No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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JANUARY 18TH, 2019

QUESTION PRESENTED

Whether the Due Process Clause permits the Eleventh Circuit to afford preclusive effect in a criminal case to a prior panel decision that was: based on a mandatory form allowing only bare legal argument; issued under a strict 30-day deadline; and immune from any petition for rehearing or a writ of certiorari.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at __ F. App'x __, 2018 WL 5919904 and reproduced as Appendix ("App.") A. App. 1a–7a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on November 13, 2018. Petitioner timely filed a petition for rehearing en banc on November 27, 2018. App. B, 8a–38a. The Eleventh Circuit denied the petition on January 2, 2009. App. C, 39a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The relevant provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, are set out in Appendix F. App. 51a.

INTRODUCTION

The Eleventh Circuit is systematically depriving federal criminal defendants of due process. It has recently instituted a method of adjudication that, in a large number of cases, allows it to affirm convictions and sentences without meaningful consideration of the defendant's arguments. Here's how this came to pass.

Following this Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016), numerous federal prisoners sought authorization from the courts of appeals to file successive 28 U.S.C. § 2255 motions to correct their sentences. The Eleventh Circuit employed a disturbing procedure to adjudicate those successive applications. It required all applicants to use a mandatory form that afforded only limited space to describe their claim and prohibited separate briefing; it feverishly rushed to decide every application within 30 days; it did not hear from the government or hold oral argument; it improperly opined on the merits of the applicant's claim; and, while applicants were statutorily barred from seeking rehearing or certiorari review, the court also prohibited them from filing new applications to correct mistaken rulings.

No other circuit employed *any* of those stifling procedures. The Eleventh Circuit's anomalous method for adjudicating successive applications engendered sharp criticism by several members of that court. *See, e.g.*, *In re Williams*, 898 F.3d 1098, 1099–1105 (11th Cir. 2018) (Wilson, J., specially concurring, joined by Martin and Jill Pryor, JJ.); *id.* at 1105–10 (Martin, J., specially concurring, joined by Wilson and Jill Pryor, JJ.). And it led commentators to observe that "something very like a travesty of justice is happening in the Eleventh Circuit." Noah Feldman, *This Is What 'Travesty of Justice' Looks Like*, Bloomberg Opinion (July 22, 2016).[1]

But the Eleventh Circuit did more than close the courthouse doors to federal prisoners already in the successive posture. The court also used its truncated and

[1] https://www.bloomberg.com/opinion/articles/2016-07-22/appeals-court-fumbles-supreme-court-ruling.

frenzied decision-making process to decide the fate of other prisoners by *publishing* dozens of orders adjudicating *Johnson*-based successive applications. In those published orders, the Eleventh Circuit made numerous merits pronouncements about whether certain offenses were "violent felonies" or "crimes of violence," issues that frequently recur in federal criminal litigation. The Eleventh Circuit then held that those holdings were entitled to full precedential effect. *United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018). As a result, under its "prior panel precedent rule," all panels in the Eleventh Circuit are now bound by earlier published orders adjudicating *Johnson*-based successive applications. So even though those published orders were based on a standardized form precluding meaningful legal argument, frenetically decided in less than 30 days, and not subject to any requests for further review, their merits holdings now bind all panels, including those adjudicating direct criminal appeals.

This new method of adjudication ensnared Petitioner. At sentencing and on direct appeal, he sought to challenge his career-offender sentencing enhancement, advancing an argument that another circuit had embraced. But neither the district court nor the Eleventh Circuit would even consider that argument, deeming it foreclosed by an earlier published order adjudicating a *Johnson*-based successive application. That was so even though that earlier ruling was decided without any briefing or adversarial testing; it was issued only 23 days after filing; and it was not subject to any requests for further review by the panel, en banc court, or this Court. Petitioner is hardly alone: there are numerous defendants in the Eleventh Circuit

whose appeals have been similarly precluded. Indeed, since 2016, the Eleventh Circuit has already cited over a dozen published orders adjudicating *Johnson*-based successive applications to resolve over 60 appeals.

