NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES

QUARTAVIOUS DAVIS,

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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QUESTION PRESENTED

Does a criminal defense attorney provide prejudicially ineffective assistance of counsel by failing to initiate plea negotiations with the prosecutors where such negotiations would be likely to yield a substantially better outcome for the defendant than would going to trial or, instead, does counsel's plea-negotiation obligation arise only if the prosecutors first initiate plea negotiations and make a plea offer?

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

Quartavious Davis respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 20-11149 in that court on February 10, 2022. App. 1 (*Davis v. United States*, 2022 WL 402915).

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), along with an order of the Eleventh Circuit denying the petition for rehearing en banc and panel rehearing (App. 7). The decision is not published in the Federal Reporter.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on February 10, 2022, and rehearing was denied on May 9, 2022. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner relies upon the following constitutional provision:

U.S. Const. amend. VI:

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

STATEMENT OF THE CASE

Criminal Proceedings

Petitioner was charged in the United States District Court for the Southern District of Florida with several offenses arising from seven Hobbs Act robberies, in violation of 18 U.S.C. § 1951. Included were seven counts of possessing a firearm in connection with the charged robberies, in violation of 18 U.S.C. § 924(c). Petitioner was convicted at trial and sentenced to 1,917 months' imprisonment.

Two of Petitioner's co-defendants, Jarmarquis Reid and Willie Smith, were charged with participating in six of the robberies; co-defendant Jahmal Martin was charged with participating in two of the robberies; and co-defendants Michael Martin and Sylvester Fisher each were charged with participating in one robbery.

The robberies occurred over a two-month span, while Petitioner was 18 and 19 years old. Petitioner suffered from bipolar disorder and a severe learning disability, and he had no prior convictions. Undisputed trial evidence established that other persons planned the robberies and recruited Petitioner to participate.

While Petitioner elected to have a jury trial, his five co-defendants all entered guilty pleas and were rewarded with charging and/or sentencing leniency. The two most similarly situated co-defendants, Jamarquis Reid and Willie Smith, each pleaded guilty to two § 924(c) charges and corresponding Hobbs Act robbery and conspiracy charges. Pursuant to written plea agreements, the government moved to dismiss four additional § 924(c) charges and corresponding Hobbs Act charges for each. Each received an aggregate 384-month sentence that later was reduced to 230 months. The

other defendants also reached agreements with the government, and each was rewarded with charging and/or sentencing leniency.

Petitioner's attorney knew prior to trial that the government planned to introduce evidence linking Petitioner's cell phone to the sites of six of the seven robberies. Additionally, counsel knew some or all of Petitioner's co-defendants would be available to testify against him. Indeed, Willie Smith and Michael Martin testified against Petitioner and described his participation in each of the robberies. The government introduced the cell phone location evidence, which bolstered the credibility of the co-defendants' testimony. This evidence, as well as additional testimonial, video, and documentary evidence resulted in Petitioner's convictions on all charged offenses.

For his convictions in this case, Petitioner currently is serving a custodial sentence of 1,917 months (159.75 years), of which the vast majority (155 years) was mandated by his seven § 924(c) convictions.[1] The district court stated it would have imposed a 40-year sentence if it were given the discretion to do so. Petitioner's convictions were affirmed on direct appeal. *See United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc).

Proceedings Pursuant to 28 U.S.C. § 2255

After exhausting his opportunities for direct appeal, Petitioner filed a timely motion pursuant to 28 U.S.C. § 2255 and raised several claims for relief. He argued,

[1] An intervening amendment to the statute's penalty provision (18 U.S.C. § 924(c)(1)(A)) reduced the minimum sentence mandated for second and subsequent § 924(c) convictions from 25 years to 5 years. The aggregate minimum sentence that would apply to a defendant sentenced today would be 35 years.

among other things, that his trial attorney rendered ineffective assistance of counsel by failing to pursue and negotiate a plea agreement with the government, and by failing to render adequate advice to Petitioner regarding matters related to the decision of whether to plead guilty or go to trial. Petitioner stated he would have pleaded guilty if he had been provided with proper advice.

Petitioner requested a hearing on his § 2255 motion. A magistrate judge recommended denial of the motion without providing Petitioner a hearing. The district court denied the motion without providing Petitioner a hearing.

Appeal From Denial of § 2255 Motion

Petitioner filed a timely notice of appeal from the district court's order, and the court of appeals granted a certificate of appealability on multiple issues, including whether trial counsel was ineffective for failing to pursue a negotiated plea agreement on Petitioner's behalf and whether the district court abused its discretion by denying the § 2255 motion without an evidentiary hearing.

After the parties briefed these issues, the court of appeals affirmed the judgment of the district court. In its opinion, the court of appeals set out the two-pronged performance and prejudice test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for considering a claim of ineffective assistance of counsel. App. 4-5. Without addressing *Strickland*'s performance prong, the court of appeals concluded Petitioner could not satisfy the prejudice prong. App. 5-6. The court of appeals stated:

> To demonstrate prejudice in the plea process, Davis must show that the plea agreement would have been presented to the court.… Davis

> did not allege in his § 2255 motion that the government even offered a plea deal, nor does he allege that he would have accepted one.

Id. On this basis, the court of appeals affirmed the district court's denial of Petitioner's claim of ineffective assistance of counsel regarding his attorney's failure to pursue a plea agreement, and the district court's denial of an evidentiary hearing on Petitioner's § 2255 motion. *Id*. The court of appeals summarily denied a petition for rehearing. App. 7.

REASONS FOR GRANTING THE PETITION

The Sixth Amendment guarantees defendants the assistance of competent counsel in defending against criminal charges. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). U.S. Const., amend. VI. The right to counsel "is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

The right to counsel encompasses the right to "effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Under *Strickland*, a defendant is entitled to relief upon a showing that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability (sufficient to undermine confidence in the outcome) that, but for counsel's objectively unreasonable performance, the proceeding's result would have differed. *Strickland*, 466 U.S. at 687-94. A petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. at 693.

The right to competent counsel applies during the pretrial period when plea negotiations typically occur. In *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010), the Supreme Court observed, "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel" (quotation marks omitted). The Court also stated, "[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Id.* at 373; *see also Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (defendants' Sixth Amendment right to counsel "extends to the plea-bargaining process").

These principles establish that Petitioner was constitutionally entitled to competent representation in the pursuit and negotiation of a plea agreement and for the purpose of providing meaningful advice regarding the advisability of a guilty plea. Petitioner's attorney provided deficient representation when he failed to initiate plea negotiations for Petitioner. Petitioner was facing the near certainty of a longer-than-life sentence if he went to trial, and similarly situated co-defendants had secured favorable plea agreements that shortened their mandatory sentences by 100 years. In its response to Petitioner's § 2255 motion, the government did not dispute Petitioner's allegation that defense counsel failed to pursue a plea agreement. Neither did the government dispute that defense counsel's failure to pursue plea negotiations constituted deficient performance.

The court of appeals implicitly concluded Petitioner had established his attorney's deficient performance in not initiating plea negotiations when it chose to

address only the prejudice prong of two-part ineffective assistance inquiry required by *Strickland*, 466 U.S. at 687. Any other conclusion would be factually implausible in this case. The only reasonable means available to Petitioner to avoid a longer-than-life sentence was through a plea agreement, and his similarly-situated co-defendants successfully pursued that path.

Any other conclusion also is legally implausible, given the central importance plea bargaining has in the criminal justice system. Because the vast majority of criminal cases in federal courts are resolved by guilty pleas, the Supreme Court has recognized that plea agreements are central to the administration of the criminal justice system. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions…are the result of guilty pleas."). Indeed, the Supreme Court has observed that the criminal justice system "is for the most part a system of pleas, not a system of trials." *Lafler*, 566 U.S. at 170. As a result, "plea bargaining…is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (internal quotation marks omitted). For these reasons, "criminal defendants require effective counsel during plea negotiations. Anything less…might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Frye*, 566 U.S. at 144 (2012) (citations and quotation marks omitted).

The court of appeals nevertheless denied relief, concluding that Petitioner could not show prejudice absent an allegation that the government had "offered a plea deal." App. 6. Contrary to the court of appeals' conclusion, Petitioner established prejudice

through his indisputable allegations that his similarly-situated co-defendants were able to negotiate plea agreements that required the dismissal of multiple counts charging violations of § 924(c). There was no reason the government would not have been willing to extend to Petitioner the same benefits conferred on his co-defendants, if it had been asked to do so.

The record shows Petitioner would have been a suitable recipient of a plea agreement similar to those extended to his co-defendants. Petitioner was young at the time of his offenses, having reached his 19th birthday during the two-month span over which the robberies occurred. Additionally, Petitioner suffered from bipolar disorder and a severe learning disability, and he had no prior convictions. Regarding Petitioner's role in the offenses, undisputed trial evidence established that other persons planned the robberies and recruited Petitioner to participate. Under these circumstances, it is likely that Petitioner would have received an agreement similar to those negotiated by his co-defendants if his attorney had initiated plea negotiations.

The court of appeals' holding that a defendant can never show he was prejudiced by his attorney's failure to pursue plea negotiations where the government has not offered a plea deal not only is erroneous, but also is in conflict with holdings of the Fourth, Sixth, and Eighth Circuits. In those Circuits, the courts have applied a case-by-case approach to determining whether a defendant can establish prejudice absent the government's offer of a plea deal. *See Byrd v. Skipper*, 940 F.3d 248, 259 (6th Cir. 2019) (finding prejudice despite the government's failure to offer a plea deal where evidence showed that, but for counsel's error, a plea offer would have been

available); *United States v. Pender*, 514 F. App'x 359, 360-61 (4th Cir. 2013) (unpublished) (finding prejudice although the defendant did not allege the government had offered a plea deal, where the government "concede[d] that a plea bargain with a beneficial sentence would have been (or was) offered had counsel pursued it"); *Hawkman v. Parratt*, 661 F.2d 1161, 1171 (8th Cir. 1981) (under the facts presented, defense "counsel's failure to initiate plea negotiations…constituted ineffective assistance of counsel which prejudiced Hawkman").

In *Byrd*, 940 F.3d at 251, the Sixth Circuit granted relief to a state court defendant whose attorney failed to initiate plea negotiations. The defendant was sentenced to life without parole after a trial conviction for aiding and abetting a first-degree felony murder. *Id*. The principal defendant negotiated a plea agreement that allowed her to plead guilty to lesser charges, and she ultimately received a sentence of 30-50 years. *Id*. at 252. Evidence supported a finding that the defendant would have received a favorable plea agreement if his attorney had requested it. *Id*. The Court held, "[W]here a petitioner alleges ineffective assistance of counsel prevented plea negotiations, demonstrating prejudice requires that he establish a reasonable probability that but for counsel's errors, the petitioner would have received a plea offer." *Id*. at 257 (citing *Lafler*, 566 U.S. at 163-64; *Frye*, 566 U.S. at 148-49). Petitioner has satisfied this requirement by pointing to the plea offers extended to and accepted by his co-defendants. In *Byrd*, 940 F.3d at 258, the court held that a movant can demonstrate that a favorable plea agreement would have been available through negotiation by pointing to a plea agreement reached by a co-defendant. Such

comparisons in this case demonstrate that the government would have offered a favorable plea agreement to Petitioner.

In *Pender*, 514 F. App'x at 360-61, the Fourth Circuit granted relief to a federal defendant whose attorney failed to initiate plea negotiations. *Pender* presents a factual background similar to Petitioner's case: "Pender averred that his attorney failed to seek a plea bargain even though the evidence against him was quite strong and he faced a mandatory life sentence if convicted." *Id.* at 360. The government asserted, without offering proof, that Pender was offered a beneficial plea agreement but had rejected it. *Id*. Without accepting the government's unproven allegations, the Fourth Circuit concluded the record supported a finding that Pender would have received a beneficial plea bargain if his attorney had pursued it. *Id.* at 361. Accordingly, Pender showed "that he was prejudiced by his attorney's actions." *Id*. The same conclusion is compelled here, where Petitioner's similarly-situated co-defendants received beneficial plea agreements.

In *Hawkman*, 661 F.2d at 1170-71, the Eighth Circuit granted relief to a state court defendant whose attorney had failed to initiate plea negotiations. The defendant pleaded guilty as charged, without an agreement, to four offenses. *Id.* at 1163. The defendant alleged his attorney should have initiated plea negotiations based on the duplicitous nature of the charged offenses. *Id.* at 1170-71. Having concluded that defense counsel rendered deficient performance when he failed to initiate plea negotiations, the Eighth Circuit concluded this failure prejudiced the defendant. *Id.* at 1171. Likewise, here, given the likelihood that Petitioner's sentence would have been

greatly mitigated if his attorney had initiated plea negotiations, Petitioner has alleged prejudice that warrants relief.

In light of the overwhelming importance of plea agreements in the administration of criminal justice, and in light of the circuit split on the question of whether a defendant can show prejudice based on his attorney's failure to initiate plea negotiations regardless of whether the government offered a plea agreement, a grant of certiorari is warranted to resolve a question of great importance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.
Counsel for Petitioner

Miami, Florida
August 2022

APPENDIX

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-11149

Non-Argument Calendar

QUARTAVIOUS DAVIS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket Nos. 1:19-cv-21457-JAL,
1:10-cr-20896-JAL-2

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Petitioner-Appellant Quartavious Davis appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his convictions and sentences. At issue on appeal is Davis's claim in his § 2255 motion that his trial counsel was ineffective for failing to pursue a plea deal for Davis and failing to advise him of the consequences of not pleading guilty. The district court denied Davis's § 2255 motion without an evidentiary hearing. On appeal, Davis argues that the district court abused its discretion by not holding an evidentiary hearing regarding Davis's plea deal, ineffective assistance of counsel claims. Because Davis failed to sufficiently plead facts showing that he was entitled to relief, the district court did not err in denying his ineffective assistance of counsel claims without holding an evidentiary hearing. Accordingly, we affirm.

I

In February 2011, a grand jury returned a 17-count superseding indictment against Davis and his five codefendants. Davis was charged with two counts of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); seven counts of Hobbs Act robbery, in violation of § 1951(a); six counts of using, carrying, and possessing a firearm during a crime of violence, in violation of § 924(c)(1)(A)(ii); and one count of using, carrying, and possessing a firearm during a crime of violence, in violation of § 924(c)(1)(A)(iii).

Davis was convicted on all 16 counts, making him subject to six mandatory consecutive terms of 25 years' imprisonment and one mandatory consecutive term of five years' imprisonment for his § 924(c) charges. The district court sentenced Davis to a total of 1,917 months' imprisonment.

In 2019, Davis filed a 28 U.S.C. § 2255 motion to vacate his convictions. Davis raised numerous challenges to his convictions and sentences, including a claim that his trial counsel was "ineffective in failing to seek and negotiate a plea on [his] behalf, and in failing to adequately advise [him] to plead guilty, despite the near-certain conviction and dire sentencing consequences." Davis alleged that his trial counsel was ineffective by not discussing with him (1) the benefits and detriments of going to trial as opposed to pleading guilty; (2) the potential consequences of his codefendants' guilty pleas and cooperation with the government, particularly when considered alongside powerful cellphone location data evidence placing Davis near the robbery sites; and (3) counsel's understanding that Davis faced a "certainty of conviction," and that Davis would receive a life sentence based on the mandatory stacking of his 18 U.S.C. § 924(c) penalties.

A magistrate judge issued a report and recommendation (R&R) on Davis's § 2255 motion, recommending a denial without holding an evidentiary hearing. Regarding Davis's plea deal, ineffective assistance of counsel claims, the magistrate judge concluded that Davis failed to demonstrate prejudice because there was no evidence that a plea deal was offered. The district court adopted

the R&R and supplemented it with the finding that Davis had not alleged that he (1) had ever told his trial counsel that he was interested in pursuing a plea deal; and (2) would have accepted a plea offer if one had been presented to him. As a result, the district court denied Davis's § 2255 motion. Davis appealed and moved for a certificate of appealability (COA). We granted the COA as to (1) whether Davis's trial counsel was ineffective in failing to pursue a plea deal and discuss with Davis the advisability of pleading guilty and (2) whether the district court abused its discretion in failing to hold an evidentiary hearing.

II.

In an appeal from the denial of a § 2255 motion, we review the district court's legal conclusions de novo and its factual findings for clear error. *Mamone v. United States*, 559 F.3d 1209, 1210 (11th Cir. 2009) (per curiam). We review a district court's denial of an evidentiary hearing in a § 2255 proceeding only for abuse of discretion. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014).

To assert a successful claim of ineffective assistance of counsel, a defendant must allege facts showing that: (1) his counsel was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The right to effective assistance of counsel "extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To establish prejudice in the plea process, a defendant must show a reasonable probability that, but for counsel's ineffectiveness: (1) the plea offer

would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it); (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that were imposed. *Id.* at 164.

Turning first to Davis's ineffective assistance of counsel claim, Davis argues that his trial counsel was ineffective in failing to pursue a plea deal given that: (1) it was clear that he was going to be convicted for charges that would yield a longer-than-life mandatory sentence and (2) two of Davis's similarly-situated codefendants negotiated a plea deal resulting in the dismissal of multiple 18 U.S.C. § 924(c) charges. He contends that his allegations and the record support the conclusion that, absent counsel's deficient performance, the government would have offered a plea agreement that included a dismissal of some of his § 924(c) charges. And given proper advice, Davis would have been willing to enter a guilty plea, which would have resulted in a significantly lower sentence. Thus, according to Davis, his trial counsel's failure to pursue a plea deal prejudiced him. As a result, Davis argues, the district court erred in denying his § 2255 motion without a hearing.

Davis's ineffective assistance of counsel claim fails because he cannot show prejudice under the second prong of *Strickland*. 466 U.S. at 687. To demonstrate prejudice in the plea process, Davis must show that the plea agreement would have been presented to the court. *Lafler*, 566 U.S. at 164. Davis did not allege in his §

2255 motion that the government even offered a plea deal, nor does he allege that he would have accepted one. Accordingly, we affirm the district court's denial of Davis's ineffective assistance of counsel claims regarding trial counsel's failure to pursue a plea deal.

