# APPENDIX

# APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 16-17211
Non-Argument Calendar

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D.C. Docket Nos. 0:15-cv-61860-WJZ; 0:13-cr-60167-WJZ-2

BURNETT GODBEE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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(February 14, 2018)

Before WILSON, JORDAN and BLACK, Circuit Judges.

PER CURIAM:

Burnett Godbee appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence for conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 1951, attempted Hobbs Act robbery, 18 U.S.C. § 1951, discharge of a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii), and possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). Godbee contends *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidated 18 U.S.C. § 924(c)(3)(B), and his convictions for Hobbs Act robbery and conspiracy to commit Hobbs Act robbery do not otherwise qualify as crimes of violence under § 924(c)(3)(A).

When we granted Godbee a certificate of appealability on whether *Johnson*'s void-for-vagueness ruling extends to § 924(c)(3)(B), we had not yet addressed the issue. We have, however, since concluded that *Johnson*'s void-for-vagueness ruling does not extend to § 924(c)(3)(B). *See Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017). Godbee's claim is foreclosed by *Ovalles*. Therefore, the denial of his § 2255 motion is

**AFFIRMED.**

# United States District Court

## Southern District of Florida

**FT. LAUDERDALE DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**BURNETT GODBEE**

**AMENDED JUDGMENT IN A CRIMINAL CASE**

**Case Number - 0:13-60167-CR-ZLOCH-2**

USM Number: 03474-104

Counsel For Defendant: Andrew Rier, Esq.
Counsel For The United States: Karen Stewart, Esq., AUSA
Court Reporter: William Romanishin

Date of Original Judgment: May 30, 2014
Reason for Amendment: Modification of Imposed Term of Imprisonment for Substantial Assistance (18 U.S.C. 3553(e))

The defendant pleaded guilty to Counts 1, 2, 3 and 5 of the Indictment.
The defendant is adjudicated guilty of the following offenses:

| TITLE/SECTION NUMBER | NATURE OF OFFENSE | OFFENSE ENDED | COUNT |
|---|---|---|---|
| 18 U.S.C. §1951(a) | Conspiracy to commit a Hobbs Act Robbery | June 17, 2013 | 1 |
| 18 U.S.C. §1951(a) | Attempted Hobbs Act Robbery | June 17, 2013 | 2 |
| 18 U.S.C. § 924(c)(1)(A)(ii) | Discharge of a firearm in furtherance of a crime of violence | June 17, 2013 | 3 |
| 18 U.S.C. § 922(g)(1) | Possession of a firearm by a convicted felon | June 17, 2013 | 5 |

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.

All remaining Counts 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 any material changes in economic circumstances.

Date of Imposition of Sentence:
May 30, 2014

WILLIAM J. ZLOCH
United States District Judge

November 6, 2014

DEFENDANT: BURNETT GODBEE
CASE NUMBER: 0:13-60167-CR-ZLOCH-2

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **204 months**. This term consists of **84 months** as to each of Counts 1, 2, and 5 of the Indictment, to be served concurrently with each other, and a term of **120 months** as to Count 3 of the Indictment, to be served consecutively to the term imposed in Counts 1, 2 and 5 of the Indictment.

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

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

Defendant be placed at a facility (Miami FDC) as close to South Florida as possible.

Defendant be evaluated for placement in the 500 hour residential drug and alcohol treatment program.

## 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 U.S. Marshal

DEFENDANT: BURNETT GODBEE
CASE NUMBER: 0:13-60167-CR-ZLOCH-2

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years** as to each of Counts 1, 2, 3 and 5 of the Indictment, all such terms to run concurrently with each other. Within 72 hours of release, the defendant shall report in person to the probation office in the district where released.

While on supervised release, the defendant shall not commit any crimes, shall be prohibited from possessing a firearm or other dangerous devices, shall not possess a controlled substance, shall cooperate in the collection of DNA, and shall comply with the standard conditions of supervised release and with the special conditions listed 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 (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the 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 by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) 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: BURNETT GODBEE
CASE NUMBER: 0:13-60167-CR-ZLOCH-2

## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of 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 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: BURNETT GODBEE
CASE NUMBER: 0:13-60167-CR-ZLOCH-2

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

| Total Assessment | Total Fine | Total Restitution |
|---|---|---|
| $400.00 | $ | $None |

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

DEFENDANT: BURNETT GODBEE
CASE NUMBER: 0:13-60167-CR-ZLOCH-2

## SCHEDULE OF PAYMENTS

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

A. Lump sum payment of **$400.00** 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.

**The 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 8N09**
**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.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 15-61860-Civ-ZLOCH
(13-60167-Cr-ZLOCH)
MAGISTRATE JUDGE P. A. WHITE

BURNETT GODBEE, :

Movant, :

v. : REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA, :

Respondent. :

## I. Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, challenging the lawfulness of his convictions and sentences following a plea of guilty entered in Case No. 13-60167-Cr-Zloch.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the motion to vacate, as supplemented, and supporting memorandum of law (Cr-DE# 159; Cv-DE# 1, 4, 16), the government's response with supporting exhibits (Cv-DE# 12), all pertinent portions of the underlying criminal file, the Presentence Investigation Report (PSI) and Addendum thereto, and Movant's Reply (Cv-DE# 16).

## II. Claims

Movant raises six ground for relief in this motion to vacate proceeding. In grounds one, two and three, he challenges his sentence imposed pursuant to the Armed Career Criminal Act as

unlawful for several reasons in light of Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010), etc. In grounds four, five and six, Movant argues that he received ineffective assistance of trial counsel with regard to the entry of his guilty plea and resultant Armed Career Offender sentence. The particular claims will be set forth in more detail in the discussion section of this Report. In his supplement to his motion to vacate, Godbee claims that his §924(c) conviction and resultant sentence are unlawful. See Cv-DE# 16.

## III. Factual Background[1]

On May 29, 2013, Godbee and codefendant Cedrick Williams committed a Hobbs Act Robbery at a Winn-Dixie Store located in Miami Gardens, Florida shortly before the store opened for business. Godbee and his co-perpetrator entered the Winn-Dixie store through the rear of the store by creating a hole in the cement wall. They both wore masks and hats covering their faces. All the employees were ordered to lie on the floor while one of the perpetrators accompanied the store manager to the safe to retrieve the cash. Godbee and Williams succeeded in stealing $10,000 from the safe after which they fled the scene.

Approximately three weeks later, on June 17, 2013, at approximately 5:50 a.m., Godbee and Williams attempted to rob a Winn-Dixie store located in Pembroke Pines, Florida. They entered the Winn-Dixie by making a hole in the cement wall. Shortly after Godbee and Williams gained entry into the store, the store manager arrived to open the store. The manager was aware of the robbery of the Winn-Dixie Store in Miami Gardens, Florida and the way in which the robbers had gained entry to the store. The manager drove around

[1]The facts of this case have been obtained from the Stipulated Factual Proffer executed by Godbee (Cr-DE# 327), which he testified at the change of plea proceeding was for the most part accurate, as well as review of paragraphs 8-20 of the PSI where a detailed recitation of the offense conduct can be found.

the rear of the store and when he observed a gaping hole in the wall, he telephoned the police.

Law enforcement officers from the Pembroke Pines Police Department responded, looked through the hole, and observed Godbee and Williams inside the store. The officers also observed that one of the robbers was armed with a shotgun. When Godbee and Williams saw the officers at the rear of the store, they ran toward the front of the business. Godbee fired a handgun multiple times at the front of the store, shot out the glass entry doors and fled the store. Godbee was apprehended two blocks from the store and taken into custody by the police officers. The officers recovered a Glock handgun on the direct route that Godbee took while fleeing, near where he was taken into custody. Recovered along the route were other items that Godbee and Williams discarded, including a black book bag that contained two rolls of grey duct tape and two packages of black zip ties. A white painter style hat was recovered from the same shopping plaza.

Williams fled on foot carrying a long black object that was later recovered and determined to be a shotgun. He was able to enter the parked car which was later found to have been registered to Godbee at his address. Williams ignored all commands to stop his vehicle and law enforcement officers pursued Williams until the car crashed. After the crash, Williams exited the vehicle and attempted to run from police; however, he was taken into custody by Miramar Police Department K-9 officers. Godbee's Florida driver's license was recovered from the vehicle. A search warrant was obtained to conduct a full search of the vehicle. Upon searching the vehicle, agents discovered two sledge hammers, white gloves similar to the gloves the subjects wore during the robbery and a white Nike baseball cap similar to the one worn by Williams during the robbery.

