No. _____

IN THE
Supreme Court of the United States

TRAVIS HORNE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents another in the recurring series of questions about the validity of a so-called "residual clause," categorizing which offenses constitute crimes of violence—this time in the context of 18 U.S.C. § 924(c). Section 924(c)'s residual clause is identical to that of 18 U.S.C. § 16(b), that was recently held to be unconstitutionally vague in *Sessions v. Dimaya*, __ U.S. __, 138 S. Ct. 1204 (2018). Despite the identical wording of the two clauses, the Circuits remain split as to whether the residual clause in § 924(c), too, has been dealt a fatal blow. This petition presents the following questions:

I. Whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), and *Sessions v. Dimaya*, __ U.S. __, 138 S. Ct. 1204 (2018).

II. Whether carjacking (18 U.S.C. § 2119), which may be committed by intimidation alone, has as an element "the use . . . of physical force against the person or property of another," under 18 U.S.C. § 924(c)(3)(A).

III. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Travis Horne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-10450-C in that court on March 30, 2018.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Horne's application for a COA in Appeal No. 18-10450-C is provided in Appendix A-1. The district court's order adopting the recommendations of the magistrate judge and denying a certificate of appealability is

reproduced in Appendix A-3. The report and recommendation of the magistrate judge recommending denying the § 2255 petition is reproduced in Appendix A-4.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2255. The decision of the court of appeals was entered on March 30, 2018. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

18 U.S.C. § 924(c) provides in pertinent part:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

. . .

(3) For purposes of this subsection the term "crime of violence" means an
offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of
physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force
against the person or property of another may be used in the
course of committing the offense.

18 U.S.C. § 2119 provides in pertinent part:

Whoever, 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, shall—

(1) Be fined under this title or imprisoned not more than 15 years, or both….

28 U.S.C. § 2253(c) provides in pertinent part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Mr. Horne was found guilty by a jury of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 (count one); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (count two); conspiracy to use, carry, and possess a firearm in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c) and (o) (count three); carjacking, in violation of 18 U.S.C. § 2119(1) (count seven); and using and carrying a firearm during and in relation to the carjacking set forth in count seven, in violation of 18 U.S.C. § 924(c) (count eight). The district court sentenced Mr. Horne to a total term of 450 months: concurrent terms of 210 months as to the drug conspiracy, Hobbs Act conspiracy, and § 924(o) counts; a concurrent 180 months as to the carjacking count; and a consecutive term of 240 months as to the § 924(c) count. Appendix (A-5). Mr. Horne appealed his conviction and sentence, which appeal was denied in a *per curiam* opinion on April 10, 2007. *United States v. Brown, et al.*, 227 F. App'x 795 (11th Cir. 2007).

On June 24, 2016, Mr. Horne filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to 18 U.S.C. § 2255. The motion was referred to a magistrate judge for a report and recommendation. On October 24, 2017, United States Magistrate Judge White issued his Report and Recommendation, recommending that the district court deny Mr. Horne's petition, finding that Mr. Horne had procedurally defaulted his claim, and rejecting Mr. Horne's claim that the residual

clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague after *Samuel Johnson*. Appendix (A-4).

The district court adopted the Report and Recommendation, finding that Mr. Horne had procedurally defaulted his claim, because he had not established actual innocence of the § 924(c) charge. The district court also denied Mr. Horne a certificate of appealability, stating only that Mr. Horne had failed to satisfy his burden of demonstrating that reasonable jurists could debate the district court's assessment of his constitutional claims. Appendix (A-3).

On February 16, 2018, Mr. Horne filed an application for a certificate of appealability with the Eleventh Circuit, requesting a COA on the issue of whether he had procedurally defaulted his claim with respect to his § 924(c) conviction in light of *Samuel Johnson*. In his application, Mr. Horne noted that reasonable jurists were actually debating whether *Samuel Johnson* invalidated § 924(c)'s residual clause, and, thus, could debate whether he had satisfied that actual innocence exemption from the procedural default rule. Mr. Horne's motion argued that pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000), a certificate of appealabilty should issue 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." Appendix (A-2).

