

NO:

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2017

TODD McDUFFIE,

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 FOR REVIEW

- I. Whether certiorari review is warranted despite the Eleventh Circuit's decision denying Todd McDuffie's Motion for Certificate of Appealability?
 - a. Whether certiorari should be granted to review whether the instructions given to the jury regarding aiding and abetting in connection with 18 U.S.C. §§2119 and 924(c) were constitutional in light of *Rosemond v. United States*, 134 S.Ct. 1240 (2014)?
 - b. Whether certiorari should be granted to review whether the instruction given to the jury with respect to 18 U.S.C. § 924(c) was constitutional despite failing to include a brandishing instruction, in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013)?
 - c. Whether certiorari should be granted to review whether McDuffie was denied his Sixth Amendment right to cross examine the prosecutor in violation of the "witness advocate" rule?
 - d. Whether certiorari should be granted to review whether McDuffie's sentence was improperly enhanced pursuant to 18 U.S.C. §924(e) because the term "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague and violates *Johnson v. United States*?

INTERESTED PARTIES

Counsel for the Petitioner, Todd McDuffie, certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Tracy Dreispul, Assistant Federal Public Defender;
2. Honorable Robert L. Dube, U.S. Magistrate Judge;
3. Daniel Ecarius, Assistant Federal Public Defender;
4. Honorable Barry L. Garber, U.S. Magistrate Judge;
5. Vanessa S. Johannes, Assistant U.S. Attorney;
6. Honorable Jose E. Martinez- District Judge;
7. Todd McDuffie, Defendant/Petitioner;
8. Michael B. Nadler, Assistant U.S. Attorney;
9. Amanda Perwin, Assistant U.S. Attorney;
10. Richard L. Rosenbaum, Esq., Counsel for Appellant/Petitioner;
11. Honorable William C. Turnoff, U.S. Magistrate Judge;
12. Honorable Patrick A. White, U.S. Magistrate Judge.

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PETITION FOR WRIT OF CERTIORARI

Todd McDuffie respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the Final Judgment denying Motion to Vacate Pursuant to Title 18 U.S.C. Section 2255, and the Order Denying Certificate of Appealability of the United States Court of Appeals for the Eleventh

Circuit rendered and entered in Case No: 16-14147-D in that court on October 31, 2017, in *Todd McDuffie v. United States*, which affirmed the Judgment and Commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the Order of Dismissal from the United States Court of Appeals for the Eleventh Circuit, which affirmed the denial of the *pro se* Motion to Vacate Conviction and Sentence Pursuant to Title 28 U.S.C. Section 2255 and is contained in Appendix (A-2). Also included in the Appendix is Order Denying Motion for Certificate of Appealability (A-8).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on October 31, 2017 (A-8). This petition is timely filed pursuant to Sup. Ct. R. 13.1.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1), Sup. Ct. R. 10.1 and Part III of the Rules of the Supreme Court of the United States. The district court had jurisdiction because Petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 1292 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district

courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner relies upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

1) Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; not shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; not shall private property be taken for public use without just compensation

2) Sixth Amendment to the United States Constitution:

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.

3) Title 18 U.S.C. Section 2255; and

4) Other case law specified herein.

STATEMENT OF THE CASE

The evidence adduced at trial¹ reveals as follows: On August 30, 2011, at approximately 12:30 or 1:00 A.M., Alvin Gainey and Nancy Gilyard returned from having dinner at an Applebee's in Hialeah Gardens, Florida (CR DE# 56² at 132-33; CR DE# 57 at 229-30). Gainey and Gilyard testified that the pair arrived at Gilyard's residence, where they parked and continued talking in the car (CR DE# 56 at 133, 136-37; CR DE# 57 at 230). While they were in the car, two males approached them, one being McDuffie (CR DE# 56 at 136, 141; CR DE# 57 at 231). McDuffie tapped on the driver's side window with a firearm and then pointed that firearm at Gainey (CR DE# 56 at 137). Gainey rolled down the window and McDuffie demanded that he give him money (*Id.* at 138). McDuffie then demanded that Gainey exit the vehicle, which Gainey did after pushing one of the two firearms that he kept in his car between the seat and the center console to hide it from McDuffie (*Id.*).

After Gainey exited his car, Gainey saw a second carjacker on the other side

¹ The facts are those found by the Magistrate Judge as set forth in his Report and Recommendation (Civ. DK 15-1-18) and Final Judgment entered by the Honorable Jose E. Martinez, U.S. District Judge, which adopted the Magistrate's Report and Recommendation. (Civ. DK 11).

² References to the trial Record are referred to as Criminal Docket Entry (CRDE ____) followed by the appropriate page number.

of his car who had opened the passenger side door (CR DE# 56 at 138-39). McDuffie continued to demand money from him, and he told McDuffie that he had no cash but gave him a debit card and pin number (*Id.* at 139). On the other side of his car, the other carjacker demanded that Gilyard give him money and then searched the glove compartment, where he found \$100 (*Id.* at 139-40). The second carjacker then searched the center console and found a firearm there (*Id.* at 140). McDuffie began to search the driver's side of the car, while still pointing his firearm at Gainey, and found the second firearm that Gainey had attempted to hide between the driver's seat and the center console (*Id.* at 142). McDuffie was the carjacker on the passenger side of the car, and the other carjacker was the one who pointed the firearm at Gainey through the driver's side window (CR DE# 57 at 231-32). McDuffie kept the firearm that he took from Gainey's center console in his hand during the carjacking (*Id.* at 232).

McDuffie demanded that Gainey take off his shorts, his shirt, and his shoes (CR DE# 56 at 142-43, 148; CR DE# 57 at 233). After that, McDuffie told the other carjacker to search the rest of the car, but then changed his mind and told him to get into the driver's seat of the vehicle (CR DE# 56 at 143). The other carjacker began driving Gainey's car (*Id.* at 143-44; CR DE# 57 at 233-34). McDuffie then hopped into the open passenger's side door, while keeping his firearm pointed at

Gainey and telling him not to move (CR DE# 56 at 144). McDuffie and the other carjacker drove off in Gainey's car (*Id.*). Once Gainey and Gilyard were sure that McDuffie and the other carjacker were gone, they went inside of Gilyard's residence and called the police (*Id.*; CR DE# 57 at 234).

In addition to the firearms and the vehicle, McDuffie and the other carjacker took Gainey's wallet, his jewelry, two Briefcases, approximately \$290, and an Android cellular telephone, which was equipped with a GPS tracking application that allowed Gainey to locate the phone from a website (CR DE# 56 at 145). Once the police arrived at Gilyard's residence, Gainey used the tracking application on his cellular phone to locate it at Northwest 53rd Street and 26th Avenue in Miami, Florida (*Id.* at 146). Gainey's car was later found abandoned at that location, and his cash, cellular telephone, debit card, jewelry, and firearms were missing (*Id.* at 148-49, 159). Fingerprints were taken from the car by the Miami-Dade Police Department and sent to an examiner, who determined that the fingerprints matched McDuffie's (*Id.* at 163-66, 179-81).

A few days after the carjacking, Gainey was shown a non-sequential photographic line-up by a police detective and he identified McDuffie in that line-up as one of the men who carjacked him (CR DE# 56 at 149-51). Gilyard was also shown a photographic line-up by a police detective, and she identified McDuffie as

the person who had carjacked her (CR DE# 57 at 234-36).

On September 2, 2011, Miami-Dade Police Department Detective Daniel Puerto conducted a recorded interrogation of McDuffie (CR DE# 57 at 195-96). During that interrogation, McDuffie stated that he and another man named Hickey committed a carjacking in front of a residence in the early morning hours of August 30, 2011. There were a man and a woman sitting inside of the car. He stated that he approached the passenger side of the car under Hickey's direction and asked the woman where the money was, and to give him everything. He searched the glove compartment and center console and found cash and a firearm. Hickey forced the driver to get out of the car and undress. Hickey found a second firearm in the car and he and Hickey drove off in the car before abandoning it at 52nd Street and 26th Avenue (*Id.* at 198-203). McDuffie also stated that the victims were held at gunpoint throughout the carjacking, but Hickey was the one holding the firearm (*Id.* at 205, 209-10). McDuffie stated that he did not sell the firearms that he and Hickey had stolen from Gainey (*Id.* at 211).

On August 3, 2012, ATF Special Agent Jane Baldassare and the prosecutor participated in a pre-trial interview with McDuffie (CR DE# 57 at 215-16). McDuffie stated during that interview that he had been at a nightclub with Hickey and that, after they left the club, they committed the carjacking (*Id.* at 217-18).

Baldassare recounted that McDuffie stated that, on the way to the convenience store, he and Hickey walked past Gainey's car and they discussed robbing Gainey and Gilyard if the couple was still in the car after they finished at the convenience store (*Id.* at 217-18). McDuffie stated that he had a firearm on him at the time of the carjacking and that his firearm was the firearm used in the carjacking. However, McDuffie claimed that Hickey had been the one using his firearm (*Id.* at 218). McDuffie stated that his role in the carjacking was to search the car and keep an eye on the victims (*Id.* at 218-19). McDuffie said that he and Hickey stole two firearms and later sold them, and McDuffie provided the name of the person who had purchased the firearms (*Id.* at 219).

At trial, McDuffie testified in his own defense. (CR DE# 57 at 244). He admitted that he was a drug dealer who had repeatedly been convicted of drug crimes (*Id.* at 245-46). He knew a man nicknamed Hickey, who was a gang member and hit man for another drug dealer, because he sold drugs to Hickey (*Id.* at 246). He did not carry a firearm because he sold drugs inside of an "after hours bar," as opposed to on a street corner (*Id.* at 247). On the evening of August 29, 2011, he was in an after-hours bar, high on cocaine, marijuana, and ecstasy, when Hickey arrived (*Id.* at 247, 265-66). He gave cocaine to Hickey at no charge and afterward, Hickey followed McDuffie out of the after-hours bar when McDuffie

went to buy cigarettes from a nearby store (*Id.* at 247-50, 266). On the way to the store, he and Hickey walked by Gainey's car and, when they did, Hickey pointed out that Gainey was wearing a watch (*Id.* at 250-51).

McDuffie further testified that he told Hickey that he did not see the watch, even though he had, because he did not want to get involved in any trouble (CR DE# 57 at 250-51). He and Hickey proceeded to the convenience store, where he bought cigarettes and a sandwich (*Id.* at 251-52). He then began walking back to the late-night bar and that Hickey followed him (*Id.* at 252-53). When Gainey's car came into view, Hickey said that he was going to draw his firearm and wanted McDuffie to open the car door (*Id.* at 253). McDuffie testified that he did not want to commit the carjacking, but he did so because he was afraid of Hickey (*Id.* at 253-54). Hickey pulled the firearm on Gainey while he went to the passenger's side of the car, told Gilyard that he would not hurt her, and took Gainey's firearm from the car (*Id.* at 254-55). Hickey then made Gainey exit the car and strip off his clothes (*Id.* at 255-56). He and Hickey stole Gainey's wallet and debit card pin number. Hickey found Gainey's other firearm and stole it, and Hickey drove away in Gainey's vehicle while he rode in the passenger seat (*Id.* at 255-56). Once Hickey stopped the car at 52nd Street and 26th Avenue, McDuffie called a taxi because he wanted to get away from Hickey, but Hickey got into the taxi with him

(*Id.* at 259-60). He took Hickey to an apartment and an after-hours bar, where he continued to imbibe in drugs and alcohol and attempted to evade Hickey (*Id.* at 261-63).

On cross examination, the prosecutor asked McDuffie if he had met her before, and McDuffie stated that he had met the AUSA for a pre-trial interview about the carjacking (CR DE# 57 at 266). He stated that he told the prosecutor during that interview that he would be totally truthful (*Id.* at 266). When the prosecutor asked him if he remembered telling her during the interview that Hickey had brought up the idea of the carjacking on the way to the store, McDuffie stated that he did not recall that (*Id.* at 267). McDuffie also testified that he did not remember stating during the interview that he told Hickey, after they walked by the car on the way to the store, that “if they’re still there when we’re done with the store, then I’ll do it” (*Id.*). The prosecutor also asked McDuffie if he remembered telling her, during the interview, that he was carrying a firearm on the night of the carjacking, and McDuffie responded “I told you I initially had a gun because I didn’t want to get [Hickey] in no kind of trouble because I was already in fear of him” (*Id.* at 267). McDuffie also admitted that, in his recorded interview with Detective Puerto, he stated that he did not know who Hickey was, who Hickey had sold the stolen firearms to or how he stole them, but he told her the name of an

individual who he claimed had purchased the firearms and had told her that he had been paid \$200 for the firearms (*Id.* at 272-73)

Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On October 18, 2012, a Grand Jury in the Southern District of Florida returned a Superseding Indictment, which charged Todd McDuffie with carjacking, in violation of 18 U.S.C. §§2119(1) and 2 (Count One); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§924(c)(1)(A)(ii) and 2 (Count Two); and being a convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count Three) (CR DE# 21). A plea of not guilty was entered on his behalf.

Trial

On December 10, 2012, McDuffie proceeded to a three-day jury trial (CR DE# 35). Before the third day of trial, the Government alerted the district court that it planned to call a Bureau of Alcohol, Tobacco, and Firearms (“ATF”) special agent to testify about statements that McDuffie made during a pre-trial interview with the Government to rebut the duress defense that McDuffie raised in his opening statement (CR DE# 57 at 187-88). Over McDuffie’s objection that his prior statements could be used only if he testified, the district court allowed the ATF special agent to testify about the statements that McDuffie made during the

pre-trial interview to rebut his claim of duress (*Id.* at 188-89).

At the end of the Government's case, McDuffie moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and for a mistrial, both of which the district court denied (CR DE# 57 at 240-42). McDuffie then testified in his own defense (*Id.* at 244). McDuffie did not object to any of the questions asked on cross-examination, including questions about what he told the prosecutor during his pre-trial interview with her and the ATF special agent (*Id.* at 265-74).

After McDuffie rested, the district court held a conference to discuss the jury instructions (CR DE# 57 at 276). McDuffie stated that he was in agreement with the jury instructions, and he lodged no objections as the district judge specifically discussed each page of the jury Instructions (*Id.* at 276-77).

In its closing argument, the Government argued that McDuffie had admitted that he had participated in the carjacking; that both victims identified McDuffie as one of the two carjackers; that the inconsistencies between the testimony of the victims as to which defendant was on which side of the car was of no moment because the two witnesses were consistent that McDuffie was one of the carjackers and was armed; and that McDuffie's fingerprints were found on the driver's side door of the victim's car (CR DE# 58 at 282-83). The Government also contended that McDuffie's claim that he committed the crime only because he was afraid of

his accomplice Hickey was implausible because McDuffie “told me that the gun belonged to him. That he was the person who was armed and Jane Baldassare, who was in that interview too, confirmed it” (*Id.* at 288). McDuffie did not object during the prosecutor’s closing argument (*Id.* at 282-91). McDuffie, in turn, argued in closing that he committed the carjacking under duress, and, accordingly, he should be acquitted (*Id.* at 291-97).

The district court, in pertinent part, instructed the jury as follows:

It’s possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or “agent.” Or it may be done by acting with or under the direction of others.

A Defendant “aids or abets” a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids or abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it. In other

words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

(CR DE# 38; CR DE# 58 at 309-102).

On December 13, 2012, the jury found McDuffie guilty of all three counts charged against him in the Superseding Indictment (CR DE# 40).

The Pre-Sentence Investigative Report (“PSI”)

Prior to sentencing, a PSI was prepared, applying the 2012 Federal Sentencing Guidelines Manual. The base offense level, pursuant to U.S.S.G. §2K2.1(a)(2), because the defendant committed the offense subsequent to sustaining two felony convictions of either a crime of violence or a controlled substance offense, was set at a level 24. (PSI ¶18). Because the offense involved more than two and less than eight firearms, the offense level was enhanced by two levels, §2K2.1(b)(1)(A). (PSI ¶19). Because a firearm was stolen, the offense level was increased by two levels, §2K2.1(b)(4)(A). (PSI ¶20). According to §4B1.1(a), the defendant was considered a Career Offender because he was at least 18 years old at the time of the instant offense, the instant offense was a felony crime of violence, and the movant had at least two prior felony convictions for crimes of violence and controlled substance offenses. (PSI ¶25). Since the statutory maximum penalty for the instant offense was 15 years, the offense level was 29,

§4B1.1(b)(4). (PSI ¶25). McDuffie, however, was also subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e) as an Armed Career Criminal. (PSI ¶25). Pursuant to §4B1.4(b)(3)(B), the offense level was 33. (PSI ¶25). The total offense level was set at 33. (PSI ¶27).

The probation officer next determined that McDuffie had a subtotal of ten criminal history points and a criminal history category V (Chapter Five, Part A). (PSI ¶36). He was a Career Offender and a Career Offender's criminal history category in every case shall be Level VI, §4B1.1. (PSI ¶37). McDuffie was also an armed career criminal and as such, his criminal history category was established at Level VI, §4B1.4(c)(1). (PSI ¶38).

Statutorily, as to Count One, the term of imprisonment was 0 to 15 years, 18 U.S.C. §2119(1). As to Count Two, the minimum term of imprisonment was 7 years and the maximum term was life (consecutive to any other sentence), 18 U.S.C. § 924(c)(1)(A)(ii) and (D)(ii). As to Count Three, the minimum term of imprisonment was 15 years and the maximum term was life, 18 U.S.C. § 924(e)(1). (PSI ¶69). Based on a total offense level of 33 and a criminal history category of VI, the recommended Guideline imprisonment range was 235 to 293 months. As to Count Two, a term of imprisonment of 84 months under 18 U.S.C. §924(c)(1)(A)(ii), (D)(ii) which shall run consecutive to any other term of

imprisonment, §5G1.2(a). Pursuant to §4B1.1(c)(3), however, the applicable guideline imprisonment range was 360 months to life. (PSI ¶70).

McDuffie objected to the PSI (CR DE# 45). In relevant part, McDuffie objected to the application of an enhanced ACCA sentence, arguing that he was not an armed career criminal (*Id.* at 12-14). Specifically, he argued that his conviction for aggravated battery on a pregnant woman did not qualify as a violent felony under the ACCA (*Id.* at 14). McDuffie's counsel did not object to the facts in the PSI stating that he knew that his victim was four months pregnant with his child, he forced his way into her apartment through a bedroom window, he punched her in the stomach, he took her cellular telephone so that she could not call the police, and she was hospitalized after the attack (PSI ¶ 33).