Surveillance video was obtained from Winn-Dixie, which revealed two subjects entering the business from a wash room which had a hole in the rear cement wall. The video showed Godbee and Williams inside the store, armed with a handgun and a shotgun, respectively. They were wearing hats and had bandanas covering their faces. The video also showed that they were wearing gloves. Additionally, the video depicted Godbee and Williams running to the front of the store and shooting at the front window glass. Upon apprehension of Godbee and Williams, both had cell phones on their person. Search warrants were obtained for the cell phones to ascertain the phone numbers and service providers associated with each. A review of data obtained from Godbee's cell phone showed that he and Williams conspired to rob the Winn-Dixie store in Miami Gardens and the Winn-Dixie store in Pembroke Pines.

During his interview with law enforcement, Godbee admitted that he and Williams attempted to rob the Winn Dixie store in Pembroke Pines, on June 17, 2013, and he provided details of the robbery. Godbee further admitted that he had been armed with a Glock handgun while Williams was armed with a shotgun and that he had fired his pistol at the front door in order to shatter the glass allowing him and Williams to flee the store. Godbee went on to admit that he and Williams had committed the robbery of the Winn-Dixie store located in Miami Gardens on May 29, 2013, and provided details of that robbery. He stated that he had brandished a firearm at the employees and directed the manager to the office. He additionally admitted that he obtained $10,000 from the safe in the office, he fled the scene with Williams, and he split the proceeds with Williams.

The firearm recovered near Godbee's arrest was a Glock Model 17, .45 caliber semi-automatic pistol, and the firearm recovered

near Williams was a Mossberg 500C, 20 Gauge shotgun. The Glock had a .45 caliber cartridge in the chamber and one .45 caliber cartridge in the magazine. Additionally, .45 caliber spent casings were recovered from the crime scene. An ATF firearms nexus expert examined the firearms and ammunition and determined that they had been manufactured outside the State of Florida.

## IV. Procedural History

### A. Indictment through Change of Plea Proceedings

Godbee was charged by Indictment returned on July 9, 2013, with the offenses of conspiring to commit a Hobbs Act Robbery of the Pembroke Pines Winn Dixie, in violation of 18 U.S.C. §1951(a) (Count 1); attempting to commit a Hobbs Act Robbery of the Pembroke Pines Winn Dixie in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 2); discharging a firearm in furtherance of the robbery, in violation of 18 U.S.C. §924(c)(1)(A)(ii) (Count 3); and a felon in possession of a firearm, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count 5). See Indictment. (Cr-DE# 18). Godbee entered pleas of not guilty and the case proceeded to jury trial.

Approximately four months later, Godbee entered into a written plea agreement with the government. See Plea Agreement. (Cr-DE# 56). Godbee agreed to enter pleas of guilty to the offenses charged in Counts 1, 2, 3 and 5 of the Indictment. Id. at ¶1. In exchange for the guilty pleas, the government agreed not to prosecute Godbee for the Hobbs Act Robbery which occurred on May 29, 2013, at the Miami Gardens Winn-Dixie store. Id. at ¶2. By executing the agreement, Godbee understood and acknowledged that this Court had the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses to which he was entering his guilty pleas. Id. at ¶3. He further understood and acknowledged that if he were found to qualify as a Career Offender, the Court must impose a mandatory minimum term of imprisonment of fifteen

years as to Count 5 and may impose a statutory maximum term of up to life, followed by a term of imprisonment of supervised release up to five years. Id. at ¶4. Godbee also acknowledged that as to Count 3, the Court must impose a minimum term of imprisonment of ten years, which was to be run consecutively to the terms imposed as to Counts 1, 2 and 5, and may impose a statutory maximum term of imprisonment of up to life, followed by a term of supervised release of at least three years. Id. at ¶5.

The written plea agreement additionally provided that Godbee was aware that his sentence had not yet been determined by the Court and that any estimate as to his sentence that he may have received from trial counsel, the government, or the probation officer was only a prediction, not a promise, and not binding on the government, the probation office or the Court. Id. at ¶12. Further, Godbee understood that any recommendation by the government to the Court as to sentencing, whether pursuant to the plea agreement or otherwise, was not binding on the Court and the Court may disregard the recommendation in its entirety. Id. The government agreed to recommend to the Court that Godbee receive a reduction for his acceptance of responsibility pursuant U.S.S.G. §3E1.1(a), (b). Id. at ¶8. By entering into the plea agreement, Godbee agreed to waive his right to pursue a direct appeal from his sentence. Id. at ¶14. Godbee also executed a written factual proffer. See Factual Proffer. (Cr-DE# 57).

On November 18, 2013, Godbee appeared before the Honorable Robin S. Rosenbaum, then United States District Judge and now Eleventh Circuit Court Judge, to change his pleas of not guilty to guilty to the offenses charged in the Indictment. See Transcript of Plea Colloquy. (Cr-DE# 161; Cv-DE# 12-1). An extensive and meticulous plea colloquy was conducted pursuant to Fed.R.Crim.P. 11, during which Godbee was sworn. Id. During the plea proceeding,

Judge Rosenbaum clearly reviewed the terms of the written plea agreement, which included the possible sentences Godbee could receive as a career offender or otherwise which could result in a total possible sentence of sixty-five years and a maximum term of life imprisonment. Id. Godbee advised the Court that he understood all possible sentences in this case. Id. After the plea proceeding, the Court found Godbee competent and capable of entering pleas of guilty, that his pleas of guilty were knowing and voluntarily entered, and the pleas were supported by an independent basis in fact containing each of the essential elements of the offenses. Id. Godbee was adjudicated guilty of the subject offense. Id.

B. PSI, Objections to PSI and Sentencing

Before sentencing, a presentence investigation report ("PSI") was prepared and the PSI indicated that Godbee had at least two prior felony convictions of crimes of violence and controlled substance convictions, including sale or delivery of cocaine within 1,000 feet of a church convicted on April 30, 2001, armed robbery with a firearm and armed carjacking convicted on February 4, 2002, and robbery with a firearm convicted on April 30, 2001. See PSI at ¶¶34, 46, 47, 48. The probation officer calculated an initial base offense level of 24, under U.S.S.G. §2K2.1(a)(2) due to the offense committed under 18 U.S.C. §922(g)(1). Id. at ¶28. However, because Godbee qualified as a armed career criminal and the statutory maximum penalty for the offense was life, the probation officer determined that Godbee was subject to an offense level of 37 under U.S.S.G. §§4B1.1 and 4B1.4. Id. at ¶34. The PSI awarded a 3-level, acceptance-of-responsibility reduction, under U.S.S.G. §3E1.1, which yielded a total offense level of 34. Id. at ¶¶35, 37.

The probation officer calculated a criminal-history score of 9 and a criminal history category of IV. Id. at ¶49. However, under §4B1.4(c)(1), Godbee was subject to a criminal history category of

VI, as an armed career criminal. Id. Based on a total offense level of 34 and a criminal history category of VI, the PSI calculated an initial Sentencing Guidelines range of 262-327 months' imprisonment plus a consecutive 120 month term. Id. at ¶86. However, pursuant to § 4B1.1(c)(3), the total guideline imprisonment range was 271 to 308 months. Id. As to Counts 1 and 2, the statutory term of imprisonment was 0 to 20 years, 18 U.S.C. §1951(a); as to Count 3, a term of not less than ten years to life imprisonment under 18 U.S.C. § 924(c)(1)(A)(ii), to run consecutively to any other term of imprisonment; and as to Count 5, the minimum term of imprisonment was 15 years and the maximum term was life, 18 U.S.C. § 922(g)(1). Id. at ¶85.

Before sentencing, Godbee filed objections to the PSI which in fact was not objections, but a notification to the Court that Godbee expected the filing of a 5K1.1 motion based upon his extensive cooperation with the government, thereby eliminating the mandatory minimum term he faced. See Defendant Burnett Godbee's Belated Objections to the Pre-sentence Investigation Report. (Cr-DE# 79). No true objections to the PSI were ever filed. Id.