Although this Court has never before addressed whether such an application of the prior panel precedent rule violates due process, the analytical framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as well as this Court's issue-preclusion precedents, leads to only one conclusion. Affording preclusive effect to prior panel decisions forged under the Eleventh Circuit's anomalous procedure denies criminal defendants any meaningful judicial consideration of their arguments. This Court should grant certiorari and confirm that this perfunctory method of adjudication is repugnant to the Due Process Clause of the Constitution.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court declared the residual clause of the Armed Career Criminal Act unconstitutionally vague. And, in *Welch v. United States*, 136 S. Ct. 1257 (2016), this Court held that *Johnson* announced a new rule of constitutional law with retroactive effect in cases on collateral review. Following *Johnson* and *Welch*, numerous federal prisoners sought to correct their sentences, pursuant to 28 U.S.C. § 2255. However, because many of them had filed a § 2255 motion in the past, they were statutorily required to obtain authorization from the court of appeals before filing a second or successive § 2255 motion based on *Johnson*. 28 U.S.C. §§ 2255(h), 2244(b)(3)(A).

Those successive applications, like all others, were governed by an unusual statutory procedure. The statute exhorts the court of appeals to adjudicate a successive application within 30 days. 28 U.S.C. § 2244(b)(3)(D). And the grant or denial of an application is not subject to a petition for rehearing or a writ of certiorari. 28 U.S.C. § 2244(b)(3)(E). Given those abnormal constraints on the decision-making process, the statute does not charge the court of appeals with adjudicating the merits of the applicant's claim. Rather, it instructs the court of appeals to determine only whether the application makes a "prima facie showing" satisfying one of two gatekeeping criteria. 28 U.S.C. § 2244(b)(3)(C). The relevant gatekeeping criterion here is that the application must contain "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)(2). If the application makes a prima facie showing in that regard, then the court of appeals must authorize the second or successive § 2255 motion. It then falls to the district court to ensure that the § 2255 motion truly does satisfy the gatekeeping criterion, and, if so, to adjudicate the merits of the applicant's claim. 28 U.S.C. § 2244(b)(4).

2. Because *Welch* made *Johnson*'s new rule of constitutional law retroactive, the courts of appeals began uncontroversially authorizing *Johnson*-based successive applications, leaving it to district courts to sort out the details in the first instance. The Eleventh Circuit refused to play ball. Unlike the other circuits, it used its screening function to conduct full-blown merits analyses of the applicant's claim at the authorization stage. And, in doing so, it routinely

opined on whether certain criminal offenses were "violent felonies" or "crimes of violence" after *Johnson*. Those merits rulings were invariably issued within 30 days of filing and were never based on adversarial testing or oral argument. Rather, and as explained below, those decisions were based on a mandatory Eleventh Circuit-only form that afforded the applicant limited space to describe his claim and that prohibited the submission of briefing in non-capital cases.

Despite that decision-making process, the Eleventh Circuit nonetheless designated for publication dozens of orders denying successive *Johnson*-based applications—far more than any other circuit. One example was *In re Burgest*, 829 F.3d 1285 (11th Cir. 2016). Using the mandatory form, Mr. Burgest sought authorization to file a successive § 2255 motion based on *Johnson*, arguing that he was no longer a career offender absent the residual clause in U.S.S.G. § 4B1.2(a). App. 40a–47a. He fit only 47 words of argument on the form: he restated *Johnson*'s holding; and he explained that the district court had relied on § 4B1.2(a)'s identical residual clause to treat his prior Florida kidnapping (and manslaughter) offenses as "crimes of violence." App. 44a. Abiding by the form's instructions, App. 40a, he did not submit any briefing. And, as was customary, the government did not respond, and the court of appeals did not request such a response or hold oral argument.

A mere 23 days later, the court of appeals denied the application and designated its order for publication. Opining on the merits, the court ruled that the claim failed because the Eleventh Circuit had previously held that *Johnson* did not invalidate § 4B1.2(a)'s residual clause. *In re Burgest*, 829 F.3d at 1287. But the

court then went further, holding that the claim failed on the merits for yet another reason: regardless of § 4B1.2(a)'s residual clause, Florida kidnapping remained a "crime of violence" because § 4B1.2's commentary enumerated "kidnapping." *Id.* The court's analysis, however, was wholly conclusory. It did not identify the elements of Florida kidnapping or the "generic" offense to which it should have been compared. *See, e.g.*, *United States v. Lockley*, 632 F.3d 1238, 1242–45 (11th Cir. 2011). And the court did not acknowledge that, in *United States v. Martinez-Romero*, 817 F.3d 917, 920–24 (5th Cir. 2016), the Fifth Circuit had recently and unanimously held that Florida kidnapping was not generic and thus not a "crime of violence" under the Sentencing Guidelines.

