NO:

IN THE
SUPREME COURT OF THE UNITED STATES

ANDREW NELSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the district court erroneously premises its denial of a meritorious, unopposed motion for continuance of the trial on a mistaken belief that the defendant sought the continuance to delay the proceedings, must the defendant on direct appeal establish specific prejudice affecting the outcome of the trial in order to meet the "affecting substantial rights" test for reversal under Fed. R. Crim. P. 52(a) or is it enough for the defendant on appeal to show that his counsel lacked an adequate opportunity to review potentially relevant evidence?

2. Because the residual-clause definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, should the Court remand for further consideration in light of *United States v. Davis*, No. 18-431, __ U.S. __ (June 24, 2019)?

3. Does Section 403 of the First Step Act, "Clarification of Section 924(c) of Title 18, United States Code," which bars application of mandatory consecutive 25-year sentences for second or subsequent § 924(c) offenses charged in a single indictment, require a remand for resentencing of Petitioner without application of five consecutive 25-year sentences totaling an additional 125 years of imprisonment?

INTERESTED PARTIES

There are no parties interested in the proceeding other than those named in the caption of the appellate decision.

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PETITION FOR WRIT OF CERTIORARI

Andrew Nelson respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-12375, *United States v. Nelson*, by that court on February 7, 2019, affirming the judgment and commitment order of the United States District Court for the Southern District of Florida. The decision of the court of appeals is not reported in the Federal Reporter.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1) as is a copy of the decision of the Eleventh Circuit denying the petition for rehearing (App. 12).

STATEMENT OF JURISDICTION

The court of appeals' decision was entered on February 7, 2019. Rehearing was denied on March 26, 2019. The petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V (due process clause):

> No person shall ... be deprived of life, liberty, or property, without due process of law.

U.S. Const., amend. VI (counsel clause):

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

18 U.S.C. § 924(c)(1)(C) (2018):

> In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall –
>
> (i) be sentenced to a term of imprisonment of not less than 25 years; ...

18 U.S.C. § 924(c)(1)(C) (2017):

> In the case of a second or subsequent conviction under this subsection, the person shall –
>
> (i) be sentenced to a term of imprisonment of not less than 25 years;...

18 U.S.C. § 924(c)(3):

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and –
>
> (A) 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.

Sec. 403, First Step Act of 2018, Pub. L. No. 115-391, Dec. 21, 2018, 132 Stat. 5194:

> SEC. 403. CLARIFICATION OF SECTION 924(C) OF TITLE 18, UNITED STATES CODE.
>
> (a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent

conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

STATEMENT OF THE CASE

Petitioner was charged, in a superseding indictment in the Southern District of Florida, with six counts of committing or aiding and abetting Hobbs Act robbery and one count of conspiring to commit those offenses, all in violation of 18 U.S.C. § 1951, and six counts of brandishing or aiding and abetting the brandishing of a firearm during the robberies, in violation of 18 U.S.C. § 924(c).

After a series of continuances that were occasioned largely by the government's addition of charges in the two superseding indictments, trial was set for December 5, 2016. App. 6–7. Shortly before the scheduled trial date, Petitioner requested the appointment of new counsel. DE:226. The district court deemed the motion meritorious and entered a December 5, 2016, order granting the motion. App. 6. The district court rescheduled the trial for January 23, 2017. App. 7.

Appointed seven weeks before the trial setting on conspiracy and substantive allegations as to six Hobbs Act robberies occurring over a two-year period from 2014 to 2016, Petitioner's new attorney was faced with an enormous collection of discovery

materials and substantial investigatory tasks. *See* App. 8. Petitioner filed an unopposed motion for a 45-day trial continuance in which counsel explained he was a solo practitioner with obligations to multiple clients and that he needed to review thousands of pages of documents and hundreds of hours of audio recordings to prepare for Petitioner's trial. DE:268. The district court denied Petitioner's motion, and his unopposed motion for reconsideration in which he requested a continuance of at least 30 days. DE:269, 271. The attorney explained he had worked diligently since the day of his appointment to plow through the mountain of discovery materials, but needed more time to prepare for trial. DE:271. The court again denied the motion. DE:272. Immediately before Petitioner's trial began, his attorney renewed his continuance motion and advised the district court that, despite doing his best, he had been unable to complete his review of the discovery, which included tens of thousands of pages of documents and 40 CDs of audio recordings containing hundreds of hours of jail calls and hundreds of hours of other materials. DE:372:5-6, 15-16. The facts concerning the immense bulk of the discovery collection and counsel's inability to complete his review of the materials were undisputed.

