No. 18-7575

IN THE

Supreme Court of the United States

ALEXIS VALDES GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
Counsel of Record
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

Counsel for Petitioner

MAY 16TH, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

This case is about fairness. And what the Eleventh Circuit is doing to criminal defendants is fundamentally unfair. That court is applying its prior panel precedent rule—perhaps strictest version in the country—in a manner that upholds criminal convictions and sentences without affording defendants a meaningful opportunity to be heard. In direct criminal appeals, that court is affording preclusive effect to prior panel decisions that were forged under procedures lacking all the standard features of the adjudicative process: briefing by counsel; adversarial testing; ample time for deliberation; and the ability to seek further review. That systematic judicial deprivation of due process is unprecedented.

The government opposes review but disputes little. It does not dispute that, due to the Eleventh Circuit's anomalous procedures, criminal defendants in that Circuit alone may now receive only token process. And it does not dispute that the Eleventh Circuit's procedures will adversely affect countless defendants for years to come. The government does dispute that the Eleventh Circuit's novel system of adjudication violates due process. But nowhere does the government argue that it actually affords defendants a meaningful opportunity to be heard. The government also observes that the Eleventh Circuit has not addressed the due process question. But Petitioner urged the court to do so here, and the government offers no reason to believe that the court ever will. Lastly, the government speculates that Petitioner might not prevail if the Eleventh Circuit truly considered his underlying sentencing argument. But, in fact, the only circuit to do so embraced it. Review is warranted.

I. THE DUE PROCESS QUESTION WARRANTS REVIEW

The government makes no effort to dispute Petitioner's arguments for why the due process question warrants this Court's review. That omission is telling.

1. The government does not dispute that the so-called "streamlined" procedures employed by the Eleventh Circuit to adjudicate successive applications are unique to that Circuit. To summarize, that Circuit alone: required successive applicants to use a form with limited space to describe their claim; invariably ruled on those applications in less than 30 days; never heard from the government or granted oral argument; routinely opined on the merits of the applicants' claims; prohibited applicants from re-filing or seeking reconsideration if their application was mistakenly denied; and treated its published orders—which far exceeded the number of published orders in all other circuits combined—as fully precedential in all cases, including direct appeals. *See* Pet. 2–3, 5–7, 11–16.

The government observes that no other circuit has limited the precedential effect of its published orders on successive applications. BIO 13. But that issue has never even arisen anywhere else, since no other circuit has employed any of the same underlying procedures. Just like a circuit split, the practical effect is a lack of national uniformity. Due to the Eleventh Circuit's extraordinary procedures, federal criminal defendants in that Circuit alone are now subject to far less judicial process than identically-situated defendants in every other circuit. Pet. 11, 15–16. The government does not dispute that geographic disparity, much less attempt to justify it. Only this Court can eliminate that uneven state of affairs.

2. The government also does not dispute that the question presented is recurring and important. In adjudicating successive applications, the Eleventh Circuit held that over a dozen offenses qualified as "crimes of violence" under 18 U.S.C. § 924(c) or the Sentencing Guidelines, or as "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B). Those legal issues frequently recur in federal criminal cases and substantially affect charging practices, plea bargaining, and sentencing exposure. And because those holdings are now fully precedential after *United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018), the Eleventh Circuit has uncritically relied on them to resolve dozens of appeals over the last two years. *See* Pet. 3, 15–17. The petition cited over 60 such appeals from that limited time period. *See* Pet. App. 47a–50a. And that number has increased just in the last few months.[1] This issue is not going away. It will affect the administration of criminal justice in the Eleventh Circuit for many years.

The Eleventh Circuit's recent denial of rehearing en banc in *St. Hubert* confirms that issue's importance. Acting *sua sponte*, ten members of that court joined six separate opinions totaling 90 pages. 918 F.3d 1174 (11th Cir. 2019). As the government observes, BIO 9, five members of the court (in two opinions)