During sentencing before then United States District Judge Rosenbaum, trial counsel apprised the Court of Godbee's extensive cooperation with the government and state homicide detectives in an open homicide case and presented witness testimony to support the assertion. See Transcript of Sentencing Proceeding conducted on May 30, 2014, at 4-13. (Cr-DE# 131; Cv-DE# 12-2). The government confirmed that Godbee had been cooperating with the government and a 5K1.1 motion would have been filed, but the government was waiting for codefendant Williams to be sentenced and the criminal case as to him disposed of. Id. at 3, 16-7. Based upon Godbee's cooperation with the government, Godbee requested the Court to sentence him to the bottom of the sentencing guidelines and the

government recommended a sentence at the bottom of the guidelines based upon Godbee's cooperation and acceptance of responsibility. Id. at 15-6, 17-8. Godbee was permitted to allocute, which he did by reading a prepared letter to the Court, accepting responsibility for his criminal actions and apologizing for his criminal behavior to the Court and his family. Id. at 19-21. Before imposing sentence, the Court discussed the troubling and dangerous circumstances of the subject robbery, where Godbee discharged his firearm, and Godbee's extensive criminal history, which began when he was a juvenile. Id. 21-3. However, when taking into consideration the §3553(a) factors and Godbee's cooperation with the government, the Court was willing to give Godbee a slight sentence reduction. Id. at 23-4. The Court then sentenced Godbee to a term of imprisonment of 360 months, consisting of concurrent terms of 240 months as to Counts 1, 2 and 5 and a consecutive term of 120 months as to Count 3, to be followed by a term of supervised release of three years. Id. at 24-5. See also Judgment. (Cr-DE# 104).

Based upon his substantial assistance, the Honorable William J. Zloch, United States District Judge, subsequently amended Godbee's sentence pursuant to motion filed by the government. See Cr-DE# 123, 153, 155. Godbee was resentenced to a total term of imprisonment of 204 months' imprisonment which consisted of a concurrent term of 84 months' imprisonment as to Counts 1, 2 and 5, and a consecutive term of 120 months as to Count 3. See Amended Judgment. (Cr-DE# 155). Godbee did not take a direct appeal from his convictions or sentences. See generally, *Docket* in Case No. 13-60167-Cr-Rosenbaum (Zloch).

## V. §2255 Motion to Vacate

Approximately ten months after the Amended Judgment had been entered, Godbee filed in this Court the instant pro se motion to

vacate pursuant to 28 U.S.C. §2255, challenging the lawfulness of his convictions and ACCA sentences. (Cr-DE# 159; Cv-DE# 1, 4, 16).

A. Standard of Review

Pursuant to 28 U.S.C. §2255, a prisoner in federal custody may move the court which imposed sentence to vacate, set aside or correct the sentence if it was imposed in violation of federal constitutional or statutory law, was imposed without proper jurisdiction, is in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. §2255.

It is well-established that a §2255 motion may not be a surrogate for a direct appeal. See, e.g., United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982). Based upon this principle that §2255 review is not a substitute for a direct appeal, the following general rules have developed: (1) a defendant must assert all available claims on direct appeal, Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994); and (2) "[r]elief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Richards v. United States, 837 F.2d 965, 966 (11th Cir. 1988)(*quoting* United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sep. 1981)).[2] See also Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004). An alleged error "'decided adversely to a defendant on direct appeal ... cannot be re-litigated in a collateral attack under section 2255.'" United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000)(citation omitted). "Once [a] defendant's chance to appeal has been waived or exhausted, ... we are entitled to presume

[2]The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981, and all Fifth Circuit Unit B decisions rendered after October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

he stands fairly and finally convicted[.]" Frady, 456 U.S. at 164.

While a non-constitutional error that may justify reversal on direct appeal does not generally support a collateral attack on a final judgment, unless the error (1) could not have been raised on direct appeal and (2) would, if condoned, result in a complete miscarriage of justice. Lynn, 365 F.3d at 1232-33, *citing*, Frady, 456 U.S. at 165, 102 S.Ct. at 1593, Stone v. Powell, 428 U.S. 465, 477 n.10, 96 S.Ct. 3037, 3044 n.10, 49 L.Ed.2d 1067 (1976), *cert. denied*, 543 U.S. 891, 125 S.Ct. 167, 160 L.Ed.2d 154 (2004).

An evidentiary hearing must be held on a §2255 motion "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. §2255(b). "[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Aron v. United States, 291 F.3d 708, 715 (11th Cir. 2002)(explaining that no evidentiary hearing is needed when a petitioner's claims are "affirmatively contradicted by the record" or "patently frivolous"). For the reasons stated herein, the claims raised are clearly without merit. Consequently, no evidentiary hearing is required in this case. See Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989), citing, Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979).

B. Discussion

1. Claim One

Godbee claims in **ground one** that his sentence imposed under the Armed Career Criminal Act is unlawful based upon the principles

established in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); Descamps v. United States, ___ U.S. ___, 133 S.Ct. 2276 (2013) and Moncrieffe v. Holder, ___ U.S. ___, 133 S.Ct. 1678, 185 L.Ed.2d 727133 (2013); McFadden v. United States, ___ U.S. ___, 135 S.Ct. 2298, 190 L.Ed.2d 260 (2015); etc. He appears to claim that the underlying prior State of Florida convictions do not qualify as ACCA-predicate "serious drug offenses" or "crimes of violence."

In *Johnson*, the Supreme Court held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Johnson, 135 S.Ct. at 2563. In other words, *Johnson* "narrowed the class of people who are eligible for" an increased sentence under ACCA. In re Rivero, 797 F.3d 986, 989 (11th Cir. Aug. 12, 2015)(citing Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253, 1278 (11th Cir. 2013). The Eleventh Circuit Court of Appeals, in binding authority, has also determined that *Johnson* "appl[ies] retroactively in the first post-conviction context." Mays v. United States, 817 F.3d 728 (11th Cir. March 29, 2016). More recently, on April 18, 2016, the Supreme Court made *Johnson* retroactively applicable to cases on collateral review. See Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257 (April 18, 2016).

As correctly argued by the government, the movant is entitled to no relief. The movant has at least one prior serious felony drug offense and two crimes of violence which properly qualify under the elements clause of §924(e) to support movant's enhanced sentence as an armed career criminal. Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), and its corresponding sentence guideline, U.S.S.G. §4B1.4, a defendant convicted of violating 18 U.S.C. §922(g), is subject to a mandatory minimum 15-year term of imprisonment if he has three prior violent felony or serious drug

offense convictions. See 18 U.S.C. §924(e)(1).

Generally, any fact that increases either the statutory maximum or statutory minimum sentence is an element of the crime, that must be submitted to a jury and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000); Alleyne v. United States, 570 U.S. ___, ___, 133 S.Ct. 2151, 2163-64 (2013). However, the fact of a prior conviction is not an element of the crime and does not need to be alleged in the Indictment or proven beyond a reasonable doubt. Almendarez-Torres v. United States, 523 U.S. 224, 243-44, 247 (1998); United States v. Harris, 741 F.3d 1245, 1250 (11th Cir. 2014). Additionally, district courts may make findings regarding the violent nature of a prior conviction for ACCA purposes. United States v. Day, 465 F.3d 1262, 1264-65 (11th Cir. 2006)(*per curiam*).

Absent an ACCA enhancement, the maximum sentence for violating §922(g) is ten years' imprisonment. See 18 U.S.C. §924(a)(2). When applying §924(e), courts should generally only look to the elements of the prior statute of conviction, or to the charging documents and jury instructions, but not the facts of each of defendant's conduct. See Taylor v. United States, 495 U.S. 575, 600-602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). With the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to challenge the validity of previous state convictions in his federal sentencing proceeding when such convictions are used to enhance sentence under the ACCA. Custis v. United States, 511 U.S. 485, 487 (1994).

The ACCA defines a "violent felony" as any crime punishable by a term of imprisonment exceeding one year that: "(i) has an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion,

involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. §922(e)(2)(B)(emphasis added). In *Johnson*, the Supreme Court struck down the italicized clause, commonly known as the residual clause, as a violation of the Fifth Amendment's guarantee of due process. See Johnson, 576 U.S. ___, ___, 135 S.Ct. 2551, 2557 (2015). Specifically, the Supreme Court held that the residual clause of the ACCA "violate[d] the Constitution's guarantee of due process," 135 S.Ct. at 2563, because it violated "[t]he prohibition of vagueness in criminal statutes," *id*. at 2556-57. The Supreme Court further explained that the vagueness doctrine "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences." Id. at 2557. The ACCA defines a crime and fixes a sentence. See 18 U.S.C. §924(e).