Nevertheless, the district court denied the request for a continuance, focusing its analysis on the length of time the case had been pending rather than on the brief period allowed for the recently-appointed attorney to prepare for trial. App. 7 ("The district court denied that motion, citing the numerous times that the trial had already been continued."); *see also* DE:269; DE:272; DE:372:16-17. Additionally, the district

court assumed, without any basis in the record, that Petitioner had requested the appointment of new counsel as a delay tactic, and the district court relied on that unsupported assumption in denying the request for continuance. DE:272; DE:372:6.

At trial, the government introduced two dozen phone calls selectively culled from the hundreds of hours of phone calls produced to the defense in discovery. DE:373:66-71, 83-94; DE:374:156-70; DE:375:15-47; GX 19; GX 19 A-X. Counsel was denied the opportunity to listen to the collection of phone calls in their entirety and was unable to determine whether valuable exculpatory or impeachment evidence was buried in the mountain of unreviewed recordings and other evidence. Petitioner's counsel renewed the motion for continuance at trial; the district court maintained its ruling. DE:375:110, 135.

Following his conviction at trial on all counts, Petitioner was sentenced in May 2017, to concurrent 78-month sentences for the conspiracy and robbery offenses, a mandatory consecutive 84-month sentence for one of the firearm offenses, and mandatory consecutive 300-month sentences for the five remaining § 924(c) offenses. App. 13. His aggregate 1,662-month custodial sentence exceeds 138 years.

On appeal to the Eleventh Circuit, Petitioner challenged the denial of his motion for continuance of trial and argued that the imposition of convictions and sentences under § 924(c) was improper because the statute's residual-clause definition of a crime of violence was unconstitutionally vague. App. 2.

The Eleventh Circuit did not address the intervening First Step Act, enacted shortly before the decision in Petitioner's case, in which Congress added language to § 924(c) pursuant to which defendants are not eligible to receive prior-offender sentences for multiple § 924(c) convictions in a single judgment. If applicable to Petitioner, under the First Step Act, he could not have received the five consecutive 300-month sentences that comprise 125 years of his sentence. *See* 18 U.S.C. § 924(c)(1)(C) (2018) ("In the case of a violation of this subsection that occurs *after a prior conviction under this subsection has become final*, the person shall – (i) be sentenced to a term of imprisonment of not less than 25 years ... .") (emphasis added).

With regard to Petitioner's claim of error in denial of a continuance, the Eleventh Circuit ruled:

> ... To obtain reversal due to the denial of a continuance ... the defendant "must show that the denial . . . resulted in specific substantial prejudice." [*United States v.*] *Bergouignan*, 764 F.2d [1503,] 1508 [(11th Cir. 1985)]. "To make such a showing, [the defendant] must identify relevant, non-cumulative evidence that would have been presented if his request for a continuance had been granted." *United States v. Saget*, 991 F.2d 702, 708 (11th Cir. 1993). If the defendant fails to proffer evidence or theories that would have been presented had he been granted a continuance, he has not shown specific substantial prejudice. *See United States v. Gibbs*, 594 F.2d 125, 127 (5th Cir. 1979) (per curiam).
>
> ... Forty-nine days is a relatively short period of time to prepare a defense when a defendant faces life in prison, and we acknowledge that the government requested most of the prior continuances in this case. But *even if we are inclined to agree that a continuance was warranted*, [Petitioner] does not point to any relevant, non-cumulative evidence that he would have presented if the court had granted the continuance. *See* [*United States v.*] *Valladares*, 544 F.3d [1257,] 1264–65 [(11th Cir. 2008)]. Facing similar circumstances, we have repeatedly held that a

> district court does not abuse its discretion by denying a defense's motion for a continuance if the defendant fails to establish specific substantial prejudice.