The Government responded in opposition (CR DE# 47). The Government argued that McDuffie's prior conviction in Florida for aggravated battery of a pregnant victim was a violent felony under the ACCA (*Id.* at 3). Specifically, the Government explained that although in *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265 (2010), the United States Supreme Court held that non-aggravated battery in Florida does not categorically constitute a violent felony under the ACCA, the United States Supreme Court did not consider whether battery qualified as a violent felony under either the modified categorical approach or

under the residual clause (*Id.*). The Government elaborated that McDuffie's aggravated battery of a pregnant victim conviction qualified as a violent felony under the modified categorical approach, explaining that the information to which McDuffie plead guilty stated that he committed his crime by "actually and intentionally touching or striking [his victim] against her will by punching her in the stomach, while [his victim] was pregnant and [he] knew or should have known that she was pregnant" (*Id.* at 4). Thus, the Government contended, because McDuffie admitted to punching his victim in the stomach, he admitted to actually and intentionally striking her, which is a violent felony under the ACCA (*Id.* at 4-5). The Government also noted that McDuffie's aggravated battery of a pregnant victim conviction qualified as a violent felony under the residual clause of the ACCA (*Id.* at 4, n.3).

Sentencing

On February 28, 2013, the district court held a sentencing hearing for McDuffie (CR DE# 48). McDuffie argued that his prior conviction for aggravated battery on a pregnant woman was not a violent felony under the residual clause of the ACCA, because the residual clause is unconstitutionally vague (CR DE# 60 at 4-5). The district court rejected McDuffie's argument, finding that his conviction for aggravated battery on a pregnant woman was a violent felony under the ACCA

and that, as a result, he was an armed career criminal (*Id.* at 5-6).

McDuffie also argued that his advisory sentencing guidelines range, which was 360 months' to life imprisonment, was so high as to violate the Eighth Amendment's prohibition on Cruel and Unusual Punishment (*Id.* at 6, 9-11). He advocated that he should be sentenced to his applicable statutory mandatory minimum sentence of 22 years of imprisonment, which was below his advisory sentencing guidelines range (*Id.*). The Government, in turn, argued that, in light of McDuffie's extensive criminal history and status as a Career Offender and as an Armed Career Criminal, a sentence within his advisory sentencing guidelines range was warranted (*Id.* at 7, 11-12).

The district court recounted McDuffie's extensive criminal history, finding that it justified a sentence within his sentencing guidelines range (CR DE# 60 at 7-8). Accordingly, the district court rejected McDuffie's request to be sentenced to the statutory minimum sentence of 22 years of imprisonment (*Id.* at 12-14, 16). The district court also explained that a high sentence was warranted under the facts of the case and that during the carjacking McDuffie terrorized one of his victims by making him strip off his clothing while a firearm was pointed at him (*Id.* at 15). The district court sentenced McDuffie to a term of 360 months' imprisonment, which was comprised of concurrent terms of 180 months' imprisonment and 276

months' imprisonment on Counts I and III, respectively, and a consecutive term of 84 months' imprisonment on Count Three (*Id.* at 16; DE 49). The term of imprisonment is followed by a term of four (4) years supervised release (CR DE 49).

Direct Appeal

On March 12, 2013, McDuffie timely appealed. (CR DE# 50). *United States v. McDuffie*, 11th Circuit Case No: 13-11115A. On appeal he argued that the Judgment, Conviction and Sentence imposed were unlawful, specifically, (1) that the district court plainly erred in failing to find prosecutorial misconduct where, during her cross-examination of McDuffie, the prosecutor asked him about prior inconsistent statements that he had made to her during a pre-trial interview; (2) that the district court plainly erred in instructing the jury on aiding and abetting; (3) that the district court plainly erred in applying a seven-year mandatory minimum sentence to McDuffie, pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), where the jury did not specifically find that a firearm was brandished; (4) that the district court erred in finding that McDuffie's prior conviction for aggravated battery on a pregnant woman was a violent felony under the Armed Career Criminal Act; (5) that the district court plainly erred in sentencing McDuffie under the Armed Career Criminal Act based on prior convictions that were not alleged in the indictment or

found by the jury; and (6) that the district court plainly erred in failing to find that 18 U.S.C. §§922(g) and 2119 violated the Commerce Clause of the United States Constitution. See *U.S. v. McDuffie*, 550 Fed.Appx. 859 (11th Cir. 2013).

On December 30, 2013, the Eleventh Circuit rejected all of McDuffie's claims on direct appeal in an unpublished opinion. *Id.* The mandate issued in the case on February 2, 2014 (CR DE# 66); on May 5, 2014, McDuffie's writ of certiorari to the United States Supreme Court was denied (CR DE# 68). *Todd McDuffie v. United States*, U.S.S.Ct. Case No: 13-9484.

McDuffie's Section 2255 Claims

McDuffie returned to the district court and filed his initial *pro se* Motion to Vacate (Cv-DE#1) with supporting memorandum (Cv-DE#4) pursuant to 28 U.S.C. §2255 on April 27, 2015. The Government filed a Response to an Order to Show Cause (DE#7) in *McDuffie v. United States*, 15-21641-CV-Martinez. The Defendant filed a Reply. (DE#8).

On March 31, 2016, the Magistrate entered his Report of Magistrate Judge (A-3). The Magistrate recommended denial of each of McDuffie's claims and found no need to conduct an evidentiary hearing on the Motion to Vacate. An Order was entered on April 29, 2016 by the District Judge adopting the Report and Recommendations (DE#10; A-4). Final Judgment was issued the same day.

(DE#11; A-5). A Notice of Appeal was filed on June 24, 2016. (DE#13).

A habeas appeal was docketed with the 11th Circuit Court of Appeal as the Motion for Certificate of Appealability was construed from the Notice of Appeal. A Motion for Certificate of Appealability was filed by appointed counsel. An Order was entered thereafter denying McDuffie's Motion for Certificate of Appealability.

Todd McDuffie remains incarcerated at USP Victorville in Victorville, CA

C. Standard of Review

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. Rule 10, U.S.S.Ct. Rules. A Petition for Writ of Certiorari is granted only for compelling reasons.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should issue in this case to review the federal constitutional questions raised herein. Pursuant to Rule 10, S.Ct.R., compelling reasons support certiorari review at bar. based on the following issues:

- II. Whether certiorari review is warranted despite the Eleventh Circuit's decision denying Todd McDuffie's Motion for Certificate of Appealability?

- a. Whether the instructions given to the jury regarding aiding and abetting in connection with 18 U.S.C. §§2119 and 924(c) were constitutional in light of *Rosemond v. United States*, 134 S.Ct. 1240 (2014)?
- b. Whether the instruction given to the jury with respect to 18 U.S.C. § 924(c) was constitutional despite failing to include a brandishing instruction, in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013)?
- c. Whether McDuffie was denied his Sixth Amendment right to cross examine the prosecutor after she violated the “witness advocate” rule? and
- d. Whether McDuffie’s sentence was improperly enhanced pursuant to 18 U.S.C. §924(e) because the term “violent felony” in the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague and violates *Johnson v. United States*?

Certiorari should be granted in this case.

I. CERTIORARI REVIEW IS WARRANTED TO REVIEW THE ELEVENTH CIRCUIT’S DECISION TO DENY TODD McDUFFIE’S MOTION FOR CERTIFICATE OF APPEALABILITY CONCERNING TODD McDUFFIE’S SECTION 2255 CLAIMS

A Certificate of Appealability must issue upon a “substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and is required when “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603-04 (2000) (internal quotation omitted); see also *Henry v. Dep’t of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999). When a

COA is sought on procedural grounds, it must issue when “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484, 120 S.Ct. at 1604.

A court “should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief.” *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029, 1039 (2003). “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.*, 537 U.S. at 338, 123 S.Ct. at 1040.

Courts must resolve doubts about whether to grant a COA in favor of the movant, and may consider the severity of the penalty in making the decision. See *Lambright v. Stewart*, 220 F.3d at 1025; *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997). A COA may be denied only when “petitioner’s claim is squarely foreclosed.” *Lambright*, 220 F.3d at 1029 (internal quotation omitted). Appellant has met the governing

standard.

Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court set forth a two-part test for showing ineffective assistance counsel: (1) “that counsel’s performance was deficient,” defined as “representation [that] fell below an objective standard of reasonableness,” and (2) “that the deficient performance prejudiced the defense” in that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064, 2068 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

“[I]t is sufficient that a petitioner must show only a reasonable probability that the outcome would have been different; he ‘need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.’” *Brownlee v. Haley*, 306 F.3d 1043, 1059-60 (11th Cir. 2002) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067); see *DeLuca v. Lord*, 77 F.3d 578, 590 (2nd Cir. 1996) (“The *Strickland* test does not require certainty that the result would have been different.”). “When evaluating this probability, ‘a court hearing an ineffectiveness claim must consider the totality of the evidence.’” *Brownlee*, 306 F.3d at 1060

(quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069). Application of these reasonable probability standards shows that the claims in this case are sufficient for appellate review.

McDuffie's Claims for a Certificate of Appealability

Appellant's *pro se* 28 U.S.C. § 2255 motion alleged that he received ineffective assistance of counsel throughout various stages of the case based on counsel's failure to object to the jury instructions regarding aiding and abetting in light of *Rosemond* and counsel's failure to request the brandishing instruction. He further alleged a 6th Amendment violation after the AUSA became a witness and *Johnson* error as the residual clause continued therein violates the Due Process Claim of the 5th Amendment. Each issue is colorable, and the district court's and circuit court's decisions should be reviewed by this Honorable Court.

Further, McDuffie claims that his 6th Amendment right to cross examine the Prosecutor was violated after she violated the "witness advocate" Rule. In essence, for the Prosecutor's next witness she called herself. Such conduct is clearly violative of the Rules Regulating the Florida Bar and denied McDuffie's right to due process of law and to a fair trial.

Certiorari should be granted in this case based upon McDuffie's *pro se* Section 2255 claims as lodged below. This Court should further analyze each of

McDuffie's claims on the merits. First, based upon McDuffie's sworn claims, factual issues exist as to the issues raised and no evidentiary hearing conducted below. Second, no hearing was conducted by the Court on McDuffie's legal arguments surrounding the aiding and abetting jury instruction, the brandishing instruction, the Prosecutor becoming a witness as to contested facts and whether McDuffie's sentence was unlawfully enhanced pursuant to Title 18 U.S.C. Section 924(e) based on *Johnson*.

In analyzing whether the Assistant U.S. Attorney improperly acted as the Prosecutor and a witness as to factual matters in this case this Court can be guided by *Holloway v. State*, 705 So.2d 646 (Fla. 4th DCA 1998). In *Holloway*, the state appellate Court was faced with a similar situation. In *Holloway*:

During trial, the prosecution maintained that appellant enticed the victim, her ex-husband, to her apartment through sexual innuendos and then shot him. In support of this theory, the prosecutor asked a witness, Michael Maravic, about appellant's attire shortly before the shooting. Maravic initially responded that he thought appellant was wearing a tank top shirt. However, when asked about the color of the shirt, Maravic testified that he could not remember what appellant was wearing. The prosecutor followed with questions concerning conversations he had with Maravic on the day prior to and the morning of his testimony. Specifically, the prosecutor asked Maravic whether he said that appellant was wearing a yellow shirt and shorts. When Maravic indicated that he could not remember what he said the

day before or earlier that morning, the prosecutor called himself to the stand to testify as to the content of his conversations with Maravic. Appellant's counsel objected and argued that if the prosecutor testified, a mistrial should be granted because the prosecutor cannot place himself on the stand and put his credibility in issue. The trial court overruled the objection and denied counsel's motion for a mistrial. The prosecutor then proceeded to testify that Maravic "did not tell the truth [about] what he told me last night nor this afternoon." During closing argument, the prosecutor again placed his credibility in issue by commenting on Maravic's testimony.

Id at 647

In reversing Holloway's murder conviction, the Court first analyzed the ethical considerations involved under Rule 4-3.7, Rules Regulating the Florida Bar, noting that:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of legal services rendered in the case; or
- (4) disqualification of the lawyer would work substantial hardship on the client. *Id.*

In *Holloway v. State*, the Fourth District Court of Appeal of the State of Florida reversed the defendant's conviction, noting that:

The state has not cited nor have we found an exception to Rule 4-3.7(a) allowing a prosecutor to attack the credibility of a witness through his own testimony and to act in the dual role of prosecutor and witness in the same case. Here, the prosecutor's testimony related to a contested issue concerning what appellant was wearing shortly before the shooting. Further, when the prosecutor called himself as a witness to impeach Maravic's testimony, he placed his credibility as a witness in issue for the jury. Moreover, when the prosecutor subsequently returned to his role as an advocate and commented on the truthfulness of Maravic's testimony, he effectively vouched for his testimony and the credibility of the state's case.

The practice of acting as a prosecutor and a witness "is not to be approved and should be indulged in only under exceptional circumstances." *Shargaa v. State*, 102 So.2d 809, 813 (Fla.), cert. denied, 358 U.S. 873, 3 L. Ed. 2d 104, 79 S. Ct. 114 (1958); see *State v. Christopher*, 623 So. 2d 1228, 1229 (Fla. 3d DCA 1993). See also *Petrilli v. Drechsel*, 94 F.3d 325, 330 (7th Cir. 1996) where counsel acts as both an advocate and a witness in a single proceeding, the sanction of reversal and a new trial may be warranted).

In *Shargaa*, the Florida Supreme Court addressed the issue, stating:

The better practice would be for a prosecuting officer who becomes a witness to withdraw from the actual prosecution of the cause. This is so because a jury is naturally apt to give the testimony of the prosecuting attorney himself much more weight than it would accord to the ordinary witness.

Shargaa, 102 So. 2d at 813. *Id.* at 647-648

Finally, despite the Magistrate's conclusion below, McDuffie contends that the minimum mandatory sentencing enhancement imposed pursuant to Title 18 U.S.C. Section 924(c) is violative of *Johnson*.

An Evidentiary Hearing Should Have Been Conducted Below

To obtain an evidentiary hearing, a petitioner need not present all evidence necessary to prevail on a § 2255 claim, a petitioner simply must "allege - not prove - reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002). That question required an evidentiary hearing at bar.

All the Circuit Courts of Appeals have held that "[a] petitioner [is] entitled to evidentiary hearing on claim of ineffective assistance of counsel unless the claim is inadequate on its face or if records conclusively refute factual assertions of claim." See, e.g., *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994).

A Certificate of Appealability Should Issue

A COA should be granted where the movant was denied an evidentiary hearing even where the movant has not shown enough evidence to prevail. See *Johnson v. Thaler*, 406 Fed.Appx. 882 (5th Cir. 2010) (question for review authorization is whether "jurists of reason could find it debatable whether the district court committed a substantive or procedural error in dismissing his habeas

application”); *United States v. MacDonald*, 641 F.3d 596, 612-14 (4th Cir. 2011) (granting COA as to procedural issue, where district court denied habeas claim; district court should not have prohibited expansion of record to include evidence received after trial and after filing of motion); *cf. Long v. United States*, 626 F.3d 1167, 1169-70 (11th Cir. 2010) (“district court must develop a record sufficient to facilitate appellate review of all issues pertinent to an application for a certificate of appealability”).

The COA standards applicable to denial of an evidentiary hearing are the same here as they are in any other § 2255 case involving a summary resolution of the claims. A COA is required based on the sworn assertions supporting the motion to vacate, not on out-of-court speculation that is not subjected to adversarial testing. See *Gomez-Diaz v. United States*, 433 F.3d 788, 790 (11th Cir. 2005).

With respect to the district court’s decision to reject the allegations of the § 2255 motion, McDuffie was entitled to a full hearing concerning his claims. See *Gallego v. United States*, 174 F.3d 1196, 1198-99 (11th Cir. 1999) (reversing denial of § 2255 challenge based on counsel’s failure to properly advise defendant of scope of right to testify and that only defendant could waive it; rejecting rule that would credit counsel’s statements over the defendant’s sworn § 2255 assertions; remanding for evidentiary hearing). Certiorari review is required.

CONCLUSION

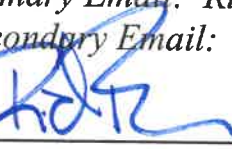
Based upon the errors below, Todd McDuffie has been unlawfully convicted and sentenced. This Honorable Court should entertain certiorari review to further scrutinize the federal constitutional issues at bar.

Respectfully submitted,

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By 

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January 29, 2018

APPENDIX

APPENDIX

	<u>Page</u>
Docket <i>U.S.A. v. McDuffie</i> , Case No:	
15-CV-21641-JEM	A-1
Motion to Vacate Under Title 28 Section 2255	
filed April 30, 2015	A-2
Report of Magistrate Judge entered	
March 31, 2016	A-3
Order Adopting Magistrate Judge White's Report	
and Recommendation entered April 29, 2016	A-4
Final Judgment entered April 29, 2016	A-5
Motion for Certificate of Appealability in	
<i>United States v. McDuffie</i> , Case No: 16-14147-D	
filed April 3, 2017	A-6
Order Denying Application for Leave to File a	
Second or Successive Motion to Vacate,	
Set Aside, or Correct Sentence	
filed April 5, 2017	A-7
Order Denying Motion for Certificate of Appealability	
entered October 31, 2017	A-8

2255,CLOSED

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:15-cv-21641-JEM**

McDuffie v. United States Of America
Assigned to: Judge Jose E. Martinez
Case in other court: USCA, 16-14147-D
USDC Southern FL, 1:12-cr-20465
Cause: 28:2255 Motion to Vacate Sentence

Date Filed: 04/30/2015
Date Terminated: 04/29/2016
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate
Sentence
Jurisdiction: U.S. Government
Defendant

Plaintiff**Todd McDuffie**

represented by **Todd McDuffie**
00293-104
McCreary-USP
United States Penitentiary
Inmate Mail/Parcels
Post Office Box 3000
Pine Knot, KY 42635
PRO SE

V.