On March 30, 2018, a single Eleventh Circuit judge denied a COA in an order that stated in summary fashion that Mr. Horne had failed to meet this standard, because Circuit precedent forecloses his claims. Appendix (A-1).

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists are currently debating whether § 924(c)'s residual clause is unconstitutionally vague.

The circuits are divided on whether § 924(c)'s residual clause in unconstitutionally vague in light of *Samuel Johnson*. *Compare United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)'s residual clause is unconstitutionally vague), *with Ovalles v. United States*, 861 F.3d 1257, 1266–67 (11th Cir. 2017) (holding that § 924(c)'s residual clause is constitutional), *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (same), *and United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016) (same). And critically, just months ago, this Court extended the logic and holding of the *Samuel Johnson* decision to the residual clause in 18 U.S.C. § 16(b), finding "a straightforward application of *Johnson*" effectively "resolve[d]" the case. *Sessions v. Dimaya*, __ U.S. __, 138 S. Ct. 1204, 1213, 1223 (2018).

The residual clauses in § 16(b) and § 924(c) are identically worded. The fate of 924(c)'s residual clause is tied to that of the recently invalidated residual clause in 16(b). Courts around the country are now reconsidering their conflicting holdings with respect to 924(c)'s residual clause, in light of the *Dimaya* decision. Indeed, the Court of Appeals for the Eleventh Circuit vacated the panel's decision in *Ovalles*, ordered additional briefing and a rehearing *en banc*, scheduled for July 9, 2018. Thus, even in the Eleventh Circuit, jurists continue to debate whether § 924(c)'s residual clause remains valid after the holdings in *Samuel Johnson* and *Dimaya*.

Based on this Court's holding in *Dimaya*, finding the materially-identical provision unconstitutionally vague, and the circuit split concerning the constitutionality of § 924(c)'s residual clause, Mr. Horne respectfully moves for a certificate of appealabilty. The single judge order denying the Motion for COA conflicts with this Court's precedent, and Mr. Horne merely asks for the ability to appeal an issue that is currently being debated by reasonable jurists across the country.

The standard for granting a Motion for COA is simply that the applicant must "sho[w] 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." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000) (internal quotation marks omitted).

As this Court has previously emphasized, 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). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court has explained, "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. Because Mr. Horne's petition revolves entirely around an issue that reasonable jurists are currently debating, he should be permitted to proceed in his appeal on the merits.

The Eleventh Circuit's single judge order failed to follow the actual mandate of this Court's precedent regarding when a COA should issue. In that order, there is no reasoning or other explanation for why the motion for COA was denied when at all levels of decision making there are conflicting decisions on these issues. Given the differing opinions and decisions at every level of jurisprudence on this issue, it is clear that "reasonable jurists would find debatable" the merits of the petitioner's underlying claim such that a certificate of appealability is warranted. *Slack v. McDaniel*, 529 U.S. at 478. Here, the Court of Appeals single-judge order failed to follow the requirements of *Slack v. McDaniel* in assessing whether the issue that Mr. Horne seeks to appeal is debatable. The Court should therefore grant the petition to issue a COA to ensure that Mr. Horne is not serving a sentence that includes a consecutive twenty-year term of imprisonment that is unwarranted.

A. Section 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Samuel Johnson* and *Dimaya*.

In *Dimaya*, the Court held that § 16(b)'s definition of "crime of violence" is unconstitutionally vague in light of its reasoning in *Johnson v. United States*, __ U.S.__, 135 S. Ct. 2551 (2015), which invalidated the definition of "violent felony" in the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii) (requiring that an offense "otherwise involve[s] conduct that presents a serious potential risk of physical injury to another").

The Court found that "a straightforward application of *Johnson*" effectively "resolve[d]" the case. *Dimaya*, 138 S. Ct. at 1213, 1223. In *Johnson,* the Court singled out two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." 135 S. Ct at 2557.