However, the *Johnson* court did "not call into question application of the ACCA to the four enumerated offenses, or the remainder of the [ACCA's] definitions of a violent felony." Johnson, ___ U.S. ___, 135 S.Ct. 2551, 2563 (2015). Section 924(e)(2)(B)(i), often referred to as the elements clause, defines a violent felony as a crime that is punishable by more than one year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §924(e)(2)(B)(i). See also United States v. Petite, 703 F.3d 1290, 1293 (11th Cir. 2013).

Moreover, pursuant to §924(e), a serious drug offense is defined as either a federal drug offense punishable by a term of 10 years' imprisonment or longer, or "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," also punishable by a maximum of 10 years' imprisonment or longer. See 18 U.S.C. §924(e)(2)(A). Cocaine is listed as a "controlled substance," 21

U.S.C. §802(6) and §812(c). A defendant who is subject to an enhanced sentence under §924(e), as is the case here, is "an armed career criminal." See U.S.S.G. §4B1.4(a).

Regarding the movant's prior sale of cocaine offense, the Supreme Court in Descamps v. United States, __ U.S. __, 133 S.Ct. 2276 (2013) has instructed courts that when determining whether a prior conviction qualifies as a predicate offense for purposes of the ACCA, "the modified categorical approach could not be applied to indivisible statutes that criminalize a broader range of conduct than the ACCA." Descamps, 133 S.Ct. at 2293. The Eleventh Circuit has previously stated that a drug offense, in violation of Fla.Stat. 893.13(1), constitutes a "serious drug offense" for purposes of the ACCA. See United States v. Smith, 775 F.3d 1262, 1267-68 (11th Cir. 2014)(Florida Statute §893.13(1) is a "serious drug offense" for purpose of the ACCA), *cert. denied*, ____ U.S. ___, 135 S.Ct. 2827 (2015); United States v. Murray, 625 F.App'x 955, 959 (11th Cir. 2015)(*per curiam*)(possession of cocaine with intent to sell qualifies as a "serious drug offense" under §924(e)(2)(A)); United States v. Pitts, 394 F.App'x 680, 683-84 (11th Cir. 2010)(*per curiam*)(sale or delivery of cocaine in violation of Florida law constitutes "serious drug offense" for ACCA purposes); United States v. Adams, 372 F.App'x 946, 950-51 (11th Cir. 2010); United States v. Hodges, 186 F.App'x 959, 962 (11th Cir. 2006)(*per curiam*)(possession of cocaine with intent to sell qualifies as a "serious drug offense").

In *Samuel*, the Eleventh Circuit applied the categorical approach and determined that a cocaine conviction under §893.13 qualifies as a "serious drug offense" for purposes of the §924(e)(2)(A)(ii) enhancement. United States v. Samuel, 580 F.App'x 836, 842-43 (11th Cir. 2014)(*per curiam*), *cert. denied*, 135 S.Ct. 1168 (2015). The *Samuel* court explained that "[t]he question of

whether §893.13 qualifies as a "generic" offense is inapplicable, because §924(e)(2)(A)(ii) is self-defining without reference to any "generic" or otherwise enumerated offenses. Samuel, 580 F.App'x at 843 (citing 18 U.S.C. §924(e)(2)(A)(ii)).

As applied here, at the time of his Florida offenses, under Florida law, the sale of cocaine within a 1000 feet of a place of worship, is a first degree felony, "punishable by a term of up to 30 years imprisonment or, when specifically provided by statute, by imprisonment of years not exceeding life imprisonment." See Fla.Stat. §893.13(1)(e); §775.082(b)1. The Eleventh Circuit has instructed that, under a "categorical approach," courts look at "the fact of conviction and the statutory definition of the prior offense." See Petite, 703 F.3d at 1294 (internal quotation marks omitted). In other words, the crime must be defined in some way or more narrowly than the "generic" federal definition of that crime. Descamps v. United States, ___ U.S. ___, 133 S.Ct. 2276, 2283 (2013). Further, under the "categorical approach," courts forego any inquiry into how the defendant may have committed the prior offense. United States v. Keelan, 786 F.3d 865, 870 (11th Cir. 2015); see also, Begay v. United States, 553 U.S. 137, 141 (2008)(To determine whether a crime is a violent felony, the court examines the crime "in terms of how the law defines the offense and not in terms of how an individual offender might have committed on a particular occasion.").

Besides the serious drug offense, Movant also has at least two prior convictions for violent felonies; robbery with a firearm, armed robbery; and armed carjacking. The Eleventh Circuit has recently reaffirmed its finding that a Florida conviction for armed robbery under §812.13(1) is categorically a crime of violence under the ACCA's elements clause. See United States v. Jenkins, ___ F.3d ___, 2016 WL 3101281 (11th Cir. June 3, 2016). See also In re

Thomas, __ F.3d __, 2016 WL 3000325, at *3 (11th Cir. 2016)(*citing* United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006)); United States v. Oner, 382 F.App'x 893, 896 (11th Cir. 2010).

The Supreme Court has made clear that courts may only consult a limited set of documents when determining which crime served as the offense of conviction for purposes of the ACCA enhancement. Specifically, the Supreme Court indicating courts may consult "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." United States v. Haywood, 742 F.3d 1334, 1347 (11th Cir. 2014)(citation and internal quotation marks omitted)). This limited set of documents additionally include facts as set forth in the PSI, where those facts were undisputed and thus deemed admitted. See United States v. Ramirez-Flores, 743 F.3d 816, 823-24 (11th Cir. 2014); United States v. Bennett, 472 F.3d 825, 834 (11th Cir. 2006)(holding the district court did not err in relying on the undisputed facts in the appellant's PSI to determine that his prior convictions were violent felonies under the ACCA).

By separate order entered in this case, copies of the state court criminal records pertaining to Goodbee's narcotics offense and armed robberies have been made part of the record herein and support the undisputed facts contained in paragraphs 34, 46, 47 and 48 of the PSI.[3] Thus, Godbee's Florida drug conviction and convictions for Florida armed robbery qualify as predicate offenses under the ACCA's elements clause, contrary to Godbee's assertions.

Godbee's qualifying offenses were not affected by *Johnson* or

[3]Godbee's assertions that the subject state court convictions do not qualify as predicate offenses for ACCA sentencing in that there are no supporting state court records included in either his criminal case or this §2255 proceeding, *see e.g.*, Reply (Cv-DE# 15), is now meritless.

any other Supreme Court precedent on which he relies. For example, Godbee's reliance on *Carachuri-Rosendo* is misplaced. *Carachuri-Rosendo* involved a lawful permanent resident of the United States who faced deportation after committing two prior simple-possession misdemeanor drug convictions from Texas, for which he had been sentenced to the county jail for twenty days and ten days, respectively. He sought discretionary cancellation of removal under the Immigration and Nationality Act ("INA"). Carachuri-Rosendo argued that neither of his earlier state convictions qualified as an "aggravated felony" under the INA. The second offense had not been enhanced to a felony, although an enhancement was permitted under state law, because the prosecutor chose not to charge Carachuri-Rosendo as a "recidivist." However, pursuant to Lopez v. Gonzales, 549 U.S. 47, 127 S.Ct. 625, 166 L.Ed.2d 462 (2006), the second misdemeanor conviction was considered an "aggravated felony" under the INA because, *hypothetically*, the state prosecutor could have pursued an enhanced felony sentence on the second conviction.

The Supreme Court in *Carachuri-Rosendo*, considered the definition of aggravated felony under the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101 *et seq.*, and in so doing looked to the definition of felony contained in the Controlled Substances Act ("CSA")(21 U.S.C. §801 *et seq.*). Carachuri-Rosendo v. Holder, 560 U.S. at 566-67, 130 S.Ct. at 2581. The Supreme Court rejected the "hypothetical approach," holding that "when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted' "of an "aggravated felony" that would disqualify an alien from seeking discretionary cancellation of his removal. Id. at 580-82, 130 S.Ct. at 2589-90. The Supreme Court ultimately determined that although Carachuri-Rosendo could have been charged with a felony in federal court for the conduct in question, because he had actually been convicted only of a

misdemeanor simple possession offense under state law, the conviction could not be counted as a prior felony offense for purposed of INA. Id. at 568-70, 130 S.Ct. at 2582-83, 2589.

