NO._____

In the Supreme Court of the United States

CURTIS D. HULING,

PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Clarence Thomas, Justice of the United States and Circuit Justice for the Eleventh Circuit:

Petitioner, by his attorney, respectfully makes an application pursuant to Supreme Court Rule 13.5 and Rule 22 to extend the time by 60 days in which to file a petition for writ of certiorari from the judgment entered by the United States Court of Appeals for the Eleventh Circuit. In support thereof, counsel states the following:

1. Mr. Huling pled guilty to bank robbery in violation of 18 U.S.C. section 2113(a), and the District Court sentenced him to 168 months in prison. This sentence was founded on a Guidelines' sentencing range of 151 to 188 months, which was based on a career offender enhancement under U.S.S.G. §4B1.1(a). That section raises the offense level for a "crime of violence" or "controlled substance offense" committed by an offender with two prior convictions of a "crime of violence" or a "controlled substance offense," as those terms are defined in U.S.S.G. § 4B1.2.

The "crime of violence" definition has two clauses. The first clause – §4B1.2(a)(1) – is commonly referred to as the "force clause" or the "elements clause." An offense is a "crime of violence" under this clause if it has an element requiring the use, attempted use, or threatened use of physical force. *Id*. The second clause – §4B1.2(b) – is commonly referred to as the "enumerated clause." An offense is a "crime of violence" under this clause when its elements are the same as or narrower than the elements of its "generic" counterpart – "*i.e*., the offense as commonly understood." *Descamps v. United States*, 570 U.S. 254, 257 (11th Cir. 2013).

Mr. Huling argued to the District Court and on appeal to the Eleventh Circuit Court of Appeals that his prior Georgia aggravated assault conviction, under Ga. Code Ann. § 16-5-21, did not qualify as a "crime of violence" under either clause. Georgia defines its aggravated assault offense as an "assault" with one of four possible aggravators. *Id*. Relevant here, one aggravator is "[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." Ga. Code Ann. § 16-5-

21(a)(2). In turn, a person can violate Georgia's simple assault statute, Ga. Code. Ann. §16-5-20(a), in one of two ways. They can "attempt to commit a violent injury to the person of another," or they can "[c]ommit an act which places another in reasonable apprehension of immediately receiving a violent injury." *Id*.

Mr. Huling made two arguments to the District Court that Georgia aggravated assault was not a "crime of violence" under the enumerated clause. First, he argued that Georgia defined deadly weapon more broadly than its generic definition, because Georgia's definition includes objects that are not inherently likely to cause serious bodily injury, but nonetheless caused such an injury. Second, he argued that Georgia aggravated assault has an overbroad *mens rea*, since it incorporates a general intent version of simple assault. Similarly, he argued that Georgia aggravated assault is not a "crime of violence" under the force clause, because to use, threaten, or attempt to use physical force also requires a *mens rea* narrower than general intent. In overruling his objection, the District Court found that Georgia aggravated assault qualified as a crime of violence under the force clause, and declined to determine whether it would qualify under the enumerated clause.

2. Thereafter, Mr. Huling timely appealed his sentence to the Eleventh Circuit Court of Appeals. He abandoned his argument as to the breadth of "deadly weapon" in Georgia, in light of an intervening Eleventh Circuit precedent, *see United States v. Morales-Alonso*, 878 F. 3d 1311, 1320 (11th Cir. 1320), that specifically rejected this argument. But he restated and elaborated on his arguments that Georgia aggravated assault did not qualify as a crime of violence because it incorporated a general intent

version of simple assault. He emphasized *Kirkland v. State*, 282 Ga. App. 331, 638 S.E.2d 784 (2006), to illustrate the realistic scope of Georgia aggravated assault.

Briefly, the facts of Kirkland were as follows: Kirkland was driving his car out of a car wash, when one officer identified himself. *Id*. at 332.

> He then left his unmarked vehicle, drew his pistol, approached Kirkland's car with his gun drawn, and reached for Kirkland. As he reached into Kirkland's car with his left arm, somehow his arm became entangled with something in the car. His gun discharged, and the bullet shattered the left rear window of Kirkland's car and struck Kirkland. Rhodes testified that he was dragged alongside the car, stumbling and falling, and that he feared for his life.

Id. Kirkland argued this evidence was insufficient to prove he committed aggravated assault with a deadly weapon. The Georgia Court of Appeals held that, in contrast to Ga. Code Ann. 16-5-20(a)(1), subsection two does not require a "specific criminal intent to injure." *Id*. It merely requires " 'the criminal intent to commit the acts which caused the victim to be reasonably apprehensive of receiving a violent injury, ...' " *Id*. at 332-33 (quoting *Jackson v. State*, 276 Ga. 408, 412, n. 5, 577 S.E.2d 570 (2003)).