---

[1] *See, e.g.*, *Robinson v. United States*, __ F. App'x __, 2019 WL 2070448, at *2 (11th Cir. May 10, 2019); *Chance v. United States*, __ F. App'x __, 2019 WL 1873269, at *2 (11th Cir. Apr. 26, 2019); *Banks v. United States*, __ F. App'x __, 2019 WL 1857115, at *1, 3 (11th Cir. Apr. 25, 2019); *United States v. Petit Frere*, __ F. App'x __, 2019 WL 1500601, at *3 (11th Cir. Apr. 4, 2019); *Mitchell v. United States*, __ F. App'x __, 2019 WL 1467988, at *2 (11th Cir. Apr. 2, 2019); *United States v. Ceasar*, __ F. App'x __, 2019 WL 1110835, at *1 (11th Cir. Mar. 11, 2019); *United States v. Becker*, __ F. App'x __, 2019 WL 689799, at *4 (11th Cir. Feb. 19, 2019); *Richardson v. United States*, 752 F. App'x 950, 950–51 (11th Cir. Feb. 8, 2019); *United States v. Nelson*, __ F. App.'x __, 2019 WL 480031, at *2 (11th Cir. Feb. 7, 2019).

defended *St. Hubert*'s holding, and five members (in four opinions) criticized it. The divisive nature of their debate reflects the importance of *St. Hubert*'s holding.[2] And four judges expressly "welcome[d] any avenue of Supreme Court review." *Id.* at 1198 n.4 (Wilson, J., dissenting from denial of rehearing en banc, joined by Martin, Jill Pryor, and Rosenbaum, JJ.). The Court should accept that invitation.

3. Rather than substantively dispute that review is warranted, the government observes only that this Court has denied review of other petitions in the past. BIO 8 & n.1. But the petitions it cites were all filed before *St. Hubert* and thus before the Eleventh Circuit had made clear that published orders on successive applications would have precedential effect in all cases. And none of those petitions even presented the same question for review. In five of them, the petitioners argued that published orders denying successive applications should not be precedential outside of that context, but they made no mention of due process. *See Cottman v. United States*, Pet. i, 12–14 (U.S. No. 17-7563); *Torres v. United States*, Pet. ii, 17–19 (U.S. No. 17-7514); *Vasquez v. United States*, Pet. i, 20–22 (U.S. No. 17-5734); *Lee v. United States*, Pet. i, 13–14 (U.S. No. 16-8776); *Eubanks v. United States*, Pet. i, 13–14 (U.S. No. 16-8893). And, in two of them, the petitioners did raise a due

[2] *E.g.*, *St. Hubert*, 918 F.3d at 1199 (Wilson, J., dissenting from denial of rehearing en banc) ("I will continue to express disagreement when important issues are at stake."); *id.* at 1209–10 (Martin, J., dissenting from denial of rehearing en banc) (*St. Hubert* "has great consequence. It curtails our review of claims made by prisoners like Mr. St. Hubert, even on direct appeal. . . . Congress gave us a gatekeeping function. We've used it to lock the gate and throw away the key. The full court should have taken up this matter of great consequence."); *id.* at 1210 (Jill Pryor, J., dissenting from denial of rehearing en banc) ("The institutional (and, possibly, constitutional) problems with treating published panel orders as binding on all subsequent panels are significant and, at a minimum, worthy of en banc review.").

process challenge to the Eleventh Circuit's prior panel precedent rule, but their challenge did not involve the extraordinary procedures at issue here. *See Jackson v. United States*, Pet. i, 7–16 (U.S. No. 17-6914); *Golden v. United States*, Pet. i, 19–33 (U.S. No. 17-5050). Thus, those petitions are no basis for denying review now.

II. THE ELEVENTH CIRCUIT DENIED PETITIONER DUE PROCESS

The government argues that Petitioner's due process claim fails on the merits. BIO 8, 10–13. But even if that argument were correct, it would not be a basis for denying review. Given the geographic discrepancy in judicial process created by the Eleventh Circuit's system of adjudication, and the number of defendants affected by it, this Court should be the one to sanction it. In any event, the Eleventh Circuit *is* denying countless defendants like Petitioner their right to due process. Accordingly, this Court's review is not only warranted but imperative.

1. As an initial matter, the government emphasizes that the courts of appeals may adopt their own procedures. BIO 10. But that uncontroversial observation does not advance the analysis because those "[p]rocedural rules of course must yield to constitutional . . . requirements." *Joseph v. United States*, 135 S. Ct. 705, 705 (2014) (Kagan, J., respecting the denial of certiorari). Thus, while the Eleventh Circuit may adopt internal procedures for adjudicating successive applications, its application of those procedures must comport with the Due Process Clause of the Constitution. That, of course, is the question presented here.

