

S.D.N.Y. – N.Y.C.
21-cv-5625
01-cr-831
Daniels, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of November, two thousand twenty-three.

Present:

Reena Raggi,
Richard J. Sullivan,
Eunice C. Lee,
Circuit Judges.

Freddy Abad,

Petitioner-Appellant,
v.
23-6672 (L),
23-6674 (Con)

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, and appointment of counsel in these consolidated appeals. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeals are DISMISSED because Appellant has not “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe


APPENDIX - B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREDDY ABAD,	:	
	Petitioner,	<u>MEMORANDUM DECISION</u>
	:	<u>AND ORDER</u>
-against-	:	
	:	1 Crim. 831 (GBD)
UNITED STATES OF AMERICA,	:	9 Civ. 8985 (GBD)
	:	21 Civ. 5625 (GBD)
	Respondent.	:

GEORGE B. DANIELS, United States District Judge:

Petitioner Freddy Abad, proceeding *pro se*, moves pursuant to 28 U.S.C. § 2255 (“§ 2255”) to vacate his conviction. (Pet’r’s Mot. to Vacate (“Mot.”), ECF No. 123.) The Government opposes Petitioner’s motion. (Ltr. of USA in Opp. to Pet’r’s Mot., dated Sept. 13, 2021 (“Gov’t Opp.”), ECF No. 125.) Petitioner also moves for counsel to be appointed on his behalf pursuant to 18 U.S.C. § 3006A (“§ 3006A”). (Pet’r’s Mot. for Couns., ECF No. 7.) Petitioner’s motions are DENIED.

I. FACTUAL BACKGROUND

Petitioner shot and killed Hilario DeJesus during an armed robbery on September 7, 1996. *United States v. Abad*, 514 F.3d 271, 272 (2d Cir. 2008); (PSR, ECF No. 125, Ex. 1 at 5–6.) Petitioner, armed with a machine gun and accompanied by two other men, forced his way into DeJesus’ apartment at gunpoint. *Abad*, 514 F.3d at 272. Once inside, Petitioner demanded money from DeJesus and began threatening and beating him. (PSR at 6.) After Petitioner found cash in DeJesus’ apartment, Petitioner fired a machine gun into DeJesus’ side, killing him. (*Id.*)

Petitioner was convicted at trial in 2004 and sentenced in 2005 to two terms of life imprisonment after being convicted of murder in aid of racketeering (“Count One”) and the use of a firearm for murder during a crime of violence (“Count Six”), in violation of 18 U.S.C. §

1959(a)(1) and 18 U.S.C. § 924(i), respectively, and to 240 months' imprisonment for conspiracy to commit Hobbs Act robbery ("Count Three") and Hobbs Act robbery ("Count Four"), to run concurrently, in violation of 18 U.S.C. § 1951, and 120 months' imprisonment for use of a firearm during a crime of violence ("Count Five"), in violation of 18 U.S.C. § 924(c) ("§ 924(c)"), to run consecutively with the terms imposed on Counts One, Three, Four, and Six. (See J., ECF No. 67; Gov't Opp. at 2.) Petitioner's conviction was subsequently affirmed on direct appeal. *See Abad*, 514 F.3d at 277.

On October 1, 2020, Petitioner was granted permission by the Second Circuit to file a successive § 2255 petition in light of the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).¹ (ECF No. 111.)

II. PETITIONER'S § 2255 MOTION IS DENIED

§ 2255 enables a prisoner in federal custody to seek to have his sentence vacated, set aside, or corrected on the grounds that the sentence "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a). Relief under § 2255 is more limited than relief under direct appeal. *See Napoli v. United States*, 32 F.3d 31, 35 (2d Cir. 1994) ("The grounds provided in section 2255 for collateral attack on a final judgment in a federal criminal case are narrowly limited . . ."). To prevail on a § 2255 motion, a movant must show "a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Sanders v. United States*, 1 Fed. App'x. 57, 58 (2d Cir. 2001) (quoting *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995)).

¹ Petitioner's first § 2255 motion was denied in 2011. (ECF No. 93.)

In *Davis*, the Supreme Court held that the “residual clause” in § 924(c)’s definition of “crime of violence” is unconstitutionally vague. *Davis*, 139 S. Ct., at 2325–36; *see* 18 U.S.C. § 924(c)(3)(B). After *Davis*, an offense only constitutes a crime of violence upon which a § 924(c) conviction may be predicated if the offense satisfies the statute’s “elements clause,” which requires the offense to have “as an element[,] the use, attempted use, or threatened use of physical force against the person or property of another.” *Davis*, 139 S. Ct. at 2324; *see* 18 U.S.C. § 924(c)(3)(A).