App. 6–7 (citing *Saget*, 991 F.2d at 708; *United States v. Gossett*, 877 F.2d 901, 905–06 (11th Cir. 1989); *Gibbs*, 594 F.2d at 126–27); *id.* at 8 ("The possibility that [Petitioner's] counsel may have found additional evidence if the district court had granted a continuance, however, does not establish prejudice. *... Because [Petitioner] does not identify any specific evidence that he would have presented at trial if the district court had allowed his counsel more time to review the phone recordings, we cannot say that the district court abused its discretion*.") (emphasis added).

On the § 924(c) convictions, the Eleventh Circuit ruled that § 924(c)(3)(B) (the residual clause definition of crime of violence) is not unconstitutionally vague. App. 4 (citing *Ovalles v. United States*, 905 F.3d 1231, 1234 (11th Cir. 2018) (*en banc*) (rejecting categorical reading of § 924(c)(3)(B), and concluding that whether an offense by its nature involves a substantial risk of use of force is a jury question)). Alternatively, the Eleventh Circuit concluded that aiding and abetting Hobbs Act robbery is an offense that, as required by § 924(c)(3)(A), has as an element the use of force against a person or property. App. 5 (citing *United States v. St. Hubert*, 909 F.3d 335, 345 (11th Cir. 2018)).

REASONS FOR ISSUING THE WRIT

This case is an appropriate vehicle for resolving important questions regarding the erroneous denial of a motion for continuance of a criminal trial to enable court-

appointed counsel to at least have an opportunity to perform the role of counsel in a professional manner that offers some assurance of the fairness of the proceeding as well as to address questions relating to the application of the multiple consecutive 25-year sentence provision of § 924(c).

1. The Eleventh Circuit's Requirement of a Showing of Evidentiary Exclusion to Render the Erroneous Denial of a Continuance Reversible Fails to Protect Due Process and Counsel Rights.

Under circumstances like those presented here, requiring defendants to know what would have been found upon review of the voluminous discovery "would overload the resources of criminal defendants and their attorneys and strain the rules of appellate procedure by requiring defendants to supplement the record." *United States v. Williams*, 576 F.3d 385, 391 (7th Cir. 2009). Nor is it feasible for appellate court-appointed counsel to follow leads, conduct investigations based on those leads, interview witnesses pertinent to those matters, or subpoena document or use compulsory process. Instead, a direct appeal cannot be transformed into a habeas petition as a means of finding error harmless under Fed. R. Crim. P. 52(a).

Appointed counsel on appeal simply cannot fulfill a role that could be performed only in part even by retained counsel. Whatever tools and resources that might be available to retained counsel to continue to prepare to try an already tried case after conviction—and even retained counsel lack subpoena power in that context—no such resources are available to appointed counsel. The obvious and unfair disparity compels

that a reasoned approach to the analysis of prejudicial error in this context cannot include the requirement imposed by the Eleventh Circuit that the appellant "identify any specific evidence that he would have presented at trial if the district court had allowed his counsel more time." App. 8.

2. Because 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, the Court should remand to the Eleventh Circuit for further consideration. *See United States v. Davis*, No. 18-431, __ U.S. __, 2019 WL 2570623 (June 24, 2019).

In light of the Court's holding that the residual clause definition of "crime of violence" in 18 U.S.C. § 924(c) is unconstitutional, and given the remedy imposed, in *United States v. Davis*, No. 18-431, __ U.S. __, 2019 WL 2570623 (June 24, 2019) (remanding to the Fifth Circuit for consideration of whether a full resentencing was warranted), the Court should remand Petitioner's case to the Eleventh Circuit for further consideration.