Defendant**United States of America**

represented by **Noticing 2255 US Attorney**
Email: usafls-2255@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Amanda Perwin
US Attorney's Office
99 NE 4th Street
Miami, FL 33132
305-961-9061
Email: amanda.perwin@usdoj.gov
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/30/2015	<u>1</u>	MOTION (Complaint) to Vacate, Set Aside or Correct Sentence (2255). NOTE: All further docketing is to be done in the civil case. (Criminal Case # 1:12-cr-20465), filed by Todd McDuffie. (Main Document 1 replaced on 4/30/2015) (pes). (Entered: 04/30/2015)

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04/30/2015	<u>2</u>	Judge Assignment to Judge Jose E. Martinez (pes) (Entered: 04/30/2015)
04/30/2015	<u>3</u>	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (pes) (Entered: 04/30/2015)
04/30/2015	<u>4</u>	MEMORANDUM in Support re <u>1</u> Motion (Complaint) to Vacate/Set Aside/Correct Sentence (2255) by Todd McDuffie. (pes) (Entered: 04/30/2015)
05/14/2015	<u>5</u>	ORDER TO SHOW CAUSE. Signed by Magistrate Judge Patrick A. White on 5/13/2015. (tw) (Entered: 05/14/2015)
05/14/2015	<u>6</u>	INITIAL ORDER OF INSTRUCTIONS TO PRO SE LITIGANT. Signed by Magistrate Judge Patrick A. White on 5/13/2015. (tw) (Entered: 05/14/2015)
07/01/2015	<u>7</u>	RESPONSE TO ORDER TO SHOW CAUSE re <u>5</u> Order to Show Cause by United States Of America. (Perwin, Amanda) (Entered: 07/01/2015)
08/11/2015	<u>8</u>	REPLY to <u>7</u> Response to Order to Show Cause by Todd McDuffie. (jas) (Entered: 08/12/2015)
03/31/2016	<u>9</u>	REPORT AND RECOMMENDATIONS on 28 USC 2255 case re <u>1</u> Motion (Complaint) to Vacate/Set Aside/Correct Sentence (2255) filed by Todd McDuffie; Recommending that this motion to vacate be denied; that all pending motions, not otherwise ruled upon be dismissed, as moot; that a certificate of appealability be denied; and, the case closed. Objections to R&R due by 4/18/2016. Signed by Magistrate Judge Patrick A. White on 3/31/2016. (br) (Entered: 03/31/2016)
04/29/2016	<u>10</u>	ORDER ADOPTING REPORT AND RECOMMENDATIONS ; Affirming and Adopting <u>9</u> Report and Recommendations. Movant's motion to vacate his sentence is DENIED. No certificate of appealability shall issue. This case is CLOSED, and any pending motions are DENIED AS MOOT. Signed by Judge Jose E. Martinez on 4/28/2016. (jas) NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69. (Entered: 04/29/2016)
04/29/2016	<u>11</u>	FINAL JUDGMENT in favor of United States of America against Todd McDuffie. Signed by Judge Jose E. Martinez on 4/29/2016. (jas) (Entered: 04/29/2016)
05/02/2016	<u>12</u>	Case No Longer Referred to Magistrate Judge Patrick A. White/Case Closed by the District Judge. Signed by Magistrate Judge Patrick A. White on 5/2/2016. (br) (Entered: 05/02/2016)
06/24/2016	<u>13</u>	Notice of Appeal as to <u>11</u> Judgment by Todd McDuffie. Filing fee \$ 505.00. USA/FPD Filer - No Filing Fee Required. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered

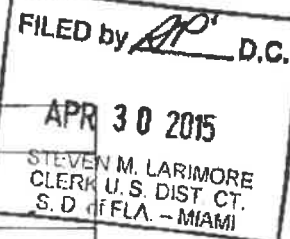
		[Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Dreispul, Tracy) (Entered: 06/24/2016)
06/27/2016		Transmission of Notice of Appeal, Judgment and Docket Sheet to US Court of Appeals re <u>13</u> Notice of Appeal, Notice has been electronically mailed. (amb) (Entered: 06/27/2016)
06/28/2016	<u>14</u>	Acknowledgment of Receipt of NOA from USCA re <u>13</u> Notice of Appeal, filed by Todd McDuffie. Date received by USCA: 6/27/2016. USCA Case Number: 16-14147-D. (amb) (Entered: 06/29/2016)
10/31/2017	<u>15</u>	ORDER of DISMISSAL from USCA. McDuffie's motion for a COA is DENIED re <u>13</u> Notice of Appeal, filed by Todd McDuffie. USCA #16-14147-D (amb) (Entered: 10/31/2017)

PACER Service Center			
Transaction Receipt			
01/29/2018 09:15:10			
PACER Login:	rr0796:2679379:0	Client Code:	
Description:	Docket Report	Search Criteria:	1:15-cv-21641-JEM
Billable Pages:	2	Cost:	0.20

Page 2

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

United States District Court Southern District of Florida	
Name (under which you were convicted): TODD McDUFFIE	Docket or Case No.: 12 CR 20465
Place of Confinement: USP McCreary, P.O. Box 3000 Pine Knot, Kentucky 42635	Prisoner No.: 00293-104
UNITED STATES OF AMERICA Movant (include name under which you were convicted) TODD McDUFFIE v.	



MOTION 15-cv-21641-Martinez/White

- (a) Name and location of court that entered the judgment of conviction you are challenging: United States District Court for the Southern District of Florida
- (b) Criminal docket or case number (if you know): 1:12-CR-20465
- (a) Date of the judgment of conviction (if you know): December 13, 2015
- (b) Date of sentencing: February 13, 2012
- Length of sentence: 300 months
- Nature of crime (all counts): Carjacking 18 USC § 2119; Felon in Possession of a firearm 18 USC § 922(g); Use of a firearm during a crime of violence 18 USC § 924(c).
- (a) What was your plea? (Check one)

(1) Not guilty ☒ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? N/A
- If you went to trial, what kind of trial did you have? (Check one) Jury ☒ Judge only ☐

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7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☒ No ☐
8. Did you appeal from the judgment of conviction? Yes ☐ No ☐
9. If you did appeal, answer the following:

(a) Name of court: USDC Southern District of Florida
(b) Docket or case number (if you know): 1:12-CR-20465
(c) Result: Conviction by jury
(d) Date of result (if you know): Same
(e) Citation to the case (if you know): _____
(f) Grounds raised: this case

- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): No. 13-9484
(2) Result: Cert was denied
(3) Date of result (if you know): May 5, 2014
(4) Citation to the case (if you know): 188 L. Ed 2d 1135
(5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: N/A
(2) Docket or case number (if you know): _____
(3) Date of filing (if you know): _____

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(4) Nature of the proceeding: N/A

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result: N/A

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result: N/A

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

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(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: N/A

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Petitioner's conviction under 18 USC § 2119, must be vacated in light of Rosemond v. United States, 572 US , 134 S. Ct. 1240(2014

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See attached Brief

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: _____

New Supreme Court Case Law. Not Previously Available.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

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Docket or case number (if you know): N/A

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: New Supreme Court Case Law. Not previously available

GROUND TWO: U.S. Attorney denied petitioner due process and his right to confront/cross examine witness against his when she testified at trial.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attached brief.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND THREE: Petitioner's conviction for violating 18 USC § 924(c) must be vacated in light of Rosemond v. United States, 572 US ___, 134 L. Ed. 2d 1240.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See attached brief

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: _____

New Supreme Court Case Law. Not previously available.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

N/A

Name and location of the court where the motion or petition was filed: _____

N/A

Docket or case number (if you know): _____

N/A

Date of the court's decision: _____

N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): N/A

N/A
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

N/A

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

N/A

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

N/A

Name and location of the court where the motion or petition was filed: _____

N/A

Docket or case number (if you know): _____

N/A

Date of the court's decision: _____

N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

N/A

Docket or case number (if you know): _____

N/A

Date of the court's decision: _____

N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: N/A

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Tracy Dreispul, Federal Public Defender
150 W. Flagler Street, Miami, FL 33130-1556

(b) At arraignment and plea: same

(c) At trial: same

(d) At sentencing: same

(e) On appeal: same

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

AO 243 (Rev. 10/07)

Therefore, movant asks that the Court grant the following relief: _____

All relief requested in the attached brief.

_____ or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 4 / 27 / 2015
(month, date, year)

Executed (signed) on 4 / 27 / 2015 (date)

X Todd McDuffie
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-21641-Civ-MARTINEZ
(12-20465-Cr-MARTINEZ)
MAGISTRATE JUDGE P. A. WHITE

TODD MCDUFFIE,

Movant,

v.

REPORT OF
MAGISTRATE JUDGE

UNITED STATES OF AMERICA,

Respondent.

_____ /

I. Introduction

The movant, a federal prisoner, has filed the instant motion to vacate, pursuant to 28 U.S.C. §2255, attacking the constitutionality of his convictions and sentences, entered following a jury verdict in case no. 12-20465-Cr-Martinez.

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

The Court has reviewed the movant's §2255 motion (CV-DE#1, 4), together with the government's response (DE#7) to an order to show, the Presentence Investigation Report ("PSI"), the court's Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file, including the transcripts of trial and sentencing.

II. Claims

A-3

This court, recognizing that the movant was proceeding *pro se*, has afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). In his §2255 filings, the movant raises the following four grounds for relief:

1. The instructions given to the jury regarding aiding and abetting in connection with 18 U.S.C. §§2119 and 924[©] were unconstitutional, in light of Rosemond v. United States, 134 S.Ct. 1240 (2014).
2. The instruction given to the jury with respect to 18 U.S.C. § 924[©] was constitutionally infirm, for failing to include a brandishing instruction, in light of Alleyne v. United States, 133 S. Ct. 2151 (2013).
3. He was denied his Sixth Amendment right to cross examine the prosecutor after she violated the "witness advocate" rule.
4. His sentence was improperly enhanced pursuant to 18 U.S.C. §924(e) because the term "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague.

III. Factual Background and Procedural History

Given the nature of the claims, a detailed factual and procedural history is warranted in this case.

A. Facts Adduced at Trial

The evidence adduced at trial reveals as follows. On August 30, 2011, at approximately 12:30 or 1:00 A.M., Alvin Gainey and Nancy Gilyard returned from having dinner at an Applebee's in Hialeah Gardens, Florida (CR DE# 56 at 132-33; CR DE# 57 at 229-30). Gainey and Gilyard testified to the following facts at

trial.

The pair arrived at Gilyard's residence, where they parked and continued talking in the car (CR DE# 56 at 133, 136-37; CR DE# 57 at 230). While they were in the car, two males approached them, one being McDuffie (CR DE# 56 at 136, 141; CR DE# 57 at 231). McDuffie tapped on the driver's side window with a firearm and then pointed that firearm at Gainey (CR DE# 56 at 137). Gainey rolled down the window and McDuffie demanded that he give him money (Id. at 138). McDuffie then demanded that Gainey exit the vehicle, which Gainey did after pushing one of the two firearms that he lawfully kept in his car between the seat and the center console to hide it from McDuffie (Id.).

After Gainey exited his car, Gainey saw a second carjacker on the other side of his car who had opened the passenger side door (CR DE# 56 at 138-39). McDuffie continued to demand money from him, and he told McDuffie that he had no cash but gave him a debit card and pin number (Id. at 139). On the other side of his car, the other carjacker demanded that Gilyard give him money and then searched the glove compartment, where he found \$100 (Id. at 139-40). That second carjacker then searched the center console and found a firearm there (Id. at 140). McDuffie then began to search the driver's side of the car, while still pointing his firearm at Gainey, and he found the second firearm that Gainey had attempted to hide between the driver's seat and the center console (Id. at 142). McDuffie was the carjacker on the passenger side of the car, and the other carjacker was the one who pointed the firearm at Gainey through the driver's side window (CR DE# 57 at 231-32). McDuffie kept the firearm that he took from Gainey's center console in his hand during the carjacking (Id. at 232).

McDuffie demanded that he take off his shorts, his shirt, and his shoes (CR DE# 56 at 142-43, 148; CR DE# 57 at 233). After that, McDuffie ordered the other carjacker to search the rest of the car, but then changed his mind and told him to get into the driver's seat of the vehicle (CR DE# 56 at 143). The other carjacker began driving Gainey's car (Id. at 143-44; CR DE# 57 at 233-34). McDuffie then hopped into the open passenger's side door, while keeping his firearm pointed at Gainey and telling him not to move (CR DE# 56 at 144). McDuffie and the other carjacker drove off in Gainey's car (Id.). Once Gainey and Gilyard were sure that McDuffie and the other carjacker were gone, they went inside of Gilyard's residence and called the police (Id.; CR DE# 57 at 234).

In addition to the firearms and the vehicle, McDuffie and the other carjacker took Gainey's wallet, his jewelry, two briefcases, approximately \$290, and an Android cellular telephone, which was equipped with a GPS tracking application that allowed Gainey to locate the phone from a website (CR DE# 56 at 145). Once the police arrived at Gilyard's residence, Gainey used the tracking application on his cellular phone to locate it at Northwest 53rd Street and 26th Avenue in Miami, Florida (Id. at 146). Gainey's car was later found abandoned at that location, although his cash, cellular telephone, debit card, jewelry, and firearms were missing (Id. at 148-49, 159). Fingerprints were taken from the car by the Miami-Dade Police Department and sent to an examiner, who determined that the fingerprints matched McDuffie's (Id. at 163-66, 179-81).

A few days after the carjacking, Gainey was shown a photographic line-up by a police detective and he identified McDuffie in that line-up as one of the men who had carjacked him (CR DE# 56 at 149-51). Gilyard was also shown a photographic

line-up by a police detective, and she identified McDuffie as the person who had carjacked her (CR DE# 57 at 234-36).

On September 2, 2011, Miami-Dade Police Department Detective Daniel Puerto conducted a recorded interview with McDuffie (CR DE# 57 at 195-96). During that interview, McDuffie stated that he and another man named Hickey committed a carjacking in front of a residence in the early morning hours of August 30, 2011, there was a man and a woman sitting inside of the car, he approached the passenger side of the car under Hickey's direction, he asked the woman where the money was and to give him everything, he searched the glove compartment and center console, he found cash and a firearm, Hickey forced the driver to get out of the car and undress, Hickey found a second firearm in the car, and he and Hickey drove off in the car before abandoning it at 52nd Street and 26th Avenue (Id. at 198-203). McDuffie also stated that the victims were held at gunpoint throughout the carjacking, but Hickey was holding the firearm (Id. at 205, 209-10). McDuffie stated that he did not sell the firearms that he and Hickey had stolen from Gainey (Id. at 211).

On August 3, 2012, ATF Special Agent Jane Baldassare and the prosecutor participated in a pre-trial interview with McDuffie (CR DE# 57 at 215-16). McDuffie stated during that interview that he had been at a nightclub with Hickey and that, after they left the club, they committed the carjacking (Id. at 217-18). Baldassare next recounted that McDuffie stated that, on the way to the convenience store, he and Hickey walked past Gainey's car and they discussed robbing Gainey and Gilyard if the couple was still in the car after they finished at the convenience store (Id. at 217-18). McDuffie stated that he had a firearm on his person at the time of the carjacking and that his firearm was the firearm used in the

carjacking, but he claimed that Hickey had been the one using his firearm (Id. at 218). McDuffie stated that his role in the carjacking was to search the car and keep an eye on the victims (Id. at 218-19). McDuffie said that he and Hickey had stolen two firearms and later sold them, and McDuffie provided the name of the person who had bought the firearms (Id. at 219).

At trial, McDuffie testified in his own defense as follows (CR DE# 57 at 244). He was a drug dealer who had repeatedly been convicted of drug crimes (Id. at 245-46). He knew a man nicknamed Hickey, who was a gang member and hit man for another drug dealer, because he sold drugs to Hickey (Id. at 246). He did not carry a firearm because he sold drugs inside of an "after hours bar," as opposed to on a street corner (Id. at 247). On the evening of August 29, 2011, he was in that after-hours bar, high on cocaine, marijuana, and ecstasy, when Hickey arrived (Id. at 247, 265-66). He gave cocaine to Hickey at no charge and afterward, Hickey followed McDuffie out of the after-hours bar when McDuffie went to buy cigarettes from a nearby store (Id. at 247-50, 266). On the way to the store, he and Hickey walked by Gainey's car and, when they did, Hickey pointed out that Gainey was wearing a watch (Id. at 250-51).

McDuffie further testified that he told Hickey that he did not see the watch, even though he had, because he did not want to get involved in anything (CR DE# 57 at 250-51). He and Hickey proceeded to the convenience store, where he bought cigarettes and a sandwich (Id. at 251-52). He then began walking back to the after hours bar and that Hickey followed him (Id. at 252-53). When Gainey's car came into view, Hickey said that he was going to draw his firearm and wanted McDuffie to open the door (Id. at 253). He did not want to commit the carjacking, but he did so because he was afraid of

Hickey (Id. at 253-54). Hickey pulled the firearm on Gainey while he went to the passenger's side of the car, told Gilyard that he would not hurt her, and took Gainey's firearm from the car (Id. at 254-55). Hickey then made Gainey exit the car and strip off his clothes (Id. at 255-56). He and Hickey stole Gainey's wallet and debit card pin number, Hickey found Gainey's other firearm and stole it, and Hickey drove away in Gainey's vehicle while he rode in the passenger seat (Id. at 255-56). Once Hickey stopped the car at 52nd Street and 26th Avenue, he called a taxi because he wanted to get away from Hickey, but Hickey got into the taxi with him (Id. at 259-60). He took Hickey to an apartment and an after-hours bar, where he continued to imbibe drugs and alcohol, in an attempt to evade Hickey (Id. at 261-63).

On cross examination, the prosecutor asked McDuffie if he had met her before, and McDuffie stated that he had met her for a pre-trial interview about the carjacking (CR DE# 57 at 266). He stated that he had told the prosecutor during that interview that he would be truthful (Id. at 266). When the prosecutor asked him if he remembered telling her during the interview that Hickey had brought up the idea of the carjacking on the way to the store, McDuffie stated that he did not recall that (Id. at 267). McDuffie also testified that he did not remember stating during the interview that he had told Hickey, after they walked by the car on the way to the store, that "if they're still there when we're done with the store, then I'll do it" (Id.). The prosecutor also asked McDuffie if he remembered telling her, during the interview, that he was carrying a firearm on the night of the carjacking, and McDuffie responded "I told you I initially had a gun because I didn't want to get [Hickey] in no kind of trouble because I was already in fear of him" (Id. at 267). McDuffie also admitted that, in his recorded interview with Detective Puerto, he stated that he

did not know who Hickey had sold the stolen firearms to or how he stole them, but he told her the name of an individual who he claimed had purchased the firearms and had told her that he had been paid \$200 for the firearms (Id. at 272-73)

B. Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On October 18, 2012, a Southern District of Florida grand jury issued a Superseding Indictment, which charged Todd McDuffie with carjacking, in violation of 18 U.S.C. §§2119(1) and 2 (Count One); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§924(c)(1)(A)(ii) and 2 (Count Two); and being a convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count Three) (CR DE# 21).