3. Given the number of similar published merits rulings on issues of broad application, an important question soon arose in the Eleventh Circuit: would that court's published orders adjudicating successive applications have precedential effect in direct criminal and § 2255 appeals? Federal prisoners argued that they should not because those orders were a product of the abnormal decision-making process described above. The Eleventh Circuit ultimately disagreed, squarely holding "that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks," unless their rulings are overruled by the en banc Eleventh Circuit or this Court. *United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018) (emphasis in original).

B. PROCEEDINGS BELOW

1. Petitioner pled guilty in the Southern District of Florida to conspiracy to possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(b)(1)(A)(viii) and 846, and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The probation officer determined that he was subject to the career-offender enhancement in U.S.S.G. § 4B1.1 in part because his prior Florida conviction for kidnapping was a "crime of violence." That enhancement increased his guideline range from 121–151 to 262–327 months.

Before sentencing, Petitioner objected to the career-offender enhancement on the ground that Florida kidnapping was not a "crime of violence" under U.S.S.G. § 4B1.2. Dist. Ct. Dkt. No. 214 at 3. He relied in part on the Fifth Circuit's decision in *Martinez-Romero*. In response, the government acknowledged that *Martinez-Romero* was "directly on point" and "thorough in its reasoning." But it argued that the Eleventh Circuit's contrary holding in *In re Burgest* was binding circuit precedent and foreclosed Petitioner's argument. Dist. Ct. Dkt. No. 233 at 2–3.

At sentencing, the district court agreed that the "Eleventh Circuit ha[d] pretty much ruled" on the issue in *In re Burgest*. Dist. Ct. Dkt. No. 304 at 22–23. Petitioner nonetheless observed that there was a "circuit split as to the kidnapping" issue, and he was "preserving [his] arguments for further review." *Id*. at 23. The court ultimately sentenced him to 160 months, and Petitioner "renew[ed] [his] objections to the career offender enhancement." *Id*. at 97–98, 100.

2. On appeal, Petitioner reiterated his argument that Florida kidnapping was not a "crime of violence" under § 4B1.2(a). In response, the government acknowledged that the legality of the career-offender enhancement turned on that issue, since Florida kidnapping did not satisfy the elements clause in § 4B1.2(a)(1). Thus, the only question was whether it satisfied the definition in § 4B1.2(a)(2), which enumerated "kidnapping" as a "crime of violence." In that regard, the government again argued that *In re Burgest* constituted binding precedent and foreclosed Petitioner's argument. Citing *St. Hubert*, the government explained that this was so even though *In re Burgest*'s kidnapping holding came in the process of adjudicating a successive application. Alternatively, the government addressed the merits and argued that *In re Burgest* had reached the correct conclusion and that the Fifth Circuit's contrary decision in *Martinez-Romero* was unpersuasive.

Petitioner replied by acknowledging that, in *St. Hubert*, the Eleventh Circuit had held that published orders adjudicating successive applications were entitled to full precedential effect, including when resolving direct criminal appeals. Petitioner nonetheless argued that *St. Hubert* was "wrongly decided" and that *In re Burgest* "should not constitute binding precedent here" because the "truncated decision-making process in [the second or successive] context is not amenable to precedential decisions" outside of that distinct context. Pet. C.A. Reply Br. 2–5.

3. The court of appeals affirmed. It recognized that "the only issue" on appeal was whether Florida kidnapping was a "crime of violence." App. 5a. The panel concluded that it was because *In re Burgest* had already so held. It explained

that, under its prior panel precedent rule, that holding "foreclosed" Petitioner's argument on appeal. App. 5a–6a. And, relying on *St. Hubert*, the panel rejected Petitioner's argument that *In re Burgest* was not binding precedent because it was decided in the context of a successive application. App. 6a–7a. The panel made no mention of the Fifth Circuit's decision in *Martinez-Romero*, and it did not otherwise address the merits of Petitioner's argument. *See* App. 4a–7a.

Petitioner sought rehearing en banc, urging the full court to address whether the panel's application of the prior panel precedent rule violated his right to procedural due process. App. 12a, 17a, 21a, 35a–36a. He explained that *In re Burgest* was the byproduct of the Eleventh Circuit's unique procedure for adjudicating successive applications based on *Johnson*. In that regard, he emphasized that *In re Burgest* was: based on nothing more than a mandatory form permitting only the most bare legal argument, none of which addressed the kidnapping issue; hurriedly decided in less than 30 days; and insulated from further review. *See* App. 21a–27a. Because that procedure lacked all of the standard features of the normal decision-making process, Petitioner argued that it violated his procedural due process rights to afford *In re Burgest*'s kidnapping holding preclusive effect in his direct criminal appeal. *See* App. 28a–35a. The court of appeals denied the rehearing petition. App. 39a.

REASONS FOR GRANTING THE PETITION

I. CRIMINAL DEFENDANTS IN THE ELEVENTH CIRCUIT ALONE ARE NOW SUBJECT TO SUPERFICIAL JUDICIAL PROCESS

The due process question presented here derives from the combination of the Eleventh Circuit's decision-making process for adjudicating successive applications based on *Johnson*, and its decision to afford the published byproduct of that process precedential effect in all subsequent cases. As members of the Eleventh Circuit have explained at length, and as summarized below, no other circuit employed those procedures. As a result, criminal defendants convicted and sentenced in the Eleventh Circuit alone may now be subject to only superficial judicial process.

1. Unlike other circuits, the Eleventh Circuit required all federal prisoners seeking successive authorization to use a form that, in all capital letters, "prohibit[ed] . . . additional briefing or attachments," and that "require[d] all argument to take place 'concisely in the proper space on the form.'" *In re Williams*, 898 F.3d at 1101 (Wilson, J., specially concurring) (quoting form); *see* 11th Cir. R. 22-3(a); App. 40a. Yet that form only "provide[d] a 1# x 5.25# space in which to state a 'ground on which you now claim that you are being held unlawfully," and then a "2.5# x 5.25# space in which to assert that a claim relies on a new rule of constitutional law." *In re Williams*, 898 F.3d at 1101 (Wilson, J., specially concurring) (quotation marks and brackets omitted); *see* App. 44a. That limited space allowed applicants to do little more than include a few sentences about their claim. *See In re Williams*, 898 F.3d at 1102 & n.4 (Wilson, J., specially concurring) (noting that applicant "wrote thirteen words of argument" on the form).

2. Unlike other circuits, the Eleventh Circuit resolved those applications at a breakneck pace. The eight circuits to address the statute's 30-day deadline have all considered it hortatory. *See id.* at 1102–03 & n.5 (citing cases from the First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits). Yet the Eleventh Circuit considered it mandatory in every case, notwithstanding the volume of *Johnson*-based applications and the difficult legal issues those applications often presented. Indeed, on the one occasion where an Eleventh Circuit panel declared that deadline hortatory, the en banc court *sua sponte* vacated the panel opinion. *Id.* at 1102–03 (citing *In re Johnson*, 814 F.3d 1259, 1262 (11th Cir. 2016), *vacated on rehearing by* 815 F.3d 733 (11th Cir. 2016) (en banc)).

3. Due to that severe time pressure, those successive applications were not subject to adversarial testing. The Eleventh Circuit "never grant[ed] oral argument," and the government did not "file[ ] an individualized brief" in response to any application that resulted in a published order. *Id.* at 1103 & n.9. By contrast, "other circuits often consider briefing from the government," appoint counsel, and "entertain oral argument from both parties." *Id.* at 1103 & n.8 (citing examples from the First, Third, Fifth, Seventh, Eighth, and Ninth Circuits). "[T]he fact that [the Eleventh Circuit's] non-death published second or successive orders *always* issue without hearing from the government—combined with [its] adherence to the thirty-day limit . . . —stands far outside the norm." *Id.* at 1103 n.8.

4. Despite the above constraints, the Eleventh Circuit nonetheless opined on the merits of applicants' claims. *See id.* at 1106–10 (Martin, J., specially

concurring). In doing so, it routinely decided whether an applicant's convictions were "violent felonies" or "crimes of violence" post-*Johnson*, even where that legal issue was one of first impression or elicited a dissent. *Id.* at 1108–09 & n.4 (citing examples). And, as explained above, evaluating those legal issues went far beyond "the prima facie showing called for under the statute." *Id.* at 1108. By contrast, and "[c]onsistent with the statute's command, [other] circuits . . . largely refrained from deciding the merits of a particular applicant's claim at the [authorization] stage." *Id.* at 1107; *see id.* at 1109 (describing Eleventh Circuit's practice as "an outlier from the practice of other circuits"); Feldman, *supra* (same). And "given the rushed, information-devoid, nonadversarial nature of the proceeding," *In re Williams*, 898 F.3d at 1104 (Wilson, J., specially concurring), the Eleventh Circuit often made mistakes, *see Ovalles v. United States*, 905 F.3d 1231, 1268–73 (11th Cir. 2018) (en banc) (Martin, J., dissenting) (discussing several examples).

5. Yet those mistaken rulings—and the underlying procedures that produced them—were not subject to any requests for further review. The statute itself provides that the "denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). Unlike other circuits, however, the Eleventh Circuit added to that procedural bar by prohibiting applicants from re-filing new applications, even if their original application was mistakenly denied. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016); *see also* 11th Cir. R. 22-3(b) (prohibiting "motion[s] for reconsideration" as well).

That ruling too elicited sharp criticism from several members of the court. *See Ovalles*, 905 F.3d at 1273–75 (Martin, J., dissenting); *In re Jones*, 830 F.3d 1295, 1297–1305 (11th Cir. 2016) (Rosenbaum and Jill Pryor, JJ., concurring in result).

6. Although the ability to seek further review of a panel decision undergirds the prior panel precedent rule, the Eleventh Circuit nonetheless designated for publication a staggering number of orders adjudicating successive applications. From May 25 through August 10, 2016—when *Johnson*-based successive applications were at their peak—the Eleventh Circuit published 30 such orders.[2] That averaged to 2 published orders per week for 2.5 months straight. Yet for the entire year of 2016, no other circuit even hit double digits. That disparity reflects a broader trend over the last five years, where the Eleventh Circuit has published far more orders on successive applications than other circuits. *See In re Williams*, 898 F.3d at 1102 (Wilson, J., specially concurring) (providing figures).

Still, the Eleventh Circuit could have limited the precedential effect of those published orders to other successive applications. But instead, it held that they "are binding precedent on *all* subsequent panels of this Court, including those

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[2] *In re Parker*, 832 F.3d 1250; *In re Chance*, 831 F.3d 1335; *In re Bradford*, 830 F.3d 1273; *In re Moore*, 830 F.3d 1268; *In re Jones*, 830 F.3d 1295; *In re Sams*, 830 F.3d 1234; *In re Gomez*, 830 F.3d 1225; *In re Davis*, 829 F.3d 1297; *In re Anderson*, 829 F.3d 1290; *In re Watt*, 829 F.3d 1287; *In re Burgest*, 829 F.3d 1285; *In re Smith*, 829 F.3d 1276; *In re Clayton*, 829 F.3d 1254; *In re Hunt*, 835 F.3d 1277; *In re Baptiste*, 828 F.3d 1337; *In re Sapp*, 827 F.3d 1334; *In re Gordon*, 827 F.3d 1289; *In re Parker*, 827 F.3d 1286; *In re Williams*, 826 F.3d 1351; *In re Jackson*, 826 F.3d 1343; *In re McCall*, 826 F.3d 1308; *In re Colon*, 826 F.3d 1301; *In re Rogers*, 825 F.3d 1335; *In re Hires*, 825 F.3d 1297; *In re Adams*, 825 F.3d 1283; *In re Fleur*, 824 F.3d 1337; *In re Hines*, 824 F.3d 1334; *In re Pinder*, 824 F.3d 977; *In re Griffin*, 823 F.3d 1350; *In re Thomas*, 823 F.3d 1345.

reviewing direct appeals and collateral attacks." *St. Hubert*, 909 F.3d at 346. Again, that holding was controversial within the Eleventh Circuit, and for good reason. Like every other appellate court in this country, the Eleventh Circuit typically has "essentially unlimited time to decide the case, there are usually attorneys on both sides, [it] ha[s] extensive briefing, and [it] ha[s] the entire record in front of [it] (including an order from the court below)." *In re Williams*, 898 F.3d at 1102 (Wilson, J., specially concurring). "And the large majority of [its] published merits opinions come from [its] oral argument calendar, where the attorneys for each party argue for at least fifteen minutes." *Id.* Yet, "after *St. Hubert*, published panel orders—typically decided on an emergency thirty-day basis, with under 100 words of argument . . . , without any adversarial testing whatsoever, and without any available avenue of review—bind all future panels." *Id.* at 1101. Although "[i]t defies belief," those published orders "now enjoy the same precedential heft" as any other published opinion in the Eleventh Circuit, "equally binding on future panels" of that court under its prior panel precedent rule. *Id.* at 1102 & n.4.

