

Out of the ten identified, Mr. Simmons experienced eight of them, eight of the adverse childhood experiences, and research has shown that if you have an individual who, for example, experiences just one of those factors, you could predict that, without some kind of intervention, that person is going to have problems and difficulties later in life.

Q. What sort of problems? What sort of difficulties?

A. The ones that we mentioned before, substance abuse, impaired personal relationships, deficits in terms of thought processing, what we call abstract thought processing, because very quickly, what we tend to see and expect under normal circumstances in their supportive environment, when a child reaches the teenage years, that kind of thing, going into the teenage years, you tend to see at some level a movement from what we call concrete thinking to abstract thinking.

Abstract thinking means you are able to go beyond the literal meaning of words to do things like project consequences. You can think about the fact that certain events or what have you carry with it certain consequences, and you can project that, that is when you are moving into abstract thinking.

If you are stymied in that whole process, you don't even consider that, you simply act impulsively, even though you are at it, you are advancing chronologically to a point where you should be manifesting abstract thought, all your thought processes are basically concrete, impulsive, here and now, without attention to consequences and without learning from past behavior.

That is what happens, and that was one of the main things that stood out in terms of the -- in terms of his evaluation and the testing that I did.

Q. In terms of looking forward, obviously Mr. Simmons is

standing before the Court and he is facing a considerable sentence.

A. Yes.

Q. And he is looking forward -- of course, nobody has a crystal ball, but he is, for example, right now engaged in the Challenge Program with the Bureau of Prisons, which is a drug and mental health program.

Based on your work with his case and the assessments that you have done, is there reason to think that Mr. Simmons is something that could navigate those programs and come out on the other end more capable of, as you say, coping, making judgments, and those sorts of things moving forward based on your overall assessment?

A. Um-m-m, based upon my overall assessment -- as I indicated, one of the things you look for in terms of a prognosis --

Q. Yes.

A. -- propensity for growth and what have you is, do we have anti-social traits there. I didn't see evidence of an anti-social personality disorder on the part of the individual.

I saw and was able to corroborate to a significant extent the existence of trauma almost -- early onset trauma, which suggests to me that this individual, with supervision and structure, could benefit from intervention in terms of moving forward.

Q. Okay.

A. But he needs an individual in the same circumstance, i.e., experience, needs structured supervision, whatever. These are things that prevent that, no structure, no stability, no predictable, no sameness.

One of the things that children need growing up, they need to know that -- they need that safety, stability, and sameness. They need to know that the person who cares for me today will be there tomorrow, that I have a place to live today, I will have that same place to live tomorrow, da, da, da. If you don't have that, all bets are off. You are talking about at this point providing the structure, the predictability, and sameness in terms of ability to grow.

The other factor that comes with that is that in doing so, you will be able to help the individual restore one critical factor that we haven't talked about that is missing, and that's the lack of trust. When you grow up in an environment that I described the first thing that goes is trust, you don't trust anybody, you don't trust family, people on the outside, there's no stability, no predictability, no sameness.

Those kind of factors will portend that Mr. Simmons could benefit from some structure and intervention in terms of trying to help him understand the relationship between his early childhood history and where he is today.

Q. All right. Okay, thank you very much, Dr. Toomer.

MR. HADDAD: I don't have any other questions. I

don't know if the Government has questions.

THE COURT: Ms. Anton or Ms. White?

CROSS-EXAMINATION

BY MS. ANTON:

Q. I will be brief.

Good afternoon, Dr. Toomer.

A. Good afternoon.

Q. Did you review the Defendant's criminal history?

A. Yes.

Q. Was that yes?

A. Yes.

Q. Okay. Did you also review the reports from the robberies in the case he was convicted of?

A. I believe so, yes.

Q. So there were four robberies?

A. Yes. That was the complaint affidavit, yes.

Q. So you only reviewed the complaint affidavit. Did you review any of the specific reports that give you any of the specific facts and circumstances of the robberies that were committed by Mr. Simmons?

A. Only the complaint affidavit that was labeled Complaint Affidavit. That is what I reviewed.

Q. Did you review any of his prior records from prison?

A. No, I did not. I reviewed his violation of probation record, but nothing specific from -- no specific DOC records,

except the DOC provides the violation of probation report.
Q. Did you review any of his prior records from the Florida Medical Center from when he was a child?
A. No, except that I believe he did get some treatment or what have you as a result of things that happened to him during his developmental years.
Q. But you did not review any of those medical records?
A. I did not review specific medical records.
Q. Did you review any of the Department of Juvenile Justice records pertaining to the treatment he received from them?
A. No.
Q. So, when you indicated that the Defendant would benefit from intervention, you didn't have the benefit of looking at those various reports from entities that could have potentially provided him with intervention; is that correct?
A. That's correct. I think you also have to keep in mind that what we are talking about now, we are talking about different time periods.
Q. Correct. And let me ask you about this. You testified the most important time period is the early childhood, that is the formative years; is that correct?
A. Well, when I say the most important, I am saying that that period sets the stage and without intervention the person is going to have the issues that I have described. So in that sense, yes.

Q. Okay, I understand.

If I told you that the Department of Juvenile Justice records and Florida Medical Center records all were compiled when the Defendant was between 12 and 15 years old, you would agree with me that it would be important to know what treatment, if any, he would have received during that period of time?

A. Yes.

Q. Okay. But you did not review those?

A. No.

Q. And the only thing, at the end of the day, that you diagnose the Defendant with, am I correct, is PTSD?

A. Yes. There is no outstanding single diagnostic entity that stands out, the PTSD is reflected across a variety of areas of symptomatology.

For example, people who suffer from PTSD manifest a lot of different ramifications with respect to that particular category. Some people are depressed, some are not, some people suffer anxiety disorders, some do not, some are suicidal. So, you have a whole variety of issues that come into play in terms of how people react to that trauma.

Q. And you would agree, based on what you just said, that many people who are diagnosed with PTSD obviously do not commit a crime?

A. Oh, no. No.

Q. So, just because you are diagnosed with PTSD does not mean that you are destained for a life of crime; is that correct?
A. No. We are talking about this individual, the one who is being sentenced.
MS. ANTON: I have no further questions for Dr. Toomer.
THE COURT: Any redirect?
MR. HADDAD: No, your Honor, thank you.
THE COURT: Can we excuse the doctor?
MR. HADDAD: Yes.
THE COURT: Doctor, you are welcome to stay connected and listen to the rest of the proceeding or you are free to go about your business.
THE WITNESS: Thank you, Judge. I appreciate the offer, thank you very much.
THE COURT: All right. Have a nice afternoon.
THE WITNESS: Thank you.
THE COURT: Do you have someone else?
MR. HADDAD: Yes, your Honor, I would like to call Mr. Simmons' mother, Dorothy Simmons.
(Thereupon, the witness was duly sworn.)
THE COURTROOM DEPUTY: Please state your name for the record.
THE WITNESS: Dorothy Ann Simmons.
THE COURT: Good afternoon. Mr. Haddad is going to

ask you some questions, ma'am.

DIRECT EXAMINATION

BY MR. HADDAD:

Q. Good afternoon, Ms. Simmons. How are you today?

A. All right.

Q. The reason I called you -- first of all, please introduce yourself to Judge Marra and tell us what is your relationship to Jerome Simmons.

A. My name is Dorothy Ann Simmons, Jerome Simmons is my son.

Q. Okay. Now, the reason I would like you to testify is, I wanted you to tell the Judge about some of the traumatic experiences that Jerome experienced as a child as it relates to, you know, Dr. Toomer's testimony earlier, but would you -- I know Dr. Toomer talked to you about a -- something occurring where, I believe, a hot water heater exploded and you were set on fire.

A. Yes.

Q. Tell the Judge about what happened and what Jerome did during that time.

A. During that time, your Honor, I got burnt up in my apartment, I was on fire. It was about ten o'clock at night, I was in my house painting, and my God dad had told me in order to get the paint off him, oil paint, he went to the car and got gas and doused it with water. My hot water heater was sitting in the corner and caught on fire. I started screaming and

yelling for Jerome, he was in the room. I said I am on fire, Jerome, I am on fire. He stomped on it, he got milk out of the refrigerator and poured a whole gallon of milk on me.

After that, they called the paramedics, the paramedics wheeled me out of the house and I was burnt from my legs, my arms, to my ankles, and he just started screaming and crying. As he was screaming and crying he was throwing milk on me. After that, they move me to the hospital.

Q. How long were you in the hospital?

A. I was in the hospital for a month. When I came home after the hospital I was in a wheelchair. During that time Jerome took care of me, he made sure I had my breakfast ready and made sure I had my medications ready, and during the time he was supposed to be going to school. He said no, momma, I am going to take care of you, I am not going to school.

For about a month and a half he took care of me. Of all of his brothers and sisters, he was the only one that took care of me and stayed home. He was a wonderful child. I never did have any problems out of Jerome. Jerome was a very wonderful young man, he always took care of his kids and he lost a child.

Q. Tell the Judge about the loss of the child, how that occurred.

A. He lost his child when it was first born. He stayed there and took care of that baby, he was working with his stepdad, he went and bought that baby so much milk, clothes and everything,

and he took care of him. He was a wonderful, wonderful son, and God knows, I miss him.

Q. How old was the baby?

A. The baby has passed, she was two weeks old when she was born.

Q. Two weeks old -- I'm sorry, how old?

A. The baby was two weeks old when he lost the baby. I have the baby pictures, I have the baby clothes, I have the baby hair. I have everything from the baby.

Q. How did he take that?

A. He took it very hard, he took it very hard. That was his first kid.

Q. Okay. And we all thank you for sharing those stories, I know they are difficult stories.

A. Yes. I really do want him home with me. I think this is going to teach him, I really do, and I am so sorry for what he went out there and did. I really do love him, I love him to death. God knows I miss him, and I tell you I had surgery, I just lost another child of mine. I had four boys, and now I have three, and I really do want him home, God knows I do.

Q. Are you asking the Judge to --

A. Your Honor, I am begging you to lower his time, please do, please do. And I thank you all.

MR. HADDAD: Thank you.

THE COURT: Do you have any questions, Ms. Anton?

MS. ANTON: No, your Honor.

THE COURT: Okay. Thank you, ma'am.

MR. HADDAD: Your Honor, that is all we have as far as the Defendant's case goes.

THE COURT: Why don't we see if our reporter needs a break. Our reporter is willing to keep going. How about the Government?

MS. ANTON: No.

THE COURT: All right. Why don't we have argument from the Government.

MS. ANTON: Judge, the Government would ask your Honor at this point to impose a sentence at the top of the Guidelines, which would be 293 months, followed by the consecutive 84 plus 84 months, for a total of 461 months in prison.