We turn next to Davis's second claim on appeal, that the district court abused its discretion in denying his § 2255 motion without an evidentiary hearing. The "decision to grant an evidentiary hearing [is] generally left to the sound discretion of district courts." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "[W]hen considering whether an evidentiary hearing should be held on habeas claims based on occurrences outside the record, no hearing is required if the allegations viewed against the record . . . fail to state a claim for relief . . . ." *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (internal quotation marks omitted).

The district court did not abuse its discretion in denying Davis's § 2255 motion without holding an evidentiary hearing. The decision to grant an evidentiary hearing is left to the discretion of the district court, *Schriro*, 550 U.S. at 473, and a hearing is not required when the allegations fail to state a claim for relief, *Tejada*, 941 F.2d at 1559. As discussed above, Davis failed to sufficiently plead facts showing that he was prejudiced by his trial counsel's alleged deficient performance. Thus, the district court properly denied Davis's § 2255 motion without an evidentiary hearing because he failed to state a claim for relief. Accordingly, we affirm.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11149-CC

QUARTAVIOUS DAVIS,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-21457-CIV-LENARD/O'SULLIVAN
(Criminal Case No. 10-20896-Cr-Lenard)

QUARTAVIOUS DAVIS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING AND SUPPLEMENTING REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE (D.E. 12), DENYING MOTION TO VACATE CONVCITION UNDER 28 U.S.C. § 2255 (D.E. 1), DENYING CERTIFICATE OF APPEALABILITY, AND CLOSING CASE

THIS CAUSE is before the Court on the Report and Recommendation of Magistrate Judge John J. O'Sullivan issued November 7, 2019, ("Report," D.E. 12), recommending that the Court deny Movant Quartavious Davis's Motion to Vacate Conviction Under 28 U.S.C. § 2255 filed April 16, 2019, ("Motion," D.E. 1). Movant filed Objections on December 23, 2019, ("Objections," D.E. 15), to which the Government did not respond. Upon review of the Report, Objections, and the record, the Court finds as follows.

I. Background

a. Factual and procedural background

As described in further detail below, between August 7, 2010 and October 1, 2010, Movant (with the help of others) committed armed robberies at a pizzeria, a gas station, a

drugstore, an auto parts store, a beauty salon, a fast food restaurant, and a jewelry store. (See Superseding Indictment, Cr-D.E. 39.)

On February 18, 2011, a federal grand jury sitting in the Southern District of Florida returned a seventeen count Superseding Indictment against Movant and five co-defendants. (See id.) Movant was named in sixteen of the seventeen counts, including: (1) two counts of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Counts 1 and 15); (2) seven counts of Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 2, 4, 6, 8, 10, 13, and 16); (3) six counts of knowingly using and carrying a firearm during a crime of violence, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2 (Counts 3, 5, 7, 9, 11, and 17); and (4) one count of knowingly using and carrying a firearm during a crime of violence, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Count 14). (See id.) Each Section 924(c) charge was premised on the preceding Hobbs Act robbery charge. (See id.)

The Hobbs Act robbery charges in Counts 2, 4, 6, 8, 10, 13, and 16 stated that Movant and his co-conspirators took currency and other property "from the person and in the presence of persons employed by, and persons patronizing" various businesses that were "operating in interstate and foreign commerce" by means of actual and threatened force, violence, and fear of injury. (See id.)

All of Movant's co-defendants pled guilty to various counts. (See Cr-D.E. 64, 65, 80, 114, 134.) Movant alone proceeded to trial.

After Movant's arrest, the Government filed an ex parte Application for Stored Cell Site Information pursuant to the Stored Communications Act, 18 U.S.C. § 2703(c) & (d), seeking cell site location information (or "CSLI") regarding four cell phone numbers, including Movant's, for the period from August 1, 2010 through October 6, 2010. ("Application," Cr-D.E. 268-1.) The Application provided explicit details of all seven robberies being investigated, none of which involved a bank, (see id. at 2-5); however, the Application stated that the Government was seeking the records "relevant to an ongoing criminal investigation over which this Court has jurisdiction, including violations of Title 18, United States Code, Section 2113[,]" which is the bank robbery statute, (id. at 6). The Application made no mention of the Hobbs Act robbery statute. (See id.) The Court granted the Application pursuant to 18 U.S.C. § 2703(d), which provides, in relevant part:

> A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

18 U.S.C. § 2703(d) (2010). The Court's Order "finds that there are specific and articulable facts showing that there are reasonable grounds to believe that the records sought are relevant and material to an ongoing criminal investigation of a violation of Title 18, United States Code, Section 2113, being conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ('ATF'), over which this Court has jurisdiction." (Cr-D.E. 266-1 at 1.)

A few days before trial, Movant filed a motion to suppress the CSLI evidence. (Cr-D.E. 272.) Specifically, he argued that the CSLI evidence was obtained without a warrant

or a finding of probable cause in violation of his Fourth Amendment right against unreasonable searches and seizures. (See id.) On January 31, 2012, after a hearing on the matter, the Court issued an ore tenus order denying the Motion.[1] (Tr. of Supp. Hr'g, Cr-D.E. 277 at 47:10-24)

Trial began on February 1, 2012. (See Cr-D.E. 278.) Judge O'Sullivan's Report summarizes the trial evidence of the robberies as follows:

> On August 7, 2010, the movant and two other men robbed a Little Caesar's restaurant in Miami, Florida, in the presence of two employees. See Transcript of Jury Trial Proceedings (CR-DE# 281 at 100-04; CR-DE# 283 at 100-06). All three men were armed, one with a revolver and two with automatic handguns. After ordering everyone in the restaurant to get down on the floor, the movant and his co-defendants stole money from the cash registers before fleeing. (CR-DE# 281 at 102-03; CR-DE# 283 at 101, 105-07).
>
> On August 31, 2010, the movant and two other men robbed an Amerika Gas Station in Homestead, Florida, in the presence of two employees (CR-DE# 281 at 112- 14; CR-DE# 283 at 109-14). All three men were armed and before fleeing they held one of the employee's at gunpoint and stole money from the cash register, money from the safe, cigarettes, cigars, and a lighter as well as the wallet and cell phone of one of the employees (CR-DE# 281 at 115-18; CR-DE# 283 at 111-14).
>
> On September 7, 2010, the movant and two other men robbed a Walgreens Pharmacy in Miami, Florida, while employees and one customer were present (CR-DE# 281 at 139-42, 146; CR-DE# 283 at 115-20). All three men were armed while they stole money from the cash registers, money from the safe, and cigarettes (CR-DE# 281 at 142-44; CR-DE# 283 at 116-17, 119-20).
>
> On September 15, 2010, the movant and two other men robbed an Advance Auto Parts in Naranja, Florida in the presence of three employees and two customers (CR-DE# 281 at 148-49; CR-DE# 283 at 122-26). All three men were armed with handguns. After yelling at the employees and customers to

[1] The ore tenus Order was issued by United States District Judge Alan S. Gold, who presided over Movant's trial. (See Cr-D.E. 239.)

"get down" on the floor and holding one employee at gunpoint, the men stole $287 from the cash register before fleeing. (CR-DE# 281 at 148-52; CR-DE# 283 at 123-26). Immediately after the movant and the two other men fled, the movant fired his handgun twice at a dog that was barking (CR-DE# 281 at 156; CR-DE# 283 at 127).

On September 25, 2010, the movant and two other men robbed the Universal Beauty Salon in Miami, FL in the presence of four employees (CR-DE# 281 at 161-69; CR-DE# 128-32). All three men were armed with handguns, but only the movant's two accomplices went into the beauty salon where they ordered the employees to get on the ground (CR-DE# 281 at 165-66, 174; CR-DE# 283 at 129, 131-32). While the beauty salon robbery was beginning, the movant entered the neighboring children's Tae Kwan Do studio, which was filled with children, pointed his gun at a man and forced him to the floor before stealing his camera as well as multiple cell phones that were out in the area. (CR-DE# 281 at 174; CR-DE# 283 at 131). Another adult was able to hide the children in a back room while the movant knocked over a 77-year-old woman as well as another woman. (CR-DE# 281 at 174). The movant left the Tae Kwan Do studio and went into the beauty salon. After searching one of the employee's purses and holding one of the employees at gunpoint, the three men stole the money in the cash register and fled while the children from the Tae Kwan Do studio screamed. (CR-DE# 281 at 166-69; CR-DE# 283 at 131-33).

On September 26, 2010, the movant and two other men robbed a Wendy's restaurant in Miami, Florida in the presence of customers and employees. (CR-DE# 283 at 70-72, 138, 148). All three men were armed with handguns, and they ordered everyone to "get down." (lg. at 72-73, 139). One of the robbers took a watch and wallet from one customer, a purse from another customer, and then robbed a third customer, while the other two men took the money from the cash register and the safe (CR-DE# at 73-75, 138-40). As the three men fled, the movant fired two shots from his gun at a customer who had attempted to identify the getaway vehicle. (CR-DE# 283 at 77-80, 142).

On October 1, 2010, the movant and two other men, robbed a Mayors Jewelry store in Weston, Florida while employees and contractors were present. (CR-DE# 279 at 22-26, 44, 212, 226). One of the men was armed. After ordering the employees to get down, the men including the movant used hammers to smash the store's display cases and stole 23 luxury watches before fleeing. (CR-DE# 279 at 24, 27-28, 32; CRDE# 281 at 10-11, 14, 19).

(Report at 8-10.)

During trial, Movant's trial attorney stipulated to the following facts for each robbery:

> The [business] located at [address] is a business and company operating in interstate and foreign commerce. The robbery of this business that occurred on [date], therefore obstructed, delayed and affected interstate and foreign commerce.

(Trial Tr., Cr-D.E. 279 at 38:6-11 (Mayor's Jewelry Store); Cr-D.E. 281 at 138:5-10 (Little Ceasar's); id. at 138:11-16 (Amerika Gas Station); id. at 158:10-14 (Walgreen's); id. at 158:15-20 (Advance Auto Parts); id. at 170:3-8 (Universal Beauty Salon); Cr-D.E. 285 at 53:10-14 (Wendy's).) The Court colloquied Movant who testified under oath that he authorized his attorney to enter these stipulations:

> THE COURT: So have you authorized Mr. Zelman to act as he described?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did anybody force you to do so?
>
> THE DEFENDANT: No.
>
> THE COURT: Do you feel that he has given you a full explanation of everything you need to know about it?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. I am satisfied it is a voluntary authorization then.

(Cr-D.E. 277 at 48:15-24.)

Following an eight-day trial, the jury convicted Movant on all sixteen counts. (Cr-D.E. 293.) The Presentence Investigation Report ("PSR") revealed that Movant committed the robberies when he was 18 and 19 years old. Prior to his arrest and incarceration, he

resided with his mother, step-father, one sibling, five half-siblings, and seven of their children in Homestead, Florida and then Dothan, Alabama. (Cr-D.E. 408 ¶ 88.)[2] The PSR further indicates that Movant has suffered from a learning disability, attention deficit disorder ("ADD"), attention deficit/hyperactivity disorder ("ADHD"), and an emotional disorder. (Id. ¶ 94.) Prior to sentencing, Movant filed a Psychologist's Report indicating that he also suffers from Bipolar Disorder. (Cr-D.E. 335-1 at 7.)

Movant faced a term of 0 to 20 years' imprisonment as to each of Counts 1, 2, 4, 6, 8, 10, 13, 15, and 16—the conspiracy and substantive Hobbs Act Robbery counts. (PSR ¶ 106 (citing 18 U.S.C. § 1951(a) (2011)).) According to the PSR, Movant's firearm conviction in Count 3 carried a minimum mandatory term of seven years' imprisonment (which is the minimum mandatory for brandishing a firearm) consecutive to all other sentences. (PSR ¶ 106 (citing 18 U.S.C. § 924(c)(1)(A)(ii) & (D)(ii) (2011).) Movant's firearm convictions in Counts 5, 7, 9, 11, 14, and 17 carried minimum mandatory terms of 25 years' imprisonment consecutive to all other sentences. (Id. (citing 18 U.S.C. § 924(c)(1)(C)(i) & D(ii) (2011)).) Based on a total offense level of 25 and a criminal history category of I, the guideline imprisonment range was 57 to 71 months, plus a consecutive term of 84 months as to Count 3, and consecutive terms of 300 months as to each of Counts 5, 7, 9, 11, 14, and 17. (Id. ¶ 107.)

[2] The PSR to which the Court cites is the one prepared for Movant's original sentencing in 2012. The United States Probation Office prepared a second PSR prior to Movant's resentencing hearing in 2016. (Cr-D.E. 408.)

On April 30, 2012, Judge Gold held a sentencing hearing. (See Cr-D.E. 337.) Prior to announcing Movant's sentence, Judge Gold stated:

> If this were a matter of only looking at the statutory criteria, I would impose a sentence here that would not be a life sentence. It would be a very lengthy sentence. I would think that a sentence here, given his age, 20, of 40 years for all these very serious, serious crimes would be one that would, as the statute says, be sufficient but not greater than necessary.

(Tr. of Sentencing Hr'g, Cr-D.E. 366:5-11.) Ultimately, however, Judge Gold sentenced Movant to 1,941 months' imprisonment—which equates to over 161 years—comprised of concurrent 57-month terms as to Counts 1, 2, 4, 6, 8, 10, 13, 15, and 16; a consecutive term of 84 months as to Count 3; and 300-month terms as to Counts 3, 5, 7, 9, 11, 14, and 17, all to run consecutively to each other and to the 57- and 84-month sentences. (See Judgment, Cr-D.E. 342.) On July 11, 2012, the Court entered an Amended Judgment to reflect a stipulated amount of $138,295.00 in restitution. (Cr-D.E. 359.)

Movant filed a direct appeal raising the following issues: (1) there was insufficient evidence to convict him of aiding and abetting the use of a firearm in connection with the jewelry store robbery (Count 17); (2) the cell site location information obtained by court order without a search warrant violated his Fourth Amendment rights; (3) prosecutorial misconduct during closing arguments; (4) the cumulative effect of multiple trial errors warranted reversal of his convictions; (5) the District Court erroneously increased his sentences as to (i) Count 3 when it sentenced him for brandishing a firearm where the jury only found that he possessed a firearm, and (ii) Counts 5, 7, 9, 11, 14, and 17 when it found that they were "second or subsequent" convictions; and (6) the nearly 162-year prison

sentence violated his Eight Amendment right against cruel and unusual punishments. United States v. Davis, Case No. 12-12928, Appellant's Brief (11th Cir. June 24, 2013).

The Eleventh Circuit issued panel and en banc opinions granting relief in part and remanding for resentencing. Initially, the panel held that "cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data without a warrant is a Fourth Amendment violation." United States v. Davis, 754 F.3d 1205, 1217 (11th Cir. 2014). However, the panel further held that the Court's denial of Movant's Motion to Suppress the CSLI evidence did not constitute reversible error "under the 'good faith' exception to the exclusionary rule recognized in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)." Id.

The panel further rejected Movant's arguments regarding sufficiency of the evidence, prosecutorial misconduct, cumulative error, an Eighth Amendment violation, and the Court's imposition of sentences for "second or subsequent" convictions of Section 924(c). See id. at 1218-23. However, the panel found that the Court plainly erred when it sentenced him in Count 3 for brandishing a firearm where the jury only found that he had possessed a firearm in furtherance of the robbery. Id. at 1220-21. Consequently, the panel opinion affirmed the Court's judgment of conviction and vacated the portion of the sentence attributable to the enhancement for brandishing a firearm. Id. at 1223.

The Eleventh Circuit subsequently vacated the panel's opinion to consider en banc whether obtaining CSLI without a warrant violated Movant's Fourth Amendment rights. See United States v. Davis, 785 F.3d 498, 500 (11th Cir. 2015) (en banc). The en banc Court held, contrary to the panel's opinion, "that the government's obtaining a § 2703(d)

court order for production of MetroPCS's business records at issue did not constitute a search and did not violate the Fourth Amendment rights of Davis." Id. at 513. Alternatively, it held "that the prosecutors and officers here acted in good faith and therefore, under the well-established Leon exception, the district court's denial of the motion to suppress did not constitute reversible error." Id. at 518 n.20 (citing Leon, 468 U.S. at 919-21). Consequently, the en banc Court affirmed the Court's Judgment and reinstated the panel's opinion with respect to all issues except those regarding the Fourth Amendment violation. Id. at 500 & n.2. The Supreme Court subsequently denied Movant's petition for writ of certiorari. Davis v. United States, 136 S. Ct. 479 (2015).

On remand, Movant filed a Motion to Vacate his Convictions for Hobbs Act Offenses, (Cr-D.E. 410), and a Motion to Dismiss the Superseding Indictment as to the Firearms Charges, (Cr-D.E. 411). In the Motion to Vacate his Convictions for Hobbs Act Offenses, Movant argued that the Government failed "to prove with particularized evidence the essential interstate commerce element of the offense." (Cr-D.E. 410 at 2.) Relying on the Supreme Court's grant of certiorari in Taylor v. United States, __ U.S. __, 136 S. Ct. 2074 (2016), which raised the issue of whether a robbery of a purely intrastate drug dealer affected interstate commerce for purposes of the Hobbs Act, Movant argued that the stipulations that he executed at trial—which stated that each robbery site "is a business and company operating in interstate and foreign commerce," and that the robbery "therefore obstructed, delayed and affected interstate foreign commerce"—were insufficient to satisfy the jurisdictional element of Hobbs Act robbery. (Id. at 2-3.) In the Motion to Dismiss the Superseding Indictment as to the Firearms Charges, Movant argued

that the "residual clause" of 18 U.S.C. § 924(c) was unconstitutionally vague. (Cr-D.E. 411 at 2-3 (citing Johnson v. United States, __ U.S. __, 135 S. Ct. 2551 (2015) (holding that the Armed Career Criminal Act's "residual clause," 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague)).)