The Eleventh Circuit's alternative basis for affirming the district court's decision to instruct the jury that Hobbs Act robbery is categorically a "violent crime" is that under the elements clause definition of "crime of violence," § 924(c)(3)(A), robbery always has as an element the threat of force against a person or property. But the Eleventh Circuit ignored that the jury instructions permitted Petitioner to be convicted of robbery on a *Pinkerton* theory of liability, *see Pinkerton v. United States*, 328 U.S. 640 (1946), whereby his mere guilt of conspiracy made him guilty of the substantive offenses based on their reasonable foreseeability. And in other cases, the government

appears to have conceded that the elements clause has no application to Hobbs Act conspiracy. *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018) ("[T]he conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force. Accordingly, the Government concedes that Defendants could only have been convicted as to Count Two under the residual clause."); *United States v. Eshetu*, 898 F.3d 36, 38 n. 2 (D.C. Cir. 2018) (recognizing government's concession that only the residual clause was at issue as to two defendants convicted of Hobbs Act robbery conspiracy). Thus, in light of this Court's ruling in *Davis*, the same relief should be afforded to Petitioner.

3. Application of the firearm enhancement statute, 18 U.S.C. § 924(c).

According to its title, Section 403 of the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018), *clarifies* 18 U.S.C. § 924(c) so that a defendant who was never previously convicted under § 924(c) is not subject to the two-strike recidivist enhancement under § 924(c)(1)(C). Under the clarified version of the statute, Petitioner would be ineligible for the consecutive mandatory minimum 25-year sentences that comprise 125 years of his 138-year sentence.

Section 403(b) of the Fist Step Act provides that the clarification "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." Relatedly, the courts have treated clarifying amendments to sentencing guideline provisions as applicable on direct appeal. *See*, *e.g.*, *United States v. Goines*, 357 F.3d 469, 474 (4th

Cir. 2004) ("A clarifying amendment must be given effect at sentencing and on appeal, even when the sentencing court uses an edition of the guidelines manual that predated adoption of the amendment.").

The rule of lenity requires that ambiguous criminal laws be interpreted in favor of the defendants subject to them. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). And the rule has special force with respect to laws that impose mandatory minimums. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980). It would be contrary not only to the rule of lenity, but also the doctrine of constitutional avoidance, given the profound questions that would be raised under the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment, if Petitioner is denied the benefit of a clarifying statute that otherwise applies directly to him. *Hooper v. California*, 155 U.S. 648, 657 (1895). And because there is room for debate as to the need for avoiding irrational disparities in the application of such provisions to defendants whose cases are not final and thus whose sentences are subject to vacation and resentencing, the Court should grant review or remand for further consideration of the issue by the court of appeals.

CONCLUSION

The Eleventh Circuit's decision warrants review by the Court.

Respectfully submitted,

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June 2019

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, *United States v. Nelson,* No. 17-12375 (Feb. 7, 2019) . . . . . App. 1

Decision of the Court of Appeals for the Eleventh Circuit denying petition for rehearing, *United States v. Nelson,* No. 17-12375 (Mar. 26, 2019) . . . . . App. 12

Judgment imposing sentence, United States District Court, S.D. Fla., *United States v. Nelson,* No. 16-20119-Cr-DMM (May 18, 2017) . . . . . App. 13

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12375
Non-Argument Calendar

D.C. Docket No. 1:16-cr-20119-DMM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREW NELSON,

Defendant-Appellant.

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

(February 7, 2019)

Before WILLIAM PRYOR, JORDAN, and GRANT, Circuit Judges.

PER CURIAM:

Andrew Nelson appeals his convictions for one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); six counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); and six counts of brandishing a firearm in furtherance of a crime of violence, in violation of the Armed Career Criminal Act, 18 U.S.C. § 924(c). On appeal, he argues that his convictions under § 924(c) are invalid because Hobbs Act robbery is not a "crime of violence" under the ACCA's elements clause, § 924(c)(3)(A), and because the ACCA's residual clause, § 924(c)(3)(B), is unconstitutionally vague. Mr. Nelson also contends that the district court erred by denying his attorney's request for additional time to prepare for trial and by denying his motion for a mistrial. Because Mr. Nelson's challenges to his § 924(c) convictions are foreclosed by precedent, and because Mr. Nelson cannot show that he was prejudiced by the district court denying his motions for a continuance and mistrial, we affirm.