First, in order to determine the risk posed by the statute, the ACCA residual clause "require[d] a court to [apply the categorical approach] and picture the kind of conduct that the crime involves 'in the ordinary case'" rather than looking at the "real-world" facts in the individual case at hand to determine the risk of injury. *Johnson*, 135 S. Ct. at 2557 (citation omitted). The clause left "grave uncertainty" about how to estimate the risk posed by a crime by asking judges "to imagine how *the idealized ordinary case* of the crime" occurs. *Id.* at 2557-58 (emphasis added). To illustrate its point, the Court asked rhetorically, "how does one go about deciding what the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Id.* at 2257-58 (internal citation omitted). None of these methods offer any "reliable way" of determining how a crime is ordinarily committed. *Id.* at 2558. Hence, the Supreme Court found that the process of identifying the "ordinary case" creates "grave uncertainty about how to estimate the risk posed by a crime." *Id.* at 2257.

Second, compounding that uncertainty, the ACCA's residual clause layered an imprecise "serious potential risk" threshold on top of the requisite "ordinary case" inquiry. The combination of "indeterminacy" created by the ordinary case inquiry

and an ill-defined risk threshold resulted in "more unpredictability and arbitrariness than Due Process tolerates." *Id.* at 2558.

This Court in *Dimaya* found that § 16(b) suffers from those same two flaws. Like the ACCA's residual clause, § 16(b) requires the court to identify a crime's "ordinary case" in order to measure the crime's risk, but "[n]othing in § 16(b) helps courts to perform that task." *Dimaya*, 138 S. Ct. at 1215. And the Court found that § 16(b)'s "substantial risk" threshold is no more determinate that the ACCA's "serious potential risk" threshold. *Id.* Thus, the same "[t]wo features" that "conspire[d] to make" the ACCA's residual clause unconstitutionally vague – "the ordinary case requirement and an ill-defined risk threshold" – also conspired to make § 16(b) unconstitutionally void. *Id.* at 1216, 1223 (citing *Johnson*, 135 S. Ct. at 2557).

Likewise, because § 924(c)(3)(B) is identical to § 16(b) – requiring the same categorical ordinary case approach and risk threshold – *Dimaya* dictates that § 924(c)(3)(B) is also unconstitutionally vague. *See, e.g., In re Hubbard*, 825 F.3d 225, 230 n.3 (4th Cir 2016) ("[T]he language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other."). Indeed, immediately after the Supreme Court issued its decision in *Dimaya*, the Tenth Circuit, in *United States v. Salas*, __ F.3d__, 2018 WL 2074547 (10th Cir. 2018) found exactly that and struck § 924(c)(3)(B) as unconstitutionally vague. This stands in accord with the position of the Seventh Circuit, which did the same before *Dimaya*. *See United States v. Cardena,* 842 F.3d 959, 996 (7th Cir. 2015) (§ 924(c)(3)(B) is unconstitutionally vague because it "is the same residual clause

contained in [§16(b)]").[1] And as noted, the Court of Appeals for the Eleventh Circuit has vacated its conflicting panel decision in *Ovalles* and ordered rehearing *en banc*.

II. Reasonable jurists could debate whether carjacking, which may be committed by intimidation alone, has as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

Whether carjacking qualifies as a "crime of violence" under § 924(c)'s force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). Pursuant to this categorical approach, if carjacking may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "crime of violence" under § 924(c)'s force clause. The term "physical force" under the elements clause "connotes a substantial degree of force." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). It means "violent force . . . force that is capable of causing physical pain or injury to another person." *Id*. Carjacking may be committed without the use of violent "physical force." Therefore, it does not qualify as a "crime of violence" under § 924(c)'s force clause.

The pattern jury instruction for carjacking in the Eleventh Circuit states that, "[t]o take 'by intimidation' is to say or do something that would make an ordinary

[1] Likewise, several district courts, post-*Dimaya*, have already held that § 924(c)(3)(B) is unconstitutionally vague. *See United States v. Meza*, 2018 WL 2048899 (D. Mont. May 2, 2018); Order, *United States v. Morrison*, Case No. BLG-SPW-04-CR-126 (D. Mont. May 7, 2018); Order, *United States v. Johnson*, Case No. BLG-SPW-11-CR-140 (D. Mont. May 7, 2018); Order, *Toussaint v. United States*, Case No. 12-CR-00407-CW-1 (N.D. Cal. May 11, 2018); Order, *Evey v. United States*, Case No. SVW-97-CR-00468 (C. D. Cal. May 10, 2018).

person fear bodily harm. It doesn't matter whether the victim in this case actually felt fear." Eleventh Circuit Pattern Jury Instr. No. 78 (2010). The result is that carjacking by intimidation does not necessarily require in every case a use or threatened used of violent, physical force.