On March 10, 2016, the Court entered an Order denying Defendant's Motion to Vacate his Convictions for Hobbs Act Offenses and Motion to Dismiss the Superseding Indictment as to the Firearms Charges, finding that they were beyond the scope of the Eleventh Circuit's Mandate and did not implicate any of the exceptions recognized by the Eleventh Circuit. (Cr-D.E. 413 (citing United States v. Amedeo, 487 F.3d 823, 830 (11th Cir. 2007); United States v. Davis, 329 F.3d 1250, 1252 (11th Cir. 2003); United States v. Tamayo, 80 F.3d 1514, 1520 (11th Cir. 1996)).)

On March 11, 2016, the Court held a resentencing hearing, reduced Movant's sentence in Count 3 from 84 months' imprisonment (the minimum mandatory for brandishing a firearm under Section 924(c)) to 60 months' imprisonment (the minimum mandatory for possessing a firearm under Section 924(c)), and reimposed all other terms issued in the original Judgment and Commitment Order (Cr-D.E. 342), for a total term of 1,917 months' imprisonment. (Tr. of Resentencing Hr'g, Cr-D.E. 421.)

Movant appealed the Court's Order denying his Motion to Vacate his Convictions for Hobbs Act Offenses and Motion to Dismiss the Superseding Indictment as to the Firearms Charges. United States v. Davis, Case No. 16-11477, Appellant's Brief (11th Cir. Nov. 23, 2016). On November 6, 2017, the Eleventh Circuit issued an opinion affirming the Court's Order. United States v. Davis, 711 F. App'x 605 (11th Cir. 2017).

The Eleventh Circuit held that the Indictment sufficiently charged that Movant's conduct "had a minimal impact on interstate commerce[,]" id. at 609, and that the Government sufficiently proved the interstate nexus at trial both through Movant's stipulations and through other evidence showing that, "in the presence of employees (and sometimes patrons), Davis and his conspirators took the property of each of the businesses, including store merchandise and currency from cash registers and safes[,]" id. at 610. As such, it concluded that Movant's "Rule 12(b) motion to vacate his nine Hobbs Act robbery convictions was due to be denied on the merits." Id. The Eleventh Circuit further held that the Supreme Court's holding in Johnson did not invalidate his 924(c) convictions because (1) Johnson does not apply to invalidate Section 924(c)(3)(B), and, regardless, (2) Hobbs Act Robbery qualifies as a crime of violence under Section 924(c)(3)(A). Id. Mandate issued November 6, 2017. (Cr-D.E. 425.) The Supreme Court denied Movant's petition for writ of certiorari on April 16, 2018. (Cr-D.E. 426.)

b. 2255 Motion

On April 16, 2018, Movant timely filed the instant Motion to Vacate Conviction Under 28 U.S.C. § 2255. (D.E. 1.) The Motion raises the following grounds for relief:

- Ground One: Ineffective assistance of trial counsel in stipulating to the essential offense element of jurisdiction as to each of the alleged Hobbs Act Offenses, (Mot. at 6-7);
- Ground Two: Ineffective assistance of trial counsel, violation of due process right to unanimous verdict, and jurisdictional indictment error vitiating Hobbs Act substantive convictions and related counts, (id. at 7-9);

- Ground Three: Ineffective assistance of trial counsel and misadvising Movant concerning entry of guilty plea, (id. at 9-10);
- Ground Four: Ineffective assistance of trial counsel in failing to challenge the search of Movant's cell phone data based on the materially defective search order application, (id. at 10-11);
- Ground Five: The imposition of a 159-year sentence, based on mandatory stacking of sentences of his Section 924(c) convictions, constitutes cruel and unusual punishment in violation of the Eighth Amendment, where the sentencing court stated that it would have imposed a 40-year sentence absent the stacking mandate and Congress's recent enactment of the First Step Act would have allowed the sentencing court the discretion to do so, (id. at 11-14);
- Ground Six: The search of Movant's cell phone location data violated his Fourth Amendment right against unreasonable searches and seizures, (id. at 15-20).

The Government filed a Response to the Motion, ("Response," D.E. 8), to which Movant filed a Reply, ("Reply," D.E. 11).

c. Report and recommendation

As an initial matter, Judge O'Sullivan concluded that Movant was not entitled to an evidentiary hearing on any of his claims. (Report at 13-15.)

Next, he found that Grounds Five and Six are procedurally barred because the Eleventh Circuit rejected them on direct appeal. (Id. at 16-17, 17-19, 23-25.) He further found that, with regard to Ground Five, the First Step Act is not retroactive, (id. at 19-22), and with regard to Ground Six, the Supreme Court's decision in Carpenter v. United States,

__ U.S. __, 138 S. Ct. 2206, 2221 (2018)—which held that the Government's acquisition of cell-site records pursuant to the Stored Communications Act is a search within the meaning of the Fourth Amendment for which it must generally get a warrant supported by probable cause—does not affect the Eleventh Circuit's alternative holding in Movant's direct appeal that the officers acted in good faith under the Leon exception to the exclusionary rule, (id. at 25-27).

Next, Judge O'Sullivan found that Ground One fails because: (1) the jurisdictional stipulations made by trial counsel did not constitute deficient performance, and, in any event, (2) he cannot establish prejudice because the Eleventh Circuit affirmed this Court's order denying his post-remand Rule 12(b) motion on this ground. (Id. at 31-32.)

Next, as to Ground Two, Judge O'Sullivan found that Movant cannot establish that trial counsel's failure to challenge the substantive Hobbs Act robbery charges as duplicitous constitutes deficient performance or that he was prejudiced by such failure because the Eleventh Circuit found that those charges were sufficient. (Id. at 35-36.)

Next, as to Ground Three, Judge O'Sullivan found that Movant cannot establish deficient performance or prejudice because he has not shown that a plea offer was ever made. (Id. at 37-38.)

Finally, as to Ground Four, Judge O'Sullivan found that trial counsel's failure to challenge the Application for Stored Cell Site Information on the grounds that it cited the bank robbery statute instead of the Hobbs Act robbery statute does not constitute ineffective assistance, given that the Application contained explicit details regarding the robberies. (Id. at 38-39.)

II. Legal Standards

a. Report and recommendations

Upon receipt of the Magistrate Judge's Report and Movant's Objections, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); accord Fed. R. Civ. P. 72(b)(3). The court must conduct a de novo review of any part of the Report that has been "properly objected to." Fed. R. Civ. P. 72(b)(3); see 28 U.S.C. § 636(b)(1) (providing that the district court "shall make a de novo determination of those portions of the [R & R] to which objection is made"). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988). Those portions of a magistrate judge's report and recommendation to which no objection has been made are reviewed for clear error. See Lombardo v. United States, 222 F. Supp. 2d 1367, 1369 (S.D. Fla. 2002); see also Macort v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006) ("Most circuits agree that [i]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.") (internal quotation marks and citations omitted). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

b. Ineffective assistance of counsel

Insofar as Petitioner's claims involve allegations of ineffective assistance of counsel, the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984) applies. "First, the defendant must show that counsel's performance fell below a threshold level of competence. Second, the defendant must show that counsel's errors due to deficient performance prejudiced his defense such that the reliability of the result is undermined." Tafero v. Wainwright, 796 F.2d 1314, 1319 (11th Cir. 1986). Under the first prong of the Strickland test, Petitioner "must establish that no competent counsel would have taken the action that his counsel did take." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). Under the second prong, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

III. Discussion

Movant objects to Judge O'Sullivan's findings and conclusions as to each Ground for relief. The Court will address them in the Order in which they appear in the Objections.

a. Ground Five

First, Movant objects to Judge O'Sullivan's finding that the Eighth Amendment claim of cruel and unusual punishment presented in Ground Five is procedurally barred because it was raised and rejected on direct appeal. (Obj. at 3.) Movant argues that Ground Five is not procedurally barred because the intervening enactment of the First Step Act constitutes "a new and significant factual circumstance supporting the claim that his

greater-than-life sentence is disproportionate and unconscionable within the meaning of the Eight Amendment ban on cruel and unusual punishment." (Obj. at 3 (emphasis in original).) He argues that the non-retroactivity of the First Step Act "does not warrant a finding of procedural bar on the evolving standards of decency and humanity underlying the Eighth Amendment[.]" (Id. at 4.) He argues that the First Step Act's non-retroactivity "does not preclude its consideration as a statement of Congressional policy and intent that buttresses Movant's claim, particularly when viewed in light of the district court's similar belief, expressed on the record, that Movant merited no more than a 40-year sentence." (Id. at 5.) Finally, he argues that "an evidentiary hearing is warranted, including to determine whether Movant's mental age was and/or remains factually akin to that of a juvenile, such that the holding of Graham v. Florida, 560 U.S. 48, 82 (2010) (life sentence without parole imposed on juvenile for non-homicide offense violates Eighth Amendment cruel and unusual punishment clause), viewed in conjunction with Congress's pronouncements in the First Step Act, would apply to invalidate the longer-than-life mandatory sentence imposed on Movant Davis." (Id.)

A prisoner is procedurally barred from raising claims in a 2255 Motion that were raised and rejected on direct appeal. United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000). "'[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255.'" Id. (quoting United States v. Natelli, 553 F.2d 5, 7 (2d Cir. 1977)). "[N]ew evidence, by itself, is not a ground for relief in a motion to vacate unless that new evidence establishes an error of constitutional proportions or a 'fundamental defect which inherently results in a complete

miscarriage of justice.'" Stoufflet v. United States, 757 F.3d 1236, 1240 (11th Cir. 2014) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). "And only a limited set of intervening changes of law warrant setting aside a ruling in the defendant's direct appeal because not all intervening changes in law have retroactive effect after a judgment of conviction has become final." Id. (citing, e.g., Teague v. Lane, 489 U.S. 288, 210-11 (1989)).

On direct appeal, Movant argued "that the 162–year sentence, which obviously amounts to a life sentence, constitutes cruel and unusual punishment" in light of the fact "that he was eighteen and nineteen years old at the time of the commission of the offenses, and suffered from bipolar disorder and a severe learning disability, and had no prior convictions." Davis, 754 F.3d at 1221. The Eleventh Circuit rejected this claim. Id. at 1221-22.

Movant has not cited (and the Court has not found) any authority supporting his argument that the enactment of the First Step Act is factual evidence of society's evolving standards of decency that supports a finding that a pre-enactment sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments. Prior to the enactment of the First Step Act, the Eleventh Circuit held that lengthy sentences imposed by stacking mandatory minimum 924(c) sentences does not constitute cruel and unusual punishment under the Eighth Amendment. United States v. Carthen, 906 F.3d 1315, 1322 (11th Cir.

2018) (57-year sentence); United States v. Bowers, 811 F.3d 412, 433 (11th Cir. 2016) (182-year sentence).[3]

When determining whether a sentence is cruel and unusual under the Eighth Amendment, "a court 'must make a threshold determination that the sentence imposed is grossly disproportionate to the offense committed.'" United States v. Johnson, 451 F.3d 1239, 1243 (11th Cir. 2006) (quoting United States v. Raad, 406 F.3d 1322, 1324 (11th Cir. 2005)). On Movant's direct appeal, the Eleventh Circuit found that Movant's sentence was not grossly disproportionate to the offenses committed:

> As applied to noncapital offenses, the Eighth Amendment encompasses at most only a narrow proportionality principle. United States v. Brant, 62 F.3d 367, 368 (11th Cir. 1995) (citing Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)). We accord substantial deference to Congress: "In general, a sentence within the limits imposed by statute is neither excessive nor cruel and unusual under the Eighth Amendment." United States v. Johnson, 451 F.3d 1239, 1243 (11th Cir. 2006) (quotation omitted). We must first make the determination whether a total sentence is grossly disproportionate to the offenses committed. Id. In United States v. Farley, 607 F.3d 1294, 1339 (11th Cir. 2010), we held that the mandatory nature of a noncapital penalty is irrelevant for proportionality purposes, and observed that we have never found a term of imprisonment to violate the Eighth Amendment. Id. at 1343. Nor do we do so now.
>
> Here, Davis's total sentence is unmistakably severe. However, a gross proportionality analysis necessarily compares the severity of a sentence to the crimes of conviction, and Davis's crimes were numerous and serious. Multiple victims experienced being robbed and threatened with a handgun. Davis's use of a handgun entailed a risk or severe injury or death. Trial testimony established that Davis shot at a dog, and actually exchanged fire

[3] See also United States v. Looney, 532 F.3d 392, 396-97 (5th Cir. 2008); United States v. Walker, 473 F.3d 71, 84 (3d Cir. 2007); United States v. Khan, 461 F.3d 477, 495 (4th Cir. 2006); United States v. Beverly, 369 F.3d 516, 536-37 (6th Cir. 2004); United States v. Parker, 241 F.3d 1114, 1118 (9th Cir. 2001); cf. Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (holding that a mandatory life sentence without the possibility of parole imposed pursuant to a Michigan drug possession statute did not violate the Eighth Amendment).

> with a witness following the Wendy's robbery. We cannot conclude that such repeated disregard for the law and for victims should overcome Congress's determination of what constitutes an appropriate sentence, even when Eighth Amendment concerns are implicated.

Davis, 754 F.3d at 1222.

The intervening enactment of the First Step Act does not meet an exception to the procedural bar that would authorize this Court to second guess the Eleventh Circuit's proportionality finding. To begin with, it is undisputed that the First Step Act's anti-stacking provision is not retroactive and is therefore inapplicable to Movant's sentence. (See Obj. at 5.) Furthermore, nothing in the First Step Act establishes that the stacking of Section 924(c) convictions results in cruel and unusual punishment in violation of the Eighth Amendment, or a fundamental defect which inherently results in a complete miscarriage of justice. See Spencer v. United States, 773 F.3d 1132, 1139 (11th Cir. 2014) ("A prisoner may challenge a sentencing error as a "fundamental defect" on collateral review when he can prove that he is either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated[.]"); see also United States v. Addonizio, 442 U.S.178, 186-87 (1979) (holding that a lawful sentence did not result in a "complete miscarriage of justice" even when subsequent change in Parole Commission policies frustrated the intent of the sentencing judge).

Because this issue was raised and rejected on direct appeal, and because it does not meet an exception to the procedural bar, the Court finds Ground Five is procedurally barred.

b. Ground Six

Next, Movant objects to Judge O'Sullivan's finding that the claim presented in Ground Six—which argues that the search of Movant's cell phone location data violated his Fourth Amendment right against unreasonable searches and seizures—is procedurally barred because it was raised and rejected on direct appeal. (Obj. at 5-7.)

A prisoner is procedurally barred from raising claims in a 2255 Motion that were raised and rejected on direct appeal. Nyhuis, 211 F.3d at 1343. "'[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255.'" Id. (quoting Natelli, 553 F.2d at 7). "[N]ew evidence, by itself, is not a ground for relief in a motion to vacate unless that new evidence establishes an error of constitutional proportions or a 'fundamental defect which inherently results in a complete miscarriage of justice.'" Stoufflet, 757 F.3d at 1240 (quoting Hill, 368 U.S. at 428). "And only a limited set of intervening changes of law warrant setting aside a ruling in the defendant's direct appeal because not all intervening changes in law have retroactive effect after a judgment of conviction has become final." Id. (citing, e.g., Teague, 489 U.S. at 210-11).

On direct appeal, Movant argued that "the government violated his Fourth Amendment rights by obtaining historical cell tower location information from MetroPCS's business records without a search warrant and a showing of probable cause." Davis, 785 F.3d at 505. The Eleventh Circuit's en banc opinion rejected the claim. Id. at 513, 518. The Eleventh Circuit held in the alternative "that the prosecutors and officers here acted in good faith and therefore, under the well-established Leon exception, the

district court's denial of the motion to suppress did not constitute reversible error." Id. at 518 n.20.

About three years later, the Supreme Court issued its decision in Carpenter, holding that the Government's acquisition of cell-site records pursuant to the Stored Communications Act, 18 U.S.C. § 2703, is a search within the meaning of the Fourth Amendment for which it must generally get a warrant supported by probable cause before acquiring such records. 136 S. Ct. at 2220-21.

Movant argues that the claim presented in Ground Six is not barred because Carpenter did not extend Leon's good faith exception to this context. (Obj. at 7.)

Although the Supreme Court's Carpenter decision impliedly abrogates the Eleventh Circuit's en banc holding that the government's obtaining a Section 2703(d) court order for production of cell site location information does not constitute a search and does not violate the Fourth Amendment, Carpenter does not prohibit the application of Leon's good faith exception to the exclusionary rule. In fact, after the Supreme Court remanded Carpenter, the Sixth Circuit Court of Appeals applied Leon's good faith exception to the exclusionary rule and affirmed the district court's denial of Carpenter's motion to suppress. United States v. Carpenter, 926 F.3d 313, 318-19 (6th Cir. 2019) ("The Government's acquisition of Carpenter's CSLI violated the Fourth Amendment. The district court nevertheless properly denied suppression because the FBI agents relied in good faith on the SCA when they obtained the data. We therefore **AFFIRM**.").[4]

[4] On rehearing, the Sixth Circuit vacated Carpenter's sentences and remanded for resentencing based on an intervening change in the law applicable to his sentence—specifically,

The Court finds that Carpenter did not overrule, abrogate, or otherwise call into question the en banc Eleventh Circuit's alternative holding that "under the well-established Leon exception, the district court's denial of the motion to suppress did not constitute reversible error." Davis, 785 F.3d at 518 n.20. Because the issue presented in Ground Six was raised and rejected on direct appeal, and because it does not meet an exception to the procedural bar, the Court finds Ground Six is procedurally barred.

c. Ground One

Next, Movant objects to Judge O'Sullivan's finding that trial counsel's stipulation to the jurisdictional element of the Hobbs Act robbery offenses does not constitute ineffective assistance of counsel. (Obj. at 8-11.) The Court pauses here to provide some legal and factual context.