I do realize that the Defendant is being resentenced without the career offender designation and without the three strikes designation. What I would say, your honor, is although he doesn't qualify legally under the Guidelines as a career offender, a review of the Defendant's criminal history shows this Court that he is nothing other than a person who has committed crime for the entirety of his life.

Beginning at the young age of 12, the Pre-Sentence Investigation Report indicates he committed his first crime then. At age 14, it was grand theft auto, robbery and

burglary, for which he was sent to the Juvenile Justice System in an attempt to rehabilitate, as is the goal of the juvenile system.

Having failed there, by the age of 16 he was already being direct filed and sentenced in adult court for burglary. He was sentenced to four years in prison and two years supervised release or probation. The and Pre-Sentence Investigation Report shows he was not successful on the supervision part of his sentence and continuously violated his supervision.

I think it shows an escalating pattern of violence because by the age of 16 you have the Defendant committing additional robberies, using vehicles as weapons, choking someone in order to take their property, and finally, by age 21, you see the Defendant was sentenced to 71 months in prison for an armed bank robbery with masks and guns, $88,000 stolen.

By that point in his life, it was surely the climax of his criminal career. The Defendant has been in and out of prison his entire life. In this case the facts were egregious, it was a robbery spree that spanned from the State of Florida into Georgia. Obviously, by that time in his career he was well versed in the planning of robberies, the execution of robberies, they wore masks, they were armed, they had blocked cell phones. Clearly it takes a great deal of planning to orchestrate.

Based on the 3553 factors -- I do understand the Defendant has come from a very troubled childhood. I listened what Dr. Toomer had to say, and at the end of the day, his diagnosis of the Defendant is that he suffers from PTSD. The Court is well aware many people in this world suffer from PTSD and live very successful lives, at the very least, not lives that are replete with criminal activity.

The Defendant made a conscious choice to commit those crimes. Dr. Toomer also admitted that he hadn't even reviewed the report or the medical records from the Department of Juvenile Justice or the Florida Medical Center that were all made at that point in the Defendant's life that Dr. Toomer himself said are the most important impressionable years when he was a young child.

At this point, the Government's request is really for the top of the Guidelines. I understand the Court sentenced him before to multiple life sentences, and that was probably due to the three strikes enhancement that was struck down by the Appellate Court.

The Government could ask your Honor for a life sentence because he still would be eligible for that under the 924(c) count, however, based on the Defendant's background and the 3553 factors, the need to rehabilitate, the need to send a message, and to be in line with the other Defendants in this case -- Mr. Hardy was just sentenced by your Honor to 36 years

in prison on his resentencing, co-defendant Emmory Moore is serving a life sentence because he was a three strike Defendant as well, and then the very last Defendant, arguably the least culpable, is the get-away driver.

The Government's position is that a 38-year sentence overall would be a just sentence in this case.

THE COURT: Ms. Anton, let me ask you this.

I know you don't agree with the sentence I imposed on Mr. Hardy, which was lower than what you and Ms. White had requested, but in terms of the relative culpability between Mr. Hardy and Mr. Simmons, wouldn't you agree Mr. Hardy is the more culpable?

MS. ANTON: We actually did discuss that. While Mr. Hardy did commit the kidnapping and the carjacking while he was fleeing from the robbery, Mr. Simmons participated in all of these robberies, Mr. Hardy did not. Jerome Simmons completed four of the armed robberies, so I guess that depends on whether or not you think that the kidnapping, carjacking is more serious and heinous than the armed robbery that occurred at the jewelry stores.

In my opinion, one is not incredibly more culpable than the other, they are both fairly aligned in their culpability. Their prior records are fairly similar, although Adrian Hardy was a criminal history category V --

THE COURT: VI.

MS. ANTON: Category VI, so he has a slightly worse criminal history category. Jerome Simmons would likely have been a repeat offender in State Court had this gone to the State system based on the mandatory life sentence there, so basically he has gotten a benefit by coming over to Federal Court.

We believe he has made a life of committing crimes, he is a career offender, so I think the 38 year sentence is in line with what Mr. Hardy received.

THE COURT: Thank you. Mr. Haddad.

MR. HADDAD: Yes, your Honor. Your Honor, the evidence that was presented at the sentencing today shows that Mr. Simmons grew up in a very, very difficult and challenging environment. As Dr. Toomer's report reflects, the ACE study, which is the seminal study on early childhood trauma and the effects that it has on individuals as they mature and progress through life, is significant. He met eight of the ten criteria for ACE factors, even one being significant according to the testimony of Dr. Toomer.

Those are things that the Defendant had very little control over, they occurred when he was very young in age. His home life, the stability that a child needs was just not present there, as is reflected in the Department of Children and Families report that I filed with the Court.

He witnessed a lot of horrific abuse, alcoholism, drug

usage, the types of things now that nobody should ever experience. Some of them were as he was a little bit older, but there is no question that he was in that environment from a very early age.

Now, that is not an excuse for what happened here today. The Government's position is essentially that people experience traumatic events and they don't necessarily turn to this sort of conduct, and I would agree with that. However, I would also point out that the nature and the extent and the duration of what he experienced from a very early age was far different than the types of trauma that most people are left to experience in life.

There are some telling events that show that he has a good side to him as well. You heard from his mom about the horrific incident that she went through and his response to that. He also lost a child at a very early age, and in my written reports I also talk about his sister who I believe was gunned down in a nightclub when she was very young as well.

So, the loss of a child is, you know, even a young parent, it is the worst experience anyone can ever go through, and then to lose a sibling and then to see his mom experience what she went through, and he responded in a caring way and in an appropriate way.

So, I bring that up to suggest to your Honor that he is somebody that can be rehabilitate. He is going to spend a

lengthy period every time behind bars before he gets out, he recognizes that as well as anybody, but what we tried to demonstrate today to the Court is that there is reason for this Court to be of the belief that much of what occurred to him when he was very young and was beyond his control negatively impacted him, but as he moves forward now, he is somebody that has set goals and is trying to do better.

You know, the experience of going through the care program in the Bureau of Prisons I think will, you know, shed further light on that and hopefully continue to rehabilitate him as he moves forward.

Looking at the 3553 factors, your Honor, I believe when -- I would suggest, your Honor, that Mr. Hardy is the most culpable here. I understand the Government's position in terms of the fact that Mr. Hardy wasn't necessarily a participant in all of the robberies, but under the Guidelines, he is the most culpable. He has the higher criminal history category and he scores a higher sentencing range, and his conduct demonstrates a higher degree of culpability.

So, I would ask the Court to impose a sentence that reflects that he is not the most culpable.

I believe when your Honor previously sentenced, I think it was Mr. Hardy, the Court, I believe, declined to impose the 924(c) counts consecutively and essentially tailored a sentence that accounted for that, and I would suggest that

that could very well be appropriate in this case as well.

Your Honor had -- your Honor imposed a variance for Mr. Hardy during his original sentencing, and I believe Mr. Brinson also received a variance. I would suggest that in the interest of uniformity, and based on the mitigating evidence that has been presented here today, that Mr. Simmons should similarly receive a variance.

The Guidelines are 235 months. We would respectfully respect a variance from that, understanding that the Court is going to impose the consecutive seven year sentences, and we would ask the Court to, based on the factors that we have outlined and the manner in which the other cases have been handled, to impose a variance, and we would ask the Court to be as merciful as possible.

THE COURT: Thank you. Mr. Simmons, did you wish to say anything before I impose sentence?

THE DEFENDANT: Yes, your Honor, I would like to address the Court, your Honor.

I would just like to apologize, your Honor, for my actions. I take full responsibility for my actions and I don't blame no one for my actions but myself. I knew what I was doing out there wasn't right, and I am not trying to justify what I did, but I ask the Court to have leniency on me.

I take full responsibility for my actions. I know what I did, I can't take that back, and I accept the fact that

whatever happens, whatever you do, whatever you find in your heart, your Honor, you feel like I deserve, I leave it up to you. That is all I have to say, your Honor.

THE COURT: Thank you.

Can we take a short recess before I impose sentence, about ten minutes?

(Thereupon, a short recess was taken.)

THE COURT: Please be seated, everyone.

I just want to make sure we are clear on the record regarding the Guideline calculations and the objection. I just conferred with Probation Officer, and am I correct that the Government agreed to remove loss analysis as to two of the groups, two of the robberies? Am I correct, 52 and 61, paragraphs 52 and 61 of the Pre-Sentence Report?

MS. ANTON: Yes, we did.

THE COURT: All right. Paragraphs 52 and 61 of the Pre-Sentence Report, those loss amounts the Government agrees should not have been calculated as part of the Guideline calculations, correct?

MS. ANTON: Correct.

MR. HADDAD: Correct.

THE COURT: So, when I earlier overruled the Defense's objection to the loss amounts, I was not -- I was not overruling the objections to 52 and 61. I am agreeing, based upon the agreement of the parties, that the loss amount for

paragraphs 52 and 61 should not be included in the Guideline calculations.

So, I just want to make sure that is clear on the record, and I believe even eliminating those two loss calculations, according to my consultation with the Probation Officer, it doesn't change the Guideline calculations in any way because of the grouping.

Am I correct, Mr. Probation Officer?

PROBATION OFFICER: Yes, your Honor.

THE COURT: Does everyone agree with that? For the record, I want to make sure we are all in agreement. If there is a disagreement, I want to hear what the disagreement is.

MS. ANTON: We are in agreement.

MR. HADDAD: I don't have any disagreement with that, your Honor.

THE COURT: All right. And then we are also all in agreement, then, based upon my ruling, which I understand Defense does not agree with my ruling, but based on my ruling, the advisory Guideline range is offense level 34, criminal history category V, with an advisory Guideline range of 235 to 293, plus two consecutive 84 month counts.

Is that also in agreement, based upon my rulings, that is the Guideline range?

MS. ANTON: Yes, your Honor.

MR. HADDAD: Yes, your Honor, based on the Court's

rulings, that is correct.

PROBATION OFFICER: Yes, your Honor.

THE COURT: Okay. Thank you.

All right. Thank you for your patience.

The Court has considered the statements of the parties, the information contained in the Pre-Sentence Investigation Report, the advisory Guideline range, and the statutory factors set forth in 18 U.S.C. Section 3553, subsection a, subsection 1 through 7.

It is the finding of the Court that the Defendant is not able to pay a fine.

In imposing sentence, the Court must consider the statutory factors set forth in 18 U.S.C. Section 3553. Those factors require the Court to impose a sentence that is sufficient, but not greater than necessary, to comply with the requirements of 18 U.S.C. Section 353.

The Court has to consider the nature and circumstances of the offense, which in this case are quite serious. The Court has to consider the history and characteristics of the Defendant which, based upon his criminal history, are -- he has a significant criminal history, but also he has had an upbringing that did not provide the best environment for a young man to be growing up, which I am sure contributed to his getting into legal trouble as he was growing up.