*Carachuri-Rosendo* addressed not the sentencing guidelines nor the ACCA, but the Immigration and Nationality Act and its definition of aggravated felony. The INA is wholly separate from laws defining career offender status or armed career offender status under the Sentencing Guidelines or ACCA. Since there are no similarities in the different laws' statutory definitions, *Carachuri-Rosendo* is not applicable to the instant case. The case, is, therefore, factually distinguishable from Godbee's case and affords Godbee no relief. See Stewart v. Warden, FCC Coleman-Low, 589 F.App'x 934. 937 (11th Cir. 2014)(holding in a §2241 proceeding that Supreme Court ruling in *Carachuri-Rosendo* did not apply to federal prisoner, who claimed that prior Florida felony conviction for a drug offense should not have been considered to enhance his sentence, since *Carachuri-Rosendo* specifically involved Immigration and Nationality Act (INA) definition of aggravated felony, and its ultimate holding that non-recidivist simple drug possession could not be an aggravated felony had no bearing on whether such an offense could be a felony drug offense). See also Ross v. Sepanek, 2013 WL 3463411, *2 (E.D.Ky. 2013)("The Court is at a loss to understand Ross's reliance on *Carachuri-Rosendo*, an immigration case concerning a defendant's challenge to a deportation proceeding. The holding in *Carachuri-Rosendo* appears to be fact-specific to immigration cases. Even if *Carachuri-Rosendo* is retroactively applicable, it is not applicable to Ross's claim [that he is actually innocent of being a career offender] and will not be considered further."); Terrell v. United States, 2012 WL 1564695, *2 (N.D.Ga. 2012)("*Carachuri-Rosendo* decided that second or successive simple possession offenses are not considered 'aggravated felonies' so as to render an alien removable under the

Immigration and Nationality Act, and has no bearing on the question of whether Movant's sentence as a career offender was proper."); Davila v. United States, 2012 WL 2839815, *3 (D.N.J. 2012)(finding *Carachuri-Rosendo* not applicable to career offender status under the Sentencing Guidelines).

It is also noted that Movant's reliance on *Moncrieffe* is unavailing. *Moncrieffe* addressed whether a Georgia conviction for possession of marijuana with the intent to distribute constituted an "aggravated felony" for "drug trafficking" under the Immigration and Nationality Act, 8 U.S.C. §1101(a)(43)(B). Moncrieffe, 133 S.Ct. 1678. *Moncrieffe* did not interpret a "serious drug offense" for ACCA sentencing and has no application in this case for purposes of determining whether a statutory enhancement was appropriate. See Thomas v. United States, 2013 WL 4855067, *8 (M.D.Fla. 2013).

The same is true for Godbee's assertion that his ACCA sentence is unlawful in light of the United States Supreme Court decision in McFadden v. United States, ____ U.S. ____, 135 S.Ct. 2298, 190 L.Ed.2d 260 (June 18, 2015).[4] Godbee is not entitled to relief based upon *McFadden*. First, the case was decided *after* Godbee's amended sentence was entered and final. The Supreme Court has not declared the decision retroactively applicable on collateral review. "[T]he Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive.". In re Anderson, 396 F.3d 1336, 1339 (11th

[4]In *McFadden*, the Supreme Court considered whether *mens rea* was required to convict a defendant of violating the Controlled Substance Analogue Enforcement Act of 1986 ("Analogue Act"). See 21 U.S.C. §§802(32)(A), 813. The Supreme Court held that in order to convict a defendant of violating the Analogue Act, the government must prove that the defendant knew "that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." 135 S.Ct. at 2304. It further held that, when trying to convict a defendant of violating the narcotics statutes using an analogue, the government must show that he "knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.

Cir. 2005), *quoting* Tyler v. Cain, 533 U.S. 656, 663 (2001). Unless the Supreme Court decides some time in the future that the case applies retroactively on collateral review, Godbee cannot now obtain relief based on the case. Even if the case could be found retroactively applicable on collateral review, it appears that Godbee would not be entitled to relief based upon *McFadden*. *McFadden* is clearly distinguishable in that the instant case does not involve a violation of the Analogue Act whatever and did not involve ACCA controlled-substance offenses. Jones v. United States, 2016 WL 3055833, at *3 (11th Cir. May 31, 2016)(holding that *McFadden* did not control the outcome of the case, because *McFadden* did not address the mens rea requirement for serious drug offenses under the ACCA or controlled-substance offenses under the career-offender guidelines).

Furthermore, as held by the Eleventh Circuit on direct appeal in *Samuel*, the definition of "serious drug offense" in §924(e) does not require knowledge of the illicit nature of the controlled substance to have been an element of a prior state crime. Samuel, 580 F.App'x at 843, *citing*, 18 U.S.C. §924(e)(2)(A)(ii). The appellate court stated that all that was required was that the prior state crime (1) involved manufacturing, distributing or possessing with intent to manufacture or distribute a controlled substance and (2) carried a maximum prison term of ten years or more. A violation of Fla.Stat. §893.13(1)(e)1. involving cocaine satisfied both of these requirements. Id., *citing*, Fla.Stat. §893.13(1)(a)(1)(cross-referencing id. Fla.Stat. §§775.082(3)(c), 893.03(2)(a)(4)).

Godbee's ACCA sentence is lawful and he is not entitled to relief in this §2255 collateral proceeding.

2. Claim Two

Godbee claims in **ground two** that he is actually innocent and ineligible for the ACCA enhancement, because his Florida convictions relied upon to qualify him for the ACCA were consolidated. Specifically, he maintains that the two armed robbery with a firearm convictions were committed on the same date and the sentences entered in the two separate state criminal cases were imposed to run concurrently. See PSI at ¶¶46, 48.

It is first noted that there was no objection to the predicate offenses whatever before or during trial and Godbee never took an appeal from his sentences. The written plea agreement contained an appeal waiver. Notwithstanding the applicable procedural bars with regard to review on the merits of this claim, Godbee is not entitled to relief even if the claim were reviewable in that it is clearly meritless.

Godbee is correct that Section 924(e)'s different-occasion requirement requires that the three convictions be temporally distinct. United States v. Holton, 571 F.App'x 794, 798-99 (11th Cir. 2014), *citing*, United States v. Sneed, 600 F.3d 1326, 1329 (11th Cir. 2010). When determining whether crimes were committed on different occasions, the Eleventh Circuit has held that "so long as predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for purposes of the ACCA." United States v. Pope, 132 F.3d 684, 692 (11th Cir. 1998). As long as some temporal "break" exists between offenses, they will be deemed to have occurred on separate occasions. Id. at 689-90. "Mere temporal proximity is ordinarily insufficient to merge multiple offenses into a single criminal episode. Distinctions in time and place are usually sufficient to separate criminal episodes from one another even when the gaps are small." Id. at 689.

In the instant case, there is clearly a distinction in time

and place. While the robberies were committed on the same day, they involved different victims and occurred in two different locations; one in Broward County, Florida and one in Miami-Dade County, Florida. See State court records pertaining to State v. Godbee, No. 00-15704 (Fla. 17th Jud. Cir. Ct.); State v. Godbee, No. 00-19896 (Fla. 11th Jud. Cir. Ct.);[5] PSI at ¶¶46, 48. The robberies were separate criminal episodes and were charged as separate criminal episodes in two distinct criminal cases; one case filed in the Broward County Circuit Court and the other filed in the Miami-Dade County Circuit Court. See State v. Godbee, No. 00-15704CF10A (Fla. 17th Jud. Cir. Ct); State v. Godbee, No. 00-19896 (Fla. 11th Jud. Cir. Ct.). The armed robberies are clearly two separate and distinct criminal episodes and, therefore, are proper predicate offenses for ACCA sentencing. See United States v. Holton, 571 F. App'x 794, 798-99 (11th Cir. 2014), *citing*, United States v. Proch, 637 F.3d 1262, 1265 (11th Cir. 2011).