I

We review the district court's application of § 924(c) de novo. *See United States v. Tate*, 586 F.3d 936, 946 (11th Cir. 2009). Under the prior-panel-precedent rule, however, we are bound by our prior decisions unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

The ACCA provides for mandatory minimum sentences for any defendant who uses or carries a firearm during a crime of violence or a drug-trafficking crime. *See* § 924(c)(1). For the purposes of the ACCA, "crime of violence" means an offense that is a felony and

> (A) 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.

§ 924(c)(3)(A), (B). We commonly refer to § 924(c)(3)(A) as the "elements clause," and § 924(c)(3)(B) as the "residual clause." *See, e.g.*, *Ovalles v. United States*, 905 F.3d 1231, 1234 (11th Cir. 2018) (en banc).

On appeal, Mr. Nelson contends that his convictions do not qualify as crimes of violence under either the elements clause or residual clause. First, Mr. Nelson argues that Hobbs Act robbery is not a crime of violence under § 924(c)'s elements clause because it can be committed without the use, attempted use, or threatened use of force. He also argues that, because the prosecution alternatively pursued an aiding and abetting theory, his convictions must be construed as being for aiding and abetting Hobbs Act robbery—which does not qualify under § 924(c)'s elements clause. Second, Mr. Nelson argues that § 924(c)'s residual clause is unconstitutionally vague under the Supreme Court's rulings in *Johnson v. United*

States, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). These arguments are foreclosed by binding precedent. *See Smith v. GTE Corp*., 236 F.3d 1292, 1302–04 (11th Cir. 2001).

After the parties briefed this appeal, we decided *Ovalles v. United States*, 905 F.3d 1231, 1252–53 (11th Cir. 2018) (en banc), and held that the Supreme Court's decisions in *Johnson* and *Dimaya* did not render § 924(c)'s residual clause unconstitutionally vague. We reasoned that the constitutional-doubt canon of statutory construction required us to apply § 924(c)'s residual clause using a conduct-based approach, as opposed a categorical approach, considering the "actual, real-world facts of the crime's commission" to determine whether a defendant's crime qualifies under the residual clause. *Id*. at 1253. We subsequently applied the rule from *Ovalles* in *United States v. St. Hubert*, 909 F.3d 335, 344–45 (11th Cir. 2018), concluding that the defendant's vagueness challenge to § 924(c)'s residual clause failed. Applying the conduct-based approach, we concluded that the defendant's Hobbs Act robbery conviction was as a "crime of violence" under the residual clause because he brandished a firearm during a robbery and threatened to shoot store employees. *See id*. at 345.[1]

[1] We acknowledge that the Supreme Court recently granted certiorari to review whether § 924(c)'s residual clause is unconstitutionally vague in light of *Johnson* and *Dimaya*. *See United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), *cert. granted*, No. 18-431, 2019 WL 98544 (U.S. Jan. 4, 2019). But the constitutionality of § 924(c)'s residual clause does not control the outcome of this appeal because we also conclude that Mr. Nelson's Hobbs Act robbery convictions qualify as crimes of violence under § 924(c)'s elements clause. For the same reason, we need not apply the

In *St. Hubert* we also concluded that—even if *Johnson* and *Dimaya* invalidated § 924(c)'s residual clause—the defendant's § 924(c) challenge failed because we had previously held that Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause. *See id*. at 345 (*citing In re Saint Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016)). We then went on to cite *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016), which held that aiding and abetting Hobbs Act robbery similarly qualifies as a crime of violence under § 924(c)'s elements clause because a person convicted of aiding and abetting an offense is punishable as a principal, and nothing in § 924(c) suggested that Congress intended to limit aiding and abetting liability. *See St. Hubert*, 909 F.3d at 345.