"The Hobbs Act makes it a federal crime to obstruct, delay, or affect commerce or the movement of any article or commodity in commerce by robbery." Davis, 711 F. App'x at 609. "Robbery" is defined as the "unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). "Commerce" is defined as, in part, "all commerce between any point in a State, Territory, Possession, or the District of Columbia and any

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Dean v. United States, __ U.S. __, 137 S. Ct. 1170 (2017), which held that district courts have discretion to consider a defendant's mandatory minimum sentence when calculating a just sentence for the predicate offense. United States v. Carpenter, __ F. App'x __, 2019 WL 6954341, at *1 (6th Cir. 2019). However, the Sixth Circuit explicitly stated: Our decision here does not vacate or otherwise affect our decision in United States v. Carpenter, 926 F.3d 313 (6th Cir. 2019)." Id.

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." 18 U.S.C. § 1951(b)(3). "The government needs only to establish a minimal effect on interstate commerce to support a violation of the Hobbs Act." United States v. Rodriguez, 218 F.3d 1243, 1244 (11th Cir. 2000).

"While the Hobbs Act usually is applied to robberies of businesses, criminal acts directed toward individuals also may violate the Hobbs Act." United States v. Diaz, 248 F.3d 1065, 1084 (11th Cir. 2001)

> Robberies or extortions perpetrated upon individuals are prosecutable under the Hobbs Act when any one of the following three conditions are met: (1) the crime depletes the assets of an individual who is directly engaged in interstate commerce; (2) the crime causes the individual to deplete the assets of an entity engaged in interstate commerce; or (3) the number of individuals victimized or the sums involved are so large that there will be a cumulative impact on interstate commerce.

Id. at 1084-85 (citations omitted). In this sense, the term "deplete" means not only "'to eliminate or exhaust,' but also includes 'to lessen in number, quantity, content, or force or in vital power or value as a result of such lessening.'" Id. at 1090 (quoting Webster's Third New International Dictionary 605 (1981)).

In this case, the Hobbs Act offenses in the Superseding Indictment charged that Movant

> did knowingly obstruct, delay, and affect commerce and the movement of articles in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take United States currency and other property from the person and in the presence of persons employed by, and persons patronizing, the [business], located at [address], 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, in violation of Title 18, United States Code, Sections 1951(a) and 2.

(See, e.g., Cr-D.E. 39 at 2 (Little Caesar's); see also id. at 3-4 (Amerika Gas Station); id. at 4-5 (Walgreen's); id. at 5-6 (Advance Auto Parts); id. at 6-7 (Universal Beauty Salon); id. at 8 (Wendy's); id. at 10 (Mayor's Jewelry Store) (emphasis added).)

At trial, Movant, through counsel, stipulated that each "[business] located at [address] is a business and company operating in interstate and foreign commerce. The robbery of this business that occurred on [date], therefore obstructed, delayed and affected interstate and foreign commerce." (Trial Tr., Cr-D.E. 279 at 38:6-11 (Mayor's Jewelry Store); Cr-D.E. 281 at 138:5-10 (Little Ceasar's); id. at 138:11-16 (Amerika Gas Station); id. at 158:10-14 (Walgreen's); id. at 158:15-20 (Advance Auto Parts); id. at 170:3-8 (Universal Beauty Salon); Cr-D.E. 285 at 53:10-14 (Wendy's) (emphasis added).) The Court colloquied Movant who testified under oath that he authorized his attorney to enter these stipulations, and that he was satisfied that counsel had given him a full explanation regarding everything he needed to know about the stipulations. (Trial Tr., Cr-D.E. 277 at 48:15-24.) The stipulations were read to the jury and admitted into evidence, with the Court instructing the jury as follows: "Now, ladies and gentlemen, when the parties reach a stipulation that has been agreed to, it means that these matters are not factually in dispute and you, the jury, may accept them as facts not in contention in this case." (Trial Tr., Cr-D.E. 279 at 38:1-4.) The jury later convicted Movant of each Hobbs Act offense. (Jury Verdict, Cr-D.E. 293.)

Following remand from the Eleventh Circuit, Movant filed a Rule 12(b) Motion to Vacate his Convictions for Hobbs Act Offenses, arguing that his convictions were "jurisdictionally infirm given the government's failure to prove with particularized evidence the essential interstate commerce element of the offense." (Cr-D.E. 410 at 2.) Relying on the Supreme Court's grant of a petition for writ of certiorari in Taylor v. United States, 754 F.3d 217 (4th Cir. 2014), Movant argued that the mere positing that a business is engaged in interstate commerce is inadequate to meet the interstate commerce element of a Hobbs Act robbery offense. (Id. at 3.) This Court denied the motion as beyond the scope of the Eleventh Circuit's Mandate, (Cr-D.E. 413), and Movant appealed, (Cr-D.E. 416). On appeal, the Eleventh Circuit held that the Superseding Indictment sufficiently charged the interstate commerce element of a Hobbs Act robbery, and that there was sufficient evidence presented at trial to establish the interstate commerce element, irrespective of the stipulations:

> Each count charged that Davis either conspired to take or took currency and other property "from the person and in the presence of persons employed by, and persons patronizing," a business. The language in each count tracked the language of 18 U.S.C. § 1951, which defines "robbery" as the "unlawful taking of personal property from the person or in the presence of another." See 18 U.S.C. [§] 1951(b)(1). In other words, both the employees and the patrons of the businesses were robbed and were present while others were robbed. Moreover, the indictment specifically alleged that each targeted business was "a business and company operating in interstate and foreign commerce." All of the substantive Hobbs Act robbery counts involved commercial establishments, such as a fast food restaurant, a drug store, or a gas station. These allegations are sufficient to establish the requisite minimal effect on interstate commerce. See e.g., Rodriguez, 218 F.3d at 1245 (involving the robbery of motel front desk clerks and explaining that "the interstate commerce connection . . . is straightforward" when there is a "robbery of a commercial establishment engaged in interstate commerce).

> To the extent Davis contends the government did not prove the interstate commerce element at trial, Davis entered into a stipulation with the government that each business was "operating in interstate and foreign commerce" and that the robbery of each business "obstructed, delayed and affected interstate and foreign commerce." Moreover, the trial evidence showed that, in the presence of employees (and sometimes patrons), Davis and his conspirators took the property of each of the businesses, including store merchandise and currency from cash registers and safes. Accordingly, Davis's Rule 12(b) motion to vacate his nine Hobbs Act robbery convictions was due to be denied on the merits.

Davis, 711 F. App'x at 609-10.

Movant now argues that counsel was constitutionally ineffective for waiving his Fifth Amendment right to due process and Sixth Amendment right to a jury trial on the "jurisdictional offense element with respect to each of the indicted robberies—of individuals, not businesses." (Mot. at 6 (emphasis in original).) He argues that he "did not knowingly agree to waive his right to have the government prove, and the jury find, the facts needed to establish the essential jurisdictional element of the Hobbs Act offenses." (Id. at 7.) He argues that the Court did not colloquy him regarding the "charged robbery's effect on interstate commerce[,]" and that counsel "did not explain . . . that he was charged with robbing individuals, not businesses, and that only those individual-person robberies could be looked to for interstate commerce effect." (Id. (emphasis in original).) He further argues that trial counsel "did not explain the impact of the jurisdictional stipulations . . . and the state of the law regarding the requisite impact on interstate commerce." (Id.) He argues that counsel "violated his duty to consult with the defendant and to research the law and evaluate the facts pertaining to the necessary effect on interstate commerce[,]" and, therefore, Movant's waiver was not knowingly made. (Id.) He argues that "[t]here was no

strategic purpose for trial counsel's entry into the stipulations," and that "[t]he government's evidence that relatively small quantities of cash, personal jewelry, and cigarettes were taken during some of the robberies does not, by itself, prove a requisite impact on interstate commerce." (Id.)

Judge O'Sullivan found trial counsel's stipulations did not constitute deficient performance and that Movant could not establish prejudice because the Eleventh Circuit ruled on appeal that the Superseding Indictment sufficiently charged the interstate commerce element of a Hobbs Act robbery, and that there was sufficient evidence presented at trial to establish the interstate commerce element, irrespective of the stipulations. (Report at 31-32.)

In his Objections, Movant argues that Judge O'Sullivan's Report does not address the Diaz factors, and that "[t]he depletion and numerosity requirements of Diaz were not otherwise met by the government, and thus but for the stipulation which counsel caused Movant to agree to by providing mistaken advice concerning the charges, there would have been a significant jury issue regarding the Diaz requirements for robberies of individuals." (Obj. at 10 & n.4.) He argues that counsel affirmatively misadvised him regarding the nature of the charges he was defending against—i.e., robberies of businesses versus robberies of persons. (Id. at 11.) "By wrongly advising the Movant to unknowingly waive his right to trial on the charges of individual robberies, counsel provided ineffective assistance." (Id.) Movant argues that, at a minimum, he is entitled to an evidentiary hearing on the issue. (Id.)

However, Movant does not specifically object to Judge O'Sullivan's finding that Movant cannot show Strickland prejudice in light of the Eleventh Circuit's findings that the Superseding Indictment sufficiently charged, and the Government sufficiently proved at trial the interstate commerce element. (See Report at 31-32.) Judge O'Sullivan's finding as to prejudice is not clearly erroneous.

Movant's argument is premised on the inaccurate assumption that the Superseding Indictment charges him with robbing individuals (rather than businesses) because it alleges that he took "United States currency and other property from the person and in the presence of persons employed by, and persons patronizing, the [business] . . . against the will of those persons . . . ." (See Cr-D.E. 39 at 2 (Little Caesar's); id. at 3-4 (Amerika Gas Station); id. at 4-5 (Walgreen's); id. at 5-6 (Advance Auto Parts); id. at 6-7 (Universal Beauty Salon); id. at 8 (Wendy's); id. at 10 (Mayor's Jewelry Store) (emphasis added).) However, the statutory definition of "robbery" does not include taking from "the business," it includes only taking from "the person[.]" See 18 U.S.C. § 1951(b)(1) ("The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.") (emphasis added). As the Eleventh Circuit observed, the Superseding Indictment merely "tracked the language of 18 U.S.C. § 1951[(b)(1)]." Davis, 711 F. App'x at 609.

> In other words, both the employees and the patrons of the businesses were robbed and were present while others were robbed. Moreover, the indictment specifically alleged that each targeted business was "a business and company operating in interstate and foreign commerce." All of the substantive Hobbs Act robbery counts involved commercial establishments, such as a fast food restaurant, a drug store, or a gas station. These allegations are sufficient to establish the requisite minimal effect on interstate commerce.

Id. at 609 (citing Rodriguez, 218 F.3d at 1245 (involving the robbery of motel front desk clerks and explaining that "the interstate commerce connection . . . is straightforward" when there is a "robbery of a commercial establishment engaged in interstate commerce)).

Given that the Eleventh Circuit has explicitly held that the Superseding Indictment sufficiently charged, and the Government sufficiently proved at trial the interstate commerce element of the Hobbs Act robbery offenses, Davis, 711 F. App'x at 609-10, Movant cannot show a reasonable probability that but-for counsel's alleged deficiencies the result of the proceedings would have been different.

d. Ground Four

Next, Movant objects to Judge O'Sullivan's finding that trial counsel was not ineffective for failing to object to the Stored Communications Act Application that erroneously cited the bank robbery statute, 18 U.S.C. § 2113, rather than the Hobbs Act robbery statute, 18 U.S.C. § 1951. (Obj. at 12.)

Pursuant to 18 U.S.C. § 2703(d), a "court of competent jurisdiction" may only order the disclosure of cell site information "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."

Judge O'Sullivan found that "[a]lthough the Application referenced the wrong robbery statute, the Application clearly laid out the facts of Hobbs Act violations." (Report at 38-39.) He further observed that Movant and his co-conspirators were later convicted of the Hobbs Act violations that were clearly described in the Application. (Id. at 38.) Thus, Judge O'Sullivan concluded that trial counsel was not ineffective for failing to challenge the Application on the ground that it did not explicitly identify Hobbs Act robbery as the jurisdictional grounds for the order. (Id. at 38-39 (citing Zakrezewski v. McDonough, 455 F.3d 1254, 1260-61 (11th Cir. 2006)).)

Movant argues that the Report "too narrowly construes the claim of counsel's ineffective assistance in failing to challenge the Stored Communications Act (SCA) application in this case, CR-DE:268-1, based on the application's fundamental failure to invoke Hobbs Act jurisdiction for the federal investigation at issue." (Obj. at 12.) He argues that "[t]he absence of anything at all in the SCA application reflecting the presence of the essential element of federal jurisdiction is a defect that defeats a statutorily-required showing of 'reasonable grounds' to believe the records were 'relevant and material to an ongoing investigation,' as required by the SCA, 18 U.S.C. § 2703(d)." (Id.)

The Court finds that counsel's failure to challenge the Application on these grounds does not constitute deficient performance because Section 2703(d) was satisfied. The statute does not require that the Application allege the jurisdictional basis for the court's order; rather, it requires only that (1) the court "is a court of competent jurisdiction" and (2) the government "offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records

or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Here, it is undisputed that this Court is "a court of competent jurisdiction" with regard to the Hobbs Act robberies at issue in this case. Moreover, the Government's Application, which described in detail the Hobbs Act robberies that were being investigated, (Cr-D.E. 268-1 at 2-5), clearly offered "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). In fact, on direct appeal the Eleventh Circuit panel observed that "the law enforcement officers, the prosecution, and the judicial officer issuing the order, all acted in scrupulous obedience to a federal statute, the Stored Communications Act, 18 U.S.C. § 2703." Davis, 754 F.3d at 1218, vacated 785 F.3d 498 (11th Cir. 2015) (en banc). Although the Application incorrectly referenced the bank robbery statute, the requirements imposed by the statute for the issuance of the order were satisfied. Consequently, counsel was not ineffective for failing to challenge the application on these jurisdictional grounds. See Ladd v. Jones, 864 F.2d 108, 110 (11th Cir. 1989) (finding that "it was clearly not ineffective for counsel not to pursue" a meritless argument).

e. Ground Two

Next, Movant objects to Judge O'Sullivan's finding that trial counsel was not ineffective for failing to challenge the Superseding Indictment as duplicitous. (Obj. at 13-14.)

In his 2255 Motion, Movant argues that trial counsel was ineffective for failing "to move to dismiss the indictment on the basis of duplicity and failure to charge individual robbery offenses where it instead charged a multiplicity of robbery offenses (of persons, and not businesses) in each count, leaving the jury to reach disparate, non-unanimous verdict decisions as to disparate alleged robbery victims and prompting the jury to accumulate from multiple victims (multiple robberies) an interstate commerce effect." (Mot. at 8.) He further argues that trial counsel "failed to object to the government's constructive amendment of the indictment to change from robbery of the individual victims (employees and customers, as stated in the indictment) to store entities/companies, seeking to prove the taking of property belonging to the stores, such as watches, as affecting commerce, rather than property of the individual victims described in the indictment." (Id.)

Judge O'Sullivan agreed with the Government's argument that the Superseding Indictment's Hobbs Act offenses each charge Movant with "a single robbery of one commercial establishment[,]" and then "goes on to specify in greater detail that the robbery was accomplished by taking currency and other property 'from the person and in the presence of persons employed by, and persons patronizing, the [business] . . . by means of actual and threatened force, violence, and fear of injury to said persons . . . .'" ("Response," D.E. 8 at 15 (quoting Superseding Indictment at 2, and citing United States v. Foster, CRIMINAL ACTION NO. 1:16-CR-128-2-MHC-CMS, 2017 WL 9476883, at *2 (N.D. Ga. May 19, 2017), report and recommendation adopted 2017 WL 2539410 (N.D. Ga. June 9, 2017).) Ultimately, Judge O'Sullivan concluded that Movant

> has failed to show that his trial counsel's failure to challenge the Hobbs Act robbery allegations on duplicity grounds constitutes deficient performance. Where, as here, the Eleventh Circuit ruled that the Hobbs Act robbery charges were sufficient, any such challenge would be futile. Davis, 711 Fed. App'x at 609 (unpublished). Thus, the movant can neither show that his trial counsel's conduct was unreasonable nor that he was prejudiced as required by Strickland.

(Report at 35-36.)

In his Objections, Movant maintains that the Superseding Indictment was duplicitous because it alleged multiple individual victims in each Hobbs Act robbery count, and the Government constructively amended the Superseding Indictment at trial to add the business as an alternative victim in each count. (Obj. at 13.) He further argues that the Report appears to suggest that the Court could have cured the unanimity issue with appropriate jury instructions, but the fact that trial counsel failed to identify the issue and request the jury instruction establishes his ineffectiveness. (Id. at 13-14.) Finally, he argues that at a minimum, he is entitled to an evidentiary hearing on this claim of ineffectiveness. (Id. at 14.)

"A count in an indictment is duplicitous if it charges two or more 'separate and distinct' offenses. United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997) (quoting United States v. Burton, 871 F.2d 1566, 1573 (11th Cir. 1989)). "A duplicitous count poses three dangers: '(1) A jury may convict a defendant without unanimously agreeing on the same offense; (2) A defendant may be prejudiced in a subsequent double jeopardy defense; and (3) A court may have difficulty determining the admissibility of evidence.'" Id. at 977 (quoting United States v. Wiles, 102 F.3d 1043, 1061 (10th Cir. 1996)). "Under this

analysis, the key issue to be determined is what conduct constitutes a single offense." Id. Significantly, however:

> Where a penal statute . . . prescribes several alternative ways in which the statute may be violated and each is subject to the same punishment . . . , the indictment may charge any or all of the acts conjunctively, in a single count, as constituting the same offense, and the government may satisfy its burden by proving that the defendant, by committing any one of the acts alleged, violated the statute. The conjunctive allegations do not render the indictment duplicitous.

Burton, 871 F.2d at 1573 (internal citations omitted).

Here, the Hobbs Act robbery statute prescribes several alternative ways in which the statute may be violated and each is subject to the same punishment:

> Whoever 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). "Robbery" is defined as the "unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1).