On December 10, 2012, McDuffie proceeded to a three-day jury trial (CR DE# 35). Before the third day of trial, the Government alerted the district court that it planned to call a Bureau of Alcohol, Tobacco, and Firearms ("ATF") special agent to testify about statements that McDuffie made during a pre-trial interview with the Government to rebut the duress defense that McDuffie raised in his opening statement (CR DE# 57 at 187-88). Over McDuffie's objection that his prior statements could be used only if he testified, the district court allowed the ATF special agent to testify about the statements that McDuffie made during the pre-trial interview to rebut his claim of duress (Id. at 188-89).

At the end of the Government's case, McDuffie moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and for a mistrial, both of which the district court denied (CR DE#

57 at 240-42). McDuffie then testified in his own defense (Id. at 244). McDuffie did not object to any of the questions asked on cross-examination, including questions about what he told the prosecutor during his pre-trial interview with her and the ATF special agent (Id. at 265-74).

After McDuffie rested, the district court held a conference to discuss the jury instructions (CR DE# 57 at 276). McDuffie stated that he was "in full agreement" with the jury instructions, and he lodged no objections as the district court specifically discussed each page of the jury instructions (Id. at 276-77).

In its closing argument, the Government pointed out that McDuffie had admitted that he had participated in the carjacking; that both victims identified McDuffie as one of the two carjackers; that the inconsistencies between the testimony of the victims as to which defendant was on which side of the car was of no moment because the two witnesses were consistent that McDuffie was one of the carjackers and was armed; and that McDuffie's fingerprints were found on the driver's side door of the victim's car (CR DE# 58 at 282-83). The Government also explained that McDuffie's claim that he committed the crime only because he was afraid of his accomplice Hickey was implausible because McDuffie "told me that the gun belonged to him. That he was the person who was armed and Jane Baldassare, who was in that interview too, confirmed it" (Id. at 288). McDuffie did not object during the prosecutor's closing argument (Id. at 282-91). McDuffie, in turn, argued in closing that he committed the carjacking under duress, and, accordingly, he should be acquitted (Id. at 291-97).

The district court, in pertinent part, instructed the jury as follows:

It's possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids or abets" a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids or abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime - not just proof that the Defendant was simply present at the scene of a crime or knew about it. In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

(CR DE# 38; CR DE# 58 at 309-102).

On December 13, 2012, the jury found McDuffie guilty of all three counts charged against him in the Superseding Indictment (CR DE# 40).

Prior to sentencing, a PSI was prepared, applying the 2012 Federal Sentencing Guidelines Manual, which reveals as follows. The base offense level, pursuant to U.S.S.G. §2K2.1(a)(2), because the defendant committed the offense subsequent to sustaining two felony convictions of either a crime of violence or a controlled substance offense, was set at a level 24. (PSI ¶18). Because the offense involved more than two and less than eight firearms, the offense level was increased by two levels, §2K2.1(b)(1)(A). (PSI ¶19).

Because a firearm was stolen, the offense level was increased by two levels, §2K2.1(b)(4)(A). (PSI ¶20). According to §4B1.1(a), the defendant was considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense was a felony crime of violence, and the movant had at least two prior felony convictions for crimes of violence and controlled substance offenses. (PSI ¶25). Since the statutory maximum penalty for the instant offense was 15 years, the offense level was 29, §4B1.1(b)(4). (PSI ¶25). The movant, however, was also subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e) and was an Armed Career Criminal. (PSI ¶25). Pursuant to §4B1.4(b)(3)(B), the offense level was 33. (PSI ¶25). The total offense level was set at 33. (PSI ¶27).

The probation officer next determined that the movant had a subtotal of ten criminal history points and a criminal history category V (Chapter Five, Part A). (PSI ¶36). The movant was a career offender and a career offender's criminal history category in every case shall be VI, §4B1.1. (PSI ¶37). The movant was also an armed career criminal and as such, his criminal history category shall also be VI, §4B1.4(c)(1). (PSI ¶38).

Statutorily, as to Count One, the term of imprisonment was 0 to 15 years, 18 U.S.C. §2119(1). As to Count Two, the minimum term of imprisonment was 7 years and the maximum term was life (consecutive to any other sentence), 18 U.S.C. § 924(c)(1)(A)(ii) and (D)(ii). As to Count Three, the minimum term of imprisonment was 15 years and the maximum term was life, 18 U.S.C. § 924(e)(1). (PSI ¶69). Based on a total offense level of 33 and a criminal history category of VI, the guideline imprisonment range was 235 to 293 months. As to Count Two, a term of imprisonment of 84 months under 18 U.S.C. §924(c)(1)(A)(ii), (D)(ii) shall run consecutive to

any other term of imprisonment, §5G1.2(a). Pursuant to §4B1.1(c)(3), however, the applicable guideline imprisonment range was 360 months to life. (PSI ¶70).

McDuffie objected to the PSI (CR DE# 45). In relevant part, McDuffie objected to the application of an enhanced ACCA sentence, arguing that he was not an armed career criminal (Id. at 12-14). Specifically, he argued that his conviction for aggravated battery on a pregnant woman did not qualify as a violent felony under the ACCA (Id. at 14). McDuffie did not object to the facts in the PSI stating that he knew that his victim was four months pregnant with his child, he forced his way into her apartment through a bedroom window, he punched her in the stomach, he took her cellular telephone so that she could not call the police, and she was hospitalized after the attack (PSI ¶ 33).

The Government responded (CR DE# 47). The Government explained that McDuffie's prior conviction for Florida aggravated battery of a pregnant victim was a violent felony under the ACCA (Id. at 3). Specifically, the Government explained that, although in Johnson v. United States, 559 U.S. 133, 130 S. Ct. 1265 (2010), the United States Supreme Court held that non-aggravated battery in Florida does not categorically constitute a violent felony under the ACCA, the United States Supreme Court did not consider whether battery qualified as a violent felony under either the modified categorical approach or under the residual clause (Id.). The Government elaborated that McDuffie's aggravated battery of a pregnant victim conviction qualified as a violent felony under the modified categorical approach, explaining that the information to which McDuffie pleaded guilty stated that he committed his crime by "actually and intentionally touching or striking [his victim] against her will by punching her in the stomach, while [his victim]

was pregnant and [he] knew or should have known that she was pregnant" (Id. at 4). Thus, the Government concluded, because McDuffie admitted to punching his victim in the stomach, he admitted to actually and intentionally striking her, which is a violent felony under the ACCA (Id. at 4-5). The Government also noted that McDuffie's aggravated battery of a pregnant victim conviction qualified as a violent felony under the residual clause of the ACCA (Id. at 4, n.3).

On February 28, 2013, the district court held a sentencing hearing for McDuffie (CR DE# 48). McDuffie argued that his prior conviction for aggravated battery on a pregnant woman was not a violent felony under the residual clause of the ACCA, because the residual clause is unconstitutionally vague (CR DE# 60 at 4-5). The district court rejected McDuffie's argument, finding that his conviction for aggravated battery on a pregnant woman was a violent felony under the ACCA and that, as a result, he was an armed career criminal (Id. at 5-6).

McDuffie also argued that his advisory sentencing guidelines range, which was 360 months' to life imprisonment, was so high as to violate the Eighth Amendment's prohibition on cruel and unusual punishment (Id. at 6, 9-11). He advocated that he should be sentenced to his applicable statutory mandatory minimum sentence of 22 years of imprisonment, which was below his advisory sentencing guidelines range (Id.). The Government, in turn, argued that, in light of McDuffie's extensive criminal history and status as a career offender and as an armed career criminal, a sentence within his advisory sentencing guidelines range was warranted (Id. at 7, 11-12).

The district court then recounted McDuffie's extensive and

continuous criminal history, finding that it justified a sentence within his sentencing guidelines range (CR DE# 60 at 7-8). Accordingly, the district court rejected McDuffie's request to be sentenced to the statutory minimum sentence of 22 years of imprisonment (Id. at 12-14, 16). The district court also explained that a high sentence was warranted by the fact that, during the carjacking, McDuffie terrorized one of his victims by making him strip off his clothing while a firearm was pointed at him (Id. at 15). The district court then sentenced McDuffie to a term of 360 months' imprisonment, which was comprised of concurrent terms of 180 months' imprisonment and 276 months' imprisonment on Counts One and Three, respectively, and a consecutive term of 84 months' imprisonment on Count Three (Id. at 16; DE:49).

On March 12, 2013, McDuffie timely appealed. (CR DE# 50). On appeal he argued (1) that the district court plainly erred in failing to find prosecutorial misconduct where, during her cross-examination of McDuffie, the prosecutor asked him about prior inconsistent statements that he had made to her during a pre-trial interview; (2) that the district court plainly erred in instructing the jury on aiding and abetting; (3) that the district court plainly erred in applying a seven-year mandatory minimum sentence to McDuffie, pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), where the jury did not specifically find that a firearm was brandished; (4) that the district court erred in finding that McDuffie's prior conviction for aggravated battery on a pregnant woman was a violent felony under the Armed Career Criminal Act; (5) that the district court plainly erred in sentencing McDuffie under the Armed Career Criminal Act based on prior convictions that were not alleged in the indictment or found by the jury; and (6) that the district court plainly erred in failing to find that 18 U.S.C. §§922(g) and 2119 violated the Commerce Clause of the United States

Constitution. See U.S. v. McDuffie, 550 Fed.Appx. 859 (11th Cir. 2013).

On December 30, 2013, the Eleventh Circuit rejected all of McDuffie's claims in an unpublished opinion. Id. The mandate issued in the case on February 2, 2014 (CR DE# 66); on May 5, 2014, McDuffie's writ of certiorari to the United States Supreme Court was denied (CR DE# 68).

Movant returned to this court filing his initial pro se motion to vacate (Cv-DE#1) with supporting memorandum (Cv-DE#4), pursuant to 28 U.S.C. §2255 on **April 27, 2015**.¹

IV. Threshold Issues-Timeliness

The government rightfully does not challenge the timeliness of the movant's motion (Cv-DE#1). See 28 U.S.C. §2255(f).

V. General Legal Principles

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on final judgments pursuant to §2255 are extremely limited. A prisoner is entitled to relief under §2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States,

¹[U]nder the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); See also Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

(2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. See 28 U.S.C. §2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. §2255 'is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.'" Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted). The "fundamental miscarriage of justice" exception recognized in Murray v. Carrier, 477 U.S. 478, 496 (1986), provides that it must be shown that the alleged constitutional violation "has probably resulted in the conviction of one who is actually innocent"

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012); United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000); Mills v. United States, 36 F.3d 1052, 1056 (11th Cir. 1994); United States v. Rowan, 663 F.2d 1034, 1035 (11th Cir. 1981). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. Nyhuis, 211 F.3d at 1343 (quotation omitted). Broad discretion is afforded to a court's determination of whether a particular claim has been previously raised. Sanders v. United States, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) ("identical grounds may often be proved by different factual allegations ... or supported by different legal arguments ... or couched in different language ... or vary in immaterial respects").

Furthermore, a motion to vacate under section 2255 is not a substitute for direct appeal, and issues which could have been

raised on direct appeal are generally not actionable in a section 2255 motion and will be considered procedurally barred. Lynn, 365 F.3d at 1234-35; Bousley v. United States, 523 U.S. 614, 621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); McKay v. United States, 657 F.3d 1190, 1195 (11th Cir. 2011). An issue is "'available' on direct appeal when its merits can be reviewed without further factual development." Lynn, 365 F.3d at 1232 n. 14 (quoting Mills, 36 F.3d at 1055). Absent a showing that the ground of error was unavailable on direct appeal, a court may not consider the ground in a section 2255 motion unless the defendant establishes (1) cause for not raising the ground on direct appeal, and (2) actual prejudice resulting from the alleged error, that is, alternatively, that he is "actually innocent." Lynn, 365 F.3d at 1234; Bousley, 523 U.S. at 622 (citations omitted). To show cause for procedural default, a defendant must show that "some objective factor external to the defense prevented [him] or his counsel from raising his claims on direct appeal and that this factor cannot be fairly attributable to [defendant's] own conduct." Lynn, 365 F.3d at 1235.

A meritorious claim of ineffective assistance of counsel can constitute cause. See Nyhuis, 211 F.3d at 1344. However, ineffective assistance of counsel claims are generally not cognizable on direct appeal and are properly raised by a §2255 motion regardless of whether they could have been brought on direct appeal. Massaro v. United States, 538 U.S. 500, 503, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); see also United States v. Patterson, 595 F.3d, 1324, 1328 (11th Cir. 2010).²

²In this case, many of the claims could have been, but were not raised on direct appeal. Construing movant's arguments liberally, he appears to fault appellate counsel for failing to assign them as error on appeal. Consequently, the claims have been analyzed under Strickland to ascertain whether he is entitled to relief sufficient to circumvent the procedural bar.

The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show a violation of his constitutional right to counsel, a defendant must demonstrate both that counsel's performance was below an objective and reasonable professional norm and that he was prejudiced by this inadequacy. Id., 466 U.S. at 686; Williams v. Taylor, 529 U.S. 362, 390, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); Darden v. United States, 708 F.3d 1225, 1228 (11th Cir. 2013). The standard is the same for claims challenging appellate counsel's effectiveness. Matire v. Wainwright, 811 F.2d 1430, 1435 (11 Cir. 1987); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991) (quoting Strickland, 466 U.S. at 688).

Keeping these principles in mind, the Court must now determine whether counsel's performance was both deficient and prejudicial under Strickland. As indicated, Courts must be highly deferential in reviewing counsel's performance, and must apply the strong presumption that counsel's performance was reasonable. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. See also Chandler v. United States, 218 F.3d at 1314. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 368, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284, 297 (2010). See also Osborne v. Terry, 466 F.3d 1298, 1305 (11th Cir. 2006) (citing Chandler v. United States, 218 F.3d at 1313).

As noted by the Supreme Court:

An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689-690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690, 104 S.Ct. 2052.

Harrington v. Richter, 562 U.S. 86, 104, 131 S.Ct. 770, 788 (2011). See also Premo v. Moore, 562 U.S. 115, 121-22, 131 S.Ct. 733, 739-740, 2011 WL 148253, *5 (2011). If the movant cannot meet one of Strickland's prongs, the court does not need to address the other prong. Strickland, 466 U.S. at 697, 104 S.Ct. 2069 (explaining a court need not address both prongs of Strickland if the defendant makes an insufficient showing on one of the prongs). See also Butcher v. United States, 368 F.3d 1290, 1293 (11th Cir. 2004); Brown v. United States, 720 F.3d 1316 (11th Cir. 2013).

To show counsel's performance was unreasonable, a defendant

must establish that "no competent counsel would have taken the action that his counsel did take." Gordon v. United States, 518 F.3d 1291, 1301 (11th Cir. 2008) (citations omitted); Chandler, 218 F.3d at 1315. With regard to the prejudice requirement, the movant must establish that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Strickland, 466 U.S. at 694. For the court to focus merely on "outcome determination," however, is insufficient; "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U.S. 364, 369-70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); Allen v. Secretary, Florida Dep't of Corr's, 611 F.3d 740, 754 (11th Cir. 2010). A defendant therefore must establish "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart, 506 U.S. at 369 (quoting Strickland, 466 U.S. at 687).

Or, in the case of alleged sentencing errors, the movant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been less harsh due to a reduction in the defendant's offense level. Glover v. United States, 531 U.S. 198, 203-04, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). A significant increase in sentence is not required to establish prejudice, as "any amount of actual jail time has Sixth Amendment significance." Id. at 203.

Furthermore, a §2255 movant must provide factual support for his contentions regarding counsel's performance. Smith v. White, 815 F.2d 1401, 1406-07 (11th Cir.1987). Bare, conclusory allegations of ineffective assistance are insufficient to satisfy the Strickland test. See Boyd v. Comm'r, Ala. Dep't of Corr's, 697 F.3d

1320, 1333-34 (11th Cir. 2012); Garcia v. United States, 456 Fed.Appx. 804, 807 (11th Cir. 2012) (citing Yeck v. Goodwin, 985 F.2d 538, 542 (11th Cir. 1993)); Wilson v. United States, 962 F.2d 996, 998 (11th Cir. 1992); Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990) (citing Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)); United States v. Ross, 147 F. App'x 936, 939 (11th Cir. 2005).

Finally, the Eleventh Circuit has recognized that given the principles and presumptions set forth above, "the cases in which habeas petitioners can properly prevail ... are few and far between." Chandler, 218 F.3d at 1313. This is because the test is not what the best lawyers would have done or even what most good lawyers would have done, but rather whether some reasonable lawyer could have acted in the circumstances as defense counsel acted. Dingle, 480 F.3d at 1099; Williamson v. Moore, 221 F.3d 1177, 1180 (11th Cir. 2000). "Even if counsel's decision appears to have been unwise in retrospect, the decision will be held to have been ineffective assistance only if it was 'so patently unreasonable that no competent attorney would have chosen it.'" Dingle, 480 F.3d at 1099 (quoting Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983)). The Sixth Circuit has framed the question as not whether counsel was inadequate, but rather counsel's performance was so manifestly ineffective that "defeat was snatched from the hands of probable victory." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992).

As will be demonstrated in more detail *infra*, the movant is

not entitled to vacatur on the claims presented.³ When viewing the evidence in this case in its entirety, the alleged errors raised in this collateral proceeding, neither individually nor cumulatively, infused the proceedings with unfairness as to deny the movant a fundamentally trial and due process of law. The movant therefore is not entitled to habeas corpus relief. See Fuller v. Roe, 182 F.3d 699, 704 (9th Cir. 1999) (holding in federal habeas corpus proceeding that where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473, 482 (2000). See also United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (stating that "a cumulative-error analysis aggregates only actual errors to determine their cumulative effect."). Contrary to the movant's apparent assertions, the result of the proceedings were not fundamentally unfair or unreliable. See Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993).

VI. Discussion of the Claims

In **claim 1**, the movant asserts that the instructions given to the jury regarding aiding and abetting in connection with 18 U.S.C. §§2119 and 924[©] were unconstitutional, in light of Rosemond v. United States, 134 S.Ct. 1240 (2014).