Here, Petitioner argues that his convictions for the use of a firearm for murder during a crime of violence (Counts Five and Six) are no longer valid after *Davis*, because conspiracy to commit Hobbs Act robbery does not constitute a “crime of violence” under Section 924(c)(3). (Mot. at 15.) The Government agrees that conspiracy to commit Hobbs Act robbery no longer constitutes a crime of violence after *Davis*. (Gov’t Opp. at 3.) The Government maintains, however, that Petitioner’s convictions are unaffected by *Davis*, because both charges were also predicated on *substantive* Hobbs Act robbery, and that the latter predicate remains a crime of violence under § 924(c)(3)(A). (*Id.*)

The substantive Hobbs Act robbery as charged in Count Four remains a valid predicate under § 924(c)(3)(A)–the “elements clause”–sufficient to uphold Petitioner’s convictions for Counts Five and Six. The “elements clause” remains constitutionally valid and can satisfy § 924(c) because only § 924(c)(3)(B) –the “residual clause”– was found to be unconstitutionally vague in *Davis*. 139 S. Ct. 2319. Indeed, in *United States v. Hill*, the Second Circuit ruled that Hobbs Act robbery is categorically a “crime of violence” under § 924(c)(3)(A). 890 F.3d 51, 60 (2d Cir. 2018). Here, Petitioner was charged and convicted of Hobbs Act robbery under 18 U.S.C. § 1951 and 18 U.S.C. § 1952. (See ECF No. 125, Ex. 1 at 4.) Because the jury found beyond a reasonable doubt that Petitioner committed a crime of violence when it found him guilty of Hobbs Act robbery

(Count Four), his convictions on Count Five and Six rest on a valid predicate. Thus, the “elements clause” for a crime of violence was satisfied for both Counts Five and Six and Petitioner’s conviction stands.⁷ *See United States v. Walker*, 789 F. App’x 241, 244–45 (2d Cir. 2019).

III. PETITIONER’S § 3006A MOTION IS DENIED

§ 3006A permits courts to determine whether a person that is financially eligible and seeking relief under § 2255 may be appointed counsel “when the interests of justice so require.” 18 U.S.C. § 3006A(a)(2). However, “[f]or the Court to order appointment of counsel, the [defendant] must, as a threshold matter, demonstrate that his claim has substance or a likelihood of success on the merits.” *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1985).

This Court already appointed counsel to assist Petitioner with his § 2255 motion. (See Ltr. from Florian Miedel, dated May 7, 2021, ECF No. 60.) However, after reviewing the factual record and the applicable law, Petitioner’s court-appointed counsel determined that she could not submit a “non-frivolous” motion, and requested to be relieved as counsel. (*Id.*) Because Petitioner has failed to demonstrate that his claim has merit, his successive request for counsel is DENIED.

⁷ Even if this Court were to vacate Petitioner’s Count Five conviction, re-sentencing would be unnecessary given Petitioner’s two mandatory life sentences (Counts One and Six). *See United States v. Peña*, 09 Crim. 341 (VM), 2020 WL 7408992, at *6 (S.D.N.Y. Dec. 17, 2020).

IV. CONCLUSION

Petitioner's motions to vacate his sentence and to appoint counsel are DENIED. No certificate of appealability shall issue because there has been no "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). This Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal.

The Clerk of Court is respectfully directed to close the open motions at ECF Nos. 123 and 7 and Cases Nos. 9-cv-8985 and 21-cv-5625.

Dated: June 8, 2023
New York, New York

SO ORDERED.


GEORGE B. DANIELS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

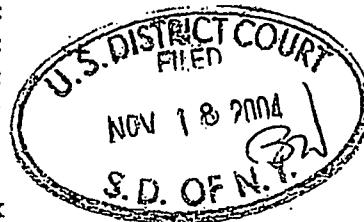
FREDDY ABAD,

a/k/a "Jose," :
a/k/a "Freddy Antonio Abad," :
a/k/a "Ramon Sanchez," :
a/k/a "Louis Fernandez," :
a/k/a "Freddy Gonzalez," :
a/k/a "Tonito," :
HECTOR ORTIZ, and :
JOHN DOE #1,

a/k/a "Sapito," :
a/k/a "Manuel LNU," :
Defendants.