As the Eleventh Circuit observed, the Superseding Indictment "tracked the language of 18 U.S.C. § 1951[(b)(1)]," Davis, 711 F. App'x at 609, charging all of the acts conjunctively:

> [Movant] did knowingly obstruct, delay, and affect commerce and the movement of articles in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), in that the defendants did take United States

> currency and other property from the person and in the presence of persons employed by, and persons patronizing, the [business], located at [address], 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, in violation of Title 18, United States Code, Sections 1951(a) and 2.

(See Cr-D.E. 39 at 2 (Little Caesar's); id. at 3-4 (Amerika Gas Station); id. at 4-5 (Walgreen's); id. at 5-6 (Advance Auto Parts); id. at 6-7 (Universal Beauty Salon); id. at 8 (Wendy's); id. at 10 (Mayor's Jewelry Store).)

The Court finds that because the Superseding Indictment merely tracked the language of 18 U.S.C. § 1951(a) & (b)(1), charging all of the acts conjunctively, the Hobbs Act counts were not duplicitous. Burton, 871 F.2d at 1573. The Court further finds that the Government did not constructively amend the Superseding Indictment from alleging Hobbs Act robbery of "persons" to Hobbs Act robbery of businesses. It simply alleges that a Hobbs Act robbery occurred, tracks the language of the statute, and charges all of the acts in the conjunctive. (See Superseding Indictment at 2-8, 10.)

Because (1) the Hobbs Act counts are not duplicitous, (2) the Government did not constructively amend the Superseding Indictment, and (3) the Eleventh Circuit has already held that the Hobbs Act counts were sufficiently pled and proved, 711 F. App'x at 609, trial counsel was not ineffective for failing to raise these issues. See Ladd, 864 F.2d at 110 (finding that "it was clearly not ineffective for counsel not to pursue" a meritless argument).

f. Ground Three

Finally, Movant objects to Judge O'Sullivan's finding that Movant cannot demonstrate deficient performance for counsel's failure to seek a plea deal and advise

Movant to plead guilty because there is no evidence that the Government ever offered a plea deal. (Obj. at 14-15.)

In his 2255 Motion, Movant argues that trial counsel was ineffective for failing "to fully advise the defendant of the relative benefits and detriments of going to trial as opposed to entering a guilty plea," and for failing to "pursue or negotiate a plea on behalf of the defendant." (Mot. at 9.) In this regard, Movant argues that counsel failed to discuss with him (1) that his co-defendants had entered plea deals with the Government and agreed to testify against Movant, (2) that conviction was a "certainty" under his understanding of the charges, and (3) that Movant would receive a mandatory life sentence due to the mandatory stacking of the 924(c) charges. (Id.)

In its Response, the Government argues that Movant is not entitled to an evidentiary hearing because he has alleged no facts regarding whether (1) a plea offer was ever made, (2) Movant would have accepted its terms, (3) the Court would have accepted its terms, and (4) the conviction or sentence or both under the offer's terms would have been less severe than under the judgment. (Resp. at 17 (citing Lafler v. Cooper, 566 U.S. 156, 164 (2012); Cook v. United States, 613 F. App'x 860, 864 (11th Cir. 2015). The Government further states that "in the event this court elects to hold an evidentiary hearing as to this issue, the undersigned has conferred with trial counsel, Michael Zelman, who has indicated that he will provide substantive testimony about the case only upon the receipt of a subpoena." (Id.)

In his Report, Judge O'Sullivan noted that the prosecutor put Movant on notice of the harsh sentence he faced and the fact that his co-defendants accepted plea offers. (Report

at 36-37). Specifically, at his pretrial detention hearing, the Assistant United States Attorney stated:

> Based on the Indictment as it stands now, Mr. Davis is facing a mandatory minimum term of 160 years in prison which must run consecutive to any other sentence imposed for the underlying robbery counts.
>
> In fact, Mr. Davis' codefendants, Mr. Reid and Mr. Smith who both just pled guilty, both pled guilty to prison terms of 37 years. That was the plea deal that they pled guilty to. So, Mr. Davis is facing an enormous amount of time in prison, a maximum of life obviously . . . .

(Pretrial Detention Hr'g Tr., Cr-D.E. 398 at 14:1-9.) Judge O'Sullivan ultimately found that because Movant has not shown that a plea offer was made but not communicated to Movant, he cannot show deficient performance or prejudice. (Report at 37-38.)

In his Objections, Movant argues that "[t]he evidence regarding the availability of plea terms can be fairly resolved only with the benefit of an evidentiary hearing." (Id. at 14.) He argues that in light of the fact that each of his co-defendants were offered plea deals of less than 40-years' imprisonment, "it would strain credulity to premise the denial of an evidentiary hearing to the Movant on the possibility that a similar plea would not have been offered to him as well in this case." (Id.) He argues that the Government's failure to deny Movant's allegations "supports an inference that a substantially more favorable offer must likely have been made." (Id. at 15.)

"Counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution." Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991) (citing Strickland, 466 U.S. at 688). The Sixth Amendment's right to the effective assistance of counsel (as well as the Strickland

analysis) "extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012) (citing Missouri v. Frye, 566 U.S. 134 (2012)). "In both Frye and Lafler, the Supreme Court clarified that the Sixth Amendment right to effective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984), extends to the negotiation and consideration of plea offers that lapse or are rejected." In re Perez, 682 F.3d 930, 932 (11th Cir. 2012). "The Court specifically held that counsel has a 'duty to communicate formal offers from the prosecution to accept a plea,' and that, in general, where such an offer is not communicated to the defendant, counsel '[does] not render the effective assistance the Constitution requires.'" Id. (quoting Frye, 566 U.S. at 145).

> The [Supreme] Court concluded that, in order to establish prejudice, a defendant must show a reasonable probability that but for counsel's ineffectiveness: (1) "the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)"; (2) "the court would have accepted its terms"; and (3) "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Lafler, 132 S. Ct. at 1385; see Frye, 132 S. Ct. at 1409.

Osley v. United States, 751 F.3d 1214, 1222 (11th Cir. 2014).

Pursuant to 28 U.S.C. § 2255(b), the Court is required to conduct a hearing on a claim "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief[.]"

> [T]his rule does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner simply asserts a claim of ineffective assistance of counsel: "A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing

> required where the petitioner's allegations are affirmatively contradicted by the record."

Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989). But "[i]f [the movant] alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim." Slicker v. Wainwright, 809 F.2d 768, 770 (11th Cir. 1987) (citing McCoy v. Wainwright, 804 F.2d 1196, 199-1200 (11th Cir. 1986)).

In this case, Movant has not alleged sufficient facts that, if true, would entitle him to relief. Specifically, he has not alleged that he would have accepted a plea offer if one had been presented to him and he had been fully advised of the relevant benefits and detriments. See Jensen v. United States, 780 F. App'x 800, 801-02 (11th Cir. 2019). In Jensen, the movant

> alleged in her § 2255 motion that her trial counsel was deficient because he "fail[ed] to obtain a pre-trial plea offer from the Government" and "fail[ed] to present such a plea offer to [her]." She asserts that "there was no discussion regarding a potential plea," but that if a plea had been negotiated, and if she had "been advised of the possibility of reduced charges and a shorter sentence . . . as well as the consequences of rejecting the plea and proceeding to trial, there is a reasonable probability that she would have accepted the plea."

Id. at 801. The district court denied the claim without an evidentiary hearing, and the Eleventh Circuit affirmed:

> The district court did not abuse its discretion by denying Jensen an evidentiary hearing. She did not present "reasonably specific, non-conclusory facts" showing a reasonable probability that she would have pleaded guilty if her trial counsel had secured a formal plea offer and

> communicated that offer to her.[5] Winthrop-Redin, 767 F.3d at 1216 (quotation marks omitted). True, Jensen asserted in her motion that "there is a reasonable probability that she would have accepted the plea," referring to a hypothetical plea offer the government did not make. Merely restating the standard is not the same as meeting it. And Jensen did not allege in her motion that she ever told her attorney that she was interested in pleading guilty or that she ever asked him to pursue a plea deal. Nor did she allege in that motion that there existed a formal plea offer from the government that her attorney did not share with her. Cf. Missouri v. Frye, 566 U.S. 134, 145, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (holding that defense counsel "has the duty to communicate formal offers from the prosecution"). A district court is not required to hold an evidentiary hearing based only on a movant's "own conclusory after-the-fact assertion[s]." Rosin v. United States, 786 F.3d 873, 879 (11th Cir. 2015); see id. at 878 (holding that "because [defendant] did not allege that he would have accepted a guilty plea and abstained from proceeding to trial but for the alleged errors of his trial counsel, [he] has failed to show that the alleged errors prejudiced him").

Id. at 801-02 (footnote in original). The Eleventh Circuit further observed that there was evidence that the government had offered a plea deal that the movant was unwilling to accept, and that the movant had argued that she did not accept it because counsel had not adequately explained it. Id. at 802-03. However, the court concluded that "her after-the-fact testimony concerning her desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, she would have accepted a plea offer that the

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[5] The district court stated that "there is simply not enough evidence in the record to permit the Court to conclude that, but for her counsel's errors, [Jensen] would have pled guilty to some unknown and unsubstantiated offer, would not have insisted on going to trial, that the plea would not have been canceled by the prosecution, and that the district court would have accepted the plea." That was a misstatement because the question before the court was not whether there was enough evidence in the record to substantiate Jensen's claims, but whether Jensen had pleaded sufficient facts that, if true, would show that she was prejudiced by her attorney's allegedly deficient performance. See Winthrop-Redin, 767 F.3d at 1215–16. Still, that error was harmless because Jensen did not allege such facts. See Rivers v. United States, 777 F.3d 1306, 1316 (11th Cir. 2015) ("An error is harmless if it had no substantial influence on the outcome.").

government was willing to make." Id. at 803 (citing Diaz v. United States, 930 F2d 832, 835 (11th Cir. 1991)).

Here, Movant's 2255 Motion does not allege that the Government ever offered a plea deal; rather, it alleges that "[t]rial counsel was ineffective in failing to seek and negotiate a plea deal[.]" (Mot. at 9.) Movant's Reply brief does not allege that the Government offered a plea deal; rather, it alleges that "[a]n evidentiary hearing is warranted to allow movant Davis to present witnesses and evidence to substantiate his claims that trial counsel did not adequately inform Davis of the comparative beneficial and negative effects of proceeding to trial as opposed to pleading guilty . . . ." (Reply at 7.) Even Movant's Objections do not allege that the Government offered a plea deal; rather, it argues that an evidentiary hearing is warranted to determine whether the government would have offered a plea deal had trial counsel sought one, in light of the fact that the Government offered his co-defendants plea deals. (Id. at 14.) Nor does Movant allege that he ever told his attorney that he was interested in pursuing a plea deal, that he instructed his attorney to negotiate a plea deal, or, significantly, that he would have accepted a plea offer had one been presented. Therefore, the Court finds that Movant has not alleged sufficient facts that, if true, would establish that Movant was prejudiced by his attorney's allegedly deficient performance. Jensen, 780 F. App'x at 802-03 & n.1. He is therefore not entitled to an evidentiary hearing on this issue, and counsel was not ineffective in relation to a potential guilty plea. See Willner v. United States, CASE NO.: 16-24459-CV-SEITZ, 2018 WL 9815445, at *25 (S.D. Fla. Dec. 18, 2018) (denying evidentiary hearing and rejecting claim that counsel was ineffective in regards to an alleged plea offer because,

inter alia, "the movant has not alleged, much less demonstrated in his § 2255 motion, as amended, that but for counsel's misadvice he would have accepted the government's plea offer and not proceeded to trial"), report and recommendation adopted 2019 WL 5104509 (S.D. Fla. Mar. 29, 2019).

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. The Report of the Magistrate Judge issued November 7, 2019 (D.E. 12) is **ADOPTED** as supplemented herein;
2. Movant Quartavious Davis's Motion to Vacate Conviction Under 28 U.S.C. § 2255 is **DENIED**;
3. A Certificate of Appealability **SHALL NOT ISSUE**;
4. All pending motions are **DENIED AS MOOT**; and
5. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 23rd day of January, 2020.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-21457-CV-LENARD/O'SULLIVAN

QUARTAVIOUS DAVIS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT AND RECOMMENDATION

THIS MATTER came before the Court on the Motion to Vacate Conviction under 28 U.S.C. § 2255 (DE# 1, 4/16/19). This matter was referred to Chief United States Magistrate Judge John J. O'Sullivan by the Honorable Joan A. Lenard for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). (DE# 6, 4/26/19). Having carefully considered this motion, the Government's Response to Petitioner's Motion to Vacate Sentence under 28 U.S.C. § 2255 (DE# 8, 6/10/19), the Movant's Reply to United States' Response to Motion to Vacate under 28 U.S.C. § 2255 (DE# 11, 7/8/19), the court file and applicable law, the undersigned respectfully recommends that the petitioner's Motion to Vacate Conviction under 28 U.S.C. § 2255 (DE# 1, 4/16/19)[1] be DENIED.

[1] References to docket entries for this Civil Case No. 1:19-CV-21457-JAL are hereinafter referred to as "DE #." References to docket entries for the underlying Criminal Case, *United States of America v. Jamarquis Terrell Reid, Quartavious Davis, et al.*, No. 10-20896-CR-JAL will be referred to as "CR-DE #."

Procedural Background

The Superseding Indictment (CR-DE# 39, 2/18/19) charged Quartavious Davis (hereinafter "Davis" or "Movant") and five co-defendants with two Hobbs Act conspiracies in violation of 18 U.S.C. § 1951(a) (Counts 1 and 15), and seven (7) Hobbs Act robbery offenses occurring on seven (7) discrete dates within a two-month period in 2010, between August 1 and October 6, in violation of 18 U.S.C. 1951(a) (Counts 2, 4, 6, 8, 10, 13, 16), as well as using, carrying or possessing a firearm in each robbery (Counts 3, 5, 7, 9, 11, 14, 17) on the corresponding dates, in violation of 18 U.S.C. § 924(c). (CR-DE# 39, 2/18/19). Davis pled not guilty; his co-defendants pled guilty to the charges against them. The movant was the only defendant to proceed to trial. A jury found the movant guilty as charged. (CR-DE# 39, 2/18/19).

Before trial, the movant filed a motion to suppress 67 days of cell site location information that was obtained with a court order without a warrant and without a finding of probable cause. Pursuant to the Stored Communications Act, 18 U.S.C. § 2703(c), (d), the government filed an *ex parte* Application for Stored Cell Site Information (CR-DE# 268-1, 1/27/19) (hereinafter "Application") regarding four cell phone numbers including the movant's, which the Court granted. The seized cell site location information was for the period from August 1 through October 6, 2010. (CR-DE# 268-1, 1/27/19); (CR-DE# 266). The Application stated that it was sought to investigate crimes pursuant to 18 U.S.C. § 2113, which is the bank robbery statute, but made no reference to the Hobbs Act statute, 18 U.S.C. § 1951(a). (CR-DE# 268-1, 1/27/19). The seven-page Application provided explicit details of the robberies that were the subject of the investigation as well as the cell phone numbers of the movant and some of his co-

defendants. After conducting a hearing, the Court conditionally denied the motion to suppress. (CR-DE# 277:45). Over the defense's objection at trial, the government admitted the CSLI for the relevant dates. (CR-DE# 283: 214-31; CR-DE# 285:26-38). The movant renewed his suppression motion, which the Court denied. (CR-DE# 364:192)

After an eight-day trial, the jury convicted the movant on all counts with which he was charged. (CR-DE# 293). The Presentence Investigation Report revealed that the movant was a teenager (18 and 19 years old) at the time of the robberies that occurred from August 1, 2010 through October 1, 2010. The movant was raised in a home with thirteen other children by his mother and stepfather in Homestead, Florida and eventually Dothan, Alabama. Since early childhood, the movant suffered from severe learning disabilities and multiple mental disorders. Presentence Investigation Report ("PSI Report") ¶¶ 88-89, 94 (CR-DE# 335; 205:121-131).

Excluding the first conviction, the § 924(c) convictions for Hobbs Act robberies carried mandatory consecutive minimum sentences of 25 years. PSI ¶ 106. Consequently, the Court sentenced the movant to 1,941 months.[2] (CR-DE# 342, 5/17/2012). Before imposing the sentence, the Court stated that, but for the mandatory consecutive penalties under § 924(c) (Hobbs Act), the Court would have imposed a sentence of 40 years. Transcript of Sentencing Hearing at pp. 33-34 (CR-DE# 366; 7/17/12). During the sentencing hearing, the judge explained that

> If this were a matter of only looking at the statutory criteria, I would impose a sentence here that would not be a life sentence. It would be a very lengthy

[2] The 1,941-month sentence is approximately 161 years and is comprised of: 57-month terms as to Counts 1, 2, 4, 6, 8, 10. 13, 15, and 16; 84-months, consecutive, as to Count 3; and seven 300-month terms as to counts 3, 5, 7, 9, 11, 14, and 17, all served consecutively to the 84-month and 57-month sentences. PSI ¶¶ 106-107 (CR-DE# 342).

> sentence. I would think that a sentence here, given his age, 20, of 40 years for all these very serious, serious crimes would be one that would, as the statute says, be sufficient but not greater than necessary.

Id. at 33.

In his direct appeal, the movant raised the following grounds: 1) that the cell site location information obtained by court order without a search warrant violated the Fourth Amendment; 2) prosecutorial misconduct regarding bolstering the testimony of a government witness and improperly commenting on the credibility of a witness during the closing argument; 3) improper sentencing enhancement based on brandishing a firearm as well as violations of the Eighth Amendment's protection from cruel and unusual punishment for imposing the approximately 162-year sentence, which amounts to a life sentence, for crimes committed when the movant was 18 and 19 years old, suffered from bipolar disorder, had a severe learning disability, and had no prior convictions; 4) that the evidence was not sufficient to convict the movant of aiding and abetting the use of a firearm by his co-defendant; and 5) the cumulative effect due to multiple trial errors and prosecutorial misconduct warranted reversal of his convictions.