The government relatedly argues that, because Petitioner does not claim that those procedures are unlawful in the context of adjudicating successive applications,

there is no due process violation as to him. BIO 10–11. But, in fact, several of those procedures are unlawful, even as applied to those in the successive posture. For example, 28 U.S.C. § 2244(b)(3)(C) requires only that successive applicants make a prima facie showing at the authorization stage. Yet the Eleventh Circuit routinely went further by opining on the merits of their claims. *See St. Hubert*, 918 F.3d at 1200–10 (Martin, J., dissenting from denial of rehearing en banc). And the court misread the statute's 30-day period as inflexibly mandatory. *See* Pet. 2, 5, 12–13.

In any event, even if the procedures were lawful as applied to those who have already received multiple rounds of process, the government fails to explain why that would render them lawful as applied to Petitioner. He had a statutory right to appeal his sentence, 18 U.S.C. § 3742(a), and the court's procedures precluded any meaningful consideration of his sentencing argument on appeal. The government overlooks that procedures can be lawful as applied to some but unlawful as applied to others. In that regard, the Eleventh Circuit did not need to afford published orders on successive applications precedential effect in *all* cases. Instead, it could have afforded those orders precedential effect only in the limited context of adjudicating other successive applications. *See* Pet. C.A. Reply Br. 4 (so arguing).

2. By affording them precedential effect even in direct appeals, that court created a serious due process problem, as this case illustrates. In balancing Petitioner's significant liberty interest in avoiding additional imprisonment, the high risk of error in relying solely on *In re Burgest*, 829 F.3d 1285 (11th Cir. 2016), and the modest burden of addressing the merits of his argument, Petitioner has

established a due process violation under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See* Pet. 20–22. Notably, the government does not dispute that application of *Mathews*. Instead, it argues that this case is not governed by *Mathews* but rather by *Medina v. California*, 505 U.S. 437, 445 (1992), which would require Petitioner to identify a procedure offensive to a fundamental principle of justice. BIO 11–13. That argument improperly narrows *Mathews* and broadens *Medina*.

Mathews established the "general approach for testing challenged state procedures under a due process claim." *Parham v. J.R.*, 442 U.S. 584, 599 (1979). *Medina*, by contrast, carved out a limited exception based on "substantial deference to [state] legislative judgments" in the area of criminal procedure, where the "States have considerable expertise." *Medina*, 505 U.S. at 445. This Court has applied *Medina* only to state procedures concerning "the allocation of burdens of proof and the type of evidence qualifying as admissible." *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 & n.7 (2017) (citing cases). No such procedures are at issue here. As for other procedures affecting those in the criminal justice system, the Court has consistently applied *Mathews*.[3] And the government cites no case applying *Medina* to federal (not state) procedures, or to procedures adopted by a court rather than a legislature.

---

[3] *See, e.g.*, *Nelson*, 137 S. Ct. at 1255–58 (state law requiring defendants whose convictions are invalidated to prove innocence before recouping criminal fees, costs, and restitution); *Kaley v. United States*, 571 U.S. 320, 333–34 (2014) (assuming that *Mathews* applied to pretrial seizure of criminal defendant's assets); *id.* at 350 n.4 (Roberts, C.J., dissenting) (opining that it was "clear" *Mathews* applied); *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005) (inmates' liberty interest in avoiding placement in maximum security prisons); *Schall v. Martin*, 467 U.S. 253, 264, 274 (1984) (state law authorizing pretrial juvenile detention); *United States v. Raddatz*, 447 U.S. 667, 677 (1980) (federal law permitting district courts to adjudicate

Regardless, Petitioner would satisfy *Medina*'s test because "[a] fundamental requirement of due process is the opportunity to be heard," and that opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation omitted). Historically, "[t]he theme that 'due process of law signifies a right to be heard in one's defense,' *Hovey v. Elliott*, [167 U.S. 409, 417 (1897)], has continually recurred in the years since *Baldwin* [*v. Hale*, 1 Wall. 223 (1864)], *Windsor* [*v. McVeigh*, 93 U.S. 274 (1876)], and *Hovey*." *Boddie v. Connecticut*, 401 U.S. 371, 377 & n.3 (1971) (citing fifteen more cases from 1900 through 1970). Given those deep roots, the government does not dispute that a meaningful opportunity to be heard is a fundamental principle of justice. And, revealingly, it does not dispute that Petitioner was deprived of such an opportunity.