Mr. Huling argued that *Kirkland* showed unequivocally that Georgia aggravated assault, as actually applied, contains a general intent *mens rea*. It is thus broader than "generic" aggravated assault, which he argued required heightened recklessness, as the Ninth Circuit held in *United States v. Esparza-Herrera*, 557 F. 3d 10019, 1024 (9th Cir. 2009), and as suggested by the Model Penal Code, § 211.1(1)(A), or at least recklessness, as the Sixth Circuit held in *United States v. Harper*, 875 F. 3d 329, 330 (6th Cir. 2017). He also argued a general intent offense

does not satisfy the force clause, relying on *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (italics in original), where this Court found that driving under the influence causing serious bodily injury was not a crime of violence under the force clause, because "the word 'use' connotes the *intentional* availment of force," and driving under the influence does not require that intent.

A panel of the Eleventh Circuit affirmed Mr. Huling's sentence in an unpublished opinion. *United States v. Huling*, __ Fed. App'x __, 2018 WL 3360413 (July 10, 2018) (See Attachment 1). It reasoned it was bound by *Morales-Alonso*, 878 F. 3d 1311, which held Georgia aggravated assault qualified as a crime of violence under the enumerated clause. *Huling*, 2018 WL 3360413, at *2. After rehashing that decision, it acknowledged Mr. Huling's argument that the *Morales-Alonso* panel failed to address whether the *mens rea* element of Georgia aggravated assault was overbroad. *Id*. at 3. But it concluded " 'we have categorically rejected an overlooked reason or argument exception to the prior panel precedent rule.' " *Id*. (quoting *United States v. Johnson*, 528 F. 3d 1318, 1320 (11th Cir. 2008)).

Mr. Huling did not seek an *en banc* rehearing, because the Eleventh Circuit has recently rejected such a motion raising a similar issue. In *United States v. Golden*, 854 F. 3d 1258 (11th Cir. 2017), a panel held that Florida aggravated assault was a crime of violence, although it could be committed by "culpable negligence." It relied on a prior panel precedent, *see Turner v. Warden Coleman FCI*, 709 F. 3d 1328 (11th Cir. 2013), notwithstanding Mr. Golden's argument that this Court's intervening decisions, including *Descamps*, 570 U.S. 254, abrogated that precedent. No member

of the Eleventh Circuit voted to review the panel decision, despite the misgivings expressed by Judge Jill Pryor in her concurrence with the panel decision. *Golden*, 854 F. 3d at 1257-60; see Attachment 2 (Eleventh Circuit Order Denying Petition for Rehearing En Banc, *Golden v. United States*, Slip op. (11th Cir. March 23, 2017)).

3. Since the Eleventh Circuit's July 10, 2018, decision affirming Mr. Huling's sentence, undersigned counsel has been busy with several appellate and district court assignments. In addition to a number of briefs filed in both forums in the normal course, counsel has had to address two expedited appeals, which were necessarily prioritized ahead of other assignments, as the Eleventh Circuit does not permit extensions of such appeals. One appeal was of a jury verdict following two trials, and, just this week, the Eleventh Circuit clerk corrected a docketing error of an appeal of a somewhat complicated bond determination involving the intersection of the Bail Reform Act and Immigration and Nationalities Act, resulting in an immediate and rigid deadline to avoid defaulting for failing to prosecute that appeal.

4. In light of undersigned counsel's eleventh-hour work assignments, on top of his normal heavy workload, he respectfully requests an extension of 60 days from October 8, 2018 – the current due date – to December 7, 2018, on which to file the petition for writ of certiorari in Mr. Huling's case. This case presents two important issues implicating Circuit splits: first, whether generic aggravated assault, as defined for purposes of various statutory and Guidelines enhancements, requires a *mens rea* greater than general intent, and second, whether the Eleventh Circuit's prior panel precedent rule, when it forecloses arguments and issues never previously considered

by any panel of that court and disregards intervening Supreme Court precedent, contravenes the supremacy of the Supreme Court, *stare decisis*, and an appellant's statutory right to appeal and due process and equal protection rights to fair appellate proceedings.

Wherefore, Petitioner prays that this application be granted. This application is respectfully submitted on September 28, 2018.

s/ Jonathan R. Dodson
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