3. Ground Three

Godbee claims in **ground three** that the Florida drug offense entered pursuant to Florida Statute §893.13 does not qualify as a predicate offense to trigger the statutory and guideline enhancements in light of the rulings in *Johnson*, *Carachuri*, *Lopez*, *Moncrieffe*, *Deschamps* and other recent Supreme Court rulings. For the reasons stated above in the discussion of ground one, this claim is clearly without merit.

4. Ground Four

Godbee claims in **ground four** that he received ineffective assistance of trial counsel, because counsel failed to object to the breach of the plea agreement. According to Godbee, he never

[5]As indicated, the pertinent state court records for the criminal cases have now been made part of the record by separate order.

agreed to enter a guilty plea that required a recidivist enhancement and only learned of the enhanced sentencing at the time of sentencing. This claim is meritless, as belied by the record.

The standard of review of a claim of ineffective assistance of trial counsel is well-established. To prevail on such a claim, a habeas petitioner must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to succeed on an ineffective assistance of counsel claim, a habeas petitioner must establish both prongs of the *Strickland* standard. Accordingly, if the movant makes an insufficient showing on the prejudice prong, the court need not address the performance prong, and *vice versa*. Strickland, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of *Strickland* if the defendant makes an insufficient showing on one of the prongs); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000); Johnson v. Alabama, 256 F.3d 1156, 1176 (11th Cir. 2001).

Since the sentence ultimately imposed upon the defendant is a "result of the proceeding," in order for a petitioner to satisfy the prejudice-prong of *Strickland*, he must demonstrate that there is a reasonable probability that the conditions of his guilty plea or his sentence would have been different but for his trial counsel's errors. See United States v. Boone, 62 F.3d 323, 327 (10th Cir.)(rejecting the defendant's claim that counsel was ineffective in part because the defendant failed to show "that the resulting sentence would have been different than that imposed under the Sentencing Guidelines"), cert. denied, 516 U.S. 1014 (1995). To obtain post-conviction relief due to ineffective assistance of counsel during the punishment phase of a non-capital

case, a petitioner must establish that he was subjected to additional jail time due to the deficient performance of her attorney. See United States v. Grammas, 376 F.3d at 439 (*citing* Glover v. United States, 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001)).

Thus, the *Strickland* test applies to claims involving ineffective assistance of counsel during the punishment phase of a non-capital case. See Glover, 531 U.S. 198 (holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established *Strickland* prejudice"); Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). If the petitioner cannot meet one of *Strickland*'s prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004).

To ensure that Godbee understood the possible sentence that could be imposed pursuant to the negotiated guilty pleas, which included a possible career offender enhancement, the Court conducted an extensive colloquy with Godbee as follows:

> THE COURT: Now, in this case the maximum penalties that can be imposed for the crimes to which you are pleading guilty are as follows.
>
> Well, first let me start by saying that it is possible, although the Court does not know at this time, *but it is possible that you could be determined to be what is known as a career offender*, and if that happens, the Court will be required to impose a mandatory-minimum term of at least 15 years of imprisonment as to Count 5 and a maximum term of imprisonment can be up to life.
>
> Do you understand that the Court will be required to impose at least 15 years' imprisonment and *could go as high as life if you are determined to be a career offender*?

THE DEFENDANT: Am I to understand that? Yes.

THE COURT: Okay. Then that would be followed by a term of supervised release of at least three years but not more than five years on Count 3. Do you understand?

THE DEFENDANT: Yes.

THE COURT: And actually as to Count 5, there will be a term of supervised release of up to five years. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: In addition, as to Count 3, the Court will be required to impose a minimum term of imprisonment of at least ten years consecutive to the term of imprisonment that is imposed on Counts 1, 2 and 5. Do you understand that?

That means in addition to. So, if you're sentenced to --

THE DEFENDANT: Yes, I understand.

THE COURT: Okay. You understand? All right. So, if you're sentenced to 15 years on Count 1, then there would be another ten years on Count 3. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So for a total of 25. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Okay. And there is a statutory maximum term of imprisonment on Count 3 of life imprisonment. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And there is a term of supervised release of at least three years but not more than five years on Count 3. Do you understand?

THE DEFENDANT: Yes.

THE COURT: That's on Count 3.

All right. On Counts 1 and 2, the Court may

impose a maximum term of imprisonment of 20 years. Do you understand?

THE DEFENDANT: Uh-huh.

THE COURT: And a maximum term of supervised release on each of these of five years. Do you understand?

THE DEFENDANT: Yes.

THE COURT: In addition, for each one of these four counts, there is a maximum fine of $250,000. Do you understand?

THE DEFENDANT: Yes.

THE COURT: Now, because there are multiple counts of conviction here, the Court in some cases, as I said, is required to impose a consecutive sentence but in other cases, even if it's not required to impose a consecutive sentence, could decide to impose a consecutive sentence. So, for example, on Counts 1 and 2, the maximum term of imprisonment is 20 years. The Court could impose 20 years on Count 1, followed by another 20 years on Count 2, followed by 15 years on count -- or ten years on Count 3, followed by 15 years on Count 5, for a total of 65 years.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. And the same is true with the terms of supervised release. They can be added together. Do you understand? I'll need you to answer.

THE DEFENDANT: Yeah.

THE COURT: I'm sorry?

THE DEFENDANT: Yes.

(emphasis added)(Transcript of Plea Colloquy) (Cr-DE# 161; Cv-DE# 12-1).

Movant's representations during the plea proceeding, as well

as those of his lawyer and the prosecutor, and the findings by this Court when accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). See also United States v. Rogers, 848 F.2d 166, 168 (11th Cir. 1988); United States v. Lemaster, 403 F.3d 216, 221-222 (4th Cir. 2005)("[I]n the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any §2255 motion that necessarily relies on allegations that contradict the sworn statements."). Solemn declarations in open court carry a strong presumption of truthfulness, and a defendant bears a heavy burden to show that the plea was involuntary after testifying to its voluntariness in open court. DeVille v. Whitley, 21 F.3d 654, 659 (5th Cir. 1994). See also United States v. Anderson, 384 F.App'x 863, 865 (11th Cir. 2010)("There is a strong presumption that statements made during a plea colloquy are true.")(unpublished); United States v. Munguia-Ramirez, 267 F.App'x 894, 897 (11th Cir. 2008) (stating that when a movant enters a guilty plea pursuant to Rule 11 proceedings, "there is a strong presumption that the statements made during the colloquy are true")(citations omitted)(unpublished).

Before Movant entered his guilty pleas, he had clearly been advised by the Court that he could possibly receive an enhanced sentence as a career offender, and Godbee unequivocally told the Court that he understood the possible sentence that could be imposed as a result of the guilty pleas. Furthermore, at the start of the sentence hearing, the Court addressed Godbee, asking whether he had reviewed the PSI and discussed the PSI with counsel. See Transcript of Sentencing Proceeding conducted on May 30, 2014, at 2. (Cr-DE# 131; Cv-DE# 12-2). Godbee unhesitatingly answered in the

affirmative. Id. When asked if he needed additional time to confer with counsel, Godbee told the Court that he did not. Id. The PSI expressly stated that Godbee qualified as an armed career criminal. See PSI at ¶34.

Later, during sentencing, when the Court asked trial counsel if he wanted to make any argument before sentence was imposed, counsel responded:

> Judge, I don't believe the Government is opposed to the bottom of the guidelines. Obviously, Mr. Godbee has asked if the seven years could run concurrent with the 15 or the 10. *I've explained to him the problem with the Armed Career Criminal statute*. I would just say, Judge, that, you know, Mr. Godbee has gone above and beyond. Part of the reason that Mr. Cedrick Williams agreed to cooperate -- or not cooperate, but agreed to take a plea is a direct result of about seven debriefings which Ms. Kuhl and I have attended all seven of that Mr. Godbee has provided on this case with this U.S. Attorney as well as Ms. Anton and other U.S. Attorneys that preceded her. So Mr. Godbee has done everything he can to make amends for the terrible choices that he made.
>
> I would ask for the bottom of the guidelines and I would ask for the Court to consider the lowest possible sentence.

(emphasis added)(Transcript of Sentencing Proceeding conducted on May 30, 2014, at 15-6)(Cr-DE# 131; Cv-DE# 12-2). Godbee personally addressed the Court during the sentence hearing, reading from a lengthy prepared letter; however, he never told the Court that he had not been aware of sentencing pursuant to the ACCA. Id. at 19-21.