The Court has to consider the need for the sentence

imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment, which in this case requires, unfortunately, a long incarcerative sentence.

The Court has to consider the need to afford adequate deterrent to criminal conduct, which both in general and specific, and particularly in view of Mr. Simmons' criminal history, that factor is important.

The Court has to consider the need to protect the public from further crimes of the Defendant, also in view of his criminal history, that factor needs to be considered.

And the Court has to consider the need to avoid unwarranted sentencing disparities among Defendants with similar records who have been found guilty of similar conduct.

Taking into account all of the factors, the Court finds that a sentence below the guideline range will be sufficient, but not greater than necessary, to comply with the requirements of Section 3553.

In particular, the Court is concerned about trying to apportion sentences among co-defendants in this case that reflect their respective culpability. Mr. Moore got a life sentence and that was based upon his criminal history and it was a mandatory life sentence. I am not sure he was the most culpable, but my hands were tied with his sentence, so he has, unfortunately, received a life sentence which was upheld on appeal.

As to the other Defendants where I have discretion, and Mr. Simmons is in a situation where I have discretion, where I previously visited in my earlier erroneous ruling, he was also given a life sentence, but based on the appeal, he has the fortunate ability to come back and be resentenced where I have some discretion.

In evaluating his culpability with Mr. Hardy's, who was sentenced earlier today to 432 months, I think Mr. Simmons is lower, not significantly lower, but lower criminal history, and not being directly involved with the abduction of the victims of Mr. Hardy's kidnapping. I think, even though Mr. Simmons was involved in more of the robberies than Mr. Hardy, I think Mr. Hardy's conduct was more egregious and harmful to the victims, and requires a more significant sentence than Mr. Simmons in order to balance the equities.

Mr. Simmons reflects that he attributed was attributed Mr. Hardy's conduct, even though he was not directly involved, and I think that was the correct ruling on the Guideline calculations, but since Mr. Hardy was the one that did that, I think Mr. Simmons should receive a less severe sentence than Mr. Hardy did. So I am going to vary below the Guideline range in order to reflect that.

Mr. Brinson was the least culpable and his sentence is going to be lower in all likelihood when he is resentenced than either Mr. Hardy or Mr. Simmons.

So, in order to try to balance the culpability, I think a variance is justified for Mr. Simmons and the sentence will be sufficient, but not greater than necessary, to comply with 3553.

So, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Jerome Simmons, is hereby committed to the custody of the Bureau of Prisons for a term of 360 months. The term consists of 192 months as to each of Counts 1, 3, and 4, to be served concurrently with each other, and 84 months as to each of Counts 2 and 5, to be served consecutively to each other and consecutively to Counts 1, 3, and 4.

Upon release from imprisonment, the Defendant shall be placed on supervised release for a term of five years. The term consists of five years as to Counts 2 and 5, and three years as to Counts 1, 3, and 4, all terms to be served concurrently.

Within 72 hours of his release from custody of the Bureau of Prisons, the Defendant shall report to the Probation Office in the district where he is released. While on supervised release the Defendant shall not commit any crimes; he shall be prohibited from possessing any firearms or dangerous devices; he shall not possess a controlled substance; he shall cooperate in the collection of DNA; and he shall comply with the following special conditions:

Association restriction, substance abuse treatment, and permissible search, as noted in Part F of the Pre-Sentence Report.

The Defendant shall also immediately pay to the United States a special assessment of $100 as to each of Counts 1 through 5, for a total of a $500 special assessment.

The total sentence is 360 months imprisonment, five years supervised release, and a $500 special assessment.

Now that sentence has been imposed, does counsel or the Defendant object to the manner in which sentence was pronounced?

MR. HADDAD: Yes, your Honor, we would reiterate all of our objections, and we impose a general objection on the reasonableness of the sentence. We do appreciate the Court's time today and giving us time to present our case.

THE COURT: Any objection from the Government?

MS. ANTON: No, your Honor.

THE COURT: Mr. Simmons, you have a right to appeal the sentence imposed. If you wish to file an appeal, you must file the Notice of Appeal within 14 days from the date judgment is entered in this case. If you are unable to pay for the cost of an appeal, you may seek leave to file an appeal in forma pauperis.

Any recommendations, Mr. Haddad?

MR. HADDAD: Yes, your Honor. Addressing that keep

away issue, or the stay separate issue, first, if I may, apparently the Government had that placed on the Defendant at my request because there were issues. Those issues have all been resolved now. Mr. Simmons is asking that it be lifted, and I believe the Government is okay in doing that.

THE COURT: Is that correct?

MS. ANTON: Judge, I don't have any objection.

THE COURT: Okay. So, I don't know how I am supposed to go about doing that. You want me to have it included in the judgment that the Court recommends that the Bureau of Prisons remove any -- what is it called, a contact restriction between Mr. Simmons and Mr. Hardy?

THE MARSHAL: They are called separatees. I believe that -- is that a word?

THE COURT: Let's say separation order. I will recommend that any separation order that has been imposed between Mr. Hardy and Mr. Simmons be eliminated or removed. And what about a place of designation?

MR. HADDAD: No special request with regard to that, your Honor.

THE COURT: All right.

MR. HADDAD: Thank you. And I believe that is it.

THE COURT: Anything else from the Government?

MS. ANTON: No, your Honor.

THE COURT: All right. Mr. Simmons, good luck to you,

sir, and thank you all. Have a nice day.

THE DEFENDANT: Thank you, your Honor.

MR. HADDAD: Thank you very much, your Honor.

(Thereupon, the hearing was concluded.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: November 1, 2021

/s/ Pauline A. Stipes, Official Federal Reporter

Signature of Court Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

UNITED STATES OF AMERICA

v.

JEROME SIMMONS
Date of Original Judgment: 6/6/2019

§ **AMENDED JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **0:17-CR-60119-KAM(1)**
§ USM Number: **15968-104**
§
§ Counsel for Defendant: **Christopher Alfred Haddad**
§ Counsel for United States: **Jodi Anton and Anita White**

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**1 through 5 of the Second Superseding Indictment on March 15, 2019**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:1951(a) Hobbs Act Robbery	04/13/2017	1ss
18:924(c)(1)(A)(ii) Carrying A Firearm In Furtherance Of A Crime Of Violence	04/13/2017	2ss
18:1951(a)Conspiracy To Commit Hobbs Act Robbery	04/13/2017	3ss
18:1951(a) Hobbs Act Robbery	04/13/2017	4ss
18:924(c)(1)(A)(ii) Carrying A Firearm In Furtherance Of A Crime Of Violence	04/13/2017	5ss

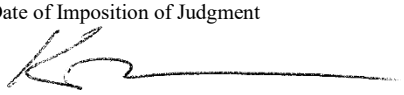
The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

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

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

October 20, 2021
Date of Imposition of Judgment



Signature of Judge

KENNETH A. MARRA
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

October 20, 2021
Date

IMPRISONMENT

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

360 months. This term consists of 192 months as to count 1ss, 3ss and 4ss to be served currently with each other, and 84 months as to count 2ss and 5ss, to be served consecutively to each other and consecutively to Counts 1ss, 3ss and 4ss.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends the separation order between defendant and codefendant Adrian Hardy be removed.

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Five (5) years. This term consists of five years as to Counts 2ss and 5ss and three years as to Counts 1ss, 3ss and 4ss, all terms to run concurrent.**

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

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.flsp.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction: The defendant is prohibited from associating with codefendants while on probation/supervised release.

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment: The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

CRIMINAL MONETARY PENALTIES

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$500.00	$.00	$.00	$.00	

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

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

The defendant must pay the total criminal monetary penalties under the schedule of payments page.
If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

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

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

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

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

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payments of $500.00 due immediately.

It is ordered that the Defendant shall pay to the United States a special assessment of $500.00 for Counts 1ss, 2ss, 3ss, 4ss and 5ss, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

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

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

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

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

REASON FOR AMENDMENT

REASON FOR AMENDMENT:

- X Correction of sentence on remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed.R.Crim.P.35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed.R.Crim.P.36)
- ☐ Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) top the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
APPEAL NO. 19-12262-F

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

JEROME SIMMONS,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA
LOWER DISTRICT COURT NO. 17-cr-60119-KAM-1

- -

BRIEF OF THE APPELLANT

APPELLANT IS IN CUSTODY

- -

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CJA Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS

Appellant, Jerome Simmons, hereby certifies that the following persons have an interest in the outcome of this case:

1. Anton, Jodi
2. Brinson, Christopher
3. Caruso, Michael
4. C.K.
5. Della Ferra, Richard F.
6. Fajardo Orshan, Ariana
7. Garland, Jeffrey H.
8. Greenberg, Benjamin G.
9. Haddad, Christopher
10. Hardy, Adrian
11. Hopkins, Hon. James K.
12. J.K.
13. LSO Jewelers and Repairs
14. Marks, Neison M.
15. Marra, Hon. Kenneth A.
16. Matthewman, Hon. William
17. Matzkin, Daniel

18. Meadows, Robert B.

19. Moore, Emmory

20. Mulvihill, Thomas J.

21. Murrell, Larry D.

22. O’Donnell, John F.

23. Rodriguez, Jr., Valentin

24. Seltzer, Hon. Barry S.

25. Simmons, Jerome

26. Smachetti, Emily M.

27. Valle, Hon., Alicia O.

28. White, Anita

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests that oral argument is requested, as it may aid the Court in resolving the instant case.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

1. Basis for subject matter jurisdiction in District Court and citation(s) to applicable statutory provisions.

Jurisdiction vested in the United States District Court, Southern District of Florida pursuant to 18 U.S.C. § 3231.

2. Basis for jurisdiction in the Court of Appeals with citation(s) to applicable statutory provisions and relevant filing dates:

Jurisdiction vests in the Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291.

a. Final Order

The Judgment as to Jerome Simmons was entered on June 7, 2019. [D.E. 309], and a term of Life imprisonment as to Counts 1 and 4, and 240 months as to Count 3, to be served concurrently with each other and life imprisonment as to each of Counts 2 and 5, to be served consecutively to each other and consecutively to Counts 1, 3 and 4 as well as a period of 5 years of Supervised release as to Counts 1, 2, 4, and 5 and 3 years as to Count 3, all terms to run concurrently was imposed by the District Court.

b. Other Jurisdictional Basis

Notice of Appeal was timely filed on June 12, 2019 [D.E. 315] and this brief follows.

STATEMENT OF THE ISSUES

Whether Mr. Simmons prior conviction for robbery was a qualifying predicate offense under 18 U.S.C. § 3559?