³Briefly, the evidence against the movant was more than sufficient to support his convictions. The movant has not shown that the result of the trial or appeal would have been affected had counsel proceeded differently. Further, no denial of due process has been demonstrated. To the contrary, it is clear after independent review of the record that the movant received a fair trial, and that no constitutional violations occurred. Consequently, he has failed to demonstrate that he is entitled to relief in this collateral proceeding.

Moreover, after independent review of the record in its entirety, any other claims, subclaims, or arguments not specifically addressed in this Report, individually identified, or otherwise subsumed within each of the claims presented herein, have been considered by the undersigned and are found to be without merit, warranting no further discussion.

On direct appeal, the movant raised the same argument. The Eleventh Circuit held:

McDuffie next challenges the district court's jury instructions about aiding and abetting. McDuffie contends that the court's instructions led the jurors to believe erroneously (1) that a lesser mens rea was required to convict McDuffie of carjacking and (2) that a finding that McDuffie himself committed an act in relation to the gun was unnecessary to convict him under section 924^c. Because McDuffie's lawyer said expressly that the defense was "in full agreement" with the court's proposed jury instructions, McDuffie has waived his right to challenge the court's instructions on appeal. See United States v. Silvestri, 409 F.3d 1311, 1337 (11th Cir.2005).

United States v. McDuffie, 550 Fed. Appx. 859, 861 (11th Cir. 2013). As a result, the claim is procedurally defaulted.

He relies on Rosemond in the instant proceedings. In Rosemond, the Supreme Court held that, in order to be convicted of aiding and abetting the use of a firearm during a drug transaction, there must be proof that the defendant was aware in advance of the drug deal that his accomplice was carrying a gun. "When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense." Rosemond v. United States, --- U.S. ----, 134 S.Ct. 1240, 1249, 188 L.Ed.2d 248 (2014).

Assuming Rosemond applies retroactively to cases on collateral review, the claim is procedurally defaulted. As a result, the court cannot review the claim unless the defendant can show either (1) cause for the default and actual prejudice from the error, or (2) that the court's failure to consider the claim will result in a

miscarriage of justice because the defendant is "actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998).

McDuffie has made no showing with respect to cause to excuse his procedural default, and he cannot establish actual prejudice, which requires that he demonstrate that the erroneous jury instruction "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Bousley, 523 U.S. at 622. Rather, as described above, the evidence at trial supported McDuffie's conviction for both the carjacking and firearm offenses without resort to an aiding and abetting theory—though the Government did argue the theory, in the alternative, in closing, See (CR DE# 59 at 287). The evidence established McDuffie's advanced knowledge of all of the events in question.

First, with respect to McDuffie's use of firearms, the jury heard evidence from Special Agent Jane Baldassare that McDuffie had admitted to providing his firearm to his co-conspirator, Hickey, for use in the robbery. One of the victims, Alvin Gainey, testified that it was actually McDuffie who initially held him at gunpoint; the other victim, Nancy Gilyard, testified that McDuffie was the second carjacker who found Gainey's gun in the console, warned Hickey about it, and pointed it at her. In either of the victim's version of events, McDuffie himself brandished a firearm and certainly had the requisite advanced knowledge that it would be used to intimidate and rob the victims.

Second, McDuffie's argument that he agreed only to a robbery, but not a carjacking and therefore did not have "advanced knowledge" of the carjacking for purposes of aiding and abetting it, is baseless. As a threshold matter, the facts described by

Gainey and Gilyard establish that McDuffie was more than an aider and abetter in the carjacking and firearm activity. Both victims testified that they were ordered out of the car (and, in Gainey's case, forced to strip), while McDuffie and Hickey were searching both the car and Gainey; both carjackers brandished firearms. Then, according to the victims, McDuffie and Hickey got in the car and drove away, leaving the victims on the street. When the car was found, numerous valuable items, including Gainey's firearms, cash, phone, and jewelry were missing, from which the jury could infer that McDuffie and Hickey stole the car in order to be able to search it more thoroughly for any valuables. Thus, whether the decision to drive away in Gainey's car was made prior to the carjacking or in the middle of it is irrelevant, since the evidence in the case supports the conclusion that McDuffie directly participated in the act.

Moreover, the evidence at trial also established that McDuffie had the requisite "advanced knowledge," even under an aiding and abetting theory. McDuffie himself admitted in multiple statements, and in his testimony at trial, to discussing an armed robbery before the carjacking occurred. Such a robbery—which is no less serious an offense than carjacking—could easily have included a carjacking, since there is no requirement that robbers use the proper statutory terminology when planning their crimes. This is especially so in light of the fact that Special Agent Baldassare also told the jury about McDuffie's statement that McDuffie and Hickey had agreed to rob Gainey and Gilyard if the couple was still in the car when McDuffie and Hickey returned from the convenience store; this, of course, could fairly give rise to an inference that McDuffie and Hickey wanted their victims to be in the car when they robbed them because they were planning to search and steal the car.

For the same reasons, McDuffie has set forth no plausible claim that he is "actually innocent" of aiding and abetting either the carjacking or the brandishing of the firearm because his conviction rested on a now-defunct aiding and abetting theory. Again, the record described is replete with evidence that McDuffie actively participated in the armed carjacking; he did not, for example, simply provide Hickey with a gun and watch as Hickey committed the carjacking alone—rather McDuffie himself interacted with the victims, warned Hickey about the firearms he had found while searching the console, before brandishing one or both of them himself, and got in the car with Hickey to drive away. Both victims described being attacked and robbed by not one, but two carjackers.

In light of the foregoing, the movant is not entitled to relief under claim 1.

In **claim 2**, the movant asserts that the instruction given to the jury with respect to 18 U.S.C. § 924⁶ was constitutionally infirm, for failing to include a brandishing instruction, in light of Alleyne v. United States, 133 S. Ct. 2151 (2013).

Relying on Alleyne, the movant argued on direct appeal that "the district court erred under Alleyne v. United States, --- U.S. ---, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), when the court enhanced McDuffie's sentence absent a jury finding that McDuffie brandished a gun." McDuffie, 550 Fed. Appx. at 861. The Eleventh Circuit held:

That the district court erred under Alleyne seems clear. In Alleyne, the Supreme Court concluded that the question of whether a defendant brandished a weapon is an element of the offense that must be submitted to the jury and found beyond a reasonable doubt. Alleyne, 133 S.Ct. at 2162-63. But, under plain error review, "where the

evidence of a statutory element of an offense is overwhelming and essentially uncontroverted, there is no basis for concluding [that an Alleyne] error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." McKinley, No. 12-14655, at *14 (citing United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 1786, 152 L.Ed.2d 860 (2002)).

Here, "overwhelming and essentially uncontroverted" evidence exists that McDuffie is criminally responsible for brandishing the gun during the carjacking. Although the two carjacking victims testified inconsistently about whether McDuffie brandished a gun personally, the evidence shows clearly that McDuffie's co-perpetrator brandished a gun. As an aider and abettor, McDuffie is responsible for his co-perpetrator's conduct in its entirety. See United States v. Williams, 334 F.3d 1228, 1232-33 (11th Cir.2003) (concluding that a defendant who aided and abetted a bank robbery could receive an enhanced sentence under section 924(c)(1) based on his co-perpetrator's use of an assault rifle). McDuffie has not satisfied the fourth element of our plain error analysis; we see no reversible error.

McDuffie, 550 Fed. Appx. at 862.

As the Eleventh Circuit has held, at least where there has been no intervening change in controlling law, a claim or issue that was decided against a defendant on direct appeal may not be the basis for relief in a § 2255 proceeding. See United States v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir.2000) ("Once a matter has been decided adversely to a defendant on direct appeal it cannot be re-litigated in a collateral attack under section 2255" (alteration, citation, and quotation marks omitted)); see also Davis v. United States, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303, 41 L.Ed.2d 109 (1974) ("[E]ven though the legal issue raised in a § 2255 motion was determined against the applicant on the merits on [direct appeal], the applicant may nevertheless be entitled to [collateral review on the legal issue] upon showing an intervening change in the law." (emphasis added) (alteration and quotation

marks omitted)); Fuller v. United States, 398 F.3d 644, 648-49 (7th Cir.2005) (holding that a movant could not relitigate his ineffective assistance of counsel claim in a § 2255 motion because the decision he relied on as an intervening change in law had "no relevance" to his case and gave the court "no reason to disturb the law of the case").

Here, the defendant has pointed to no intervening change in the law with respect to his Alleyne claim regarding the failure of the district court to require the jurors to find that the firearm had been brandished. In its decision, the Eleventh Circuit held that under plain error review, "where the evidence of a statutory element of an offense is overwhelming and essentially uncontroverted, there is no basis for concluding [that an Alleyne] error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." McDuffie, 550 Fed.Appx. at 861-62.

In light of the foregoing, the movant is not entitled to relief under claim 2.

In **claim 3**, the movant asserts that he was denied his Sixth Amendment right to cross examine the prosecutor after she violated the "witness advocate" rule. Although McDuffie couches this claim as a confrontation clause claim, while the Eleventh Circuit treated it as a prosecutorial misconduct claim, McDuffie's argument is identical and relies upon the same cases, namely Berger v. United States, 295 U.S. 78, 55 S. Ct. 629 (1935) and United States v. Hosford, 782 F.2d 936 (11th Cir. 1986). See Brief for Appellant, 2013 WL 5297521.

As with claims 2, the movant raised the same claim on appeal.

The Eleventh Circuit provided as follows in rejecting this claim:

McDuffie first argues that the prosecutor misconducted herself when she cross-examined McDuffie about—and disputed McDuffie's recollection of—statements he made to her during a pre-trial conversation. Because McDuffie failed to raise this argument in the district court, we review only for plain error. See United States v. Johnson, 694 F.3d 1192, 1195 (11th Cir.2012).

McDuffie must show both that the prosecutor's comments were improper and that a reasonable probability exists that, but for the prosecutor's improper comments, the outcome of the case would have been different. See United States v. Eyster, 948 F.2d 1196, 1206-07 (11th Cir.1991). We consider prosecutorial misconduct "in the context of the entire trial and in light of any curative instruction." United States v. Wilson, 149 F.3d 1298, 1301 (11th Cir.1998).

McDuffie objects to three statements made by the prosecutor during her cross-examination of McDuffie: (1) that McDuffie told her that he was carrying a gun on the night of the carjacking; (2) that McDuffie said he knew to whom the coperpetrator sold the guns; and (3) that McDuffie had told her that his co-perpetrator suggested the carjacking on the way to the store, not on the way back from the store.

Even if we assume—without deciding—that the prosecutor's statements were improper, McDuffie has shown no reasonable probability that the prosecutor's comments affected the outcome of his case. McDuffie himself testified that he told the prosecutor that he had a gun that night. The prosecutor's comment about the gun sale carried no obvious risk of prejudicing the jury's determination about whether McDuffie had the requisite mens rea during the carjacking itself. And, in the light of all the evidence introduced at trial and the court's instruction to the jurors that lawyers' statements are not considered evidence, McDuffie has not shown that the prosecutor's third comment had a reasonable probability of changing the jury's verdict.

McDuffie, 550 Fed.Appx. at 860-61.

The law is well established that a district court need not reconsider issues raised in a section 2255 motion which have been resolved on direct appeal. Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012). Once a matter has been decided adversely to a defendant on direct appeal, it cannot be re-litigated in a collateral attack under section 2255. Nyhuis, 211 F.3d at 1343.

The claim raised under claim 3 was raised and rejected by the Eleventh Circuit on direct appeal. It cannot be relitigated in the instant proceedings. The movant is not entitled to relief under claim 3.

In **claim 4**, the movant asserts that his sentence was improperly enhanced pursuant to 18 U.S.C. §924(e) because the term "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague.

On appeal, McDuffie argued (1) that the district court misapplied Descamps v. United States, 133 S. Ct. 2276 (2013) in using a modified categorical approach to determine that his conviction for aggravated battery on a pregnant woman, in violation of Fla. Stat. §784.045, constituted a violent felony for purposes of ACCA's "elements" clause; and (2) that the ACCA's residual clause, Section 924(e)(2)(B)(ii), was unconstitutional. The Eleventh Circuit rejected these arguments. McDuffie, 550 Fed.Appx. at 863. McDuffie did not, however, challenge the entire "violent felony" provision of Section 924(e)(2)(B) as unconstitutionally vague.

As noted, at McDuffie's sentencing and on appeal, the district

court and the Eleventh Circuit used a modified categorical approach to determine that McDuffie's conviction for aggravated battery on a pregnant woman, in violation of Fla. Stat. § 784.045, constituted a violent felony for purposes of ACCA's "elements" clause, § 924(e)(2)(B)(i). See McDuffie, 550 Fed.Appx. at 862-63. Because neither the district court nor the Eleventh Circuit relied upon ACCA's residual cause, 18 U.S.C. § 924(e)(2)(B)(ii), to make this finding, this decision is unaffected by the Supreme Court's recent decision in Johnson v. United States, No. 13-7120 (June 26, 2015) (finding that the residual clause in the Armed Career Criminal Act was unconstitutionally vague and therefore violates due process). Johnson, however, "does not call into question application of the [ACCA] to the four enumerated offenses or the remainder of the Act's definition of a violent felony." Slip op. 15. In other words, McDuffie's conviction remains a violent felony in this Circuit. See, e.g., United States v. Diaz-Calderone, 716 F.3d 1345, 1351 (11th Cir. 2013). Accordingly, this claim is without merit.

Finally, none of the errors complained of either individually or cumulatively in this §2255 proceeding had a substantial and injurious effect or influence in determining the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619 (1993). Consequently, no prejudice has been established arising from counsel's failure to pursue any of the foregoing claims either at trial, sentencing, or on appeal.

VII. Evidentiary Hearing

To the extent movant requests an evidentiary hearing on these claims, it should be denied. The movant has the burden of establishing the need for an evidentiary hearing, and he/she would only be entitled to a hearing if his/her allegations, if proved,

would establish his/her right to collateral relief. See Townsend v. Sain, 372 U.S. 293, 307 (1963). A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations or affirmatively contradicted by the record. See Holmes v. United States, 876 F.2d 1545, 1553 (11th Cir. 1989), citing, Guerra v. United States, 588 F.2d 519, 520-21 (5th Cir. 1979). As discussed in this Report, the claims raised are unsupported by the record or without merit. No evidentiary hearing is required.

VIII. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253©." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255 Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have

been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in his case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

IX. Conclusion

It is therefore recommended that this motion to vacate be denied; that all pending motions, not otherwise ruled upon be dismissed, as moot; that a certificate of appealability be denied; and, the case closed.

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

Signed this 31st day of March, 2016.


UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division
Case Number: 15-21641-MARTINEZ-WHITE

TODD MCDUFFIE,
Movant,
vs.

UNITED STATES OF AMERICA,
Respondent.

**ORDER ADOPTING MAGISTRATE JUDGE WHITE'S REPORT AND
RECOMMENDATION**

THE MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, for a Report and Recommendation on Movant's motion to vacate his sentence, filed pursuant to 28 U.S.C. § 2255. Judge White filed a Report and Recommendation [ECF No. 9], recommending that the motion be denied and that no certificate of appealability issue. The Court has reviewed the entire file and record and notes that no objections to the Magistrate Judge's Report and Recommendation have been filed. After careful consideration, the Court affirms and adopts the Report and Recommendation. Accordingly, it is hereby **ADJUDGED** that United States Magistrate Judge White's Report and Recommendation [ECF No. 9] is **AFFIRMED** and **ADOPTED**. Accordingly, it is:

ADJUDGED that Movant's motion to vacate his sentence is **DENIED**. No certificate of appealability shall issue. This case is **CLOSED**, and any pending motions are **DENIED AS MOOT**. A final judgment shall be entered by separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 28 day of April, 2016.


JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record
Todd McDuffie, #00293-104

A-4

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 15-21641-MARTINEZ-WHITE

TODD MCDUFFIE,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58, and in accordance with the reasons stated in the Court's Order Adopting Judge White's Report and Recommendation, judgment is entered in favor of Respondent and against Movant.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of April, 2016.



JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge White
All Counsel of Record
Todd McDuffie, #00293-104

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

TODD MCDUFFIE,

CASE NO: 16-14147-D

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

**CERTIFICATE OF INTERESTED PARTIES AND
MOTION FOR CERTIFICATE OF APPEALABILITY**

COMES NOW, the Appellant, Todd McDuffie, by and through his undersigned counsel and certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Tracy Dreispul, Assistant Federal Public Defender;
2. Honorable Robert L. Dube, U.S. Magistrate Judge;
3. Daniel Ecarius, Assistant Federal Public Defender;
4. Honorable Barry L. Garber, U.S. Magistrate Judge;
5. Vanessa S. Johannes, Assistant U.S. Attorney;
6. Honorable Jose E. Martinez- District Judge;
7. Todd McDuffie, Defendant/Appellant;
8. Michael B. Nadler, Assistant U.S. Attorney;
9. Amanda Perwin, Assistant U.S. Attorney;
10. Richard L. Rosenbaum, Esq., Counsel for Appellant;
11. Honorable William C. Turnoff, U.S. Magistrate Judge;
12. Honorable Patrick A. White, U.S. Magistrate Judge.

MOTION FOR CERTIFICATE OF APPEALABILITY

COMES NOW, the Appellant, Todd McDuffie, by and through undersigned counsel, pursuant to Title 28 U.S. Section 2254(c) and Rule 22(b), Fed.R.App.P., and respectfully requests this Honorable Court issue a Certificate of Appealability from the denial of his claims under Title 28 U.S. Section 2255, to the following issues

- I. Whether the instructions given to the jury regarding aiding and abetting in connection with 18 U.S.C. §§2119 and 924(c) were constitutional in light of *Rosemond v. United States*, 134 S.Ct. 1240 (2014);
- II. Whether the instruction given to the jury with respect to 18 U.S.C. § 924(c) was constitutional despite failing to include a brandishing instruction, in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013);
- III. Whether McDuffie was denied his Sixth Amendment right to cross examine the prosecutor after she violated the "witness advocate" rule; and
- IV. Whether McDuffie's sentence was improperly enhanced pursuant to 18 U.S.C. §924(e) because the term "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague and violates *Johnson v. United States*.