From full and careful review of the record, it is apparent that Godbee was advised of all possible sentences he could receive as a result of his guilty pleas from trial counsel and the Court, which included life imprisonment. There was no breach of the plea agreement and trial counsel's performance was not constitutionally deficient for failing to make such an argument. It is well settled that counsel is not required to make a frivolous motion or

otherwise take some baseless action. See Knowles v. Mirzayance, 556 U.S. 111, 126-27, 129 S.Ct. 1411, 1422 (2009)(stating that Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success); Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001)(counsel is not ineffective for failing to raise a non-meritorious objection).

In sum, trial counsel's performance was not constitutionally ineffective with regard to the guilty pleas and/or sentencing. See Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399 (2012); Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376 (2012); Hill v. Lockhart, 474 U.S. 52 (1985); Strickland v. Washington, 466 U.S. 668 (1984). See also Glover v. United States, 531 U.S. 198, 121 (2001)(holding "that if an increased prison term did flow from an error [of counsel] the petitioner has established *Strickland* prejudice"); Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993)(*cited* in Glover).

E. Claim Five

Godbee claims in **ground five** that he received ineffective assistance of trial counsel, because his lawyer failed to argue that this federal court lacked subject matter jurisdiction to prosecute his offenses on the basis that the robberies were local in nature and did not involve a substantial effect on interstate commerce. Godbee is not entitled to relief on this ground in that the underlying claim is without merit.

Federal courts derive their power solely from Article III of the Constitution and from the legislative acts of Congress and Congress has chosen to grant federal courts exclusive jurisdiction over "all offenses against the laws of the United States." Brown v. United States, 748 F.3d 1045, 1068 (11th Cir. 2014), *citing*, 18

U.S.C. §3231. The Southern District of Florida is certainly a federal district court, having the jurisdictional foundation to preside over cases before the court.

Godbee was charged *inter alia* with criminal violations of federal law pursuant to 18 U.S.C. §1951(a) and 2 and 18 U.S.C. §924(c)(1)(A)(ii). See Indictment. (Cr-DE# 18). Thus, the Government had standing to prosecute Godbee, and this Court had jurisdiction to convict him. United States v. Brown, 227 F.App'x 795, 798 (11th Cir. 2007)("The superseding indictment in this case was sufficient. It charged Brown and Williams with violations of the laws of the United States: 18 U.S.C. §§2, 924(c)(1)(A)(i)-(iii), 924(o), 1951(a) and 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), 841(b)(1)(B)(ii), 846. This invoked the district court's subject matter jurisdiction under 18 U.S.C. § 3231.").

The Hobbs Act provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section, shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). See also United States v. Gray, 260 F.3d 1267, 1272 (11th Cir. 2001); United States v. Diaz, 248 F.3d 1065, 1084 (11th Cir. 2001). "Commerce" is broadly defined as being "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." Id. §1951(b)(3). See also Gray, 260 F.3d at 1272, *citing*, Stirone v. United States,

361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)(confirming the expansive scope of the statute). A conviction for Hobbs Act robbery may be sustained if there is proof that the defendant's conduct had even a minimal effect on interstate commerce. See, e.g., United States v. Rodriguez, 218 F.3d 1243, 1244 (11th Cir. 2000)("The government needs only to establish a minimal effect on interstate commerce to support a violation of the Hobbs Act."). Also, the Eleventh Circuit clearly found that a "'mere depletion of assets' of a business engaged in interstate commerce will meet the requirement [of the Hobbs Act]." United States v. Corn, 2014 WL 3894259, at *5 (M.D. Fla. Aug. 8, 2014), *citing*, United States v. Rodriguez, 218 F.3d 1243, 1244 (11th Cir. 2000), *aff'd*, 608 F. App'x 900 (11th Cir. 2015).

In this case, Godbee attempted to rob a Winn-Dixie store, a Florida business and company operating in interstate and foreign commerce. Because the government demonstrated a sufficient nexus between Godbee's conduct and interstate commerce, this federal district court had jurisdiction over the Hobbs Act violation. See Corn, 2014 WL 3894259, at *1 (finding that where defendant robbed or attempted to rob three Publix supermarkets and brandished a pistol during one failed attempt, causing the store to lose sales by closing approximately forty-five minutes to an hour early due to the police investigation as well as store's ability to stock shelves and run its customer service counter, satisfied Hobbs Act effect on interstate commerce requirement); United States v. Kelly, 102 F. App'x 838, 839 (4th Cir. 2004)(holding that jurisdictional requirement of Hobbs Act can be established by a minimal effect on interstate commerce and finding sufficient evidence to establish jurisdiction to prosecute in the case where defendant pled guilty to one count of conspiracy to commit and attempt to commit armed robbery of several restaurants, supermarkets, and convenience stores). Also, Godbee knowingly used and carried a firearm which

discharged during the attempted robbery, as properly charged in the Indictment as Count 3 and established by the government.

If Godbee is contending that the United States lacked territorial jurisdiction to prosecute him for crimes committed in the State of Florida, such an argument is also without merit. When a federal law is violated, the permission of the state where the offender committed his crime against the United States is not a prerequisite for the United States to exercise that jurisdiction. See Taylor v. United States, 2009 WL 1874071, *3 (E.D.Tenn. 2009), *citing*, United State v. Blevins, 999 F.2d 540 (6th Cir. July 6, 1993), available at 1993 WL 243765, at *1 ("Federal courts have exclusive jurisdiction over offenses against the laws of the United States ...; the permission of the states is not a prerequisite to exercise of that jurisdiction.")(internal quotations and citations omitted); United States v. Burchett, 12 F.3d 214 (6th Cir. 1993), available at 1993 WL 473689, *1 (same). Consequently, the federal government has jurisdiction to prosecute federal offenses committed in Florida and pursuant to 28 U.S.C. §89, which provides that the jurisdiction of the Southern District of Florida includes Broward County, Florida (where Godbee's crimes were committed).

The crimes in the instant case were lawfully prosecuted by the government and the convictions lawfully entered by this Court. Accordingly, the ineffective assistance of trial counsel claim is meritless. See Knowles v. Mirzayance, 556 U.S. at 126-27; Chandler v. Moore, 240 F.3d at 917.

F. Claim Six

Godbee claims in **ground six** that he received ineffective assistance of trial counsel in connection with his guilty pleas, because his convictions for conspiracy to commit Hobbs Act Robbery and attempting to commit a Hobbs Act Robbery are violative of his

protection against double jeopardy since the two offenses both charge a violation of 18 U.S.C. §1951.

A defendant's plea of guilty made knowingly, voluntarily, and with the benefit of competent counsel, waives all nonjurisdictional defects in the proceedings. Tollett v. Henderson, 411 U.S. at 267 (1973)(noting that a guilty plea represents a break in the chain of events which had preceded it in the criminal process); United States v. Broce, 488 U.S. 563 (1989). See also Barrientos v. United States, 668 F.2d 838, 842 (5th Cir. 1982). This waiver extends to claims of ineffective assistance of counsel that do not attack the voluntariness of the guilty plea. See Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir. 1981), cert. denied, 456 U.S. 992 (1982). See also United States v. Bohn, 956 F.2d 208, 209 (9th Cir. 1992)(per curiam)(holding that pre-plea ineffective assistance of counsel claims are also waived by guilty plea). Exceptions to the general rule are those cases which are constitutionally infirm because the government has no power to prosecute them at all, which is not applicable to this case. See Broce, 488 U.S. at 574-575. Thus, a voluntary guilty plea constitutes a waiver of all nonjurisdictional defects in the proceeding up to that point.

Review of the change of plea transcript shows that Godbee voluntarily, knowingly and freely chose to forego his right to go to trial and thereby waived any and all rights he may have had to challenge his convictions.[6] See Transcript of Plea Colloquy. (Cr-DE# 161; Cv-DE# 12-1). Godbee's possible defenses to the crimes committed do not relate to the voluntariness of the plea. They are therefore waived by the entry of the guilty pleas as is any possible related effectiveness of counsel.

[6]Again, Movant's sworn responses made in connection with the entry of the no contest pleas carry a strong presumption of verity. See Blackledge v. Allison, 431 U.S. 63, 74 (1977); Kelley v. Alabama, 636 F.2d 1082, 1084 (5th Cir. Unit B. 1981).