Whether the "three-strikes" law, 18 U.S.C. § 3559 is unconstitutional because it impermissibly shifts the burden of proof and violates the prescribes of *Alleyne* and its progeny? And further, whether Mr. Simmons convictions for Hobbs Act Robbery and/or carrying a firearm in furtherance of a crime of violence qualify as a serious violent felony under 18 U.S.C. § 3559.

Whether Mr. Simmons' offenses of conviction were improperly classified as crimes of violence under U.S.S.G. §§ 4B1.1 AND 4B1.2 making the career offender enhancement inapplicable.

STATEMENT OF THE CASE AND RELEVANT FACTS

1. Course of the Proceedings and Dispositions Below

The record will be noted by reference to the docket entry number, and page number(s) of the record on appeal.

On November 9, 2017, Mr. Simmons, along with co-defendants, Emmory Moore, Christopher Brinson and Adrian Hardy was charged by second superseding indictment with five criminal offenses: Counts one and four: Hobbs Act robbery, in

violation of to 18 U.S.C. § 1951; Counts two and five: Carrying a firearm in furtherance of a crime of violence, in violation of to 18 U.S.C. § 924 (c)(1)(A)(ii) and Count three: Conspiracy to commit Hobbs Act robberies in violation of to 18 U.S.C. § 1951 (a). [D.E. 43]

The day before trial, the Government filed a notice of sentencing enhancement pursuant to the "three-strikes" law, under 18 U.S.C. § 3559 (a) seeking to enhance Mr. Simmons sentence to life imprisonment. [D.E.156] In support of the enhancement, the Government listed the Hobbs Act robbery and carrying a firearm in furtherance of a crime of violence offenses as the predicate offenses as contained in the second superseding indictment. Further, the Government listed two prior state court convictions for robbery with a deadly weapon and robbery respectively, as the necessary predicate offenses establishing that Mr. Simmons qualified for the "three-strikes" law enhancement. The following day, Mr. Simmons filed a response challenging the Government's 3559 (c) notice as failing to enumerate proper qualifying offenses for the enhancement in that the Government could not establish that Mr. Simmons had two prior qualifying offenses that involved a firearm or other dangerous weapon or involved the threat of use of a firearm or other dangerous weapon, and resulted in death or serious bodily injury to any person. [D.E. 162] Mr. Simmons also challenged the constitutionality of the "three-strikes" law, under 18 U.S.C. § 3559 (a) raising a burden shifting challenge to the requirement that he

present clear and convincing evidence to establish that the "three-strikes" law did not apply to him.

The trial lasted approximately three weeks. The Government presented evidence that over the course of several weeks, armed individuals dressed as females conducted a series of jewelry store robberies in Florida and Southern Georgia. The first robbery occurred on March 3, 2017 at Class Jewelers in Deerfield Beach, Florida. A second robbery on March 16, 2017 was committed at Lily's Jewelry store in Spring Hill, Florida. On April 1, 2017, a jewelry store robbery involving a similar modus operandi of individuals wearing make-up and dressed as women occurred at Bishop's Jewelers in Valdosta, Georgia. Finally, a fourth robbery occurred at LSO Jewelers located in Port Saint Lucie, Florida.

Jonathan Patterson was the first witness to testify. The morning of April 13, 2017, he was with his daughter when they stopped at Wal-Mart in the same plaza as the LSO Jewelry store. (D.E. 359, P. 179). Upon returning to his car, he observed a suspicious vehicle parked in the plaza. He saw three people exist the vehicle, all wearing jumpsuits. He describes seeing one dressed in pink, another in white or grey, and a third in blue. They were carrying handbags and wearing shoulder length wigs and wearing make-up. Noticing broad shoulders and seeing one of the individuals enter and then lock the door to the LSO Jewelry store heightened his suspicion. (D.E. 359, P. 179-180). After driving back around to look for the vehicle,

he called 911. The person wearing the pink jumpsuit appeared armed with a gun. (D.E. 359, P. 185). Once police arrived, he informed them of his observations. (D.E. 359, P. 190-191).

Larissa Oprysk owned and operated LSO. (D.E. 360, P. 38). The store was equipped with a buzzer system and security cameras. On the morning of April 13, 2017, she arrived at 8 AM. The store opened at 9 AM. She immediately noticed three people walk into the store dressed suspiciously. The first person spoke with a man's voice, indicating that he was looking for an engagement ring. He then jumped over the jewelry case, placing a gun to her head and ordered her to the ground. (D.E. 360, P. 44). A second individual helped drag both women to the rear of the store. (D.E. 360, P. 46). The store was ransacked. (D.E. 360, P. 50). The incident was captured on videotape and played for the jury. (D.E. 360, P. 53).

Natalia Nabatova described first assisting the person with the pink jumpsuit who asked for an engagement ring. (D.E. 360, P. 85). Within moments, he then pulled a gun from his purse, grabbed her and pulled her to the back of the store. She heard the robbers communicating via walkie-talkie.

Ian Harris was dispatched to LSO where he first observed a black SUV parked in the plaza. (D.E. 360, P. 102). Officer Victor Garcia assisted, and they spoke to Mr. Patterson about his 911 call. Harris approached the front of the store and observed one of the suspects. He ordered him to show his hands, and then the

suspect turned and ran toward the rear of the store. (D.E.360, P. 105). All three suspects were observed exiting the rear of the store and running towards St. Lucie West Boulevard.

Victor Garcia testified that upon arriving to LSO, he was approached by Mr. Patterson who advised that three individuals were still in the jewelry store. He observed the man in the pink jumpsuit exiting the store. Garcia drew his weapon and the man fled. (D.E.360, P. 115).

Port Saint Lucie officer Christina Rasko was on road patrol. She saw two black males running, one in a pink jumpsuit and the other in a black shirt. She observed them running toward a nearby hospital. She gave pursuit with her gun drawn. (D.E. 360, P. 130). She then saw a man dressed in boxers and one sock wiping make-up off his face. (D.E. 360, P. 133). He was ordered to remain on the ground. The man spontaneously stated that three females robbed him and stole his clothes. (D.E. 360, P. 136). After being placed in custody, a pile of clothes were located, including a pink jumpsuit concealed underneath a car parked in the lot. (D.E. 360, P. 138). He was holding a walkie talkie. (D.E.360, P. 138). The man was arrested and identified as Mr. Simmons.

Officer Suzannie Moore Fleites responded to Martin Memorial Hospital as a back-up. (D.E. 360, P. 187). She observed Mr. Simmons being detained and took him into custody. (D.E. 360, P. 187). She collected items of evidence including the

pink jumpsuit and a wig. She discovered a key to an alarm box in the clothing. (D.E. 360, P. 193).

Port Saint Lucie crime scene investigators Joel Smith and Ashley Perkins responded to LSO, where they took photographs and collected duffel bags and other items of evidence. (D.E. 361, P. 195). Smith processed the items for fingerprints and DNA. (D.E. 361, P. 196-198). CSI Danita Yaroma assisted as well, including photographing the interior and exterior of LSO, and processing the fingerprints recovered from LSO. (D.E. 361, P. 14). She also took DNA swabs from Mr. Simmons for comparison purposes. (D.E. 361, P. 15).

Criminalist Julie Casals, a DNA analysist for the Indian River Crime Lab, testified that DNA analysis of the wig attributed to Mr. Simmons could not exclude him as a contributor. The likelihood of the profile matching another contributor was 1 in five octillion. (D.E.361, P. 128-129).

Rehana Ahmed was the store manager for Class Jewelers. While working with a colleague, she assisted a man trying to sell some jewelry. After giving him a price, he left and then later two people returned dressed in "weird clothing". (D.E. 362, P. 188-189). They asked to see wedding rings. (D.E. 362, P. 191). As she was assisting, one jumped over the counter carrying a "silver or grey colored" gun. (D.E. 362, P. 192). She was ordered to the ground and directed not to say anything. (D.E. 362, P. 192-195). Her colleague Alina was also ordered to the ground. (D.E. 362,

P. 195). After the perpetrators left the store, Ms. Ahmed called the police. (D.E. 362, P. 195). The incident was captured on videotape.

Lily Hansseen was the owner of Lily's Jewelry Store in Spring Hill, Florida. On March 16, 2017, she received a call asking about wedding rings. The person inquired about store directions and sounded like a man. Around 3 PM, two people came to the store. One asked for a wedding ring and was dressed like a woman with long hair. (D.E. 363, P. 216). The second person then grabbed her, while carrying a gun and took her to the back of the store. (D.E. 363, P. 219). The man said that he would not hurt her. (D.E. 363, P. 220). They remained in the store for about ten minutes. Prior to leaving, they pulled the camera system down. A cell phone was left on the floor. (D.E. 363, P. 232).

Crime scene technician Kenneth Locke took the cellphone and battery into evidence. Hernando County Sheriff's Detective Christopher Vascellaro performed a cell phone extraction. DNA Analyst A. Baker concluded that Emmory Moore's DNA could not be excluded from the cellphone and the evidence that someone other than Moore was a contributor to the DNA was one in 27 sextillion. (D.E. 364, P. 226).

Stephen Bryce of the FBI counter-terrorism unit conducted a Cellbrite analysis of the phone by downloading the phone's contents into a report. D.E. 365, P. 156-204).

Michelle Bishop was called next. She is an owner of Bishop's Jewelry store in Valdosta, Georgia. On April 1, 2017, 3 individuals entered the store, appearing to be women. After inquiring about jewelry, one, wearing a wig and make-up with sleeves over his hands was observed carrying a gun. (D.E. 364, P. 29). The perpetrators said this is a robbery and ordered her to comply with their demands. (D.E. 364, P. 31).

Michael Bishop was in the middle area of the store when the perpetrators came in. (D.E. 364, P. 78). He looked up and saw what appeared to be three black females. While seated, he was confronted by one of the perpetrators who pointed a gun at his face. (D.E. 364, P. 79). The Bishops were taken to the rear of the store where they remained during the course of the robbery.

ATF agent Elizabeth Richards Morales retrieved bank account and driver's license information of Mr. Simmons. (D.E. 366, P. 83). She also obtained Sun Pass transponder records. (D.E. 366, P. 110). She mapped the transponder to show that the vehicle associated with the defendants was near Spring Hill when Lily's Jewelry store was robbed and near Valdosta, Georgia when the Bishop's robbery occurred. Further, she connected the phone number on the bank application to the number reported to be Mr. Simmons.

Wendall Cosenza of the FBI cellular phone analysis survey team presented evidence of the locations of phones connected to the defendants during various

points in time. He acknowledged that he can only place a particular phone within the vicinity of a cell phone tower and cannot determine the precise location of a phone at a given point in time. (D.E. 366, P. 139-180).

FBA Agent Bryan Kendall began his investigation on March 20, 2017. He retrieved a signed guest registry card for the Regency Inn in Valdosta Georgia with Mr. Simmons' name, address and photocopy of his driver's license. (D.E. 367, P. 16-17).