1 BOC X-41
SUPERSEDING
INDICTMENT

S2 01 Cr. 831 (GBD)



COUNT ONE

The Grand Jury charges:

THE ENTERPRISE

1. From at least in or about the Winter of 1993 through at least in or about the Fall of 1996, in the Southern District of New York and elsewhere, the Andrews Avenue Enterprise (hereinafter "the Andrews Avenue Enterprise" or "the Enterprise"), was a criminal organization whose members and associates engaged in robbery, robbery of individuals who trafficked in narcotics, kidnapping, acts involving murder, other acts of violence and narcotics trafficking in, among other places, the New York City metropolitan area. At all times relevant to this Indictment, the Andrews Avenue Enterprise, which

EXHIBIT - C-

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at various times included FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," and HECTOR ORTIZ, the defendants, together with others known and unknown, operated primarily in the Bronx and New York, New York, among other locations.

2. The Andrews Avenue Enterprise, including its leadership, its membership, and its associates, constituted an "enterprise," as that term is defined in Title 18, United States Code, Section 1959(b)(2), that is, a group of individuals associated in fact, although not a legal entity, which was engaged in, and the activities of which affected, interstate and foreign commerce. The Andrews Avenue Enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.

3. The Andrews Avenue Enterprise, through its members and associates, engaged in "racketeering activity" as that term is defined in Title 18, United States Code, Sections 1961(1) and 1959(b)(1), that is, acts involving robbery, kidnapping, and murder, in violation of New York State penal law, and narcotics trafficking, in violation of Title 21, United States Code, Sections 812, 841 and 846. FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis

Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," and HECTOR ORTIZ, the defendants, and others known and unknown, participated in the operation and management of the Enterprise.

PURPOSES OF THE ENTERPRISE

4. The purposes of the Enterprise included the following:

a. Enriching the members and associates of the Enterprise through, among other things, robbery, robbery of individuals who trafficked in narcotics, kidnapping, acts involving murder, other acts of violence, threats of violence, narcotics trafficking, and intimidation;

b. Preserving and protecting the power of the Enterprise, its members and associates through the use of robbery, robbery of individuals who trafficked in narcotics, kidnapping, acts involving murder, other acts of violence, threats of violence, narcotics trafficking, and intimidation; and

c. Promoting and enhancing the Enterprise and the activities of its members and associates.

MEANS AND METHODS OF THE ENTERPRISE

5. Among the means and methods by which the members and associates of the Enterprise conducted and participated in the conduct of the affairs of the Enterprise were the following:

a. The members and associates of the Enterprise conspired to commit, committed, attempted and threatened to

commit acts of violence, including robbery, kidnapping, murder, and other acts of violence, to enrich themselves and to protect and expand the Enterprise's criminal operations;

b. The members and associates of the Enterprise acquired, possessed, carried and used deadly weapons, including firearms, in the course of the Enterprise's criminal activities; and

c. The members and associates of the Enterprise participated in narcotics trafficking.

MURDER IN AID OF RACKETEERING
STATUTORY ALLEGATION

6. On or about September 7, 1996, in the Southern District of New York and elsewhere, as consideration for the receipt of, and as consideration for a promise and agreement to pay, anything of pecuniary value from the Andrews Avenue Enterprise, and for the purpose of gaining entrance to and maintaining and increasing his position in the Andrews Avenue Enterprise, an enterprise engaged in racketeering activity, FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," the defendant, together with others known and unknown, unlawfully, intentionally and knowingly murdered and aided and abetted the murder of Hilario DeJesus in

an apartment at 65 Fort Washington Avenue, New York, New York, in that in the course of and in furtherance of committing a robbery, defendant FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," together with others, caused the death of Hilario DeJesus, a person other than one of the participants, in violation of New York Penal Law Section 125.25(3).

(Title 18, United States Code, Sections 1959(a)(1) and 2.)

COUNT TWO

7. Paragraphs 1 through 6 of this Indictment are repeated and re-alleged as if fully set forth herein.

8. On or about September 7, 1996, in the Southern District of New York and elsewhere, as consideration for the receipt of, and as consideration for a promise and agreement to pay, anything of pecuniary value from the Andrews Avenue Enterprise, and for the purpose of gaining entrance to and maintaining and increasing his position in the Andrews Avenue Enterprise, an enterprise engaged in racketeering activity, HECTOR ORTIZ, the defendant, and others known and unknown, unlawfully, intentionally and knowingly, acting with other persons, murdered Hilario DeJesus in an apartment at 65 Fort Washington Avenue, New York, New York, that is, committed robbery, and in the course of and in furtherance of committing a robbery, defendant HECTOR ORTIZ, and other participants, caused

the death of Hilario DeJesus, a person other than one of the participants, in violation of New York State Penal Law Section 125.25(3).