3. Bolstering that due process violation are this Court's issue-preclusion precedents. As summarized in the petition, and explained at length by Amy Coney Barrett in *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003), this Court has imposed strict due process limits on issue preclusion, which operates just like the prior panel precedent rule. *See* Pet. 22–24. The government responds that courts have not cited Judge Barrett's article, BIO 13 n.2, but the government does not grapple with her substantive arguments or acknowledge that she is now a highly-respected member of the Judiciary. The government's only other response is that the Court has indicated in dictum that issue preclusion and *stare decisis* might

---

suppression motions based on records developed by magistrate judges); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 528–35 (2004) (op. of O'Connor, J.) (detention of enemy combatants); *Wolff v. McDonnell*, 418 U.S. 539, 560–72 (1974) (applying *Mathews*-like balancing test to revocation of inmates' good-time credits).

be analyzed differently. BIO 11–12 (citing *Taylor v. Sturgell*, 553 U.S. 880, 903 (2008) and *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167–68 (1999)). But the Court has never elaborated on that potential distinction, much less explained what due process principle might support it. And the government makes no attempt to do so here. At very least then, this case would afford the Court an ideal opportunity to resolve that tension in the law—an added bonus to review.

That opportunity is particularly attractive because the government appears to argue that there is no due process limit *at all* on the prior panel precedent rule. On its view, a panel could decide a case by flipping a coin, and that decision would bind all future panels so long as en banc and Supreme Court review remained available. *See* BIO 12. But, in the context of successive applications, such review is not available. 28 U.S.C. § 2244(b)(3)(E). And rarely can other litigants satisfy the stringent criteria for such review. *See* Fed. R. App. P. 35(a); Sup. Ct. R. 10.

This case illustrates that point. Whether Florida kidnapping is a "crime of violence" was not a "question of exceptional importance" warranting en banc review. Fed. R. App. P. 35(a)(2). And it was not a viable candidate for this Court's review under *Braxton v. United States*, 500 U.S. 344, 347–49 (1991). So that "purported backstop [wa]s illusory." *St. Hubert*, 918 F.3d at 1198 n.4 (Wilson, J., dissenting from denial of rehearing en banc). Given the extreme procedures generating *In re Burgest*, the panel's exclusive reliance on it, and the practical unavailability of further review, this case is an ideal one to test whether due process imposes any limits on the prior panel rule—a rule that the courts of appeals apply every day.

III. THE GOVERNMENT'S VEHICLE ARGUMENTS BACKFIRE

Other than superficially contesting the due process violation on the merits, the government offers two procedural arguments against review. Both backfire.

1. The government first argues that the Eleventh Circuit has not passed on the due process question. BIO 7–10. But we now know it never will.

a. Three-judge panels in the Eleventh Circuit now lack authority to address that question after *St. Hubert*'s holding that published orders denying successive applications are "binding precedent on *all* subsequent panels." 909 F.3d at 346 (emphasis in original). Not only is that holding categorical, but the Eleventh Circuit "categorically reject[s] any exception to [its] prior panel precedent rule based on a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time." *Smith v. GTE Corp.*, 236 F.3d 1292, 1301–03 (11th Cir. 2001) (rejecting any "overlooked reason" exception).[4] Thus, even if a future panel believed that applying *St. Hubert* would violate due process under this Court's precedents, the panel would still be bound by *St. Hubert*, and, in turn, the prior panel's published order denying the successive application. No exceptions.

---

[4] *See, e.g.*, *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) ("But even if [a prior panel decision] is flawed, that does not give us, as a later panel, the authority to disregard it."); *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."); *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) ("We have held that a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel. In short, we have categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule.") (internal citations omitted); *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc) ("Under our prior panel precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong.").

The only way for the Eleventh Circuit to consider the due process question is to convene en banc. That is why Petitioner sought rehearing en banc on that very question. Yet the court denied his petition. Then, after six separate opinions totaling 90 pages, the court *sua sponte* denied rehearing en banc in *St. Hubert*. Given those definitive rehearing denials, the Eleventh Circuit has now said all it is going to say about *St. Hubert*. That debate is not "active," BIO 9; it is over. The government offers no reason to believe that the court will ever address the question.

Given the Eleventh Circuit's unyielding prior panel rule, and its recent denials of rehearing en banc, the only place for criminal defendants to vindicate their rights is in this Court. Yet the government asks this Court to remain idle and wait for an en banc Eleventh Circuit decision that will never come. Denying review on that illusory basis would insulate that court's troubling method of adjudication from any oversight and deny countless criminal defendants any avenue of judicial review. They are already claiming a systematic judicial deprivation of due process; precluding any review of that claim in this Court would exacerbate that injustice.

b. In addition to disregarding the nature (and gravity) of the due process claim, the government's opposition to review also neglects this Court's "traditional rule" that "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (quotation omitted). That "rule operates (as it is phrased) in the disjunctive." *Id.* And, here, the government does not dispute that Petitioner pressed his due process

argument below. Indeed, he strenuously urged the Eleventh Circuit to take up that issue. Pet. App. 8a–38a. Again, the court unambiguously refused. Pet. App. 39a.

Nor does the government argue that Petitioner pressed that claim too late on rehearing. After all, the due process violation did not occur until *after* the panel affirmed based solely on *In re Burgest*. And Petitioner had expressly urged the panel not to treat *In re Burgest* as precedential. *See* Pet. C.A. Reply Br. 2–4. Had the panel obliged and analyzed his argument independently on *In re Burgest*, there would have been no due process violation at all. By pressing that claim as soon as it arose, Petitioner preserved it for review here. *See Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 799 n.3 (1996) ("Because petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review.").[5]

2. In a last-ditch effort to evade review, the government argues that the panel correctly concluded that Florida kidnapping was "crime of violence." BIO 8, 13. But, again, Petitioner does not seek review of that issue here in light of *Braxton*. And that issue is irrelevant to the due process question he does present.

---

[5] *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env. Protection*, 560 U.S. 702, 712 n.4 (2010) ("[W]here the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review."); *United States v. Jimenez Recio*, 537 U.S. 270, 278 (2003) (Stevens, J., concurring in part and dissenting in part) (objecting—unsuccessfully—to this Court's review of a federal jury instruction dictated by circuit precedent on the ground that the government challenged that precedent for the first time on rehearing); *Hathorn v. Lovorn*, 457 U.S. 255, 262–65 & n.15 (1982) (reviewing state-court judgment where federal claims were raised for the first time on rehearing but not passed on by state court).

Whether the court of appeals correctly concluded that Florida kidnapping is a "crime of violence" has no bearing on whether the court deprived him of due process.

In any event, the government is flat wrong that Petitioner offers "no basis for concluding that the Eleventh Circuit would grant him relief from his career-offender enhancement even if *Burgest* were not binding precedent." BIO 15. As the government acknowledges, a unanimous Fifth Circuit panel has held in a thorough, published opinion that Florida kidnapping is not a "crime of violence." *United States v. Martinez-Romero*, 817 F.3d 917, 920–24 (5th Cir. 2016). The government cites decisions from other circuits, but they all address different state kidnapping offenses. BIO 14–15. Because the only decision directly on point embraced Petitioner's argument, there is a compelling reason to believe that the Eleventh Circuit would have accepted his argument were it not constrained by *In re Burgest*.

Although the government makes no attempt to defend *In re Burgest*, which did not even conduct the proper legal analysis, it asserts that other circuits have indicated that Florida kidnapping is a "crime of violence." BIO 15. That is just not true. The cases cited did no more than include Florida in a list of states requiring a "nefarious purpose," an element of the generic offense. *See United States v. Flores-Granados*, 783 F.3d 487, 494 & n.2, 497 & n.9 (4th Cir. 2015); *United States v. Soto-Sanchez*, 623 F.3d 317, 322 (6th Cir. 2010); *United States v. De Jesus Ventura*, 565 F.3d 870, 876 n.5 (D.C. Cir. 2009). But that was not one of the generic elements that the Fifth Circuit found lacking. *Martinez-Romero*, 817 F.3d at 923–24. Rather, the Fifth Circuit found that Florida kidnapping was not generic both because it did

not require substantial interference with the victim's liberty, and because it could be accomplished secretly rather than through force, threat, or fraud. *Id.* The decisions cited by the government agree that those two elements form part of the generic offense, *e.g.*, *Flores-Granados*, 783 F.3d at 493–94, and none of those decisions address whether Florida requires those elements, much less hold it does.

Thus, the legal landscape only bolsters the arguments for review here. This is not a case where the underlying sentencing argument has been uniformly rejected. Indeed, there is no contrary authority at all. And because the only circuit to address Petitioner's argument has squarely embraced it, there would be a strong likelihood of relief on remand if the court of appeals meaningfully considered his argument. That makes this case a perfect one to consider the due process question. No better vehicle will come to this Court. And there is no valid reason for delay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
Counsel of Record
ANDREW L. ADLER
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

Counsel for Petitioner