Mr. Simmons presented one defense witness, Broward County Deputy Sheriff Vincent Campos. (D.E. 368, P. 31). Deputy Campos testified that he was the first responding officer to Class Jewelry on March 3, 2017. He spoke to Alina Iakushyna and Rehana Ahmed. (D.E. 368, P. 34-35). Both women gave a general description of two black males dressed in women's clothing. (D.E. 368, P. 37). He reviewed the store video. (D.E. 368, P. 35).

At the conclusion of the presentation of evidence, the court instructed the jury on the law of the case. (D.E. 370, P. 13). The jurors deliberated over the course of two days before returning their verdicts on March 15, 2019. [D.E. 198] Mr. Simmons was found guilty by the jury of all 5 charged offenses contained in the superseding indictment. A presentence investigation report was prepared by the United States probation office recommending that Mr. Simmons be sentenced under the "three-strikes" law to life imprisonment on Counts 1 and 4 followed by consecutive life

sentences on Counts 2 and 5, each to run consecutively to the life sentence imposed in Counts 1 and 4 which ran concurrent. [D.E 227, 253] A twenty-year concurrent sentence was recommended on Count three.

Prior to sentencing, Mr. Simmons moved to dismiss the carrying a firearm in furtherance of a crime of violence charges in Counts 2 and 5 on vagueness grounds. [D.E.258] Prior to sentencing, Mr. Simmons renewed his objections to the Government's Notice of Enhancement [D.E. 259-260] He also filed a Sentencing Memorandum outlining the difficult circumstances of his upbringing, including witnessing his mother inadvertently setting herself on fire causing burns throughout her body, and the tragic circumstances of his sister being killed in a nightclub and the grief he suffered when his first child died when only a few days old. [D.E. 269]. The sentencing hearing took place on June 6, 2019. Mr. Simmons contended that the "three-strikes" law did not apply, because one of the predicate offenses that the Government was relying upon to support the imposition of the "three-strikes" law; namely the state court offense of robbery was not a qualifying offense. Pursuant to his burden, Mr. Simmons entered into evidence documents from the state court robbery to establish that no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense, and that the offense did not result in death or serious bodily injury to any person. Thus, he argued that the robbery was not a qualifying offense under the

"three-strikes" law. The Government countered that during the course of the robbery, the suspects used a vehicle to hit the victim's car, making it a dangerous weapon and thus the robbery was a qualifying predicate offense.

The District Court overruled Mr. Simmons objections and sentenced him to life imprisonment as outlined above pursuant to the "three-strikes" law, under 18 U.S.C. § 3559 (a).

In addition to challenging the constitutionality of 18 U.S.C § 3559 (a) and the factual predicate for imposition of the "three-strikes" law, Mr. Simmons also objected to the presentence investigation report designating him as a career offender under the Sentencing guidelines. The District Court overruled the objection and sentenced him as a career offender on the basis that the instant offense of conviction was a crime of violence under U.S.S.G. § 4B1.1(b)(1).

SUMMARY OF ARGUMENT

POINT I

MR. SIMMONS PRIOR STATE COURT ROBBERY CONVICTION WAS NOT A QUALIFYING OFFENSE UNDER 18 U.S.C. § 3559(c).

18 U.S.C. § 3559(c) IMPROPERLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT TO CHALLENGE HIS QUALIFYING OFFENSES AND ALLOWS THE COURT TO DETERMNE FACTS USED TO INCREASE A DEFENDANT'S SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT

Under the "three strikes" law codified in 18 U.S.C. § 3559(c), a sentencing court is required to impose life imprisonment where a defendant is convicted of a serious violent felony and has two qualifying prior violent offenses. The District Court erred in sentencing Mr. Simmons to life imprisonment because one of the two prior robbery offenses relied upon by the Government in its Notice of Enhancement, was not a qualifying offense, under 3559(c). Under the "three-strikes" law, if a firearm or other dangerous weapon was not used or threatened to be used, and the offense did not result in death or serious bodily injury to any person, it is not a qualifying predicate offense. Although the Government's Notice of Enhancement alleged that Mr. Simmons had two prior robbery convictions, only one involved the use of a firearm or other dangerous weapon and thus, Mr. Simmons had only one qualifying robbery offense; not the required two qualifying offenses, to warrant the mandatory life sentence. Therefore, this matter should be remanded to the District Court for resentencing without imposition of the 3559(c) enhancement.

Additionally, the statutory framework of 18 U.S.C. § 3559(c) violates the Sixth Amendment by shifting the burden of proof to the defendant to establish that his predicate offenses do not qualify for the "three-strikes" law and by having the sentencing court make fact-based findings used to increase the defendant's sentence.

18 U.S.C § 3559 (c) "three-strikes" law places the burden on the defendant to prove by clear and convincing evidence that a predicate robbery conviction relied

upon to support imposition of the "three-strikes" law is a non-qualifying offense. This burden required Mr. Simmons to present factual evidence to the sentencing court, to attempt to persuade the court that no firearm or other dangerous weapon or threat of use of a firearm or other dangerous weapon was involved in the offense, and the offense did not result in death or serious bodily injury to any person.

During his sentencing, Mr. Simmons presented court documents, police reports, and witness statements from the disputed Broward county robbery case to demonstrate that no firearm or dangerous weapon was used during the robbery. After considering the evidence presented and the facts surrounding the predicate robbery offense, the District Court determined that it viewed the manner in which the suspect vehicle was used during the robbery to constitute use of a vehicle as a dangerous weapon and that Mr. Simmons failed to meet his burden of establishing by clear and convincing evidence that the robbery was not a qualifying offense. The Superseding Indictment contained no allegations about the prior robbery offense and no jury findings were made regarding the facts of the robbery or whether the manner in which the vehicle was used constituted use of a dangerous weapon.

The process of requiring Mr. Simmons to affirmatively prove that the robbery did not involve the use of a dangerous weapon impermissibly shifted the burden of proof to him rather than the Government in violation of the Sixth Amendment. Further, the District Court's conclusion that the vehicle was used as a dangerous

weapon, thereby mandating a life sentence under the "three strikes" law, amounted to impermissible judicial fact-finding in violation of the Sixth Amendment. Thus, Mr. Simmons must be resentenced without the "three-strikes" enhancement.

POINT II

MR. SIMMONS CONVICTIONS FOR HOBBS ACT ROBBERY AND CARRYING A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE DO NOT QUALIFY AS SERIOUS VIOLENT FELONY OFFENSES UNDER 18 U.S.C. § 3559(c).

Mr. Simmons was convicted on, two Counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and two Counts of Carrying a firearm in furtherance of a crime of violence in violation of 924 (C) to life imprisonment under 3559(c). The District Court found that both Hobbs Act robbery and Carrying a firearm in furtherance of a crime of violence, were crimes of violence under 18 U.S.C. § 3559 (c), and that Mr. Simmons had two qualifying prior offenses under the "three-strikes" law. Thus, pursuant to 18 U.S.C. § 3559 (c) the District Court imposed a mandated life sentence.

The imposition of concurrent life sentences for the Hobbs Act robberies in Counts 1 and 4 under 18 U.S.C. § 3559 (a) was erroneous under both the elements clause and the enumerated felony clause of 18 U.S.C § 3559 (a) because Hobbs Act

robbery is not a crime of violence under 18 U.S.C § 3559 (a).[1] Although in the context of 18 U.S.C. 924(c) cases, In re St. Fleur and St. Hubert, supra are binding precedent and both hold that Hobbs Act robbery is a crime of violence under 924 (c); the Supreme Court has not specifically held that Hobbs Act robbery is a crime of violence under 18 U.S.C § 3559 (a). Other Supreme Court opinions have held that the elements clause and/or residual clause in other recidivist statutes such as the Armed Career Criminal Act ("ACCA") are void for vagueness and violate the categorical approach. Mr. Simmons contends that Hobbs Act robbery does not qualify as a predicate serious violent felony for purposes of 18 U.S.C. § 3559(c) under either the enumerated offense clause or the residual clause on these same vagueness grounds.

POINT III

MR. SIMMONS HOBBS ACT CONVICTIONS CANNOT SUPPORT A CAREER OFFENDER ENHANCEMENT AND HOBBS ACT ROBBERY IS NOT A VALID PREDICATE OFFENSE UNDER THE ELEMENTS CLAUSE OF 18 U.S.C § 924 (c)

Mr. Simmons was sentenced as a career offender under U.S.S.G §§ 4B1.1 and 4B1.2, for Hobbs Act robbery in Counts 1 and 4, and Carrying a firearm in

[1] Admittedly, this Court has found in both *In re St. Fleur*, 824 F.3d 1337 (11th Cir. 2016) and *United States v. St. Hubert*, 909 F.3d 335, 344 (11th Cir. 2018) that Hobbs Act robbery is a crime of violence under 924 (c)'s elements clause.

furtherance of a crime of violence, in Counts 2 and 5. He was also sentenced as a career offender under the elements clause of 924 (c).

Under 18 U.S.C § 1951, Hobbs Act robbery is defined as the "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking.

This Court has affirmatively held in *United States v. Eason*, 2020 WL 1429110 (11th Cir. Mar. 24, 2020) that a Hobbs Act robbery conviction is not a crime of violence under the career offender provision of U.S.S.G guideline 4B1.1. Therefore, it was error to sentence Mr. Simmons as a career offender under the Guidelines and this matter must be remanded for resentencing without the career offender guideline enhancement.

As far as the elements clause under 924 (c), there is binding precedent in this circuit, holding that Hobbs Act robbery is a crime of violence under 924 (c)'s element clause, when applying the categorical approach. However, as explained in *Descamps v. United States*, 133 S. Ct. 2275 (2013), there are conceivable ways to commit Hobbs Act robbery that do not require violent force against a person or property. Hence, not all Hobbs Act robbery offenses require "physical force" and

Hobbs Act robbery is not categorically a crime of violence under the 924 (c) elements clause. Stated otherwise, Hobbs Act robbery encompasses criminal conduct that does not categorically include "crimes of violence" as defined under 924 (c). Therefore, Hobbs Act robbery is not a valid predicate offense for the 924 (c) convictions and Mr. Simmons cannot be sentenced as a career offender under 924 (c).

ARGUMENT

Mr. Simmons Broward County robbery predicate was not a qualifying offense under 18 U.S.C. § 3559(c)

At the sentencing hearing, the Government sought a ruling from the District Court that Mr. Simmons qualified for the "three-strikes" law under 18 U.S.C. § 3559(c) mandating the imposition of a life sentence. Mr. Simmons objected and argued that because no firearm or other dangerous weapon was used during the commission of the predicate robbery at issue, it was not a qualifying offense under the "three-strikes" law. The Government argued that because during the robbery, the suspect vehicle was used to ram into the victims' vehicle, constituting use of the vehicle as a dangerous weapon it qualified. Mr. Simmons disagreed, arguing that the evidence did not establish that the vehicle was used as a dangerous weapon.