On appeal, Mr. Nelson acknowledges our decisions in *Colon* and *Saint Fleur*, but contends that they are not binding here because both were rulings on applications to file a second or successive 28 U.S.C. § 2255 motion, as opposed to direct appeals, and were decided without full briefing. This argument is also foreclosed by *St. Hubert*. There, we explicitly determined that the decisions in *Saint Fleur* and *Colon* are binding, despite being rulings on second or successive applications. *See* 909 F.3d at 346 ("Lest there by any doubt, . . . law established . . . in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all subsequent panels of this court[.]") (emphasis in original).

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conduct-based approach from *Ovalles*, 905 F.3d at 1253.

Because Mr. Nelson's challenges to his § 924(c) convictions are foreclosed by *St. Hubert*, *Ovalles*, and *Colon*, we affirm his convictions on those grounds.

II

We review the district court's the denial of Mr. Nelson's motion to continue his trial date for an abuse of discretion. *See United States v. Bergouignan*, 764 F.2d 1503, 1508 (11th Cir. 1985). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case[.]" *United States v. Valladares*, 544 F.3d 1257, 1262 (11th Cir. 2008) (per curiam) (quoting *United States v. Verderame*, 51 F.3d 249, 251 (11th Cir. 1995)). To obtain reversal due to the denial of a continuance, however, the defendant "must show that the denial . . . resulted in specific substantial prejudice." *Bergouignan*, 764 F.2d at 1508. "To make such a showing, [the defendant] must identify relevant, non-cumulative evidence that would have been presented if his request for a continuance had been granted." *United States v. Saget*, 991 F.2d 702, 708 (11th Cir. 1993). If the defendant fails to proffer evidence or theories that would have been presented had he been granted a continuance, he has not shown specific substantial prejudice. *See United States v. Gibbs*, 594 F.2d 125, 127 (5th Cir. 1979) (per curiam).

Here, the district court granted Mr. Nelson's motion to discharge his original defense counsel and appointed new counsel on December 5, 2016. To allow Mr.

Nelson's new attorney to get up to speed, the district court continued Mr. Nelson's trial for seven weeks, until January 23, 2017. On January 12, 2017, Mr. Nelson's new attorney moved to continue the January 23 trial date to allow him more time to review evidence and prepare for trial. The district court denied that motion, citing the numerous times that the trial had already been continued.

In our view, the district court did not commit reversible error by denying Mr. Nelson's motion for a continuance. Forty-nine days is a relatively short period of time to prepare a defense when a defendant faces life in prison, and we acknowledge that the government requested most of the prior continuances in this case. But even if we are inclined to agree that a continuance was warranted, Mr. Nelson does not point to any relevant, non-cumulative evidence that he would have presented if the court had granted the continuance. *See Valladares*, 544 F.3d at 1264–65. Facing similar circumstances, we have repeatedly held that a district court does not abuse its discretion by denying a defense's motion for a continuance if the defendant fails to establish specific substantial prejudice. *See id.* (concluding that the district court did not abuse its discretion by denying a continuance with only thirty-five days prepare for trial); *Saget*, 991 F.2d at 708 (affirming the denial of a continuance where the defense was only allowed fourteen days to review new evidence); *United States v. Gossett*, 877 F.2d 901, 905–06 (11th Cir. 1989) (per curiam) (affirming the denial of a seven-day continuance where the defense was allowed twenty-three days to

prepare for trial); *Gibbs*, 594 F.2d at 126–27 (affirming the denial of a continuance where the defense was allowed approximately one month to prepare for trial).

On appeal, Mr. Nelson argues that the fact that his second attorney was not permitted enough time to review "hundreds of hours of jail phone calls" establishes that he was substantially prejudiced. The possibility that Mr. Nelson's counsel may have found additional evidence if the district court had granted a continuance, however, does not establish prejudice. *See United States v. Perez*, 473 F.3d 1147, 1150–51 (11th Cir. 2006) (per curiam) (affirming the denial of a continuance to review recordings because the defendant "present[ed] no reason why further review would have revealed" exculpatory evidence). Because Mr. Nelson does not identify any specific evidence that he would have presented at trial if the district court had allowed his counsel more time to review the phone recordings, we cannot say that the district court abused its discretion.