More specifically, it is well-established that the rights afforded by the Double Jeopardy Clause are personal and can be waived by a defendant. Broce, 488 U.S. at 569. Pursuant to these principles, the Supreme Court has held explicitly that a subsequent double jeopardy challenge is foreclosed by the entry of a guilty plea. Id. See also Dermota v. United States, 895 F.2d 1324 (11th Cir. 1990), cert. denied, 498 U.S. 837 (1990)(holding that because the defendant freely, voluntarily, and accompanied by his attorney entered into a plea agreement whereby he pled guilty to both transporting unregistered firearms in interstate commerce and possessing or causing to be possessed unregistered firearms, he waived his right to raise the double jeopardy objection that the offenses constituted a single offense rendering his consecutive sentences impermissible); United States v. Mortimer, 52 F.3d 429, 435 (2d Cir.)(holding that in signing plea agreement that he would plead guilty to two felonies and receive consecutive sentences, defendant waived claim that imposition of consecutive sentences for offenses that, defendant alleged, arose out of same transaction and constituted singe offense violated Double Jeopardy Clause), cert. denied, 516 U.S. 877 (1995).

Further, even if the claim had not been waived by the entry of the guilty pleas, Godbee would not be entitled to collateral relief, because the convictions do not violate Godbee's double jeopardy protections. The Eleventh Circuit has long recognized that the commission of a substantive offense and a conspiracy to commit that offense are separate and distinct offenses for Double Jeopardy purposes. United States v. Gornto, 792 F.2d 1028, 1035 (11th Cir. 1986), *overruled on other grounds by* Dowling v. United States, 493 U.S. 342, 348-49, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Furthermore, each charge requires proof of a fact that the other does not. See Blockburger v. United States, 284 U.S. 299, 304, 52

S.Ct. 180, 76 L.Ed. 306 (1932). More specifically, the courts have held that conspiring to commit a Hobbs Act Robbery and attempting to commit a Hobbs Act Robbery, both in violation of Section 1951, are two separate offenses, which may be charged separately. See United States v. McGhee, 542 F.App'x 231, 233 (4th Cir. 2013)(holding that defendant's convictions for both conspiracy to commit Hobbs Act robbery and Hobbs Act robbery did not violate the Double Jeopardy Clause, as the convictions were for separate offenses). See, generally United States v. Holland, 503 F.App'x 737, 740 (11th Cir. 2013).

Because the double jeopardy argument was waived by the voluntary guilty pleas; see Bradbury, 658 F.2d at 1087; Bohn, 956 F.2d at 209; and/or the double jeopardy claim is meritless, the ineffective assistance of trial counsel claim is without merit. See Knowles v. Mirzayance, 556 U.S. at 126-27; Chandler v. Moore, 240 F.3d at 917.

G. Supplement to §2255 Motion to Vacate

Godbee essentially claims in his supplement to his §2255 motion to vacate that his §924(c) conviction is unlawful pursuant to Johnson v. United States, 135 S.Ct. 2551 (2015).[7] See Cv-DE# 16. Godbee is entitled to review on the merits of his claim. See In re Pinder, ___ F.3d at ___ n.1, 2016 WL 3081954 (11th Cir. June 1, 2016)(holding that *Johnson* applies retroactively to §924(c) violations). See also Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257 (April 18, 2016); Mays v. United States, 817 F.3d 728 (11th Cir. March 29, 2016).

[7]By separate order Godbee was granted leave to supplement his motion to vacate to include the additional challenges to his 924(c) conviction and sentence. See Cv-DE# 17, *citing*, In re Pinder, 2016 WL 3081954 (11th Cir. June 1, 2016); Mays v. United States, 817 F.3d 728 (11th Cir. March 29, 2016). Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257 (April 18, 2016).

Pursuant to §924(c), a defendant who "during and in relation to any crime of violence ... uses or carries a firearm ... shall, in addition to the punishment provided for such crime of violence ... if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years." 18 U.S.C. §924(c)(1)(A)(ii). To prove a violation of §924(c)(1)(A)(ii), "the [government must prove: (1) the defendant possessed and brandished a firearm; and (2) he did so during and in relation to a crime of violence." United States v. Jenkins, 628 F.App'x 840 (4th Cir. 2015). The statute defines "crime of violence" as any felony:

> (A) [that] has as 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.

18 U.S.C. §924(c)(3). Subsection (A) and subsection (B) are commonly referred to as the "Force Clause" and the "Residual Clause" respectively. At issue here is whether Hobbs Act robbery qualifies as a "crime of violence" under either the Force Clause or the Residual Clause of § 924(c)(3). A number of district courts have assessed whether the new rule in *Johnson* extends to a "crime of violence" under the similarly defined residual clause in §924(c)(3)(B). See Polanco v. United States, 2016 WL 1357535, at *2 (S.D. Fla. Apr. 6, 2016), *citing*, United States v. McDaniels, 2015 WL 7455539, at *6 (E.D.Va. Nov. 23, 2015).

Here, Count 2 charged Godbee in pertinent part with unlawfully taking United States currency and other property from persons and a business and company operating in interstate and foreign commerce, "against the will of those persons, by means of actual and threatened force, violence, and fear of injury to said persons." See Indictment. (Cr-DE# 18). The statutory elements that these allegations of the indictment repeat clearly meet

§924(c)(3)(A)'s requirement that the underlying felony offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." This means that Godbee's conviction under §924(c) would be valid even if *Johnson* renders the "crime of violence" definition in §924(c)(3)(B) unconstitutional. See In re Hines, 2016 WL 3189822, at *3 (11th Cir. June 8, 2016). Stated differently, this case involves the actual commission of an attempted armed Hobbs Act robbery of a Winn-Dixie store. Thus, even if Godbee is given the benefit of *Johnson*, his sentence remains valid under the use-of-force clause in §924(c)(3)(A). Id. at 3 n.5. See also United States v. Collins, 2016 WL 1639960, at *26 (N.D.Ga. Feb. 9, 2016), *report and recommendation adopted*, 2016 WL 1623910 (N.D. Ga. Apr. 25, 2016). *Compare* In re Pinder, ___ F.3d at ___ n.1, 2016 WL 3081954 (11th Cir. June 1, 2016)(stating that the applicant's §924(c) sentence "appear[ed] to have been based on a conviction for *conspiracy* to commit Hobbs Act robbery.")(emphasis added).

The Supreme Court's ruling in *Johnson*, which has recently been held to be retroactively applicable, *see* Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257 (April 18, 2016); In re Pinder, ___ F.3d at ___ n.1, 2016 WL 3081954 (11th Cir. June 1, 2016), does not aid Movant. His sentences are lawful.

## VI. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2255 Proceedings, Rule 11(b), 28

U.S.C. foll. §2255.

After review of the record, Movant is not entitled to a certificate of appealability. "A certificate of appealablilty may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Id. 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Movant must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the claims are clearly without merit, Movant cannot satisfy the *Slack* test. Slack, 529 U.S. at 484.

As now provided by Rules Governing §2255 Proceedings, Rule 11(a), 28 U.S.C. foll. §2255: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

## VII. Recommendations

Based upon the foregoing, it is recommended that the motion to vacate be DENIED.[8] It is further recommended that no certificate of appealability should issue and this case be closed.

[8]The undersigned has thoroughly and carefully reviewed Movant's motion to vacate with supporting memorandum of law as well as all his supplemental pleading and reply to the government's response. Any additional claims or subclaims not specifically addressed in this Report are found to be without merit.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 13th day of June, 2016.

UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-61860-CIV-ZLOCH

BURNETT GODBEE,

Movant,

vs. **FINAL JUDGMENT**

UNITED STATES OF AMERICA,

Respondent.
_____/

THIS MATTER is before the Court upon Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1). For the reasons expressed in this Court's Order denying said Motion, entered separately, and pursuant to Federal Rule of Civil Procedure 58, it is

**ORDERED AND ADJUDGED** as follows:

1. Final Judgment be and the same is hereby **ENTERED** in favor of Respondent United States of America and against Movant Burnett Godbee upon Movant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (DE 1). Movant shall take nothing by this action and said Respondent shall go hence without day; and

2. To the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 28th day of July, 2016.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

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