> Pursuant to 18 U.S.C. § 3559 (c) **(F)** the term "serious violent felony" means—
> **(i)**
> a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111);

manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and 18 U.S.C. § 3559 (c) (3) provides:

(3) Nonqualifying felonies.—

(A)Robbery in certain cases.—Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i)
no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and

(ii)
the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

(B)Arson in certain cases.—Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i)
the offense posed no threat to human life; and

(ii)
the defendant reasonably believed the offense posed no threat to human life.

Thus, under 18 U.S.C 3559 (c) if Mr. Simmons demonstrates by clear and convincing evidence that no firearm or other dangerous weapon was used in the

offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and that the offense did not result in death or serious bodily injury (as defined in section 1365) to any person than the robbery is not a qualifying offense and does not constitute a strike under the law.

Prior to sentencing, the Government filed a memorandum of law to support the 3559 (c) enhancement arguing that the robbery was a qualifying offense "because the defendant [Mr. Simmons] and his accomplices used their vehicle to ram into the rear of the victims' car." The Government's position was that by ramming into the rear of the victims' car, the suspect vehicle was used as a dangerous weapon making it a qualifying robbery offense under 3559 (c). [D.E. 281]. To support its argument that the vehicle was used to ram into the victims' car, the Government relied upon the facts of the case as contained in the presentence investigation report [D.E. 253], and the police reports and victim statements placed into evidence about the predicate robbery offense. [D.E. 252]. Notwithstanding the Government's position, none of the documents, supported a finding that the vehicle was used as a dangerous weapon. Although, in the presentence investigation report states that the victims informed the police that their vehicle was hit from behind, the impact was minimal and did not endanger life or cause risk of great bodily injury. [D.E. 227 paragraph 89].

A supplemental police report, prepared by Officer R. Krege of the Sunrise Police Department indicated that one of the victim's described feeling her car,

"shake from behind", and when looking back, noticed it was hit from behind. When she and her friend (the victims) exited their car to see what had happened, the occupants of the other car all got out, and the driver "backed up a little" and "got out". One of the victims was then pushed down to the ground and her purse was stolen, while the other's purse was "forced" from her arm. Officer Krege's report notes that he observed "minor damage to the right rear bumper with white paint transfer from the suspect vehicle." During witness interviews, one victim described feeling a bump [D.E. 260 page 25 of 38], and the other indicated that the car "shifted" or was "banged into" [D.E. 260 page 34 of 38]. These facts established only minor impact, and no victim injury caused by that impact.

The standard of review as to whether the intent to use an instrumentality to cause bodily injury, making it a dangerous weapon, is clear error. *United States v. Morris*, 131 F.3d 1136, 1138 (5th Cir. 1997). A finding of fact is clearly erroneous if the Court is left with "a definite and firm conviction that a mistake has been committed." *United States v. Foster*, 155 F.3d 1329, 1331 (11th Cir. 1998). The question of whether the intent to cause bodily harm is present in a case "is to be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude." *United States v. Perez*, 897 F.2d 751, 753 (5th Cir. 1990) (quoting *Shafffer v. United States*, 308 F.2d 654, 655)(5th Cir. 1962));

see also *United States v. Oregon*, No. 01-51202, 2002 WL 1860281, at *1 (5th Cir. 2002)(unpublished). [2]

In *United States v. Games-Cruz*, No. 07-15722 (11th Cir. 9/16/2008), the Court found the act of hitting a police vehicle with sufficient speed to cause the truck door to buckle and dislodge, forcibly causing the Agent a sprained knee, significant bruising and ongoing pain for about a year constituted use as a deadly weapon. The defendant also admitted intending to "assault" the Agent.

United States v. Jackson, Case No. 17-10392 (11th Cir. 3/23/2018), involved a challenge to the District Court's finding that a vehicle was used as a dangerous weapon during a driving under the influence investigation. The facts showed upon being directed by the officer to turn his car off, Jackson responded by, "look[ing] around in all directions, gripping the steering wheel tightly, and accelerat[ing] the vehicle" striking the officer in the chest. When the officer grabbed onto the driver's side window frame, the car ran over his foot dragging him approximately 15 feet before falling and sustaining strained muscles and scrapes to his hand, arm and shoulder. In affirming, this Court found that the District Court did not clearly err in finding that Jackson acted with the intent to cause injury.

[2] In Shepard v. State, 259 So. 3d 701 (Fla. 2018), the Florida Supreme Court held that an automobile is a weapon under section 775.087(1) if it is used to inflict harm on another.

In *United States v. Nunez-Granados*, No. 12-41081 (5th Cir. 11/6/2013), the defendant used his shoes to kick the case Agent multiple times causing lacerations to the forehead and a mild deviation to the nasal septum. The defendant contended that because he lacked the intent to cause bodily injury, his shoes were not a dangerous weapon. The court discussed the dangerous weapon concept, referring to the Sentencing Guidelines definition of "dangerous weapon" as an instrument that is "capable of inflicting death or serious bodily injury," as well as an object not capable of inflicting death or serious bodily injury if it "closely resembles such an instrument," or if "the defendant used the object in a manner that created the impression that the object was such an instrument." Id. At § 1B1.1, cmt. N.1(D). In addition, the term "includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury." Id. At §2A2.2, cmt. N.1. Applying this standard, the Court held that Nunez-Granados's kicking of the case Agent in the face several times, as he tried to free himself, did not amount to use of the shoe as a deadly weapon. The court distinguished Nunez-Granados conduct from other cases, where repeated intentional kicking constituted use of a shoe as a dangerous weapon. Cf. *United States v. Serrata*, 425 F.3d 886, 910 (10th Cir. 2005); *United v. Hatch*, 490 F. App'x 136, 137 (10th Cir. 2012 (unpublished).

In *United States v. Guilbert*, 692 F.2d 1340 (11th Cir. 1982), this Court stated that determining whether an object constitutes a "dangerous weapon" does not turn solely upon the object's latent capability, but also on the manner the object was used. Objects that are not inherently dangerous weapons, when used in a manner likely to endanger life or inflict great bodily are deemed to be "dangerous weapons".

In the case at bar, the suspect vehicle was not used in manner constituting use as a "dangerous weapon", and the District Court's finding to the contrary was clearly erroneous. The initial impact was minimal resulting in a scratch, some paint transfer and a bent fender. Neither of the victims sustained any injury from the impact to their car. As the victims exited their car, the suspect vehicle backed up rather than being used in an aggressive manner. During police questioning, Mr. Simmons, 16 years of age at the time, told the police that the impact occurred as the victim's car was backing out and that the intention was to get the victim's purse, not to cause harm. Mr. Simmons was not the driver and no evidence of a plan to use the vehicle to cause injury was presented.

The ostensible purpose behind impacting the victims' vehicle was to entice them from their car, but not to cause injury. Although this suggests that the impact was purposeful, it does not show intent to cause injury. If such intent had existed, the impact would likely have been far more significant. Further, the manner in which the car was used after the impact, when the victims existed their car, does not support

a finding that it was used as a dangerous weapon or with intent to cause injury. After the purses were taken, the vehicle fled the area.

Thus, the District Court's finding that the vehicle was used as dangerous weapon with intent to cause injury was clearly erroneous and this matter must be remanded for Mr. Simmons to be sentenced without the 3559 (c) enhancement.

18 U.S.C. § 3559(c) improperly shifts the burden of proof to the defendant to challenge his qualifying offenses and allows the court to determine facts used to increase a defendant's sentence in violation of the Sixth Amendment

18 U.S.C. § 3559(c) places the burden of proof on the defendant to establish by clear and convincing evidence that a dangerous weapon was not used or threatened to be used in connection with a predicate offense. The statute provides for the sentencing court to determine, as a matter of fact, whether the predicate offenses are qualifying offenses.

This raises two Sixth Amendment questions: 1) whether requiring the defendant to shoulder the burden of proving by clear and convincing evidence that a predicate offense is not a qualifying offense under 18 U.S.C. § 3559(c) is constitutional and 2) whether allowing the sentencing court to make factual findings about whether a dangerous weapon was used during the course of a predicate robbery exceeds a sentencing court's fact-finding authority.

Admittedly, in *United States v. Gray*, 260 F. 3d 1267 (11th Cir. 2001), this Court squarely addressed the question of whether requiring a defendant to prove that

a prior conviction is a non-qualifying offense under 18 U.S.C. § 3559(c) is constitutional finding that it was.

In *Gray*, however, the Court was not asked to and did not on its own, address the question of whether the Sixth Amendment is violated when a sentencing court makes factual findings such as whether a dangerous weapon was used during the commission of an offense, which if so, increases a defendant's sentence. Mr. Simmons acknowledges the precedent established in *Gray*, and the concept of *stare decisis* but suggests that the Court re-consider its decision in *Gray*. Mr. Simmons will address the burden of proof issue first and then the issue of whether a sentencing court may make findings of fact before imposing a sentence under a recidivist sentencing statute like 18 U.S.C. § 3559(c).

Shifting of the burden of proof

18 U.S.C. § 3559(c), provides that a defendant who is convicted of a serious violent felony and has previously been convicted of two or more such felonies receive a mandatory life sentence. However, the statute expressly carves out an exception for robbery providing that not all robberies are "serious violent felonies" and in certain circumstances, robbery is not counted as a prior strike. Specifically, the statute provides that if a defendant can establish by clear and convincing evidence that a predicate robbery conviction did not involve the use or threatened

use of a dangerous weapon, the robbery offense is not counted as strike under the statue.

In discussing the heightened clear and convincing standard of proof, this Court explained that when Congress carves out an exception to a mandatory sentencing statute thereby creating an affirmative defense for a defendant, it may properly allocate the burden of proof. The Court did not, however, address whether the clear and convincing standard places too high a burden on the defendant and whether the lower preponderance of the evidence standard is constitutionally required. Mr. Simmons respectfully urges this Court to now address whether the heightened clear and convincing standard in 18 U.S.C. § 3559(c) should be replaced with the lower preponderance of the evidence standard.

There are several reasons for this Court to modify the clear and convincing standard to the lower preponderance of evidence standard. For one, it is the prosecution, not the defendant that bears the burden of proof of a criminal charge beyond a reasonable doubt. C. McCormick, Evidence § 321, pp. 681682 (1954). Admittedly, this case deals with sentencing and not guilt or innocence at trial, however due process and fundamental fairness are essential in any criminal proceeding. This is particularly so when a sentencing court's decision literally determines whether the defendant will spend the rest of his life in prison. In addition to the enormity of the consequences facing the defendant, practical considerations

also support the lower preponderance standard. The defendant will often face significant difficulties in gathering records which may be lost or destroyed. Evidence at sentencing is often mere hearsay, and the court will frequently be deprived of the critical opportunity to see the witnesses in person and assess their credibility and demeanor. Physical evidence may also be difficult or impossible to obtain.

In the Matter of Samuel Winship, 397 U.S. 358, 370-371, 90 S. Ct. 1068, 1076, 25 L.Ed.32d 368 (1970) (concurring opinion), the Court discussed these very concerns stating:

> "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The Court went on further to say "even though the labels used for alternative standards of proof are vague and not a very sure guide to decision making, the choice of the standard for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations. To explain why I think this is so, I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief-the degree to which a factfinder is convinced that a given act actually occurred – can of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact find-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the

> degree of confidence he is expected to have in the correctness of his factual conclusions.
>
> A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusion. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes.

Thus, when considering the potential penalty at stake, the difficulty in reconstructing prior events, and the lack of precision in the decision-making by the sentencing court, the Sixth Amendment necessitates using the lower preponderance of the evidence standard over the more difficult to meet clear and convincing evidence standard. Therefore, this matter should be remanded with directions that the sentencing court conduct a *de novo* sentencing applying the preponderance standard of proof in lieu of the clear and convincing evidence standard.

The District Court's findings of fact that a vehicle was used as a dangerous weapon during the predicate robbery offense requiring the imposition of a life sentence under 18 U.S.C. § 3559(c) violated the Sixth Amendment.

Pursuant to the Government Notice under 18 U.S.C. § 3559(c), the District Court found that the prior robbery offense involved the use of a dangerous weapon requiring the imposition of a life sentence.

The superseding indictment was entered on June 29, 2017. [D.E. 29]. On September 25, 2018, the District Court set the case for Jury Trial to commence on February 19, 2019. [D.E. 132]. On February 18, 2019, literally the eve of trial, the Government filed a Notice of Enhancement under 18 U.S.C. § 3559 (c). [D.E. 156]. On February 19, 2019, Mr. Simmons filed a Response to the Government's Notice requesting that, among other things, the District Court conduct a hearing to determine whether the qualifying offenses contained in the Government's Notice were qualifying offenses. [D.E. 162]. The District Court declined to hold such a hearing, and the case proceeded to trial. [D.E. 366, P. 139-180].

The Government's last-minute filing of the "three-strikes" notice, severely prejudiced the defendant. No pre-trial determination was made about whether the predicate offenses qualified under the statute. The Notice simply lists the predicate robbery, without any allegation of the use of a weapon. The Superseding Indictment contained no allegations about the predicate robbery or about a dangerous weapon. No jury findings were made regarding the predicate robbery.

The sentencing hearing occurred on June 7, 2019. At the hearing, the District Court reviewed police reports and witness statements and found that the vehicle was used as a dangerous weapon during the commission of the robbery. (D.E. 373, P. 84-117).

The District Court's finding of fact was critical to the ultimate sentence imposed under 18 U.S.C § 3559 (c), because but for the finding by the court, that the vehicle was used as a dangerous weapon, a mandatory life sentence was not required. Stated otherwise, if the District Court had determined that the vehicle was not used or threatened to be used as a dangerous weapon, a life sentence would not have been mandated. Because questions of fact about underlying conduct surrounding a prior conviction are to be determined by a jury, and not a judge, the court's finding that the vehicle was used as a dangerous weapon triggering the "three-strikes" law violated the Sixth Amendment. Thus, the mandatory life sentence imposed in this matter under 18 U.S.C. § 3559 (c) must be reversed.

In *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed 2d 438, 570 U.S. 254 (2013) the Government sought an enhanced sentence under the Armed Career Criminal Act ("ACCA") based on Descamps prior state court convictions for burglary, robbery, and felony harassment. Descamps challenged whether his prior burglary conviction counted under ACCA under the categorical approach. The Government responded by introducing plea documents to support that Descamps had admitted the elements of the generic burglary when entering his plea. The Court held that the categorical approach did not allow for consideration of facts surrounding the offense, and even a modified categorical approach allowing for the court to scrutinize a restricted set of materials (plea agreement or transcript of plea

colloquy") was only authorized to determine whether the charge which the defendant pled to was consistent with the statutory version of the crime and whether it corresponded to the generic offense. 570 U.S. at 263. Thus, the Court held that even under the modified categorical approach allowing for consideration of the plea paperwork and colloquy, the sentencing court was not authorized to substitute a facts-based inquiry for an elements-based one. 570 U.S. at 278-279.

In *United States v. Davis*, 139 S. Ct. 2319, 204 L.Ed. 2d 757 (2019) the Court discussed language in Johnson v. United States, 576 U.S. ----, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) and the Davis opinion expresses "serious Sixth Amendment concerns" associated with "reconstruct[ing] long after the original conviction, the conduct underlying that conviction." See also *Descamps v. United States*, 570 U.S. 254, 269-270, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), as cited in *United States v. Davis*, 139 S.Ct. at 2327. Thus, it was error for the District Court to make findings of fact which were used to enhance his sentence.

If, as Descamps, id. instructs, the District Court had conducted an elements based inquiry into whether the predicate robbery offense met the dangerous weapon requirement under 18 U.S.C § 3559 (c), it would have determined that the robbery was not a qualifying offense.

Applying the categorical approach to Mr. Simmons predicate robbery offense, which was a generic robbery offense and did not allege use of a weapon of any type

would not support a finding that a firearm or other dangerous weapon was used in the offense or that a threat of use of a firearm or other dangerous weapon was involved in the offense; or that the offense resulted in death or serious bodily injury (as defined in section 1365) to any person. Simply stated, a generic robbery offense can be committed without using or threatening to use a dangerous weapon. Therefore, the predicate robbery offense relied upon by the District Court to impose a life sentence was not a qualifying robbery offense under 18 U.S.C § 3559 (c) and the enhancement must be reversed.

Although *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998) holds that treating recidivism as a sentencing factor rather than an element of the crime is consistent with the legislature's power to define the elements of the offense, a sentencing court may not increase the defendant's sentence unless the issue is submitted to a jury and proved beyond a reasonable doubt. This did not occur in this case and Mr. Simmons sentence must be reversed. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). See also, *Alleyne* v. *United States*, 133 S.Ct. 2151, 186 L.Ed.2d 314, 570 U.S. 99 (2013) holding that any fact that by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.

Mr. Simmons convictions for Hobbs Act robbery and carrying a firearm in furtherance of a crime of violence do not qualify as serious violent felony offenses under 18 U.S.C. § 3559(c)

Mr. Simmons was convicted of, two Counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and two Counts of Carrying a firearm in furtherance of a crime of violence in violation of 924 (c) and sentenced to life imprisonment under 3559(c). The District Court found that both Hobbs Act robbery and Carrying a firearm in furtherance of a crime of violence, were crimes of violence under 18 U.S.C. § 3559 (c). The District Court also found that Mr. Simmons had the two qualifying predicate offenses and imposed a mandatory life sentence.

The constitutionality of a statute is reviewed *de novo*. *United States v. Rozier*, 598 F. 3d 768, 769 (11th Cir. 2010). Likewise, the determination of whether a particular offense is a "crime of violence" under 18 U.S.C. § 924(c) is reviewed *de novo*. *United States v. St. Hubert*, 909 F.3d 335, 345-346 (11th Cir.), cert. denied, __U.S. ___, 139 S.Ct. 1394 (2019).

18 U.S.C 3559 (c)(2)(F) provides:

> (i) a Federal or State offense, by whatever designation and whoever committed, consisting of murder (as described in section1111); . . . . robbery (as described in section 2111, 2113, or 2118); . . . . or attempt, conspiracy, or solicitation to commit any of the above offenses; and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense . . . .

18 U.S.C. 924 (c) states in pertinent part:

> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and - -
>
> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Mr. Simmons contends that when reviewing the residual clause and the enumerated offense clause of 18 U.S.C. § 3559 (c), the residual clause under 18 U.S.C. § 3559 (c) is unconstitutionally vague under Davis, Johnson and Dimaya, and Hobbs Act robbery is not an enumerated offense under the 3559 (c) enumerated felony clause. Further, due to the element clause of 18 U.S.C. § 3559 (c) applying to force and violence against a person only, and Hobbs Act robbery covering a more broad course of conduct to include force against property, Hobbs Act robbery cannot qualify as a predicate under 18 U.S.C. § 3559 (c)'s element clause.

3559(c)- Hobbs Act robbery

The 3559(c) residual clause is void for vagueness for similar reasons that other recidivist statutes have been declared so. These include 18 U.S.C. § 924(e)(2)(B)(ii), 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B). See *Johnson v. United States*, 135 S.Ct. 2551, 2563 (2015)(18 U.S.C. § 924(e)("ACCA"), *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223 (2018)(18 U.S.C. § 16) and *United States v. Davis*, 139 S.Ct. 2319, 2336 (June 24, 2019)(18 U.S.C. § 924(c)).

The basis for the Supreme Court declaring these statutes unconstitutional was that they all employed an unworkable "categorical" approach disregarding how the defendant actually committed the offense and imagining the degree of risk in an "ordinary case". This same defect applies to the residual clause in 18 U.S.C. § 3559(c) making it void for vagueness.

Similarly, the 18 U.S.C § 3559(c) elements clause is unconstitutional because a Hobbs Act robbery can be committed by "actual or threatened force, or violence, or fear of injury," to a person *or property*. The elements clause under 18 U.S.C. § 3559(c), on the other hand has a requirement that the serious violent felony predicate, have "as an element the use, attempted use, or threatened use of physical force against the person of another." Thus, Hobbs Act robbery is not a "serious violent felony" under § 3559(c) because it does not necessarily involve threats to a person but can also be accomplished by threats to property. In *United States v. Evans*, 478 F. 3d 1332, 1343 (11th Cir. 2007), this Court found that offense of threatening to use a weapon of mass destruction against federal property under 18 U.S.C. 2332a(a)(3) qualified as a 3559 (c) predicate finding that it did not qualify because of the lack of evidence showing force against a person. Thus, under the residual clause and the elements clause of § 3559(c), Mr. Simmons should not have been sentenced to the enhanced life sentence and his sentence should be reversed.

3559(c)- Hobbs Act robbery under 924 (c)

Robbery is an explicitly enumerated felony under 18 U.S.C. § 3559 (c). However, the offense of Hobbs Act robbery can be committed by causing fear of future injury to property, which does not necessarily require "physical force". Thus, Hobbs Act robbery is arguably not a crime of violence under the elements clause of 18 U.S.C § 924(c), when applying the categorical approach. Although this Court has found in both *In re St. Fleur*, 824 F.3d 1337 (11th Cir. 2016) and *United States v. St. Hubert*, 909 F.3d 335, 344 (11th Cir. 2018) that Hobbs Act robbery is a crime of violence under § 924 (c)'s elements clause, this Court has not so ruled in the context of 18 U.S.C § 3559 (c). Although these cases are binding precedent, because Hobbs Act robbery is so broad and encompasses force or fear against property, they cannot properly qualify under the elements clause since the § 924 (c) elements clause is broader than the § 3559 (c) elements clause.

The Hobbs Act robbery convictions in Count 1 and 4 do not support the career offender enhancement and Hobbs Act robbery is not a valid predicate offense under the elements clause of 18 U.S.C § 924 (c).

Pursuant to the recommendation contained in the presentence investigation report that a career offender sentence be imposed under U.S.S.G §§ 4B1.1 and 4B 1.2, the District Court sentenced Mr. Simmons as a career offender. Although the presentence report is silent as to what offenses of conviction warranted the career offender enhancement, it appears to be Mr. Simmons convictions for Hobbs Act

robbery in Counts 1 and 4, and Carrying a firearm in furtherance of a crime of violence, in Counts 2 and 5.

The Hobbs Act robbery convictions in Count 1 and 4 do not support the career offender enhancement

In *United States v. Eason*, 2020 WL 1429110 (11th Cir. Mar 24, 2020), this Court held that Hobbs Act robbery is not a crime of violence under the career offender guideline. The Court examined whether a conviction for Hobbs Act robbery in violation of 18 U.S.C. § 1951 (a) satisfies the Guidelines definition of "crime of violence" under either the elements clause or the "enumerated offense clause". The Court held that Hobbs Act robbery does not qualify as a crime of violence under U.S.S.G. § 4B1.2(a) because the offense can be committed by a threat to person or property, rendering the statute too broad to qualify as a crime of violence either under the elements clause or as an enumerated robbery or extortion offense. The Court reached the conclusion by applying the categorical approach; that is by comparing the scope of the conduct covered by the elements of Hobbs Act robbery with the definition of "crime of violence" in U.S.S.G. § 4B1.2(a). Focusing on the text of the Hobbs Act robbery statute, which provides that it may be violated by using, attempting to use, or threatening to use force against a person's property, even when the property is not physically proximate to the robbery victim, the Court determined that the Hobbs Act robbery statute sweeps too broadly to satisfy the career offender elements clause under U.S.S.G. 4B1.2(a). Similarly, in examining

whether the enumerated offense clause satisfies the definition of "crime of violence" under the guidelines which includes robbery as an enumerated felony, the Court concluded that it did. Again, focusing on the text of the statute, rather than labels, the Court noted that robbery was not defined in the guidelines, so the Court would look to a generic definition of robbery. Generic robbery is defined as "the taking of property from another person or from the immediate presence of another person by force or intimidation. Concluding thus, that the generic form of robbery involves immediate danger to the person, and Hobbs Act robbery reaches conduct directed at property, the Court held that Hobbs Act robbery is not a categorical match for the enumerated offense of robbery.[3]

Thus, the Hobbs Act robbery statute sweeps too broadly to satisfy the career offender guidelines under the elements clause and the enumerated robbery or extortion clause under U.S.S.G. 4B1.2(a) and Mr. Simmons must be resentenced without the Guidelines career offender designation.

Hobbs Act robbery is not a valid predicate offense under the elements clause of 18 U.S.C § 924 (c).

Hobbs Act robbery is also not a predicate offense under the elements clause of 924 (c).

[3] The Court also ruled that Hobbs Act robbery does not qualify as an enumerated crime of violence under the extortion clause although this was not at issue in the instant case.

Mr. Simmons was found guilty in Count 2 and 5 of Carrying a firearm in furtherance of a crime of violence. He objected to the predicate Hobbs Act robbery convictions constituting crimes of violence under 18 U.S.C. § 924 (c) and sought dismissal of the charges. [D.E. 269] The District Court overruled his objection and denied the motion to dismiss as untimely and on its merits.

United States v. Davis, *supra* holds that § 924(c)(3)(B)'s residual clause is void for vagueness. That is, in reading the language of the residual clause, one cannot determine what types of offenses are crimes of violence rendering the residual clause void for vagueness. Thus, the residual clause is no longer valid under *Davis* id. and Mr. Simmons career offender designation under 924 (c) can only be upheld if it is categorically a crime of violence under the elements clause of 924(c)(3)(A).

In re St. Fleur, 824 F.3d 1337 (11th Cir. 2016) and *United States v. St. Hubert*, 909 F.3d 335, 344 (11th Cir. 2018), this Court held that Hobbs Act robbery is a crime of violence under the 924 (c)(3)(A) elements clause. Mr. Simmons respectfully urges that because of how broadly Hobbs Act robbery sweeps these opinions are inconsistent with the holding in *Davis*, *supra*.

United States v. McGuire, 706 F.3d 1333 (11th Cir. 2013) holds that 924(c)(3)(A)'s statutory text requires a categorical approach. The categorical approach permits courts to look only to statutory definitions of the crime. See *Taylor*

v. United States, 495 U.S. 575, 602, 110 S. Ct. 2143, 2160, 109 L.Ed. 2d 607 (1990). Thus, the issue to determine is whether Hobbs Act robbery "has an element of use, attempted use, or threatened use of physical force" against another person or property. Here, because Hobbs Act robbery can be violated without the use of physical force to a person 924 (c)'s elements clause sweeps too broadly and Hobbs act robbery is not a crime of violence under 924 (c's) element's clause.

Hobbs Act robbery criminalizes crimes against both person and property including crimes committed against property not involving physical force. For purposes of § 924(c), a predicate offense can qualify as a crime of violence under one of two definitions. Specifically, under § 924(c), a crime of violence is an offense that is a felony and that:

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

In *Descamps*, *supra* as well as *Moncrieffe v. Holder*, 569 U.S. 184 (2013) and *Mathis v. United States*, 136 S.Ct. 2243 (2016), the Supreme Court has held that the categorical approach necessitates a comparison of the statutory definition of Hobbs Act robbery to the crime of violence sections under 924 (c). In cases where the federal statute is indivisible, such as Hobbs Act robbery in this case[4], if the "least

[4] Mathis v. United States, 136 S.Ct. 2243 (2016)(Hobbs Act robbery is an indivisible offense)

culpable" mean of committing the offense does not require the use or threat of the Johnson level of "violent force," the offense should not count as a "crime of violence under 924 (c)(3)(A).

The Eleventh Circuit pattern jury instruction which was read to the jury [D.E. 197;14[D.E. 370:Tr.36] in this case reads as follows:

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt.

(1) the Defendant knowingly acquired someone else's personal property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and

(3) the Defendant's actions obstructed, delayed, or affected interstate commerce.

"Property includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.

"Fear" means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.

Under the instruction read to the jury, it is conceivable that the jury could find the defendant guilty based on a future threat or fear of harm to property.

The Supreme Court decisions instruct that "physical force" in the elements clause context means: (1) an act that is physical, in that it must be "exerted by and through concrete bodies," not "intellectual force or emotional force", (2) physical act that is directly or indirectly "capable of causing physical pain and injury:; and

(3) "capable" means that the force "potentially" will cause physical pain or injury, not that it is "reasonably likely' to do so.

Thus, Hobbs Act robbery is not categorically a crime of violence under the elements of clause of § 924 (c)(3)(A) , because acts that constitute threats of future injury to property not requiring physical force as described in Johnson and under the textual reading of 924 (c)(3) are broader than those proscribed under the elements clause of 924 (c)(3)(A).[5]

CONCLUSION

For the reasons presented herein, the imposition of the 18 U.S.C § 3559 (c) enhancement should be stricken and this matter remanded to the District Court for a *de novo* resentencing. Further, Appellant's career offender designation should be stricken.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P 32(a)(7)(B). This brief contains 11,903 words, inclusive of all the exceptions in Fed.R.App.P 32(f).

Respectfully Submitted,

BY: /s/_____
CHRISTOPHER A. HADDAD

[5] See United States of America v. Chea, 98-cr-20005 (N.D.Cal.,Oct. 2, 2019)

Florida Bar No. 0879502

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2020 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

Respectfully submitted,

CHRISTOPHER A. HADDAD
Attorney for Appellant,
7301 S. Dixie Highway
West Palm Beach, FL 33405
(561) 832-1126

By: /s/_____
CHRISTOPHER A. HADDAD
Florida Bar Number: 0879592

UNITED STATES DISTRICT COURT

Southern District of Florida
West Palm Beach Division

UNITED STATES OF AMERICA
v.
JEROME SIMMONS

JUDGMENT IN A CRIMINAL CASE

Case Number: **17-60119-CR-MARRA-1**
USM Number: **15968-104**

Counsel For Defendant: **Christopher Haddad, Esq.**
Counsel For The United States: **Jodi Anton, AUSA/Anita White, AUSA**
Court Reporter: **Stephen Franklin**

The defendant was found guilty on Counts 1 through 5 of the Second Superseding Indictment on March 15, 2019.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §§ 1951(a) and 3559(c)	Hobbs Act robbery	04/13/2017	1, 4
18 U.S.C. §§ 924(c)(1)(A)(ii) and 3559(c)	Brandishing a firearm in furtherance of a crime of violence	04/13/2017	2, 5
18 U.S.C. § 1951(a)	Conspiracy to commit Hobbs Act robbery	04/13/2017	3

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

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

Date of Imposition of Sentence: **6/6/2019**

Kenneth A. Marra
United States District Judge

Date: 6/6/19

DEFENDANT: **JEROME SIMMONS**
CASE NUMBER: **17-60119-CR-MARRA-1**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **Life followed by life followed by life. This term consists of life imprisonment as to Counts One and Four, and 240 months as to Count Three, to be served concurrently with each other and life imprisonment as to each of Counts Two and Five, to be served consecutively to each other and consecutively to Counts One, Three and Four.**

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

The defendant be designated to Coleman for incarceration.

The defendant be enrolled in a drug treatment rehabilitative program.

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **JEROME SIMMONS**
CASE NUMBER: **17-60119-CR-MARRA-1**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years. This term consists of five years as to Counts One, Two, Four and Five and three years as to Count Three, all terms to run concurrently**.

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

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

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

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: **JEROME SIMMONS**
CASE NUMBER: **17-60119-CR-MARRA-1**

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction - The defendant is prohibited from associating with codefendants while on probation/supervised release.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **JEROME SIMMONS**
CASE NUMBER: **17-60119-CR-MARRA-1**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$500.00	$0.00	$to be determined

The determination of restitution is deferred until 8/23/19. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

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

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **JEROME SIMMONS**
CASE NUMBER: **17-60119-CR-MARRA-1**

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $500.00 due immediately.

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

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

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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