Under 28 U.S.C. § 2253(c)(1), a movant must obtain a Certificate of Appealability to appeal the denial of § 2255 relief. The pleadings, exhibits, and orders addressing the § 2255 claims in this case establish that Appellant has made the requisite substantial showing, under § 2253(c)(2), of (1) constitutionality of Title 28 U.S.C. Section 2119 and 924(c) in light of *Rosemond v. United States*, 134 S.Ct. 1240 (2014); (2) the instructions given to the jury under Title 18 U.S.C. Section 924(c) were unconstitutional for failing to include a brandishing instruction in light of *Alleyne v. United States*, 133 S.Ct. 2151 (2013); (3) that McDuffie was denied his 6th Amendment right to cross examine the Prosecutor after she violated the "witness advocate" Rule; and (4) that his sentence was improperly enhanced pursuant to Title 18 U.S.C. Section 924(e) because the term "violent felony" in the Armed Career Criminal Act (ACCA) is constitutionally vague and violates *Johnson v. United States*, Supreme Court Case No: 13-7120 (June 26, 2015). Further, the errors

complained of individually and cumulatively had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Jurists of reason could disagree with the district court's resolution of the § 2255 claims; the issues should proceed further; and the Court should grant a Certificate of Appealability.

STATEMENT OF THE FACTS AND PROCEEDINGS

Facts Adduced at Trial

The evidence adduced at trial reveals as follows. On August 30, 2011, at approximately 12:30 or 1:00 A.M., Alvin Gainey and Nancy Gilyard returned from having dinner at an Applebee's in Hialeah Gardens, Florida (CR DE# 56¹ at 132-33; CR DE# 57 at 229-30). Gainey and Gilyard testified to the following facts at trial.

The pair arrived at Gilyard's residence, where they parked and continued talking in the car (CR DE# 56 at 133, 136-37; CR DE# 57 at 230). While they were in the car, two males approached them, one being McDuffie (CR DE# 56 at 136, 141; CR DE# 57 at 231). McDuffie tapped on the driver's side window with a firearm and then pointed that firearm at Gainey (CR DE# 56 at 137). Gainey rolled down the window and McDuffie demanded that he give him money (*Id.* at 138). McDuffie then demanded that Gainey exit the vehicle, which Gainey did after pushing one of the two firearms that he kept in his car between the seat and the center console to hide it from McDuffie (*Id.*).

After Gainey exited his car, Gainey saw a second carjacker on the other side of his car who had opened the passenger side door (CR DE# 56 at 138-39). McDuffie continued to demand money from him, and he told McDuffie that he had no cash but gave him a debit card and pin number (*Id.* at 139). On the other side of his car, the other carjacker demanded that Gilyard give him money and then searched the glove compartment, where he found \$100 (*Id.* at 139-40). The

¹ References to the trial Record are referred to as Criminal Docket Entry (CRDE ____) followed by the appropriate page number.

second carjacker then searched the center console and found a firearm there (*Id.* at 140). McDuffie then began to search the driver's side of the car, while still pointing his firearm at Gainey, and he found the second firearm that Gainey had attempted to hide between the driver's seat and the center console (*Id.* at 142). McDuffie was the carjacker on the passenger side of the car, and the other carjacker was the one who pointed the firearm at Gainey through the driver's side window (CR DE# 57 at 231-32). McDuffie kept the firearm that he took from Gainey's center console in his hand during the carjacking (*Id.* at 232).

McDuffie demanded that Gainey take off his shorts, his shirt, and his shoes (CR DE# 56 at 142-43, 148; CR DE# 57 at 233). After that, McDuffie told the other carjacker to search the rest of the car, but then changed his mind and told him to get into the driver's seat of the vehicle (CR DE# 56 at 143). The other carjacker began driving Gainey's car (*Id.* at 143-44; CR DE# 57 at 233-34). McDuffie then hopped into the open passenger's side door, while keeping his firearm pointed at Gainey and telling him not to move (CR DE# 56 at 144). McDuffie and the other carjacker drove off in Gainey's car (*Id.*). Once Gainey and Gilyard were sure that McDuffie and the other carjacker were gone, they went inside of Gilyard's residence and called the police (*Id.*; CR DE# 57 at 234).

In addition to the firearms and the vehicle, McDuffie and the other carjacker took Gainey's wallet, his jewelry, two Briefcases, approximately \$290, and an Android cellular telephone, which was equipped with a GPS tracking application that allowed Gainey to locate the phone from a website (CR DE# 56 at 145). Once the police arrived at Gilyard's residence, Gainey used the tracking application on his cellular phone to locate it at Northwest 53rd Street and 26th Avenue in Miami, Florida (*Id.* at 146). Gainey's car was later found abandoned at that location, and his cash, cellular telephone, debit card, jewelry, and firearms were missing (*Id.* at 148-49, 159). Fingerprints were taken from the car by the Miami-Dade Police Department and sent to an examiner, who determined that the fingerprints matched McDuffie's (*Id.* at 163-66, 179-81).

A few days after the carjacking, Gainey was shown a photographic line-up by a police

detective and he identified McDuffie in that line-up as one of the men who had carjacked him (CR DE# 56 at 149-51). Gilyard was also shown a photographic line-up by a police detective, and she identified McDuffie as the person who had carjacked her (CR DE# 57 at 234-36).

On September 2, 2011, Miami-Dade Police Department Detective Daniel Puerto conducted a recorded interview with McDuffie (CR DE# 57 at 195-96). During that interview, McDuffie stated that he and another man named Hickey committed a carjacking in front of a residence in the early morning hours of August 30, 2011. There were a man and a woman sitting inside of the car. He approached the passenger side of the car under Hickey's direction and he asked the woman where the money was and to give him everything. He searched the glove compartment and center console and found cash and a firearm, Hickey forced the driver to get out of the car and undress, Hickey found a second firearm in the car, and he and Hickey drove off in the car before abandoning it at 52nd Street and 26th Avenue (*Id.* at 198-203). McDuffie also stated that the victims were held at gunpoint throughout the carjacking, but Hickey was the one holding the firearm (*Id.* at 205, 209-10). McDuffie stated that he did not sell the firearms that he and Hickey had stolen from Gainey (*Id.* at 211).

On August 3, 2012, ATF Special Agent Jane Baldassare and the prosecutor participated in a pre-trial interview with McDuffie (CR DE# 57 at 215-16). McDuffie stated during that interview that he had been at a nightclub with Hickey and that, after they left the club, they committed the carjacking (*Id.* at 217-18). Baldassare next recounted that McDuffie stated that, on the way to the convenience store, he and Hickey walked past Gainey's car and they discussed robbing Gainey and Gilyard if the couple was still in the car after they finished at the convenience store (*Id.* at 217-18). McDuffie stated that he had a firearm on his person at the time of the carjacking and that his firearm was the firearm used in the carjacking, but he claimed that Hickey had been the one using his firearm (*Id.* at 218). McDuffie stated that his role in the carjacking was to search the car and keep an eye on the victims (*Id.* at 218-19). McDuffie said that he and Hickey had stolen two

firearms and later sold them, and McDuffie provided the name of the person who had bought the firearms (*Id.* at 219). At trial, McDuffie testified in his own defense as follows (CR DE# 57 at 244). He was a drug dealer who had repeatedly been convicted of drug crimes (*Id.* at 245-46). He knew a man nicknamed Hickey, who was a gang member and hit man for another drug dealer, because he sold drugs to Hickey (*Id.* at 246). He did not carry a firearm because he sold drugs inside of an "after hours bar," as opposed to on a street corner (*Id.* at 247). On the evening of August 29, 2011, he was in an after-hours bar, high on cocaine, marijuana, and ecstasy, when Hickey arrived (*Id.* at 247, 265-66). He gave cocaine to Hickey at no charge and afterward, Hickey followed McDuffie out of the after-hours bar when McDuffie went to buy cigarettes from a nearby store (*Id.* at 247-50, 266). On the way to the store, he and Hickey walked by Gainey's car and, when they did, Hickey pointed out that Gainey was wearing a watch (*Id.* at 250-51).

McDuffie further testified that he told Hickey that he did not see the watch, even though he had, because he did not want to get involved in anything (CR DE# 57 at 250-51). He and Hickey proceeded to the convenience store, where he bought cigarettes and a sandwich (*Id.* at 251-52). He then began walking back to the after hours bar and that Hickey followed him (*Id.* at 252-53). When Gainey's car came into view, Hickey said that he was going to draw his firearm and wanted McDuffie to open the door (*Id.* at 253). He did not want to commit the carjacking, but he did so because he was afraid of Hickey (*Id.* at 253-54). Hickey pulled the firearm on Gainey while he went to the passenger's side of the car, told Gilyard that he would not hurt her, and took Gainey's firearm from the car (*Id.* at 254-55). Hickey then made Gainey exit the car and strip off his clothes (*Id.* at 255-56). He and Hickey stole Gainey's wallet and debit card pin number, Hickey found Gainey's other firearm and stole it, and Hickey drove away in Gainey's vehicle while he rode in the passenger seat (*Id.* at 255-56). Once Hickey stopped the car at 52nd Street and 26th Avenue, he called a taxi because he wanted to get away from Hickey, but Hickey got into the taxi with him (*Id.* at 259-60). He took Hickey to an apartment and an after-hours bar, where he continued to imbibe

in drugs and alcohol and attempted to evade Hickey (*Id.* at 261-63).

On cross examination, the prosecutor asked McDuffie if he had met her before, and McDuffie stated that he had met the AUSA for a pre-trial interview about the carjacking (CR DE# 57 at 266). He stated that he had told the prosecutor during that interview that he would be truthful (*Id.* at 266). When the prosecutor asked him if he remembered telling her during the interview that Hickey had brought up the idea of the carjacking on the way to the store, McDuffie stated that he did not recall that (*Id.* at 267). McDuffie also testified that he did not remember stating during the interview that he had told Hickey, after they walked by the car on the way to the store, that "if they're still there when we're done with the store, then I'll do it" (*Id.*). The prosecutor also asked McDuffie if he remembered telling her, during the interview, that he was carrying a firearm on the night of the carjacking, and McDuffie responded "I told you I initially had a gun because I didn't want to get [Hickey] in no kind of trouble because I was already in fear of him" (*Id.* at 267). McDuffie also admitted that, in his recorded interview with Detective Puerto, he stated that he did not know who Hickey had sold the stolen firearms to or how he stole them, but he told her the name of an individual who he claimed had purchased the firearms and had told her that he had been paid \$200 for the firearms (*Id.* at 272-73)

Indictment, Pre-trial Proceedings, Conviction, Sentencing, and Direct Appeal

On October 18, 2012, a Southern District of Florida grand jury issued a Superseding Indictment, which charged Todd McDuffie with carjacking, in violation of 18 U.S.C. §§2119(1) and 2 (Count One); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§924(c)(1)(A)(ii) and 2 (Count Two); and being a convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count Three) (CR DE# 21).

On December 10, 2012, McDuffie proceeded to a three-day jury trial (CR DE# 35). Before the third day of trial, the Government alerted the district court that it planned to call a Bureau of

Alcohol, Tobacco, and Firearms (“ATF”) special agent to testify about statements that McDuffie made during a pre-trial interview with the Government to rebut the duress defense that McDuffie raised in his opening statement (CR DE# 57 at 187-88). Over McDuffie’s objection that his prior statements could be used only if he testified, the district court allowed the ATF special agent to testify about the statements that McDuffie made during the pre-trial interview to rebut his claim of duress (*Id.* at 188-89).

At the end of the Government’s case, McDuffie moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and for a mistrial, both of which the district court denied (CR DE# 57 at 240-42). McDuffie then testified in his own defense (*Id.* at 244). McDuffie did not object to any of the questions asked on cross-examination, including questions about what he told the prosecutor during his pre-trial interview with her and the ATF special agent (*Id.* at 265-74).

After McDuffie rested, the district court held a conference to discuss the jury instructions (CR DE# 57 at 276). McDuffie stated that he was in agreement with the jury instructions, and he lodged no objections as the district court specifically discussed each page of the jury Instructions (*Id.* at 276-77).

In its closing argument, the Government pointed out that McDuffie had admitted that he had participated in the carjacking; that both victims identified McDuffie as one of the two carjackers; that the inconsistencies between the testimony of the victims as to which defendant was on which side of the car was of no moment because the two witnesses were consistent that McDuffie was one of the carjackers and was armed; and that McDuffie’s fingerprints were found on the driver’s side door of the victim’s car (CR DE# 58 at 282-83). The Government also explained that McDuffie’s claim that he committed the crime only because he was afraid of his accomplice Hickey was implausible because McDuffie “told me that the gun belonged to him. That he was the person who was armed and Jane Baldassare, who was in that interview too, confirmed it” (*Id.* at 288). McDuffie did not object during the prosecutor’s closing argument (*Id.* at 282-91). McDuffie, in

turn, argued in closing that he committed the carjacking under duress, and, accordingly, he should be acquitted (*Id.* at 291-97).

The district court, in pertinent part, instructed the jury as follows:

It's possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids or abets" a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids or abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it. In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

(CR DE# 38; CR DE# 58 at 309-102).

On December 13, 2012, the jury found McDuffie guilty of all three counts charged against him in the Superseding Indictment (CR DE# 40).

Prior to sentencing, a PSI was prepared, applying the 2012 Federal Sentencing Guidelines Manual, which reveals as follows. The base offense level, pursuant to U.S.S.G. §2K2.1(a)(2), because the defendant committed the offense subsequent to sustaining two felony convictions of either a crime of violence or a controlled substance offense, was set at a level 24. (PSI ¶18). Because the offense involved more than two and less than eight firearms, the offense level was increased by two levels, §2K2.1(b)(1)(A). (PSI ¶19).

Because a firearm was stolen, the offense level was increased by two levels, §2K2.1(b)(4)(A). (PSI ¶20). According to §4B1.1(a), the defendant was considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense was a felony crime of violence, and the movant had at least two prior felony convictions for crimes of violence and controlled substance offenses. (PSI ¶25). Since the statutory maximum penalty for the instant offense was 15 years, the offense level was 29, §4B1.1(b)(4). (PSI ¶25). The movant, however, was also subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e) as an Armed Career Criminal. (PSI ¶25). Pursuant to §4B1.4(b)(3)(B), the offense level was 33. (PSI ¶25). The total offense level was set at 33. (PSI ¶27).

The probation officer next determined that the movant had a subtotal of ten criminal history points and a criminal history category V (Chapter Five, Part A). (PSI ¶36). The movant was a career offender and a career offender's criminal history category in every case shall be VI, §4B1.1. (PSI ¶37). The movant was also an armed career criminal and as such, his criminal history category shall also be VI, §4B1.4(c)(1). (PSI ¶38).

Statutorily, as to Count One, the term of imprisonment was 0 to 15 years, 18 U.S.C. §2119(1). As to Count Two, the minimum term of imprisonment was 7 years and the maximum term was life (consecutive to any other sentence), 18 U.S.C. § 924(c)(1)(A)(ii) and (D)(ii). As to Count Three, the minimum term of imprisonment was 15 years and the maximum term was life, 18 U.S.C. § 924(e)(1). (PSI ¶69). Based on a total offense level of 33 and a criminal history category of VI, the guideline imprisonment range was 235 to 293 months. As to Count Two, a term of imprisonment of 84 months under 18 U.S.C. §924(c)(1)(A)(ii), (D)(ii) shall run consecutive to any other term of imprisonment, §5G1.2(a). Pursuant to §4B1.1(c)(3), however, the applicable guideline imprisonment range was 360 months to life. (PSI ¶70).

McDuffie objected to the PSI (CR DE# 45). In relevant part, McDuffie objected to the application of an enhanced ACCA sentence, arguing that he was not an armed career criminal (*Id.*

at 12-14).

Specifically, he argued that his conviction for aggravated battery on a pregnant woman did not qualify as a violent felony under the ACCA (*Id.* at 14). McDuffie did not object to the facts in the PSI stating that he knew that his victim was four months pregnant with his child, he forced his way into her apartment through a bedroom window, he punched her in the stomach, he took her cellular telephone so that she could not call the police, and she was hospitalized after the attack (PSI ¶ 33).

The Government responded (CR DE# 47). The Government explained that McDuffie's prior conviction for Florida aggravated battery of a pregnant victim was a violent felony under the ACCA (*Id.* at 3). Specifically, the Government explained that, although in *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265 (2010), the United States Supreme Court held that non-aggravated battery in Florida does not categorically constitute a violent felony under the ACCA, the United States Supreme Court did not consider whether battery qualified as a violent felony under either the modified categorical approach or under the residual clause (*Id.*). The Government elaborated that McDuffie's aggravated battery of a pregnant victim conviction qualified as a violent felony under the modified categorical approach, explaining that the information to which McDuffie pleaded guilty stated that he committed his crime by "actually and intentionally touching or striking [his victim] against her will by punching her in the stomach, while [his victim] was pregnant and [he] knew or should have known that she was pregnant" (*Id.* at 4). Thus, the Government concluded, because McDuffie admitted to punching his victim in the stomach, he admitted to actually and intentionally striking her, which is a violent felony under the ACCA (*Id.* at 4-5). The Government also noted that McDuffie's aggravated battery of a pregnant victim conviction qualified as a violent felony under the residual clause of the ACCA (*Id.* at 4, n.3).

On February 28, 2013, the district court held a sentencing hearing for McDuffie (CR DE# 48). McDuffie argued that his prior conviction for aggravated battery on a pregnant woman was not a

violent felony under the residual clause of the ACCA, because the residual clause is unconstitutionally vague (CR DE# 60 at 4-5). The district court rejected McDuffie's argument, finding that his conviction for aggravated battery on a pregnant woman was a violent felony under the ACCA and that, as a result, he was an armed career criminal (*Id.* at 5-6).

McDuffie also argued that his advisory sentencing guidelines range, which was 360 months' to life imprisonment, was so high as to violate the Eighth Amendment's prohibition on cruel and unusual punishment (*Id.* at 6, 9-11). He advocated that he should be sentenced to his applicable statutory mandatory minimum sentence of 22 years of imprisonment, which was below his advisory sentencing guidelines range (*Id.*). The Government, in turn, argued that, in light of McDuffie's extensive criminal history and status as a career offender and as an armed career criminal, a sentence within his advisory sentencing guidelines range was warranted (*Id.* at 7, 11-12).

The district court then recounted McDuffie's extensive and continuous criminal history, finding that it justified a sentence within his sentencing guidelines range (CR DE# 60 at 7-8). Accordingly, the district court rejected McDuffie's request to be sentenced to the statutory minimum sentence of 22 years of imprisonment (*Id.* at 12-14, 16). The district court also explained that a high sentence was warranted by the fact that, during the carjacking, McDuffie terrorized one of his victims by making him strip off his clothing while a firearm was pointed at him (*Id.* at 15). The district court then sentenced McDuffie to a term of 360 months' imprisonment, which was comprised of concurrent terms of 180 months' imprisonment and 276 months' imprisonment on Counts I and III, respectively, and a consecutive term of 84 months' imprisonment on Count Three (*Id.* at 16; DE 49).