The Eleventh Circuit issued panel and en banc decisions that granted relief in part. United States v. Davis, 754 F.3d 1205 (11th Cir. 2014), rehr'g granted, opinion vacated, United States v. Davis, 785 F.3d 498 (11th Cir. 2015) (en banc), cert. denied, Davis v. United States, 136 S. Ct. 479 (Nov. 9. 2015), appeal after new sentencing, United States v. Davis, 711 Fed. App'x 605 (11th Cir. 2017) (unpublished), cert. denied, Davis v. United States, 138 S. Ct. 1548 (2018).

In his first appeal, the Eleventh Circuit held that "cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data

without a warrant is a Fourth Amendment violation." United States v. Davis, 754 F.3d 1205, 1217 (11th Cir. 2014). Although obtaining the cell site location information without a warrant violated the Fourth Amendment, the Eleventh Circuit held that the admission of the cell site location information did not constitute reversible error "under the 'good faith' exception to the exclusionary rule recognized in United States v. Leon, 468 U.S. 897 (1984)." Id. In Davis, the Eleventh Circuit explained "[h]ere, the law enforcement officers issuing the order, all acted in scrupulous obedience to a federal statute, the Stored Communication Act, 18 U.S.C. § 2703." Id. at 1218.

The Eleventh Circuit rejected the movant's challenges to his conviction except his challenge to his increased sentence for brandishing a weapon. The Eleventh Circuit accepted the movant's constitutional challenge to his sentence on Count 3 because the district court found that he was subject to a seven-year mandatory minimum sentence for "brandishing" a weapon pursuant to 18 U.S.C. § 924(c), where the jury found only that the movant "possessed a firearm in furtherance of the robbery." Id. at 1220. The district court imposed a seven-year sentence for brandishing when a conviction for possession requires a five-year sentence. The Eleventh Circuit "affirmed the judgment of conviction and vacate[d] only that portion of the sentence attributable to the enhancement for brandishing [on Count 3]." Id. at 1223.

Subsequently, the Eleventh Circuit vacated the panel opinion to consider en banc whether obtaining the cell site location information without a warrant violated the defendant's Fourth Amendment rights. United States v. Davis, 785 F.3d 498 (11th Cir. 2015) (en banc). The Eleventh Circuit held, contrary to the panel decision, that obtaining the cell site location information without a warrant did not violate the

defendant's constitutional rights. Id. at 500, 518 n. 21. On May 21, 2015, the Eleventh Circuit issued its mandate affirming the movant's judgment of conviction and "vacating only that portion of the sentence attributable to the enhancement for brandishing." (CR-DE# 401). The Eleventh Circuit explained that "we reinstate the panel opinion, United States v. Davis, 754 F.3d 1205 (11th Cir.), reh'g en banc granted, opinion vacated, 573 F. App'x 925 (11th Cir. 2014), with respect to all issues except those addressed in Parts I and II, 754 F.3d 1210-18, which are now decided by the en banc court," and the opinion further noted that the vacating of "the application of the guidelines sentencing increase for 'brandishing of a firearm' ... stands." Id. at 500 n. 2. On November 9, 2015, the Supreme Court denied the movant's petition for a writ of certiorari. Davis v. United States, 136 S. Ct. 479 (2015).

On March 9, 2016, two days before his re-sentencing hearing, the movant filed a motion to vacate his convictions and a motion to dismiss the indictment for lack of jurisdiction. (CR-DE# 410; 411). The movant argued that this Court should vacate his Hobbs Act robbery convictions because the government failed "to prove with particularized evidence the essential interstate commerce element of the offense." (CR-DE# 410 at 2). Relying upon the Supreme Court's grant of certiorari in Taylor v. United States, 136 S. Ct. 2074, 2080 (2016), which raised the issue of whether a robbery of a purely intrastate drug dealer had affected interstate commerce under the Hobbs Act, the movant argued that the stipulations that he executed at trial, which stated that the robberies occurred at businesses "operating in interstate and foreign commerce" and that the robberies "obstructed, delayed and affected interstate and foreign commerce" were insufficient to satisfy the jurisdictional element of Hobbs Act robbery. Id. at 2-3;

see Taylor v. United States, 136 S. Ct. 2074, 2080 (2016). Additionally, relying on the Supreme Court decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), was unconstitutionally vague, the movant argued that the residual clause of 18 U.S.C. § 924(c) was equally unconstitutionally vague despite acknowledging that the definition of "crime of violence" in section 924(c) was different from the definition of "violent felony" in section 924(e). Id. at 2-6.

On March 10, 2016, the district court denied the movant's motions to vacate his convictions and dismiss the indictment based on the limited remand that the Eleventh Circuit issued in its mandate regarding the enhanced sentence for brandishing a firearm. (CR-DE# 413; 3/10/16). The district court explained that three exceptions to the Court's mandate rule exist and that it could consider an issue outside the limited remand only if: 1) a subsequent trial produced substantially different evidence; 2) controlling authority had made a contrary decision of law; or 3) the prior appellate decisions would work a manifest injustice. Id. Finding that none of the exceptions applied, the district court denied the movant's motion to dismiss. Id.

On March 11, 2016, the district court held a sentencing hearing, rejected the movant's repeated arguments to expand the scope of the resentencing to beyond reducing the sentence on Count 3 from seven years to five years where the jury found only that the movant possessed a firearm. As a result, the movant's overall sentence was reduced to 1,917 months of imprisonment. (CR-DE# 421 at 24-25).

The movant appealed the district court's denial of his Rule 12(b) motions and the Eleventh Circuit affirmed the district court's denial and held that the indictment

"sufficiently charged that Davis's conduct had a minimal impact on interstate commerce." Davis, 711 Fed. App'x at 610 (unpublished). The Eleventh Circuit found that the government proved the interstate nexus at trial through both the movant's stipulations and through the testimony of victim store employees. Id. The Supreme Court denied a writ of certiorari on April 18, 2018. Davis, 138 S. Ct. 1548 (2018).

Evidence at Trial

The movant and his co-defendants committed seven robberies of stores, restaurants and gas stations in approximately two months.

On August 7, 2010, the movant and two other men robbed a Little Caesar's restaurant in Miami, Florida, in the presence of two employees. See Transcript of Jury Trial Proceedings (CR-DE# 281 at 100-04; CR-DE# 283 at 100-06). All three men were armed, one with a revolver and two with automatic handguns. After ordering everyone in the restaurant to get down on the floor, the movant and his co-defendants stole money from the cash registers before fleeing. (CR-DE# 281 at 102-03; CR-DE# 283 at 101, 105-07).

On August 31, 2010, the movant and two other men robbed an Amerika Gas Station in Homestead, Florida, in the presence of two employees (CR-DE# 281 at 112-14; CR-DE# 283 at 109-14). All three men were armed and before fleeing they held one of the employee's at gunpoint and stole money from the cash register, money from the safe, cigarettes, cigars, and a lighter as well as the wallet and cell phone of one of the employees (CR-DE# 281 at 115-18; CR-DE# 283 at 111-14).

On September 7, 2010, the movant and two other men robbed a Walgreens Pharmacy in Miami, Florida, while employees and one customer were present (CR-DE#

281 at 139-42, 146; CR-DE# 283 at 115-20). All three men were armed while they stole money from the cash registers, money from the safe, and cigarettes (CR-DE# 281 at 142-44; CR-DE# 283 at 116-17, 119-20).

On September 15, 2010, the movant and two other men robbed an Advance Auto Parts in Naranja, Florida in the presence of three employees and two customers (CR-DE# 281 at 148-49; CR-DE# 283 at 122-26). All three men were armed with handguns. After yelling at the employees and customers to "get down" on the floor and holding one employee at gunpoint, the men stole $287 from the cash register before fleeing. (CR-DE# 281 at 148-52; CR-DE# 283 at 123-26). Immediately after the movant and the two other men fled, the movant fired his handgun twice at a dog that was barking (CR-DE# 281 at 156;
CR-DE# 283 at 127).

On September 25, 2010, the movant and two other men robbed the Universal Beauty Salon in Miami, FL in the presence of four employees (CR-DE# 281 at 161-69; CR-DE# 128-32). All three men were armed with handguns, but only the movant's two accomplices went into the beauty salon where they ordered the employees to get on the ground (CR-DE# 281 at 165-66, 174; CR-DE# 283 at 129, 131-32). While the beauty salon robbery was beginning, the movant entered the neighboring children's Tae Kwan Do studio, which was filled with children, pointed his gun at a man and forced him to the floor before stealing his camera as well as multiple cell phones that were out in the area. (CR-DE# 281 at 174; CR-DE# 283 at 131). Another adult was able to hide the children in a back room while the movant knocked over a 77-year-old woman as well as another woman. (CR-DE# 281 at 174). The movant left the Tae Kwan Do studio and

went into the beauty salon. After searching one of the employee's purses and holding one of the employees at gunpoint, the three men stole the money in the cash register and fled while the children from the Tae Kwan Do studio screamed. (CR-DE# 281 at 166-69; CR-DE# 283 at 131-33).

On September 26, 2010, the movant and two other men robbed a Wendy's restaurant in Miami, Florida in the presence of customers and employees. (CR-DE# 283 at 70-72, 138, 148). All three men were armed with handguns, and they ordered everyone to "get down." (Id. at 72-73, 139). One of the robbers took a watch and wallet from one customer, a purse from another customer, and then robbed a third customer, while the other two men took the money from the cash register and the safe (CR-DE# at 73-75, 138-40). As the three men fled, the movant fired two shots from his gun at a customer who had attempted to identify the getaway vehicle. (CR-DE# 283 at 77-80, 142).

On October 1, 2010, the movant and two other men, robbed a Mayors Jewelry store in Weston, Florida while employees and contractors were present. (CR-DE# 279 at 22-26, 44, 212, 226). One of the men was armed. After ordering the employees to get down, the men including the movant used hammers to smash the store's display cases and stole 23 luxury watches before fleeing. (CR-DE# 279 at 24, 27-28, 32; CR-DE# 281 at 10-11, 14, 19).

The movant's trial counsel stipulated to the following facts for each robbery:

> The [business] located at [address] is a business and company operating in interstate and foreign commerce. The robbery of this business that occurred on [date], therefore obstructed, delayed and affected interstate and foreign commerce.

(CR-DE# 281 at 138 – Little Caesar's Restaurant; CR-DE# 279 at 38 – Amerika Gas Station; CR-DE# 281 at 158 – Walgreens Pharmacy; CR-DE# 281 at 158 – Advance Auto Parts; CR-DE# 281 at 170 – Universal Beauty Salon; CR-DE# 285 at 53 – Wendy's; CR-DE# 279 at 38 - Mayors Jewelry store). After the following colloquy with the movant at trial, the trial court determined that the movant had knowledge and consented to his trial counsel's stipulations that each business that was a target of the robberies was involved in interstate commerce:

THE COURT: So have you authorized Mr. Zelman to act as he described?

THE DEFENDANT: Yes.

THE COURT: Did anybody force you to do so?

THE DEFENDANT: No.

THE COURT: Do you feel that he has given you a full explanation of everything you needed to know about it?

THE DEFENDANT: Yes.

THE COURT: All right. I am satisfied it is a voluntary authorization then.

(CR-DE# 346 at 193-195).

At trial, a Miami-Dade police detective testified that the cell site location information ("CSLI") placed Davis near the sites of six (6) of the robberies. The government submitted into evidence the police detective's maps showing the location of the movant's phone relative to the location of the robberies. (CR-DE# 364:192); Gov't. Ex. 37A-F.

Legal Analysis

The movant timely filed a Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 (DE# 1, 4/16/19). The movant seeks habeas relief for a variety of ineffective assistance of counsel claims under the Sixth Amendment as well as constitutional claims based on the Fourth and Eighth Amendments. The movant relies on the Supreme Court's recent decision in Carpenter v. United States, 138 S. Ct. 2206 (2018) that held that a search warrant supported by probable cause is necessary to obtain cell phone location information from a third-party wireless carrier, which did not happen in this case. Although the movant concedes that the First Step Act of 2018 does not apply retroactively to him, he relies on the First Step Act to support his position that his sentence should be reduced. By enacting the First Step Act of 2018, Congress amended 18 U.S.C. § 924(c) to eliminate the mandatory stacking of consecutive minimum 25-year sentences that was imposed on the movant, which was replaced with a total 25-year mandatory consecutive minimum sentence for all subsequent convictions of Hobbs Act robberies. Under the First Step Act, the movant would receive a 40-year sentence rather than the 160-year sentence he is currently serving.

In its response (DE# 8, 6/10/19), the government argues that the motion for habeas relief should be denied because the movant's ineffective assistance of counsel claims lack merit and the movant's constitutional claims based on violations of the Fourth and Eighth Amendments are procedurally barred because they were raised and rejected on direct appeal. The government argues further that neither Carpenter nor the First Step Act of 2018 supports habeas relief in the present case.

In his reply (DE# 11, 7/8/19), the movant maintains that his counsel was ineffective for stipulating to the interstate commerce element of the Hobbs Act robberies and that he did not voluntarily waive his right to challenge the element. Additionally, the movant argues that his counsel was ineffective for failing to advise him to plead guilty particularly where the sentencing judge expressed that he would have imposed a 40-year sentence but for the statutory mandatory penalties, which is approximately the same sentence available under the First Step Act of 2018. The movant maintains that he is entitled to an evidentiary hearing to determine whether the prosecutor and law enforcement obtained the cell site location information in good faith relying on the Supreme Court's recent Carpenter decision that requires a search warrant based on probable cause to obtain such information.

The motion is ripe for disposition.

I. Standard of Review for Habeas Relief under 28 U.S.C. § 2255

A prisoner seeking post-conviction relief by filing a motion to vacate, set aside, or correct the sentence must allege as a basis for relief that: (1) the sentence was imposed in violation of the Constitution or laws of the United States, (2) the court was without jurisdiction to impose such sentence, (3) the sentence was in excess of maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C.A. § 2255.

II. Evidentiary Hearing

The movant requests an evidentiary hearing. To be entitled to an evidentiary hearing on a section 2255 habeas claim, the petitioner must allege facts that, if proved at the hearing, would entitle him to relief. See Schriro v. Landrigan, 550 U.S. 465, 474-

75 (2007) (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing). The Court must hold an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; see also Anderson v. United States, 948 F.2d 704, 706 (11th Cir. 1991).

The petitioner maintains that he is entitled to an evidentiary hearing on his ineffectiveness of counsel claims unless the claims are inadequate on their face or the records conclusively refute his factual assertions. Motion at 5 (DE# 1, 4/16/19) (citing Shaw v. United States, 24 F.3d 1040, 1043 (8th Cir. 1994); United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994)).

In Holmes v. United States, the Eleventh Circuit explained that "[i]t is the general rule in this circuit that ineffective assistance claims will not be addressed on direct appeal from a criminal conviction because an evidentiary hearing, available in a section 2255 proceeding, is often required for development of an adequate record." Holmes v. United States, 876 F.2d 1545, 1552 (11th Cir. 1989) (citation omitted). The Eleventh Circuit further explained that "this rule does not require that the district court hold an evidentiary hearing every time a section 2255 petitioner simply asserts a claim of ineffective assistance of counsel: 'A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required when the petitioner's allegations are affirmatively contradicted by the record.'" Id. (quoting Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979)).

The "decision to grant an evidentiary hearing [is] left to the sound discretion of [the] district courts." Schriro, 550 U.S. at 473. "[A] federal court must consider whether

such a hearing could enable an applicant to prove the petitioner's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro, 550 U.S. at 474. For the reasons set forth below, the undersigned finds that the movant is not entitled to federal habeas relief. Thus, an evidentiary hearing is not warranted as to any of his claims. For this reason, the undersigned concludes that the movant's request for an evidentiary hearing on his claims should be **DENIED**.

III. Standard for Ineffective Assistance of Counsel

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const., 6th Am. The right to counsel includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

The Eleventh Circuit applies the two-prong test set forth in Strickland to analyze an ineffective assistance of counsel claim. Strickland requires the defendant to prove that: (1) counsel's representation of petitioner fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. Diaz v. United States, 930 F.2d 832 (11th Cir. 1991). "Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. The reasonableness of counsel's conduct must be evaluated from counsel's perspective at the time. Id. Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order [e.g. deficient performance before prejudice] or even to address both components

of the inquiry if the defendant makes an insufficient showing on one." Id. at 697; see, Dingle v. Sec'y for Dep't. of Corr., 480 F.3d 1092, 1100 (11th Cir. 2007).

IV. Neither *Carpenter* nor the First Step Act Requires Habeas Relief

Neither the Supreme Court's decision in Carpenter v. United States, 138 S. Ct. 2206 (2018), nor the First Step Act of 2018 afford the movant habeas relief.

V. Movant Is Not Entitled to Habeas Relief

A. Procedurally Barred Claims

The government argues that two of the movant's claims: 1) that his 159-year sentence violates the Eighth Amendment's ban on cruel and unusual punishment; and 2) that the cell site location information was obtained in violation of the Fourth Amendment are procedurally barred because the Eleventh Circuit has already rejected the claims on direct appeal. See Response at 18 (DE# 8, 6/10/19). As discussed above, neither the Supreme Court's Carpenter decision nor the First Step Act of 2018 change the analysis. Id. at 18, 21.

A prisoner is procedurally barred from raising arguments in a motion to vacate his sentence under 28 U.S.C. § 2255 that were raised and rejected on direct appeal. See United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000) (citing United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). "[O]nce a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255." Id. (quoting United States v. Natelli, 553 F. 2d 5, 7 (2d Cir. 1977) (footnote omitted)). On direct appeal in the present case, the Eleventh Circuit rejected the movant's Fourth and Eighth Amendment claims. As discussed below, the

undersigned finds that the movant's constitutional claims are procedurally barred. This Court should deny habeas relief on the movant's Fourth and Eighth Amendment claims.