To the contrary, one can commit carjacking by threatening to infect the driver with a poison, toxin, or infectious diseases, which would not require any force at all. In her dissent from the denial of an application to file a second or successive motion to vacate, Judge Jill Pryor of the Court of Appeals for the Eleventh Circuit made a similar point in *In re Smith*:

> Although on its face, the term "intimidation" seems coterminous with "threatened use of physical force" as it appears in the elements clause, our precedent indicates that may not necessarily be the case. This Court previously has held that whether a defendant engaged in "intimidation" is analyzed from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant. *See United States v. Kelley*, 412 F.3d 1240, 1244–45 (11th Cir. 2005). It is thus possible for a defendant to engage in intimidation without ever issuing a verbal threat by, for example, slamming a hand on a counter, as occurred in *Kelley*. *Id.* at 1245.

In re Smith, 829 F.3d, 1276, 1283 (11th Cir. 2016) (Jill Pryor, J., dissenting).

Judge Jill Pryor also explained that this conclusion was not altered by the fact that the carjacking statute requires that the defendant possess the intent to cause death or serious bodily harm. Indeed, given the examples just mentioned, it is certainly "possible to prove that a defendant had the intent to commit death or serious bodily harm without providing that he used, attempted to use, or threatened to use physical force against the victim." *Id.* at *6. In that regard, she further observed that "a defendant could still be found guilty of carjacking in a 'case in which

the driver surrendered or otherwise lost control over his car' without the defendant ever using, attempting to use, or threatening to use physical force so long as the government could separately satisfy the intent element," which it could do, for example, by "looking . . . at his prior bad acts." *Id.* (quoting *Holloway v. United States*, 526 U.S. 1, 11 (1999)).

And, under *Curtis Johnson*, it is very much possible to cause death or bodily harm without the use, attempted use, or threatened use of violent physical force—for example, through poison—an unremarkable conclusion that several courts have recognized. *See, e.g.*, *United States v. Garcia-Perez*, 779 F.3d 278, 283-84 (5th Cir. 2015) (holding that Florida manslaughter did not satisfy the elements clause because, despite requiring causation of death, it "could be committed by poison, for example, which would not be 'use of physical force' for these purposes"); *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) ("Of course, a crime may *result* in death or serious injury without involving *use* of physical force."); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005) (statute requiring causation of bodily injury "does not necessarily include the use or threatened use of 'physical force' under" the elements clause); *Chrzanoski v. Aschroft*, 327 F.3d 188, 195 (2d Cir. 2003) (agreeing "that there is a difference between the causation of an injury and an injury's causation by the 'use of physical force'") (quotation marks omitted).

In sum, the "force and violence" and "intimidation" components of the carjacking Statute represent alternative means of satisfying a single element. Accordingly, the statute is indivisible. And carjacking by intimidation does not

necessarily require in every case that the defendant use, attempt to use, or threaten to use violent physical force, as required by *Curtis Johnson*. Accordingly, the Court must assume under the least-culpable-act rule that the offense was committed that way. As a result, the statute is categorically overbroad and does not qualify as a crime of violence under § 924(c)'s elements clause.

III. The Eleventh Circuit's rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit's rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton v. Sec'y Fla. Dep't of Corr.*,

793 F.3d 1261 (11th Cir. 2015) ("[R]easonable jurists will follow controlling law."); *see also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Horne's case using the proper terms—that reasonable jurists would not find the district court's assessment of the constitutional claims to be debatable or wrong—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because circuit precedent forecloses his claims. The Eleventh Circuit's rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S. Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, "[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." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all

debate." *Welch*, 136 S. Ct. at 1264. Here, we know that is not the case, particularly in light of Judge Jill Pryor's dissenting opinion in *In re Smith*, 829 F.3d, 1276, 1283 (11th Cir. 2016) (Jill Pryor, J., dissenting). Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Horne respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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