Direct Appeal

On March 12, 2013, McDuffie timely appealed. (CR DE# 50). On appeal he argued (1) that the district court plainly erred in failing to find prosecutorial misconduct where, during her cross-

examination of McDuffie, the prosecutor asked him about prior inconsistent statements that he had made to her during a pre-trial interview; (2) that the district court plainly erred in instructing the jury on aiding and abetting; (3) that the district court plainly erred in applying a seven-year mandatory minimum sentence to McDuffie, pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), where the jury did not specifically find that a firearm was brandished; (4) that the district court erred in finding that McDuffie's prior conviction for aggravated battery on a pregnant woman was a violent felony under the Armed Career Criminal Act; (5) that the district court plainly erred in sentencing McDuffie under the Armed Career Criminal Act based on prior convictions that were not alleged in the indictment or found by the jury; and (6) that the district court plainly erred in failing to find that 18 U.S.C. §§922(g) and 2119 violated the Commerce Clause of the United States Constitution. See *U.S. v. McDuffie*, 550 Fed.Appx. 859 (11th Cir. 2013).

On December 30, 2013, the Eleventh Circuit rejected all of McDuffie's claims in an unpublished opinion. *Id.* The mandate issued in the case on February 2, 2014 (CR DE# 66); on May 5, 2014, McDuffie's writ of certiorari to the United States Supreme Court was denied (CR DE# 68).

McDuffie's Section 2255 Claims

McDuffie returned to the district court and filed his initial *pro se* motion to vacate (Cv-DE#1) with supporting memorandum (Cv-DE#4) pursuant to 28 U.S.C. §2255 on April 27, 2015. The Government filed a Response to an Order to Show Cause (DE#7) in *McDuffie v. United States*, 15-21641-CV-Martinez. The Defendant filed a Reply. (DE#8).

On March 31, 2016, the Magistrate entered his Report of Magistrate Judge (DE#9). The Magistrate recommended denial of each of McDuffie's claims and found no need to conduct an evidentiary hearing on the Motion to Vacate. An Order was entered on April 29, 2016 adopting the Report and Recommendations (DE#10). Final Judgment was issued the same day. (DE#11). A Notice of Appeal was filed on June 24, 2016. (DE#13). This Motion for Certificate of Appealability ensues.

MEMORANDUM OF LAW

A. Standard of review for a certificate of appealability

A Certificate of Appealability must issue upon a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and is required when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603-04 (2000) (internal quotation omitted); see also *Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999). When a COA is sought on procedural grounds, it must issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484, 120 S.Ct. at 1604.

A court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029, 1039 (2003). "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*, 537 U.S. at 338, 123 S.Ct. at 1040.

Courts must resolve doubts about whether to grant a COA in favor of the movant, and may consider the severity of the penalty in making the decision. See *Lambright v. Stewart*, 220 F.3d at 1025; *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997). A COA may be denied only when "petitioner's claim is squarely foreclosed." *Lambright*, 220 F.3d at 1029 (internal quotation omitted). Appellant has met the governing standard.

Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court set forth a two-part test for showing ineffective assistance counsel: (1) "that counsel's performance was deficient," defined as "representation [that] fell below an objective standard of reasonableness," and (2) "that the deficient performance prejudiced the defense" in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064, 2068 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

"[I]t is sufficient that a petitioner must show only a reasonable probability that the outcome would have been different; he 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.'" *Brownlee v. Haley*, 306 F.3d 1043, 1059-60 (11th Cir. 2002) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067); see *DeLuca v. Lord*, 77 F.3d 578, 590 (2d Cir. 1996) ("The Strickland test does not require certainty that the result would have been different."). "When evaluating this probability, 'a court hearing an ineffectiveness claim must consider the totality of the evidence.'" *Brownlee*, 306 F.3d at 1060 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069). Application of these reasonable probability standards shows that the claims in this case are sufficient for appellate review.

McDuffie's Claims for a Certificate of Appealability

Appellant's *pro se* 28 U.S.C. § 2255 motion alleged that he received ineffective assistance of counsel throughout the case based on counsel's failure to object to the jury instructions regarding aiding and abetting in light of *Rosemond* and counsel's failure to request the brandishing instruction. He further alleged a 6th Amendment violation after the AUSA became a witness and *Johnson* error as the residual clause continued therein violates the Due Process Claim of the 5th Amendment. Each issue is colorable and the district court's decision shall be reviewed by this Honorable Court.

Further, McDuffie claims that his 6th Amendment right to cross examine the Prosecutor was

violated after she violated the "witness advocate" Rule. In essence, for the Prosecutor's next witness she called herself. Such conduct is clearly violative of the Rules Regulating the Florida Bar and denied McDuffie's right to due process of law and to a fair trial.

In *Holloway v. State*, 705 So. 2d 646 (Fla. 4th DCA 1998), the state appellate Court was faced with an identical situation. In *Holloway*:

During trial, the prosecution maintained that appellant enticed the victim, her ex-husband, to her apartment through sexual innuendos and then shot him. In support of this theory, the prosecutor asked a witness, Michael Maravic, about appellant's attire shortly before the shooting. Maravic initially responded that he thought appellant was wearing a tank top shirt. However, when asked about the color of the shirt, Maravic testified that he could not remember what appellant was wearing. The prosecutor followed with questions concerning conversations he had with Maravic on the day prior to and the morning of his testimony. Specifically, the prosecutor asked Maravic whether he said that appellant was wearing a yellow shirt and shorts. When Maravic indicated that he could not remember what he said the day before or earlier that morning, the prosecutor called himself to the stand to testify as to the content of his conversations with Maravic. Appellant's counsel objected and argued that if the prosecutor testified, a mistrial should be granted because the prosecutor cannot place himself on the stand and put his credibility in issue. The trial court overruled the objection and denied counsel's motion for a mistrial. The prosecutor then proceeded to testify that Maravic "did not tell the truth [about] what he told me last night nor this afternoon." During closing argument, the prosecutor again placed his credibility in issue by commenting on Maravic's testimony.
Id at 647

In reversing Holloway's murder conviction, the Court first analyzed the ethical considerations involved, stating

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of legal services rendered in the case; or
- (4) disqualification of the lawyer would work substantial hardship on

the client. *Id.*

The Court further held that,

The state has not cited nor have we found an exception to Rule 4-3.7(a) allowing a prosecutor to attack the credibility of a witness through his own testimony and to act in the dual role of prosecutor and witness in the same case. Here, the prosecutor's testimony related to a contested issue concerning what appellant was wearing shortly before the shooting. Further, when the prosecutor called himself as a witness to impeach Maravic's testimony, he placed his credibility as a witness in issue for the jury. Moreover, when the prosecutor subsequently returned to his role as an advocate and commented on the truthfulness of Maravic's testimony, he effectively vouched for his testimony and the credibility of the state's case.

The practice of acting as a prosecutor and a witness "is not to be approved and should be indulged in only under exceptional circumstances." *Shargaa v. State*, 102 So. 2d 809, 813 (Fla.), cert. denied, 358 U.S. 873, 3 L. Ed. 2d 104, 79 S. Ct. 114 (1958); see *State v. Christopher*, 623 So. 2d 1228, 1229 (Fla. 3d DCA 1993). See also *Petrilli v. Drechsel*, 94 F.3d 325, 330 (7th Cir. 1996) where counsel acts as both an advocate and a witness in a single proceeding, the sanction of reversal and a new trial may be warranted).

In *Shargaa*, the Supreme Court also stated:

The better practice would be for a prosecuting officer who becomes a witness to withdraw from the actual prosecution of the cause. This is so because a jury is naturally apt to give the testimony of the prosecuting attorney himself much more weight than it would accord to the ordinary witness.

Shargaa, 102 So. 2d at 813. *Id.* at 647-648

Finally, despite the Magistrate's conclusion below, McDuffie's sentencing enhancement pursuant to Title 18 U.S.C. Section 924(c) is violative of *Johnson*.

An Evidentiary Hearing Should Have Been Conducted Below

To obtain an evidentiary hearing, a petitioner need not present all evidence necessary to prevail on a § 2255 claim, a petitioner simply must "allege - not prove - reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002). Appellant did more than that in this case. In fact, it is undisputed, and the

district court accepts as true, that the search of the marijuana grow house is the basis for the entire prosecution and was the subject of the interrogation of Appellant. This case turns solely on standing—whether the defendant, like his co-conspirator/co-defendant, had a reasonable expectation that the police would not warrantlessly enter his locked warehouse. That question requires an evidentiary hearing.

All the Circuit Courts of Appeals have held that “[a] petitioner [is] entitled to evidentiary hearing on claim of ineffective assistance of counsel unless the claim is inadequate on its face or if records conclusively refute factual assertions of claim.” See, e.g., *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994).

A Certificate of Appealability Should Issue

A COA should be granted where the movant was denied an evidentiary hearing even where the movant has not shown enough evidence to prevail. See *Johnson v. Thaler*, 406 Fed.Appx. 882 (5th Cir. 2010) (question for review authorization is whether “jurists of reason could find it debatable whether the district court committed a substantive or procedural error in dismissing his habeas application”); *United States v. MacDonald*, 641 F.3d 596, 612-14 (4th Cir. 2011) (granting COA as to procedural issue, where district court denied habeas claim; district court should not have prohibited expansion of record to include evidence received after trial and after filing of motion); cf. *Long v. United States*, 626 F.3d 1167, 1169-70 (11th Cir. 2010) (“district court must develop a record sufficient to facilitate appellate review of all issues pertinent to an application for a certificate of appealability”).

The COA standards applicable to denial of an evidentiary hearing are the same here as they are in any other § 2255 case involving a summary resolution of the claims. A COA is required based on the sworn assertions supporting the motion to vacate, not on out-of-court speculation that is not subjected to adversarial testing. See *Gomez-Diaz v. United States*, 433 F.3d 788, 790 (11th Cir. 2005).

With respect to the district court's decision to reject the allegations of the § 2255 motion, McDuffie was entitled to a full hearing concerning his claims. See *Gallego v. United States*, 174 F.3d 1196, 1198-99 (11th Cir. 1999) (reversing denial of § 2255 challenge based on counsel's failure to properly advise defendant of scope of right to testify and that only defendant could waive it; rejecting rule that would credit counsel's statements over the defendant's sworn § 2255 assertions; remanding for evidentiary hearing).

WHEREFORE, the Appellant, Todd McDuffie, moves for a certificate of appealability as to the issues set forth herein.

Certificate of Compliance With Type-Volume Limit

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 6617 words.

I hereby certify that on April 3rd, 2017 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11095-J

IN RE: TODD MCDUFFIE,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: HULL, WILLIAM PRYOR and JORDAN, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Todd McDuffie has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence. Such authorization may be granted only if we certify that the second or successive motion contains a claim involving:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). “The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.” *Id.* § 2244(b)(3)(C); *see also*

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Jordan v. Sec'y, Dep't of Corr., 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his application, McDuffie indicates that he wishes to raise two claims in a second or successive § 2255 motion. In his first claim, McDuffie argues that a prior conviction for battery on a pregnant woman under Florida law was improperly counted as a third predicate conviction under the Armed Career Criminals Act (“ACCA”). McDuffie argues that use of this conviction was improper because it was based on the ACCA’s residual clause. McDuffie relies on *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), as new rules of constitutional law.

The ACCA defines the term “violent felony” as any crime punishable by a term of imprisonment exceeding one year that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the “elements clause,” while the second prong contains the “enumerated crimes” and, finally, what is commonly called the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. 135 S. Ct. at 2557-58, 2563.

The Supreme Court clarified, in holding the residual clause void, that it did not call into question the application of the elements clause and the enumerated crimes of the ACCA's definition of a violent felony. *Id.* at 2563. On April 18, 2016, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch*, 136 S. Ct. at 1264-65, 1268.

In light of the Supreme Court's holdings in *Johnson* and *Welch*, federal prisoners who can make a *prima facie* showing that they previously were sentenced, at least in part, in reliance on the ACCA's now-voided residual clause are entitled to file a second or successive § 2255 motion in the district court. *See In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016). However, alleging a basis that meets § 2255(h)'s requirements only in the abstract "represent[s] the minimum showing" necessary to file a successive § 2255 motion because, under § 2244(b)(3)(C), the applicant also must make "a *prima facie* showing that the application satisfies the requirements of this subsection." *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Accordingly, it is not enough for a federal prisoner to simply identify *Johnson* as the basis for the claim or claims he seeks to raise in a second or successive § 2255 motion; he also must show that he falls within the scope of the new substantive rule announced in *Johnson*. *See, e.g., id.*; 28 U.S.C. § 2244(b)(3)(C).

I. ACCA

McDuffie fails to demonstrate that he would be entitled to relief under *Johnson* because he would still have three predicate offenses under the ACCA without application of the now-void residual clause.

First, McDuffie's 2004 and 2009 convictions for sale or delivery of cocaine each qualify as a "serious drug offense" under the ACCA. *See United States v. James*, 430 F.3d 1150, 1155 (11th Cir. 2005) (holding that a Florida conviction for trafficking in cocaine, Fla. Stat. § 893.135(1)(b), was a "serious drug offense," as defined in 18 U.S.C. § 924(e)(2)(A), and noting that a lesser offense contained within that statute, "possession with intent to distribute," would also result in an ACCA enhancement).

In addition, in McDuffie's direct appeal, this Court held McDuffie's battery by striking a pregnant woman was a violent felony under the ACCA. *United States v. McDuffie*, 550 F. App'x 859, 863 (11th Cir. 2013). Thus, his conviction for battery on a pregnant woman remains a valid predicate. *See also United States v. Diaz-Calderone*, 716 F.3d 1345, 1347 n.2 (11th Cir. 2013) (holding that battery by striking a pregnant woman can qualify as a "crime of violence" under the elements clause of the sentencing guidelines).

Our decision on McDuffie's direct appeal makes undeniably clear that, regardless of the district court's ruling concerning the residual clause, McDuffie's sentence was validly enhanced under the elements clause. *Rogers*, 825 F.3d at 1339.

Thus, McDuffie's argument—that his sentence was unlawfully enhanced based on the ACCA's residual clause—is unavailing, as, even without the residual clause and *Johnson*, he still has three prior convictions that qualify either as a "serious drug offense" or as a "violent felony" under the elements clause. *See id.* at 1338-40.

II. Section 924(c)

In his second claim, McDuffie argues that a prior conviction for carjacking was improperly counted as a predicate crime of violence under 18 U.S.C. § 924(c) because it relied, at least in part,

on the residual clause of § 924(c). McDuffie argues that because the Supreme Court held in *Johnson* that the residual clause of the ACCA was unconstitutional, and because the residual clauses of § 924(c) and the ACCA rely on similar language, the residual clause in § 924(c) is also unconstitutional. McDuffie argues that this error resulted in him being wrongly sentenced to a consecutive seven-year sentence. McDuffie therefore relies again on *Johnson* and *Welch* as new rules of constitutional law.

Distinct from the definition of violent felony in § 924(e), 18 U.S.C. § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence or a drug-trafficking crime. 18 U.S.C. § 924(c)(1). For the purposes of § 924(c), “crime of violence” means an offense that is a felony and:

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

Id. § 924(c)(3)(A), (B).

McDuffie has failed to make a *prima facie* showing for relief under *Johnson*. The superseding indictment specified that the crime of violence upon which the § 924(c) charge was premised was Count 1, which was carjacking. The instructions given to the jury specified that McDuffie was charged with knowingly possessing a firearm in furtherance of a crime of violence as charged in Count 1. Further, this Court has held that “carjacking in violation of § 2119 satisfies § 924(c)’s force clause” and that this was true “regardless of the validity of § 924(c)’s residual clause.” *In re Smith*, 829 F.3d 1276, 1280-81 (11th Cir. 2016).

Here, McDuffie was found guilty of carjacking in violation of 18 U.S.C. § 2119(1); of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and of one additional crime. Under *Smith*, McDuffie's § 924(c) sentence for carjacking would be valid even if § 924(c)(3)(B)'s residual clause is determined to be unconstitutional after *Johnson*. Because McDuffie's seven-year consecutive sentence under 18 U.S.C. § 924(c)(1)(A)(ii) is based on his conviction for carjacking, McDuffie's application lacks merit on this issue.

Accordingly, because McDuffie has failed to make a *prima facie* showing of the existence of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DENIED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

FILED BY ABM

Oct 31, 2017

STEVEN M. LARIMORE
CLERK U.S. DISTRICT CT.
S.D. OF FLA. MIA

David J. Smith
Clerk of Court

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October 31, 2017

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 16-14147-D
Case Style: Todd McDuffie v. USA
District Court Docket No: 1:15-cv-21641-JEM
Secondary Case Number: 1:12-cr-20465-JEM-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Scott O'Neal, D
Phone #: (404) 335-6189

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

A-8

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14147-D

TODD MCDUFFIE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Todd McDuffie is a federal prisoner serving a total 360-month sentence after a jury found him guilty of carjacking, in violation of 18 U.S.C. §§ 2 and 2119(1); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A)(ii); and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

In April 2015, McDuffie filed the instant *pro se* motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, raising four claims. First, McDuffie contended that the district court gave the jury a defective aiding-and-abetting

instruction. He asserted that the instruction violated *Rosemond v. United States*¹ by failing to require the jury to determine whether he (1) intended to facilitate carjacking, rather than robbery; and (2) had advance knowledge that his codefendant would be armed during the carjacking (“Claim 1”). Second, McDuffie argued that the district court violated *Alleyne v. United States*² by imposing an enhanced sentence under § 924(c)(1)(A)(ii), without requiring the jury to determine whether a firearm was brandished during the carjacking (“Claim 2”). Third, McDuffie maintained that he was denied the right to cross-examine the prosecutor after she violated the advocate-witness rule (“Claim 3”). Fourth, McDuffie argued that his sentence under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), was unconstitutional because the entire definition of the phrase “violent felony” was unconstitutionally vague (“Claim 4”).

As background, McDuffie was tried during a three-day jury trial in December 2012. The victims, A.G. and N.G., were among the witnesses to

¹ See *Rosemond v. United States*, 134 S. Ct. 1240, 1248-50 (2014) (holding that proving a defendant guilty of aiding and abetting a § 924(c) violation requires proof that the defendant actively participated in the underlying crime, intended to facilitate the crime’s commission, and had advance knowledge that a codefendant would use or carry a firearm during the crime’s commission).