1. The Eleventh Circuit Rejected Movant's Claim That His 162-Year Sentence Was Cruel and Unusual under Eighth Amendment

In his initial direct appeal, the movant raised, and the Eleventh Circuit rejected the argument that his then 162-year sentence, which has since been reduced to an approximately 160-year sentence,[3] constituted cruel and unusual punishment in violation of the Eighth Amendment. United States v. Davis, 754 F.3d 1205, 1221 (11th Cir. 2014). The movant neither cites nor addresses the Eleventh Circuit's rejection of his Eighth Amendment violation claim in his direct appeal. Instead, the movant argues that the recently enacted First Step Act of 2018 supports his argument his sentence is egregiously disproportionate and fails to comport with the Eighth Amendment's guarantee against cruel and unusual punishment. The undersigned will address the government's procedural bar argument before separately addressing the movant's argument that the First Step Act of 2018 supports his position for habeas relief.

In his motion for habeas relief, the movant relies on the same personal factors that the Eleventh Circuit considered in his direct appeal: "that he was eighteen and nineteen years old at the time of the commission of the offenses, and suffered from bipolar disorder and a severe learning disability, and had no prior convictions." Id.; see Motion at p. 13 (DE# 1, 4.16/19). Like his direct appeal, the movant "views his sentence ... as grossly disproportionate when considering his youth, intellectual disability, and

[3] The trial court sentenced Davis to 1,917 months, or 159 years and 9 months, which results from stacking six 25-year penalties for his Section 924(c) convictions.

emotional immaturity, and as especially harsh for a non-homicide offense." Id.; see Motion at 13.

In its initial panel opinion, the Eleventh Circuit explained that "[a]s applied to noncapital offenses, the Eighth Amendment encompasses at most only a narrow proportionality principle." Id. (citing United States v. Brant, 62 F.3d 367, 368 (11th Cir. 1995) (citing Harmelin v. Michigan, 501 U.S. 957 (1991)). The Eleventh Circuit "accord[s] substantial deference to Congress: 'In general, a sentence within the limits imposed by statute is neither excessive nor cruel and unusual under the Eighth Amendment.'" Id. (quoting United States v. Johnson, 451 F.3d 1239, 1243 (11th Cir. 2006) (quotation omitted)). "In United States v. Farley, 607 F.3d 1294, 1339 (11th Cir. 2010), [the Eleventh Circuit] held that the mandatory nature of a noncapital penalty is irrelevant for proportionality purposes, and observed that [the Eleventh Circuit] has never found a term of imprisonment to violate the Eighth Amendment. *Id.* Nor do we now." Davis, 754 F.3d at 1221.

In the present case, the Eleventh Circuit acknowledged that the movant's "total sentence [was] unmistakably severe." Id. The Court explained that "a gross proportionality analysis necessarily compares the severity of a sentence to the crimes of conviction, and [found] Davis's crimes were numerous and serious." Id. at 1221-22. The Eleventh Circuit summarized the facts: "Multiple victims experienced being robbed and threatened with a handgun. Davis's use of a handgun entailed a risk [of] severe injury or death. Trial testimony established that Davis shot at a dog, and actually exchanged fire with a witness following the Wendy's robbery." Id. at 1222. The Eleventh Circuit explained that "[it] cannot conclude that such repeated disregard for the

law and for victims should overcome Congress's determination of what constitutes an appropriate sentence, even when Eighth Amendment concerns are implicated." Id. The undersigned finds that the movant's Eighth Amendment violation claims were raised and rejected on direct appeal and are procedurally barred. This Court should deny habeas relief on this ground.

As the government argues and the movant concedes, the First Step Act of 2018 is not retroactive.

A. The First Step Act of 2018 Does Not Apply Retroactively

The movant relies on the First Step Act of 2018 to support his argument that his greater-than-life sentence (i.e. 1,917 months or 159 years and 9 months), which was contrary to the sentencing judge's announced inclination to impose a 40-year sentence, is disproportionate and fails to comply with the Eighth Amendment's guarantee against cruel and unusual punishment. Motion at 12 (DE# 1, 4/16/19).

The First Step Act of 2018 amended 18 U.S.C. § 924(c) to eliminate the mandatory stacking of consecutive minimum 25-year sentences that was imposed on the movant for his Hobbs Act robbery convictions. See Section 403 of the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018). The First Step Act of 2018 replaced the mandatory stacking with a total 25-year mandatory consecutive minimum sentence for all subsequent convictions of Hobbs Act robberies.[4] The movant argues

[4] Before the First Step Act, the penalty for a defendant's second violation of 18 U.S.C. § 924(c) increased to twenty-five years and was required to run consecutively to any other sentence. See 18 U.S.C. § 924(c)(1)(D)(ii). Section 403(a) of the First Step Act amends the statutory structure and provides: "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.'" See

that his sentence under the First Step Act would be 35 years rather than 150 years for the Hobbs Act robberies.

The movant argues that the First Step Act would reduce the penalties for the movant's Hobbs Act robberies (i.e. 18 U.S.C. § 924(c) offenses) to a 35-year term, in total, for his Section 924(c) convictions rather than his current 160-year sentence, which is consistent with the sentencing judge's announced preference to impose a 40-year sentence.

The movant relies on the dissent in United States v. St. Hubert, 918 F.3d 1174, 1201 (11th Cir. 2019) (Martin, J., joined by Pryor, J., dissenting from the denial of rehearing en banc), which explains that "the recently enacted First Step Act of 2018 would not have permitted this type of 'stacking' of § 924(c) charges... To say it plainly, this new law would today prohibit 25 years of the 32-year sentence imposed on [the defendant] in 2016." Although the First Step Act reduces the penalties of Hobbs Act robberies, as the movant concedes, it is not retroactive. As discussed above, the First Step Act does not warrant habeas relief in the present case. See United States v. Rondon, Case No. 8:06-CR-326-T-23TGW, 2019 WL 1060813, at *2 (M.D. Fla. Mar. 6, 2019) (denying post-conviction request and determining that "a prisoner sentenced before enactment of the First Step Act is not entitled to retroactive application of the changes to a sentence under Section 924(c)").

Section 403 of the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018). Under the First Step Act, unless a defendant has a prior section 924(c) conviction, a defendant who commits multiple violations of section 924(c) as part of the same indictment faces the same term for all violations charged in the indictment, that is, a minimum of (i) not less than five years if a firearm was possessed; (ii) not less than seven years if the firearm was brandished, and (iii) not less than ten years if the firearm was discharged.

The Government argues that the First Step Act of 2018 does not apply retroactively to the movant's sentence. See United States v. Rondon, Case No. 8:06-CR-326-T-23TGW, 2019 WL 1060813, at *2 (M.D. Fla. Mar. 6, 2019) (dismissing the successive habeas petition that was filed without a certificate of appealability and explaining that "a prisoner sentenced before enactment of the First Step Act is not entitled to the retroactive application of the changes to a sentence under Section 924(c)"). The movant concedes that the First Step Act is not retroactive. Motion at 12 (DE# 1. 4/16/19).

Unlike other sections of the First Step Act of 2018, Section 403(a) does not apply retroactively to defendants who were sentenced prior to its enactment. Section 403(b) expressly provides:

> 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.***

See Section 403 of the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018); 132 Stat. 5194 (emphasis added). In the present case, the movant was convicted and sentenced years before the First Step Act of 2018 was enacted. As the movant concedes, the First Step Act of 2018 does not apply retroactively to the movant's sentence.

In his reply, the movant contends that "Section 403 of the First Step Act of 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)." Reply at 9 (DE# 11, 7/8/19) (emphasis in original).

The movant argues that the First Step Act "is a recent development that necessarily informs the applicable Eighth Amendment analysis, in that it establishes a dramatic evolution of societal views on the nature of appropriately-mandated punishment for the very offenses at issue in the movant's case." Reply at 9. The movant contends that his 159-year sentence is "'cruel in its excessiveness and unusual in its character'" given his personal circumstances. Id. (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)). The movant argues the same personal circumstances that were considered by the Eleventh Circuit on direct appeal.

Like other courts that have addressed the issue, the undersigned finds that the First Step Act of 2018 does not apply retroactively to the movant's Hobbs Act robbery convictions because he was convicted and sentenced many years before it was enacted. Although the movant argues that the First Step Act is a clarifying amendment to the sentencing guidelines, the undersigned disagrees. Cf., United States v. Jerchower, 631 F.3d 1181 (11th Cir. 2011) (identifying the factors the Eleventh Circuit considers when determining whether an amendment to the sentencing guidelines is substantive or clarifying; concluding that Amendment 732 is a clarifying amendment because "the amendment alters only the commentary, rather that the text of the Guideline itself...."). Unlike the amendment in Jerchower, the First Step Act substantively alters the language of Subsection 924(c)(1)(C) of Title 18 of the United States Code. See Section 403 of the First Step Act of 2018, Pub. L. No. 115-391 (enacted Dec. 21, 2018); see also Footnote 4, supra. Accordingly, the undersigned recommends that the Court deny the movant habeas relief on this ground.

2. The Eleventh Circuit Ruled That Cell Site Location Information Did Not Violate the Fourth Amendment and Alternatively, that the *Leon* Exception Applied to the Government

The movant claims that his Fourth Amendment rights were violated because the cell site location information was obtained with a court order rather than a search warrant. In United States v. Davis, 785 F.3d 498, 506 (11th Circuit) (en banc), the Eleventh Circuit explained that "[i]n this appeal, we are called to decide on whether the court order authorized by the Stored Communications Act ["SCA"], [18 U.S.C.] § 2703(d), compelling the production of a third-party telephone company's business records containing historical cell tower location information, violated Davis's Fourth Amendment rights and was thus unconstitutional. We hold that it did not and was not." Davis, 785 F.3d at 506.

In denying the movant's Fourth Amendment claim based on the government obtaining cell site location information with a court order under the SCA, rather than a warrant, the Eleventh Circuit held that Davis failed to "show both (1) that the application of the SCA to the facts of his case involved a 'search' within the meaning of the Fourth Amendment, and (2) that such search was unreasonable." Davis, 785 F. 3d at 506 (en banc).

The "SCA … authorize[s] the United States Attorney to obtain court orders requiring a provider of electronic communication service … to disclose a record or other information pertaining to a subscriber to … such service (not including the contents of communications).'" 18 U.S.C. § 2703(c). Pursuant to Section 2703(c), a judge "'shall issue' the order if the government 'offers *specific and articulable facts* showing that there are *reasonable grounds* to believe that the … records or other information

sought[ ] are *relevant and material to an ongoing criminal investigation*.'" Davis, 785 F.3d at 505 (en banc) (quoting 18 U.S.C. § 2703(d)) (emphasis in original).

Although the government's application for cell site information did not reference the correct statute,[5] the seven-page Application thoroughly described the offense conduct,[6] that is Hobbs Act robberies for which the movant and his co-conspirators were later convicted. See Application for Stored Cell Site Information (CR-DE# 268-1); Davis, 785 F.3d 502. The Eleventh Circuit found that "[t]he government's § 2703 application provided a detailed summary of the evidence implicating Davis in the seven robberies, including post-*Miranda* statements from two accomplices and the DNA evidence found in two getaway cars." Davis, 785 F.3d at 502 (en banc). "Undisputedly, a sufficient showing was made to satisfy the SCA's statutory requirements." Id. The Eleventh Circuit held that "the [Section] 2703(d) order permitting government access to MetroPCS's records comports with applicable Fourth Amendment principles and is not constitutionally unreasonable." Id. at 518.

Alternatively, the Eleventh Circuit held that "the prosecutors and officers here acted in good faith and therefore, under the well-established *Leon* exception, the district court's denial of the motion to suppress did not constitute reversible error." Id. at 518 n.20 (citing United States v. Leon, 468 U.S. 897, 919-21 (1984)). In its initial panel opinion, the Eleventh Circuit determined that

> Here, the law enforcement officers, the prosecution, and the judicial officer issuing the order, all acted in scrupulous obedience to a federal statute, the Stored Communications Act, 18 U.S.C. § 2703. At that time, there was no

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[5] The government's application erroneously cited the bank robbery statute, 18 U.S.C. § 2113, rather than the Hobbs Act robbery statute, 18 U.S.C. § 1951.

[6] "Not surprisingly, Mr. Davis conceded at oral argument that the government could have secured a warrant (had it elected to do so) for the cell site information because it had the necessary probable cause." Davis, 785 F.3d at 523 (Jordan, J., concurring).

> governing authority affecting the constitutionality of this application of the Act. There is not even allegation that any actor in the process evidenced anything other than good faith.

United States v. Davis, 754 F.3d 1205, 1218 (11th Cir. 2014), granting rehearing en banc, vacating opinion, 573 Fed. App'x 925 (11th Cir. 2014), partial rehearing en banc, 785 F.3d 498 (11th Cir. 2015), cert. denied, 136 S. Ct. 479 (2015). In Davis, 785 F.3d 498, 500 (11th Cir. 2015), the Eleventh Circuit "reinstat[ed] the [initial] panel opinion, United States v. Davis, 754 F.3d 1205 (11th Cir. 2014), ... with respect to all issues except those discussed in Parts I and II, 754 F.3d at 1210-1218, which [were] ... decided by the en banc court." Davis, 785 F.3d at 500 (footnote omitted).

The Eleventh Circuit found that the cell site location information obtained by the government with a court order pursuant to the SCA did not violate the Fourth Amendment. Alternatively, the Eleventh Circuit found that the Leon exception applied, and that the government acted in good faith. This Court should deny habeas relief on this ground.

A. The Supreme Court's *Carpenter* Decision Does Not Affect the Eleventh Circuit's Alternative Holding That the *Leon* Exception to the Warrant Requirement Is Proper in the Present Case

The movant relies on the Supreme Court's 2018 Carpenter decision that held a search warrant supported by probable cause is generally necessary to obtain cell site location information from a third-party wireless carrier. Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018). The Supreme Court decided Carpenter on June 22, 2018, more than six (6) years after the movant in the present case was convicted and sentenced in 2012. (CR-DE# 342, 5/17/2012).

In Carpenter, as in the present case, the government obtained the cell site location information pursuant to a court order issued under the SCA, based on a "show[ing] of 'reasonable grounds' for believing the records to be 'relevant and material to an ongoing investigation.'" Id. (quoting the SCA, 18 U.S.C. § 2703(d)). In Carpenter, the Supreme Court found "[t]hat showing falls well short of the probable cause required for a warrant." Id. The Supreme Court held "[b]efore compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." Id.

In its response, the government argues that the movant has failed to provide a legitimate reason to disturb the Eleventh Circuit's en banc opinion in the present case. United States v. Davis, 785 F.3d 498 (11th Cir. 2015) (en banc). The government relies on the Eleventh Circuit's recent decision in United States v. Joyner, 899 F.3d 1199 (11th Cir. 2018). In Joyner, which was decided after Carpenter, the Eleventh Circuit relied on its Davis en banc decision and held that the district court's denial of the defendant's motion to suppress cell phone records including cell site data did not constitute reversible error on direct appeal. Joyner, 899 F.3d at 1204. In Joyner, the Eleventh Circuit explained that "*Carpenter* does not affect our alternative rationale in *Davis*--'that the prosecutors and officers ... acted in good faith and therefore, under the well-established *Leon* exception [to the warrant requirement], the district court's denial of the motion to suppress did not constitute reversible error.'" Id. (quoting United States v. Davis, 785 F.3d 498, 518 n.20 (11th Cir. 2015) (en banc) (citing United States v. Leon, 468 U.S. 897, 919-21 (1984)). In Joyner, the Eleventh Circuit explained further that "the Government complied with the requirements of the [Stored Communications

Act] in obtaining the orders to compel cell site records, and when they did so in June 2015, that warrantless procedure[7] was, under this Court's precedent, within the bounds of the Fourth Amendment." Joyner, 899 F.3d at 1205.

Likewise, Carpenter does not afford the movant habeas relief in the present case. Joyner, 899 F.3d at 1205 (citing United States v. Chavez, 984 f.3d 593,608 (4th Cir. 2018) (post-*Carpenter* case noting that "[w]hile Carpenter is obviously controlling going forward, it can have no effect on" cases where law enforcement acted in "[o]bjectively reasonable good faith," which "includes 'searches conducted in reasonable reliance on subsequently invalidated statutes.'" (quoting Davis v. United States, 564 U.S. 229, 239 (2011)). This Court should deny habeas relief for the cell site location information evidence that was obtained with a court order under the SCA rather than with a warrant.

B. Ineffective Assistance of Counsel Claims

1. Stipulation to Jurisdiction Element of Hobbs Act Robberies

The movant contends that his trial counsel waived his Fifth and Sixth Amendment rights to due process and a jury verdict as to the jurisdictional element of each of the indicted Hobbs Act robberies, and that his trial counsel rendered ineffective assistance by factually stipulating to the essential jurisdictional element of the Hobbs Act robberies "with respect to each of the *indicted* robberies—of individuals, not businesses." Motion at 6 (DE# 1, 4/16/19). The stipulations stated that each robbery

[7] "Not surprisingly, Mr. Davis conceded at oral argument that the government could have secured a warrant (had it elected to do so) for the cell site information because it had the necessary probable cause." Davis, 785 F.3d 498, 523 (Jordan, J., concurring).

site "is a business and company operating in interstate and foreign commerce," and that the robberies "therefore obstructed, delayed and affected interstate commerce." (CR-DE# 279:38 (Mayor's)); (CR-DE# 281:138 (Little Caesar's; Amerika Gas Station)); (CR-DE# 281: 158 (Walgreen's; Advanced Auto Parts)); (CR-DE# 281:170 (Universal Beauty Salon)); and (CR-DE# 285 (Wendy's)).