(Title 18, United States Code, Sections 1959(a)(1) and 2.)

ROBBERY COUNTS

COUNT THREE

The Grand Jury further charges:

9. On or about September 7, 1996, in the Southern District of New York and elsewhere, FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," HECTOR ORTIZ, and JOHN DOE #1, a/k/a "Sapito," a/k/a "Manuel LNU," the defendants, and others known and unknown, unlawfully, willfully and knowingly did conspire to commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," HECTOR ORTIZ, and JOHN DOE #1, a/k/a "Sapito," a/k/a "Manuel LNU," the defendants, and others known and unknown, would and did conspire to rob Hilario DeJesus and others of narcotics and

narcotics proceeds at gunpoint in an apartment located at 65 Fort Washington Avenue in New York, New York.

(Title 18, United States Code, Section 1951.)

COUNT FOUR

The Grand Jury further charges:

10. On or about September 7, 1996, in the Southern District of New York and elsewhere, FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," HECTOR ORTIZ, and JOHN DOE #1, a/k/a "Sapito," a/k/a "Manuel LNU," the defendants, and others known and unknown, unlawfully, willfully and knowingly did commit robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), and thereby obstructed, delayed and affected commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," HECTOR ORTIZ, and JOHN DOE #1, a/k/a "Sapito," a/k/a "Manuel LNU," the defendants, and others known and unknown, robbed Hilario DeJesus and others at gunpoint in an apartment located at 65 Fort Washington Avenue in New York, New York, demanding narcotics and narcotics proceeds, and during the course of that robbery a firearm was discharged, and Hilario DeJesus,

who had been physically restrained to facilitate the commission of the robbery, sustained life-threatening bodily injury and was murdered.

(Title 18, United States Code, Sections 1951 and 2.)

FIREARMS COUNTS

COUNT FIVE

The Grand Jury further charges:

11. On or about September 7, 1996, in the Southern District of New York and elsewhere, FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," HECTOR ORTIZ, and JOHN DOE #1, a/k/a "Sapito," a/k/a "Manuel LNU," the defendants, and others known and unknown, unlawfully, willfully, and knowingly, during and in relation to a crime of violence and a drug trafficking crime for which they may be prosecuted in a court of the United States, namely, the conspiracy to rob and robbery of Hilario DeJesus in an apartment at 65 Fort Washington Avenue, New York, New York, charged in Counts Three and Four of this Indictment, did use and carry a firearm, and, in furtherance of such crime, did possess a firearm, to wit, a 9-millimeter semi-automatic assault weapon, which was discharged.

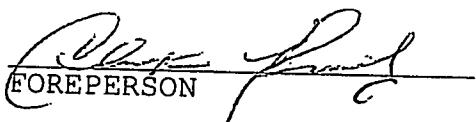
(Title 18, United States Code, Sections 924(c)(1)(A)(iii) and 2.)

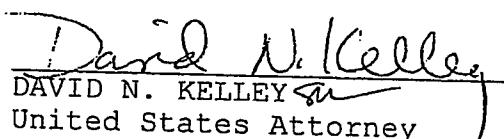
COUNT SIX

The Grand Jury further charges:

12. On or about September 7, 1996, in the Southern District of New York and elsewhere, FREDDY ABAD, a/k/a "Jose," a/k/a "Freddy Antonio Abad," a/k/a "Ramon Sanchez," a/k/a "Louis Fernandez," a/k/a "Freddy Gonzalez," a/k/a "Tonito," the defendant, unlawfully, willfully, and knowingly, during and in relation to a crime of violence and a drug trafficking crime for which he may be prosecuted in a court of the United States, namely, the robbery of Hilario DeJesus in an apartment at 65 Fort Washington Avenue, New York, New York, charged in Count Four of this Indictment, did use and carry a firearm, and, in furtherance of such crime, did possess a firearm, to wit, a 9-millimeter semi-automatic assault weapon, which ABAD used to cause the death of Hilario DeJesus, which killing is murder as defined in Title 18, United States Code, Section 1111(a).

(Title 18, United States Code,
Sections 924(i)(1), 1111(a) and 2.)


FOREPERSON


DAVID N. KELLEY
United States Attorney

**Additional material
from this filing is
available in the
Clerk's Office.**