² See *Alleyne v. United States*, 133 S. Ct. 2151, 2160-64 (2013) (holding that any fact that increases the mandatory-minimum penalty for a crime is an element that must be found by a jury, and concluding that, for the purpose of applying 18 U.S.C. § 924(c)(1)(A)(ii), the brandishing of a firearm must be found by a jury).

testify during the trial. A.G. testified that he and N.G. were sitting in his car when McDuffie and a second man approached. McDuffie tapped on the driver's side window with a firearm and demanded money. McDuffie told A.G. to exit the car, and A.G. did so and gave McDuffie a debit card and PIN. Meanwhile, the second man on the passenger's side of the car demanded money from N.G. and searched the car. The second man found money in the glove compartment and a firearm in the center console. McDuffie began to search the car while pointing his firearm at A.G., and McDuffie found another firearm wedged between the driver's seat and the center console. McDuffie had A.G. remove his shorts, shoes, and holster. The second man continued to search the car and then got into the driver's seat and began to drive the car. McDuffie got into the passenger's seat while pointing his firearm at A.G., and the two men left in the car.

N.G. testified that McDuffie was the man on the passenger's side of the car who demanded money from her and searched the glove compartment. McDuffie found the two firearms in the car, took the firearms, and had N.G. exit the car. After A.G. was forced to remove articles of clothing, the second man got into the driver's seat, McDuffie got into the passenger's seat, and the two men left in the car.

An agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives testified that she had interviewed McDuffie. McDuffie stated during the interview that he and another man, known as Hickey, were walking to a store when they saw two people sitting in a car. McDuffie admitted that he and Hickey discussed robbing the people if the car was there when he and Hickey left the store. McDuffie stated that the robbery was Hickey's idea and that he gave Hickey a firearm before the robbery. McDuffie admitted that he searched the car, found and kept two firearms, and left with Hickey in the car.

McDuffie testified in his own defense that he did not carry a firearm. He and Hickey left a store and saw two people sitting in a car. Hickey said, "I'm going to draw the gun, you open the door." McDuffie felt that he "was stuck in a position where [he] had to cooperate" because Hickey had a firearm. Hickey "had the gun already out" when they approached the car, and McDuffie opened the driver's side door. McDuffie went to the passenger's side of the car, opened the door, demanded the passenger's money, and took a firearm from the car. Hickey had the driver remove articles of clothing and found a second firearm in the car. Hickey then said, "[M]an, we got to take the car. It's no telling what else they got." Hickey got into the driver's seat while pointing his firearm at the driver, McDuffie got into the passenger's seat, and they left in the car.

On cross-examination, the prosecutor confirmed with McDuffie that she had met him for a pretrial interview. The prosecutor then asked McDuffie questions about his interview statements, including whether he had stated that “the idea of a robbery came up before [he and Hickey] got to the store,” that he had agreed to participate in the robbery if the car was still there when they left the store, that he was carrying a firearm on the night of the carjacking, and that he did not know to whom Hickey sold the victim’s firearms. McDuffie did not object to this line of questioning.

The parties and the district court discussed the jury instructions after both parties rested. When the government withdrew its objection to the inclusion of a duress instruction, defense counsel stated, “We’re in full agreement then.”

The district court instructed the jury on the defense of duress. The district court also instructed the jury:

A defendant aids and abets a person if the defendant intentionally joins with that person to commit a crime. A defendant is criminally responsible for the acts of another person if the defendant aids and abets the other person. A defendant is also responsible if the defendant willfully directs or authorizes the acts of an agent, employee or other associate. But finding that a defendant is criminally responsible for the acts of another requires proof that the defendant intentionally associated with or participated in the crime, not just proof that the defendant was simply present at the scene of a crime or knew anything about it. In other words, you must find beyond a reasonable doubt that the defendant was a willful participant and not merely a knowing spectator.

The jury found McDuffie guilty of carjacking, using or carrying a firearm during and in relation to a crime of violence, and being a felon in possession of a firearm.

During the sentencing hearing, the district court found, over McDuffie's objection, that he qualified as an armed career criminal based in part on his prior conviction of aggravated battery of a pregnant woman. The district court imposed a total 360-month sentence, consisting of concurrent sentences of 180 months for carjacking and 276 months for being a felon in possession of a firearm, and a consecutive sentence of 84 months for using or carrying a firearm during and in relation to a crime of violence.

McDuffie raised several issues on direct appeal, including (1) that the prosecutor violated the advocate-witness rule by implicitly testifying while questioning him about his interview statements; (2) that the aiding-and-abetting instruction was defective because it permitted the jury to convict him of carjacking without finding that he intended to cause death or serious bodily harm; (3) that the aiding-and-abetting instruction was defective because it permitted the jury to convict him under § 924(c) without finding that he committed an act in relation to Hickey's firearm; (4) that the district court violated *Alleyne* by imposing an enhanced sentence under § 924(c)(1)(A)(ii), without requiring the jury to determine whether a firearm was brandished during the carjacking; and (5) that his

prior conviction of aggravated battery of a pregnant woman was not an ACCA predicate offense. We affirmed McDuffie's convictions and sentences. *See United States v. McDuffie*, 550 F. App'x 859, 863 (11th Cir. 2013) (unpublished). We concluded that, even if the prosecutor made improper statements during McDuffie's cross-examination, McDuffie had shown no reasonable probability that those statements affected the outcome of the case. *Id.* at 861. We held that McDuffie waived his right to challenge the jury instructions when defense counsel stated that the defense was "in full agreement" with the instructions. *Id.* We determined that, although the district court erred under *Alleyne*, the error was not reversible because the overwhelming and essentially uncontroverted evidence showed that Hickey brandished a firearm during the carjacking. *Id.* at 862. Finally, we applied the modified categorical approach and concluded that McDuffie's prior conviction of aggravated battery of a pregnant woman was a violent felony under the ACCA's elements clause. *Id.* at 862-63.

Returning to McDuffie's § 2255 motion, a magistrate judge recommended that the motion and a certificate of appealability ("COA") be denied. The magistrate judge determined that Claim 1 was procedurally barred and that McDuffie did not show either cause for the default and prejudice or that he was

actually innocent. The magistrate judge rejected Claim 2 because the same claim was raised and rejected on direct appeal. The magistrate judge stated that Claim 3, while phrased as a confrontation claim, was identical to a claim that was raised and rejected on direct appeal. As to Claim 4, the magistrate judge determined that *Johnson v. United States*³ did not impact McDuffie's ACCA sentence and that his challenge to the entire definition of the phrase "violent felony" was without merit.

The district court adopted the magistrate judge's recommendation and denied McDuffie's § 2255 motion and a COA. McDuffie appealed, and he now seeks a COA.⁴

A COA is required to appeal a final order in a § 2255 proceeding. 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, a movant must make "a substantial showing

³ See *Johnson v. United States*, 135 S. Ct. 2551, 2557-60 (2015) (concluding that the residual clause of the ACCA's definition of a violent felony is unconstitutionally vague).

⁴ Shortly before he filed his notice of appeal in this matter, McDuffie filed in the district court a second § 2255 motion, again challenging his ACCA sentence and challenging his § 924(c) conviction by arguing that carjacking did not qualify as a crime of violence. The district court dismissed the second § 2255 motion as impermissibly filed. We denied McDuffie leave to file a second § 2255 motion, concluding (1) that he qualified as an armed career criminal based on his two prior convictions of serious drug offenses and his prior conviction of aggravated battery of a pregnant woman, and (2) that carjacking qualified as a crime of violence under § 924(c)'s use-of-force clause.

of the denial of a constitutional right.” *Id.* § 2253(c)(2). When a district court denies a § 2255 motion on a procedural ground, a COA should issue if the movant shows that reasonable jurists would find debatable whether (1) the motion states a valid claim of the denial of a constitutional right, and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

I. Claim 1

McDuffie contends that the aiding-and-abetting instruction was defective because it failed to require the jury to determine whether he intended to facilitate carjacking, rather than robbery, and whether he had advance knowledge that Hickey would be armed during the carjacking. He relies on the Supreme Court’s opinion in *Rosemond*, which was issued after his direct appeal concluded. Although McDuffie challenged the aiding-and-abetting instruction on direct appeal, he did not advance the same arguments that he makes in his § 2255 motion.

A person is guilty of carjacking if he “with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so.” 18 U.S.C. § 2119. Under 18 U.S.C. § 924(c)(1)(A), it is a crime to use or carry a firearm during and in relation to a crime of violence or a drug-trafficking crime. *Id.* § 924(c)(1)(A).

A § 924(c) violation is punishable by a mandatory-minimum seven-year sentence “if the firearm is brandished.” *Id.* § 924(c)(1)(A)(ii). “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” *Id.* § 2.

Prior to *Rosemond*, we held that convicting a defendant of aiding and abetting a § 924(c) violation required proof “that the defendant associated himself with a crime of violence or drug trafficking, that he knew that a firearm was being used or carried by a co-conspirator, and that he committed some act related to the gun.” *Rutledge v. United States*, 138 F.3d 1358, 1359 (11th Cir. 1998). In *Rosemond*, the Supreme Court considered what must be proven to convict a defendant of aiding and abetting a § 924(c) violation. *See* 134 S. Ct. at 1243. The Court began by reviewing the common-law standards for accomplice liability, which require an accomplice to participate actively in a crime and to intend to facilitate the crime’s commission. *See id.* at 1245-49. The Court then held that convicting a defendant of aiding and abetting a § 924(c) violation requires proof that the defendant actively participated in the crime of violence or drug-trafficking crime with advance knowledge that a codefendant would use or carry a firearm during the crime’s commission. *Id.* at 1243, 1249-50. We have stated that *Rosemond* does not require a defendant to have had advance knowledge that a codefendant actually

would brandish a firearm for the defendant to be sentenced under § 924(c)(1)(A)(ii). See *United States v. Maddox*, 803 F.3d 1215, 1222 n.3 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 852 (2016); *United States v. Payne*, 763 F.3d 1301, 1304 n.2 (11th Cir. 2014).

To obtain collateral relief based on trial errors that were not objected to at the trial or raised on direct appeal, a defendant must show both cause that excuses his double procedural default and actual prejudice resulting from the errors of which he complains. *United States v. Frady*, 456 U.S. 152, 167-68 (1982). Alternatively, a defendant may obtain collateral relief despite a procedural default by establishing a fundamental miscarriage of justice. *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994).

Cause for a procedural default exists if some objective factor external to the defense impeded counsel's efforts to comply with the procedural rule. *Reece v. United States*, 119 F.3d 1462, 1465 (11th Cir. 1997). "[A] claim that is so novel that its legal basis is not reasonably available to counsel may constitute cause for a procedural default." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (quotation omitted). "However, the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default

the claim was available at all.” *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (quotation omitted).

To establish a fundamental miscarriage of justice, a defendant must “show that a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quotation omitted). The defendant must show that it is more likely than not that no reasonable juror would have convicted him in light of new evidence. *Id.* To be credible, a claim of actual innocence must be based on new, reliable evidence that was not presented at the trial. *Id.* at 316, 324 (stating that, “[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice”).

McDuffie’s § 2255 arguments about the aiding-and-abetting instruction are procedurally defaulted because he did not challenge any of the jury instructions during the trial, and he did not advance the arguments on direct appeal. Neither cause and actual prejudice nor a fundamental miscarriage of justice excuses the procedural default.

First, McDuffie cannot establish cause for failing to advance his arguments earlier. To the extent that he challenges the aiding-and-abetting instruction as it relates to his carjacking conviction, *Rosemond* did not alter the common-law

standards for accomplice liability, which require an accomplice to participate actively in a crime and to intend to facilitate the crime's commission. *See Rosemond*, 134 S. Ct. at 1245-49 (reviewing common law). To the extent that McDuffie challenges the aiding-and-abetting instruction as it relates to his § 924(c) conviction, he could have argued even before *Rosemond* that the instruction failed to require the jury to determine whether he knew that Hickey would be armed. We had held before *Rosemond* that convicting a defendant of aiding and abetting a § 924(c) violation required proof both that the defendant knew that a codefendant used or carried a firearm and that the defendant committed some act related to the firearm. *See Rutledge*, 138 F.3d at 1359. McDuffie has not established that the principles addressed in *Rosemond* were so novel that he could not have raised Claim 1 on direct appeal. *See Bousley*, 523 U.S. at 622.

Second, McDuffie cannot show a fundamental miscarriage of justice. He has pointed to no new evidence to establish his actual innocence. His own trial testimony shows that he had advance knowledge that Hickey would brandish a firearm during the carjacking, as he testified that Hickey said "I'm going to draw the gun, you open the door" before they approached the car. Although McDuffie testified that he felt that he had to cooperate, the jury received an instruction on the defense of duress and rejected that defense by finding him guilty. McDuffie further

testified at the trial that, after he and Hickey searched the car, Hickey said “we got to take the car,” and he and Hickey then got into the car and left. McDuffie is not entitled to a COA on Claim 1 because the claim is procedurally defaulted, and he has not established either cause and actual prejudice or a fundamental miscarriage of justice.

II. Claim 2

McDuffie contends that the district court erred by imposing an enhanced sentence for his § 924(c) conviction for the brandishing of a firearm, when the jury was not asked to determine whether a firearm was brandished during the carjacking. He challenges our determination in his direct appeal that the error is not reversible.

A § 924(c) violation is punishable by a mandatory-minimum five-year sentence, with several exceptions. *See* 18 U.S.C. § 924(c)(1)(A)-(C). The violation is punishable by a mandatory-minimum seven-year sentence “if the firearm is brandished.” *Id.* § 924(c)(1)(A)(ii). Any fact that increases the mandatory-minimum penalty for a crime is an element that must be submitted to a jury and found beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 1260-64 (concluding that, for the purpose of applying § 924(c)(1)(A)(ii), the brandishing of a firearm must be found by a jury). “[W]here there has been no intervening change in controlling law, a claim or issue that was decided against a defendant on

direct appeal may not be the basis for relief in a § 2255 proceeding.”
Rozier v. United States, 701 F.3d 681, 684 (11th Cir. 2012).

McDuffie raised his claim of an *Alleyne* violation on direct appeal, and we concluded that the district court’s error in failing to include a brandishing instruction was not a reversible error. *See McDuffie*, 550 F. App’x at 862. McDuffie is not entitled to a COA on Claim 2 because we rejected the claim on direct appeal. *See Rozier*, 701 F.3d at 684.

III. Claim 3

McDuffie maintains that he was denied the right to cross-examine the prosecutor after she violated the advocate-witness rule while questioning him about his interview statements. Under the advocate-witness rule, “counsel should avoid appearing as both advocate and witness except under extraordinary circumstances.” *United States v. Hosford*, 782 F.2d 936, 938 (11th Cir. 1986). It is improper for a prosecutor to “implicitly testif[y] to personal knowledge or otherwise attain[] ‘witness verity’ in a case in which he appears as an advocate for the government.” *Id.* at 939.

As stated above, a claim that was decided against a defendant on direct appeal may not be the basis for relief in a § 2255 proceeding, absent an intervening change in controlling law. *Rozier*, 701 F.3d at 684. The defendant may not avoid this bar

merely by re-characterizing the previously raised claim. *See United States v. Nyhuis*, 211 F.3d 1340, 1343 (11th Cir. 2000) (concluding that a district court properly denied a due-process claim that was “merely re-characterized” from an immunity claim that the defendant raised on direct appeal).

McDuffie argued on direct appeal that the prosecutor violated the advocate-witness rule by implicitly testifying while questioning him about his interview statements. We concluded that McDuffie did not show a reasonable probability that any improper statements that the prosecutor made affected the outcome of the case. *See McDuffie*, 550 F. App’x at 861. McDuffie phrases the same argument as a confrontation claim in his § 2255 motion, asserting that he did not have an opportunity to cross-examine the prosecutor after she implicitly testified. Claim 3 is not a basis for collateral relief because McDuffie merely has re-characterized a claim that we rejected on direct appeal. *See Rozier*, 701 F.3d at 684; *Nyhuis*, 211 F.3d at 1343.

Moreover, to the extent that Claim 3 differs from the claim that McDuffie raised on direct appeal, Claim 3 is procedurally defaulted because he failed to raise it on direct appeal. *See Frady*, 456 U.S. at 167-68. McDuffie has not established cause to excuse the procedural default, as he points to no external factor that impeded his ability to raise Claim 3 on direct appeal. *See Reece*, 119 F.3d at 1465.

As discussed above, McDuffie cannot show a fundamental miscarriage of justice.

In sum, he is not entitled to a COA on Claim 3.

IV. Claim 4

McDuffie relies on *Johnson v. United States* to argue that the entire definition of the phrase “violent felony” in the ACCA is unconstitutionally vague. Under the ACCA, a person convicted of unlawful possession of a firearm is subject to a mandatory-minimum 15-year sentence if the person has 3 prior convictions of a combination of violent felonies and serious drug offenses. *See* 18 U.S.C. § 924(e)(1). A violent felony is a felony that “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” *Id.* § 924(e)(2)(B); *see also United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012) (referring to the first prong of this definition as the elements clause and stating that the second prong contains the enumerated crimes and the residual clause).

The Supreme Court held in *Johnson* that the ACCA’s residual clause is unconstitutionally vague. *See* 135 S. Ct. at 2557-60; *see also Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (concluding that *Johnson* is retroactively

applicable to cases on collateral review). The Supreme Court made clear in *Johnson*, however, that its decision did “not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA’s] definition of a violent felony.” 135 S. Ct. at 2563.

Johnson does not impact McDuffie’s ACCA sentence because he qualifies as an armed career criminal notwithstanding the unconstitutionally vague residual clause. We concluded on direct appeal that his prior conviction of aggravated battery of a pregnant woman is a violent felony under the elements clause. *See McDuffie*, 550 F. App’x at 862-63. As we stated when we denied McDuffie leave to file a second § 2255 motion, he also has two prior convictions of serious drug offenses. McDuffie’s contention that, in light of *Johnson*, the entire definition of the phrase “violent felony” is unconstitutionally vague is without merit. *See id.* McDuffie is not entitled to a COA on Claim 4.

Reasonable jurists would not debate the district court’s denial of McDuffie’s § 2255 motion. *See Slack*, 529 U.S. at 484. His motion for a COA is DENIED.


UNITED STATES CIRCUIT JUDGE