The crux of the movant's ineffective assistance of counsel claim is based on his counsel's stipulation to the jurisdictional element of Hobbs Act offenses for businesses rather than individuals. The movant fails to cite a single case[8] to support his position that there is a distinction. Instead, the movant argues that his waiver of his constitutional rights was unknowing and involuntary because his trial counsel misadvised him as to interstate legal nexus required for robberies of individuals rather than businesses and the alleged inadequacy of the evidence based on the small quantities of cash, personal jewelry and cigarettes taken during some of the robberies. See Motion at 6-7 (DE# 1, 4/16/19). The movant ignores the allegations of the indictment that reference patrons and employees of businesses who were robbed in the presence of each other at business locations (e.g. a fast food restaurant, a gas station, a drug store)

[8] The movant cites Taylor v. United States, 136 S. Ct. 2074, 2080 (2016), for the general proposition that without proof of an effect on interstate commerce as an essential element of a Hobbs Act offense, the Court lacks federal jurisdiction. The movant's reliance on Taylor is misplaced. The Eleventh Circuit distinguished Taylor as being narrowly construed for cases involving the jurisdictional element of Hobbs Act robberies of drug dealers. United States v. Davis, 711 Fed. App'x at 605, 612 n.3 (11th Cir. 2017) (unpublished). In Taylor, the Supreme Court explained "[o]ur holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds." Taylor, 136 S. Ct. at 2080. The movant fails to cite any other case to support his arguments that his counsel's stipulation constituted deficient performance and that he did not knowingly and voluntarily waive his constitutional rights despite the Court's colloquy with the movant regarding the jurisdictional stipulations. (CR-DE# 346 at 193-195).

The Hobbs Act provides in pertinent part:

> Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery ... or attempts or conspires so to do ... shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). To establish federal jurisdiction for a Hobbs Act robbery offense, the government must show an effect on interstate commerce. "The Supreme Court has made it clear that the Hobbs Act's broad jurisdictional language is to be read as meaning what it says: '[The] Act speaks in broad language manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" United States v. Rodriguez, 218 F.3d 1243, 1244 (11th Cir. 2000) (quoting Stirone v. United States, 361 U.S. 221, 215 (1960) (quoting 18 U.S.C. § 1951(a)).

The government relies on cases in the Eleventh Circuit that hold that trial counsel may make strategic decisions that effectively waive a defendant's constitutional rights. See United States v. Joshi, 896 F.2d 1303, 1308 (11th Cir. 1990); Poole v. United States, 832 F.2d 561, 563 (11th Cir. 1987) (affirming the denial of habeas relief on the ground of ineffective assistance of counsel based on a stipulation of the insured status of a bank without the defendant's consent); and Belitsky v. United States, No. 2:09-CR-14-FTM-29UAM, 2018 WL 2317796, at *7 (M.D. Fla. May 22, 2018). In Poole, the Eleventh Circuit explained that "the decision to stipulate to the insured status of the banks is more a tactical decision than an infringement on an 'inherently personal right of fundamental importance.'" Poole, 832 F.2d at 564 (citation omitted). The Eleventh Circuit opined that "[i]t is often wise for counsel to stipulate to such trivial and easily

proven matters as to whether banks were federally insured at the time of the robbery. Courts have even encouraged such stipulations." Id. (citations omitted).

Additionally, the government relies on the colloquy between the movant and the trial court wherein the trial court determined that the movant had knowledge and consented to his trial counsel's stipulation that each business was involved in interstate commerce. (CR-DE# 346 at 193-195). The government contends that the movant cannot prevail on this ground as a matter of both fact and law. The undersigned agrees.

In his Reply, the movant argues that the government's constructive amendment that relied on evidence showing only the taking of property of the businesses when the indictment alleged only the taking of property belonging to individuals, enlarged the grounds for the movant's convictions and denied the movant of due process and fatally prejudiced him. Reply at 6 (DE# 11, 7/8/19). The movant claims that the government's constructive amendment was the core basis for the Eleventh Circuit to affirm the district court's denial of his Rule 12(b) motion to vacate his Hobbs Act robbery convictions. See, United States v. Davis, 711 Fed. App'x at 605, 612 n.3 (11th Cir. 2017) (unpublished). The undersigned disagrees.

On appeal from the denial of the movant's Rule 12(b) motion to vacate Hobbs Act convictions, the Eleventh Circuit held that

> the nine Hobbs Act counts sufficiently charged that Davis's conduct had a minimal impact on interstate commerce. Each count charged that Davis either conspired to take or took currency and other property "from the person and in the presence of persons employed by, and persons patronizing," a business. The language in each count tracked the language of 18 U.S.C. § 1951, which defines "robbery" as the "unlawful taking of personal property from the person or in the presence of another." See 18 U.S.C. § 1951. In other words, both the employees and the patrons of the businesses were robbed and were present while others were robbed. Moreover, the indictment specifically alleged that each targeted business was "a business and company operating in interstate and foreign

> commerce." All of the substantive Hobbs Act robbery counts involved commercial establishments, such as a fast food restaurant, a drug store, or a gas station. These allegations are sufficient to establish the requisite minimal effect on interstate commerce.

Davis, 711 Fed. App'x at 609 (citation omitted) (unpublished); see Superseding Indictment (CR-DE# 39, 2/22/11). Independent of the stipulation regarding jurisdiction, the Eleventh Circuit found that "the trial evidence showed, that in the presence of employees (and sometimes patrons), Davis and his conspirators took the property of each of the businesses, including store merchandise and currency from cash registers and safes." Id. at 610 (unpublished). The Eleventh Circuit concluded that "Davis's Rule 12(b) motion to vacate his nine Hobbs Act robbery convictions was due to be denied on the merits." Id. (unpublished).

As the Eleventh Circuit explained in Davis, 711 Fed. App'x at 609 (unpublished); the superseding indictment tracked the language of the Hobbs Act, which defines "robbery" as

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1). The undersigned finds that the jurisdictional stipulations made by the movant's trial counsel did not constitute deficient performance. Additionally, the Eleventh Circuit ruled that the allegations in the indictment were sufficient to establish the minimal effect on interstate commerce under the Hobbs Act. Davis, 711 Fed. App'x at 609 (citation omitted) (unpublished). Finally, the Eleventh Circuit affirmed the trial court's denial of the movant's Rule 12(b) motion to vacate his Hobbs Act robbery

convictions on this ground. Id. Thus, the movant cannot satisfy the prejudice prong of Strickland. This Court should deny habeas relief on the movant's ineffective assistance of counsel claim based on his trial counsel's jurisdiction stipulations regarding Hobbs Act robberies of businesses engaged in interstate and foreign commerce.

2. Failure to Challenge Indictment on Duplicity

The movant argues that his trial counsel was ineffective for failing to challenge the Hobbs Act allegations on duplicity grounds. The movant claims that because the indictment alleges that property was taken from "persons" employed by and patronizing various business in South Florida (CR-DE# 39), the indictment improperly alleges multiple robberies, of a business and of people, in the same count.

The government argues that the movant fails to cite a single case in support of the argument he claims his trial counsel should have made. The government argues further that "trial counsel 'could not have been ineffective for not raising a novel claim that was not supported by existing law.'" Response at 14 (DE# 8, 6/10/19) (quoting Samra v. Price, No. 2:07-CV-1962-LSC, 2014 WL 4452676, at *40 (N.D. Ala. Sept. 5, 2014), aff'd sub nom. Samar v. Warden, Donaldson Corr. Facility, 626 Fed. App'x 227 (11th Cir. 2015); and citing Engle v. Isaac, 456 U.S. 107, 134 (1982) ("[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.")). Finally, the government contends that even if the movant's trial counsel raised duplicity in a motion to dismiss, it is unlikely the motion to dismiss would be successful.

Relying on United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997), the government explains that "[a] count in an indictment is duplicitous if it charges two or

more 'separate and distinct' offenses." Id. (quoting United States v. Burton, 871 F.2d 1566, 1573 (11th Cir. 1989)). "A duplicitous count poses three dangers: '(1) A jury may convict a defendant without unanimously agreeing on the same offense; (2) A defendant may be prejudiced in a subsequent double jeopardy defense; and (3) A court may have difficulty determining the admissibility of evidence." Id. (quoting United States v. Wiles, 102 F.3d 1043, 1061 (10th Cir. 1996) (finding no duplicity where the indictment merely alleged multiple means or methods of committing a single offense), modified, 106 F.3d 1516 (10th Cir. 1997)).

The government maintains that the indictment against the movant alleged a single robbery of one commercial establishment in each of Counts 2, 4, 6, 8, 10, 13 and 16. Superseding Indictment (CR-DE# 39). The Hobbs Act robbery counts[9] of the indictment allege in pertinent part:

> the defendants ... did knowingly obstruct, delay, and affect commerce and the movement of articles in commerce by means of robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b)(1) and (b)(3), in that the defendants did take the United States currency and other property from the person and in the presence of persons employed by, and persons patronizing the [BUSINESS NAME and LOCATION] ... a business and company operating in interstate and foreign commerce, against the will of those persons, by means of actual and threatened force, violence, fear of injury to said persons, in violation of Title 18, United States Code, Sections 1951(a) and 2.

See, e.g., Superseding Indictment (DE# 39, 2/22/11). Each Hobbs Act robbery count identified the targeted business by name and location.

The government relies upon United States v. Foster, No. 116CR1282MHCCMS, 2017 WL 9476883, at *2 (N.D. Ga. May 19, 2017), report and recommendation adopted,

[9] Each count identified the business entity by name: Little Caesar's Restaurant (Count 2); Amerika Gas Station (Count 4), Walgreens (Count 6), Advance Auto Parts (Count 8), Universal Beauty Salon (Count 10), Wendy's Restaurant (Count 13), and Mayor's Jewelry Store (Count 16).

No.116CR1282MHCCMS, 2017 WL 2539410 (N.D. Ga. June 9, 2017). In Foster, the district court denied the defendant's motion to dismiss seven Hobbs Act robbery counts as duplicitous. In Foster, the Hobbs Act robbery counts alleged in pertinent part that the defendant "did obstruct, delay, and affect commerce by robbery ... of [BUSINESS NAME] located at [ADDRESS], a business then engaged in and affecting interstate commerce, and in furtherance of the plan and purpose to commit the robbery, the defendants did knowingly commit and threaten physical violence against the persons of employees of [BUSINESS NAME], all in violation of Title 18, United States Code, Section 1951(a) and Section 2." Foster, 2017 WL 9476883, at *1.

In Foster, the district court agreed with the government that each count alleged a single Hobbs Act robbery on a specific date at a specific business. Id. The court rejected the defendant's duplicitous claim and found that the "'in furtherance language' merely specifies how the robbery is alleged to have been committed, and it does not provide for an alternative theory or additional offense." Id. The Foster court explained further that:

> the dangers posed by duplicitous counts are not present here. The Eleventh Circuit has identified three such dangers: that the defendant may be prejudiced in a subsequent double jeopardy defense; that a court may have difficulty determining the admissibility of evidence; and that a jury may convict a defendant without unanimously agreeing on the same offense. See, United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997). Foster has made no attempt to show how any subsequent double jeopardy defense might be prejudiced, nor has he identified any evidentiary rulings that might be impacted by the manner in which the Indictment was pled. Finally, the third danger—the risk that a jury might convict Foster without unanimously agreeing on the same offense—can be cured (to the extent it exists) either by giving a unanimity jury instruction or by requiring the Government to elect the basis upon which it will continue the prosecution.

Id.

In the present case, the government contends that the indictment properly alleged individual acts of Hobbs Act robberies. Like Foster, the government maintains that the allegations provided a description of how the robberies occurred rather than an additional charge in each count. The government argues that the movant fails to show that his trial counsel's failure to challenge the Hobbs Act robbery allegations in the indictment on duplicity grounds constitutes deficient performance and that the movant cannot demonstrate prejudice due to the unlikelihood of success had the movant's trial counsel filed a motion to dismiss on this ground. Response at 16 (DE# 8, 6/10/19). The undersigned agrees.

The movant's reliance on United States v. Diaz, 248 F.3d 1065, 1084-85 (11th Cir. 2001) is misplaced. Diaz involved Hobbs Act robbery charges based on extortions and kidnappings of individual business owners at locations other than their businesses. Unlike Diaz, in the present case, the Eleventh Circuit previously found that the allegations of Hobbs Act robberies "sufficiently charged that Davis's conduct had a minimal impact on interstate commerce. Each count charged that Davis either conspired to take or took currency and other property 'from the person and in the presence of persons employed by, and persons patronizing,' a business." Davis, 711 Fed. App'x at 609 (unpublished). The Eleventh Circuit explained that "the trial evidence showed that, in the presence of employees (and sometimes patrons), Davis and his conspirators took the property of each of the businesses, including store merchandise and currency from cash registers and safes." Id. at 610.

The undersigned finds that the movant has failed to show that his trial counsel's failure to challenge the Hobbs Act robbery allegations on duplicity grounds constitutes

deficient performance. Where, as here, the Eleventh Circuit ruled that the Hobbs Act robbery charges were sufficient, any such challenge would be futile. Davis, 711 Fed. App'x at 609 (unpublished). Thus, the movant can neither show that his trial counsel's conduct was unreasonable nor that he was prejudiced as required by Strickland. Accordingly, this Court should deny the movant's ineffective assistance claim based on his trial counsel's failure to challenge the Hobbs Act robbery allegations on duplicity grounds.

3. Failure to Seek a Plea Deal and to Advise Movant to Plead Guilty

The movant claims that his trial counsel was ineffective because he did not seek a plea deal and did not advise him to plead guilty. The movant claims that his "[t]rial counsel did not discuss with [him] the certainty of conviction under counsel's understanding of the charges, and that he would receive a life sentence based on the required stacking of § 924(c) penalties." Motion at 9 (DE# 1, 4/16/19). The movant fails to cite any case law to support his argument that his trial counsel's failure to seek a plea deal and failure to advise movant to plead guilty constitutes ineffective assistance of counsel. See Motion at 9 (DE# 1, 4/16/19); Reply at 7 (DE# 11, 7/8/19). The Supreme Court has held that "a defendant has no right to be offered a plea, ...nor a federal right that the judge accept it." Frye, 566 U.S. 134, 148 (2012) (internally citing Weatherford v. Bursey, 429 U.S. 545, 561 (no right to a plea offer) and Santobello v. New York, 404 U.S. 257, 262 (1971) (no right to judge's acceptance of a plea offer)). The undersigned

finds that at the movant's pretrial detention hearing, the prosecutor put the movant on notice of the harsh sentence that he faced.[10]

The government acknowledges that a defense counsel's failure to communicate a plea offer to a defendant may constitute ineffective assistance of counsel. Response at 16 (DE# 8, 6/10/19) (citing Missouri v. Frye, 566 U.S. 134 (2012)). In the present case, the movant has failed to show that a plea offer was made and was not communicated. Additionally, to prove prejudice in the context of a failed or rejected plea bargain, the defendant must show that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court ..., that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under than under the judgment and sentence that in fact were imposed." Lafler v. Cooper, 566 U.S. 156, 164 (2012); see also Cook v. United States, 613 Fed. App'x 860, 864 (11th Cir. 2015). The movant relies on the fact that the trial judge would have sentenced the movant to 40 years if he was not bound by the mandatory stacking of the sentencing guidelines for Hobbs Act robbery convictions. The undersigned finds that where, as here, there is no

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[10] At the movant's pretrial detention hearing, the prosecutor expressly stated:

> "Based on the indictment as it stands now, Mr. Davis is facing a mandatory minimum term of 160 years in prison which must run consecutive to any other sentence imposed for the underlying robbery counts.
>
> In fact, Mr. Davis' codefendants, Mr. Reid and Mr. Smith who both just pled guilty, both pled guilty to prison terms of 37 years. That was the plea deal that they pled guilty to. So, Mr. Davis is facing an enormous amount of time in prison, a maximum of life obviously that I think would make a man run away from his predicament."
>
> Transcript of Pretrial Detention Hearing (CR-DE# 398 at 14:1-10).

evidence that a plea deal was offered by the prosecution that was not communicated to the movant, the movant cannot demonstrate deficient performance by his trial counsel or prejudice as required by Strickland. This Court should deny habeas relief on the movant's ineffective assistance of counsel claim based on his trial counsel's failure to seek a plea offer or failure to advise him to plead guilty.

4. Failure to Challenge Government's Acquisition of Cell Site Data with an Application That Did Not Cite the Hobbs Act Statute

The movant seeks habeas relief on the ground that his trial counsel failed to challenge the government's acquisition of historical cell site location information pursuant to the SCA, 18 U.S.C. § 2703(d), because the government's *ex parte* Application for Stored Cell Site Information (CR-DE# 268-1, 1/27/19) (hereinafter "Application") erroneously cited the bank robbery statute, 18 U.S.C § 2113, but made no reference to the Hobbs Act robbery statute, 18 U.S.C § 1951. (CR-DE# 268-1, 1/27/19). The Application sought information regarding four cell phone numbers including the movant's, which the Court granted. The seized cell site location information was for the period August 1 through October 6, 2010. (CR-DE# 268-1, 1/27/19); (CR-DE# 266). The Court denied the movant's pre-trial motion to suppress as well as his renewed motion to suppress at trial. (CR-DE# 277:45); (CR-DE# 364:192). The movant's trial counsel did not base his motions to suppress on the government's failure to cite the Hobbs Act robbery statute. The seven-page Application provided explicit details of the robberies that were the subject of the investigation as well as the cell phone numbers of the movant and some of his co-defendants. The movant and his conspirators were later convicted of the robberies described in the Application. Although the Application referenced the wrong robbery statute, the Application clearly laid out the

facts of Hobbs Act violations. Trial counsel for movant's failure to challenge the Application on this ground did not constitute ineffective assistance of counsel. See Zakrzewski v. McDonough, 455 F.3d 1254, 1260-61 (11th Cir. 2006) (affirming the state court's denial of habeas relief because counsel's failure to challenge a warrantless search did not constitute ineffective assistance of counsel). This Court should deny habeas relief on this ground.

VI. Conclusion

Having carefully reviewed and considered the motion, the response, the reply, and the record in this matter, the undersigned finds that the petitioner is not entitled to federal habeas relief and respectfully recommends that petitioner's request for habeas relief to vacate his sentence be DENIED.

RECOMMENDATION

Based on the foregoing, the undersigned respectfully **RECOMMENDS** that the Motion to Vacate Conviction under 28 U.S.C. § 2255 (DE #1, 4/16/19) be **DENIED**.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Joan A. Lenard, United States District Court Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F. 2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED at Miami, Florida, this 7th day of November, 2019.

JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE