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

SUPPLEMENTAL 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

December 18th, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

OTHER AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner files this supplemental brief to advise the Court of material developments following Petitioner's Reply Brief of May 16, 2019. These developments confirm and bolster the need for the Court's review.

1. In *United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018), *reh'g denied*, 918 F.3d 1174 (11th Cir. 2019), the Eleventh Circuit held that, although they are the byproduct of an anomalous set of procedures, published orders adjudicating successive applications constitute "binding precedent on *all* subsequent panels of th[at] Court, including those reviewing direct appeals and collateral attacks." The practical impact of that holding continues to grow.

When this Petition was filed in January 2019, the Eleventh Circuit had rejected at least 60 appeals challenging a federal conviction or sentence due to the preclusive effect of a published order adjudicating a successive application. *See* Pet. 16–17; Pet. App. 47a–50a (citing cases). By May 2019, Petitioner had identified several more appeals. *See* Pet. Reply Br. 3 n.1 (citing cases). Between then and now, even more cases have emerged.[1] Thus, the last few months confirm Petitioner's prediction that the due process "issue is not going away." Pet. Reply Br. 3. The Eleventh Circuit will be relying on these published orders for years to come.

[1] *See, e.g.*, *United States v. Alston*, __ F. App'x __, 2019 WL 5957206, at *1–2 (11th Cir. Nov. 13, 2019); *United States v. Rogers*, __ F. App'x __, 2019 WL 5814566, at *1–2 (11th Cir. Nov. 7, 2019); *Smith v. United States*, __ F. App'x __, 2019 WL 5681213, at *2 (11th Cir. Nov. 1, 2019); *United States v. Hunt*, 941 F.3d 1259, 1262 (11th Cir. Oct. 30, 2019); *Steiner v. United States*, 940 F.3d 1282, 1293 & n.4 (11th Cir. Oct. 16, 2019); *United States v. Washington*, 777 F. App'x 465, 466 (11th Cir. Sept. 12, 2019); *Childs v. United States*, 783 F. App'x 893, 894–95 (11th Cir. Aug. 8, 2019); *Mack v. United States*, 2019 WL 2725846, at *1 (11th Cir. May 22, 2019).

And Petitioner's citations are conservative. They exclude numerous unreported decisions by the Eleventh Circuit summarily affirming appeals or denying certificates of appealability ("COA"). *See, e.g.*, *Marquez v. United States*, No. 18-14946 (11th Cir. May 17, 2019) (summary affirmance); *Robinson v. United States*, No. 19-10841 (11th Cir. June 19, 2019) (COA denial). Yet those examples follow the same pattern: the Eleventh Circuit refuses to consider a defendant's argument because it is precluded by a published order adjudicating a successive application. Indeed, in those contexts, there is no merits briefing at all. Petitioner's citations also exclude pre-*St. Hubert* decisions treating such published orders as precedential. *See, e.g.*, *King v. United States*, 723 F. App'x 842, 844 (11th Cir. 2018). And they exclude countless unreported district court rulings overruling sentencing objections and denying § 2255 motions based on such published orders. *See, e.g.*, *Bell v. United States*, 2019 WL 1919171, at *1 & n.2 (M.D. Ala. Apr. 30, 2019).

2. Exacerbating the problem, the Eleventh Circuit has added even more published orders to its body of precedent in just the law few months. *See In re Wright*, 942 F.3d 1063 (11th Cir. Nov. 7, 2019); *In re Bowles*, 935 F.3d 1210 (11th Cir. Aug, 22, 2019); *In re Pollard*, 931 F.3d 1318 (11th Cir. July 31, 2019); *In re Palacios*, 931 F.3d 1314 (11th Cir. July 30, 2019); *In re Navarro*, 931 F.3d 1298 (11th Cir. July 30, 2019); *In re Cannon*, 931 F.3d 1236 (11th Cir. July 25, 2019); *In re Hammoud*, 931 F.3d 1032 (11th Cir. July 23, 2019). They will all be afforded preclusive effect moving forward. And two of those precedents in particular will likely preclude relief for numerous prisoners seeking to benefit from this Court's

recent decision in *Davis v. United States*, 139 S. Ct. 2319 (June 24, 2019), which declared the residual clause in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague.

a. In *In re Cannon*, a *pro se* case, the Eleventh Circuit *sua sponte* held that, where a § 924(c) offense is predicated on multiple offenses—some of which no longer qualify as valid predicates post-*Davis* and some of which do—the defendant bears the burden to prove that the jury based its verdict only on the former. 931 F.3d at 1243–44. The court relied on *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), which had imposed a similar burden in the context of the Armed Career Criminal Act and *Johnson v. United States*, 135 S. Ct. 2551 (2015). Notably, other circuits had rejected that requirement, which foreclosed relief in numerous cases. *See, e.g.*, *Levert v. United States* (U.S. No. 18-1276) (cert. denied Oct. 15, 2019).

b. In *In re Navarro*, another *pro se* case, the Eleventh Circuit *sua sponte* erected a similar obstacle to *Davis* claims in plea cases. It held that, where a factual proffer and/or plea agreement indicates that the § 924(c) offense was based on a dismissed count that remains a valid predicate post-*Davis*, the defendant is not entitled to relief. And that is true even if the only § 924(c) predicate to which he actually pled guilty is no longer a valid predicate post-*Davis*. *In re Navarro*, 931 F.3d at 1302 & nn.2–3. Just as *In re Cannon* will preclude *Davis* relief in numerous trial cases, *In re Navarro* will preclude *Davis* relief in numerous plea cases.

In short, the Eleventh Circuit continues to add more published orders to its arsenal. And affording them precedential effect will continue to foreclose relief for numerous prisoners. Thus, reliance on those orders will only expand, not contract.

3. That continued reliance will leave federal prisoners in the Eleventh Circuit with little choice but to seek relief in this Court. Reflecting that dynamic, there are at least four more pending petitions presenting the due process question. *See Williams v. United States*, No. 18-6172 (to be distributed for conference of Jan. 10, 2020); *St. Hubert v. United States*, No. 19-5267 (same); *Robinson v. United States*, No. 19-5451 (same); *Mack v. United States*, No. 19-6355 (pet. filed Oct. 21, 2019). More petitions will be filed as time passes. The Court should resolve the due process question now rather than allow even more prisoners to become aggrieved.

4. Although Petitioner supports this Court's review in any of the pending petitions, his case is an optimal vehicle for resolving the due process question.

a. First, Petitioner is not pressing his due process claim for the first time here. As soon as the Eleventh Circuit rejected his argument that *In re Burgest*, 829 F.3d 1285 (11th Cir. 2016) was not precedential and affirmed based solely on that decision, Petitioner raised a due process claim on rehearing, preserving his claim for review here. *See* Pet. Reply Br. 11–12 & n.5. Indeed, his rehearing petition laid out the due process argument in great detail, alerting the full Eleventh Circuit to the constitutional violation. Yet the court declined to rectify it. Pet. App. 8a–39a. The court has shown no sign of doing so since. *See, e.g.*, *Steiner*, 940 F.3d at 1293 n.4 (noting that *St. Hubert* remains binding even though "[s]ome have challenged" it).

b. Second, Petitioner's case is on direct appeal. Because that appeal is guaranteed by statute, 18 U.S.C. § 3742(a), denying him a meaningful opportunity to be heard there squarely implicates due process. *See Wolff v. McDonnell*, 418 U.S.

539, 556–58 (1974). By contrast, federal prisoners on collateral review have already received one full round of judicial process, and appeals are therefore not statutorily guaranteed. *See* 28 U.S.C. § 2253(c) (requiring a COA). Thus, the due process question is most cleanly presented in the context of a direct appeal like this one.

c. Third, Petitioner's underlying sentencing argument has been unanimously accepted by the only other circuit to consider it. *See* Pet. Reply Br. 12–14. Thus, if the Eleventh Circuit considered Petitioner's argument afresh with the benefit of briefing, adversarial testing, and time for deliberation, there is every reason to believe that the court would embrace it. And that would substantially reduce Petitioner's guideline range. *See* Pet. 8. Therefore, a favorable resolution of the due process question would likely make a real practical difference to Petitioner.

d. Finally, Petitioner has not raised other issues that might complicate review of the due process question. That is the only question he presents. And it narrowly focuses on the preclusive effect afforded to published orders in light of the irregular procedures under which they are forged. Petitioner has not independently challenged those underlying procedures. After all, they did not apply in his case; they apply only to successive applicants, who are in a very different posture. Those procedures come into play here only because they produced *In re Burgest*, which the court then used to dispose of Petitioner's direct appeal. Thus, those procedures should be analyzed as part of his due process claim. In sum, this is an ideal vehicle to address the due process problem at the core of the Eleventh Circuit's troubling system of adjudication in which many criminal appeals are being rubber stamped.

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