III

Like the denial of a continuance, we review the district court's denial of Mr. Nelson's motion for a mistrial for an abuse of discretion. *See United States v. McGarity*, 669 F.3d 1218, 1232 (11th Cir. 2012). To justify a mistrial, the defendant must show substantial prejudice—i.e., "a reasonable probability that, without the improper event, *the result of the trial would have been different*." *See United States*

v. Barsoum, 763 F.3d 1321, 1340 (11th Cir. 2014) (emphasis added). Mr. Nelson fails to meet this high standard.

At trial, Mr. Nelson's attorney cross-examined one of the alleged robbery victims. When the attorney attempted to discredit the victim's identification of Mr. Nelson, the witness became agitated, started cursing, accused the attorney of lying, and accused the attorney of unfairly implying that he (the witness) was lying. *See* D.E. 372 at 212. After the district court excused the jury, the attorney moved for a mistrial, arguing that Mr. Nelson could no longer receive a fair trial after the government's only non-cooperating eyewitness made such accusations, used "opprobrious language," and failed to respond to questions. *Id.* at 214–15. The district court denied the motion.

The function of defense counsel is essential to due process, and an attorney is entitled to courtesy and respect. *See United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987), *overruled on other grounds by United States v. Watson*, 866 F.2d 381, 385 n.3 (11th Cir. 1989); *Zebouni v. United States*, 226 F.2d 826, 827 (5th Cir. 1955). At the same time, "the trial judge has broad discretion in handling the trial and [we] should restrain [ ] from interposing [our] opinion absent a clear showing of abuse." *McLain*, 823 F.2d at 1460. *See also United States v. Emmanuel*, 565 F.3d 1324, 1334 (11th Cir. 2009) ("The district court is in the best position to evaluate

the prejudicial effect of a statement or evidence on the jury.") (quotation marks omitted).

We have suggested in past cases that the court or the government disparaging defense counsel in front of the jury may unfairly prejudice the defendant. *See Zebouni*, 226 F.2d at 827–28 (the judge); *McLain*, 823 F.2d at 1462 (the government). Neither party, however, cites a case where a government witness disparaging a defense attorney on cross-examination caused sufficient prejudice to justify a mistrial. In *United States v. De La Vega*, 913 F.2d 861, 867 (11th Cir. 1990), we found no error where a government witness "volleyed" disparaging remarks at the defense attorney on cross-examination because there is "no governmental duty to muzzle prosecution witnesses on cross-examination" and "there are no cases requiring reversal because of disparaging remarks made by witnesses." Moreover, we noted that "the trial judge [in *De La Vega*] labored to minimize and cure this witness's disparaging remarks." *Id.* *See also Messer v. Kemp*, 760 F.2d 1080, 1087 (11th Cir. 1985) ("Because the trial judge is in the best position to evaluate the prejudicial effect of [an] outburst [by the victim's father], the decision on whether to grant a mistrial lies within his sound discretion.")

In this case, the district court did not abuse its discretion in denying Mr. Nelson's motion for a mistrial. Although our decisions in *Zebouni* and *McLain* suggest that attacks on defense counsel *may* rise to the level of substantial prejudice,

those cases dealt with disparagement by the court and the government, not a witness on cross-examination. *Cf. De La Vega*, 913 F.2d at 867.

Mr. Nelson does not otherwise establish substantial prejudice. He has not shown that, without the witness' outburst, there is a reasonable probability that the result of the trial would have been different. *See Barsoum*, 763 F.3d at 1340. It may be true that the witness' accusations and distasteful language prejudiced the jury against Mr. Nelson. But the witness' statements—which the trial judge contemporaneously admonished—could equally have soured the jury against the witness and the prosecution. Moreover, there was ample evidence, aside from this witness' testimony, to establish guilt, including that Mr. Nelson admitted to committing one of the alleged robberies and statements from other cooperating witness.

IV

For the foregoing reasons, we affirm Mr. Nelson's convictions under § 924(c) and the district court's denial of Mr. Nelson's motions for a continuance and a mistrial.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12375-GG

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ANDREW NELSON,

Defendant - Appellant.

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

BEFORE: WILLIAM PRYOR, JORDAN, and GRANT, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
ANDREW NELSON

JUDGMENT IN A CRIMINAL CASE

Case Number: **16-20119-CR-MIDDLEBROOKS**
USM Number: **13050-104**

Counsel For Defendant: **Albert Levin**
Counsel For The United States: **Ignacio J. Vazquez, Jr.**
Court Reporter: **Lisa Edwards**

The defendant was found guilty on count(s) 1, 3, 4, 7, 8, 9, 10, 13, 14, 15, 16, 17 and 18 of the indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §1951(a)	Conspiracy to commit Hobbs Act robberies	05/04/2016	1
18 U.S.C. §1951(a)	Hobbs Act robbery	04/15/2015	3
18 U.S.C. §924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	04/15/2015	4
18 U.S.C. §1951(a)	Hobbs Act robbery	04/22/2015	7
18 U.S.C. §924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	04/22/2015	8
18 U.S.C. §1951(a)	Hobbs Act robbery	04/27/2015	9
18 U.S.C. §924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	04/27/2015	10
18 U.S.C. §1951(a)	Hobbs Act robbery	05/07/2015	13
18 U.S.C. §924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	05/07/2015	14
18 U.S.C. §1951(a)	Hobbs Act robbery	05/09/2015	15
18 U.S.C. §924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	05/09/2015	16
18 U.S.C. §1951(a)	Hobbs Act robbery	05/13/2015	17
18 U.S.C. §924(c)(1)(A)(ii)	Brandishing a firearm in furtherance of a crime of violence	05/13/2015	18

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

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

Date of Imposition of Sentence: **5/16/2017**

Donald M. Middlebrooks
United States District Judge

Date: 5/18/17

DEFENDANT: **ANDREW NELSON**
CASE NUMBER: **16-20119-CR-MIDDLEBROOKS**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE THOUSAND SIX HUNDRED SIXTY-TWO (1,662) MONTHS. This term consists of concurrent terms of Seventy-Eight (78) Months as to each of Counts 1, 3, 7, 9, 13, 15 and 17, a consecutive term of Eighty-Four (84) Months as to Count 4 and a consecutive term of Three Hundred (300) months as to each of Counts 8, 10, 14, 16 and 18.**

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

1. **The Defendant participate in the 500 hour drug treatment program (RDAP) while in custody.**
2. **The Defendant be designated to a facility in or as close to South Florida as possible.**

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

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **ANDREW NELSON**
CASE NUMBER: **16-20119-CR-MIDDLEBROOKS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS. This term consists of concurrent terms of Three (3) years as to each of Counts 1, 3, 7, 9, 13, 15 and 17 and Five (5) years as to each of Counts 8, 10, 14, 16 and 18.**

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: **ANDREW NELSON**
CASE NUMBER: **16-20119-CR-MIDDLEBROOKS**

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction - The defendant is prohibited from associating with his co-defendants and with the defendants in the related cases while on probation/supervised release.

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

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

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

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

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **ANDREW NELSON**
CASE NUMBER: **16-20119-CR-MIDDLEBROOKS**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$1,300.00	$0.00	$4,938.21

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE
See attached victim list	$0.00	$4,938.21	

Restitution with Imprisonment - It is further ordered that the defendant shall pay joint and several restitution in the amount of $4,938.21. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

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

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

DEFENDANT: **ANDREW NELSON**
CASE NUMBER: **16-20119-CR-MIDDLEBROOKS**

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $1,300.00 due immediately.

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

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

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

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

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

Joint and Several

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

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT
16-20119-CR-DMM Andrew Nelson (1), Steven Alfred Stafford (2) Jarvis Robinson (3), Terril Kinchen (4) 15-20783-CR-FAM Torrence Lawton (1) 16-20847-CR-JEM Anthony Stuckey (1)	$0.00	$4,938.21

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.