* * *

The result is that the Eleventh Circuit alone may now affirm convictions and sentences without any panel ever meaningfully considering the merits of the defendant's argument. Only in that Circuit may criminal appeals now be procedurally foreclosed by a prior panel opinion that: was not based on any legal argument or adversarial testing; was hurriedly issued in less than 30 days; exceeded the proper scope of the inquiry; and was immune from any requests for

further review. Because no other circuit has deigned to create such a disturbing system of adjudication, there is now a glaring lack of national uniformity on the amount of judicial process criminal defendants may receive. Those in the Eleventh Circuit alone are now subject to what may only be described as token process. This Court's intervention is necessary to eliminate this geographic disparity that the Eleventh Circuit has so unfortunately created.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

1. That untenable disparity, moreover, will persist absent this Court's intervention. Indeed, the anomalous procedures employed by the Eleventh Circuit will affect the administrative of criminal justice for years, if not decades, to come in that Circuit. Again, the Eleventh Circuit published dozens of holdings forged under its procedure for adjudicating successive applications based on *Johnson*. And many of those holdings address whether a particular criminal offense is a "violent felony" under the ACCA or a "crime of violence" under the Sentencing Guidelines and 18 U.S.C. § 924(c). Those are bread-and-butter issues in the federal criminal justice process, affecting sentencing exposure, plea bargaining, charging practices, etc...

And because the Eleventh Circuit has endowed those published orders with precedential effect under its rigidly-applied prior panel precedent rule, subsequent panels may now uncritically rely on them to dispose of direct criminal and § 2255 appeals. Unsurprisingly, Eleventh Circuit panels have wasted no time doing just that. Thus far, at least 60 panels resolving direct criminal and § 2255 appeals have cited 14 different published orders adjudicating *Johnson*-based successive

applications. *See* App. E, 47a–50a (collecting cases). And only two short years have passed since the publication of those orders. That number will skyrocket in the coming years. The Eleventh Circuit will continue to invoke its prior panel precedent rule, obviating any need for panels (or district courts) to independently consider the merits of a defendant's argument. Thus, absent intervention by this Court, countless federal prisoners will continue to be prejudiced by this unique method of adjudication. Accordingly, the Court's immediate intervention is necessary. There is no reason for delay.

2. Not only will the Eleventh Circuit's unique method of adjudication continue to prejudice countless criminal defendants in that Circuit, but that method "depart[s] from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). There is direct evidence of that: as explained above, no other circuit employed a similar procedure for adjudicating successive applications, let alone afforded the published byproduct precedential effect. More broadly, Petitioner is unaware of any comparable method of adjudication, where courts are free to reject properly-raised arguments without ever meaningfully considering them. Indeed, "[t]he core of due process is the right to . . . a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). And the opportunity to be heard is not meaningful where courts are powerless to accept the arguments presented to them. In the criminal justice context, that judicial impotence strips criminal defendants of their only mechanism of judicial enforcement. Without that

enforcement mechanism, their rights will become illusory. The question presented is thus of great public importance warranting review by this Court.

III. THIS IS AN IDEAL VEHICLE

This case affords the perfect opportunity to intervene. Procedurally, the due process question is squarely presented. And, factually, this case is ideal due to the circumstances surrounding *In re Burgest*. No better vehicle will come to the Court.

1. At sentencing and on appeal, Petitioner challenged his career-offender enhancement on the ground that his prior Florida kidnapping offense was not a "crime of violence" under § 4B1.2(a). On appeal, the government relied on *In re Burgest*'s contrary holding and explained that, under *St. Hubert*, published orders resolving successive applications were binding on all subsequent panels. Petitioner replied that *In re* "*Burgest* should not constitute binding precedent here because it was decided in the unique [second or successive] context," and he explained why "the truncated decision-making process in that context is not amenable to precedential decisions with application outside of that context." Pet. C.A. Reply Br. 2–4. He acknowledged the contrary holding in *St. Hubert*, but he argued that it was "wrongly decided" and "preserve[d] this issue for further review." *Id*. at 5.

The Eleventh Circuit affirmed based exclusively on *In re Burgest* and the prior panel precedent rule. It acknowledged that "the only issue" was whether Petitioner's Florida kidnapping offense was a "crime of violence." App. 5a. And it emphasized that it had "already concluded in *In re Burgest*" that it was. *Id.* (internal citation omitted). Thus, the court explained that, under the prior panel

precedent rule, Petitioner's argument was "foreclosed by . . . binding precedent." App. 6a. The court also squarely rejected Petitioner's argument that *In re Burgest* was not binding because it was decided in the context of a successive application, explaining that *St. Hubert* had rejected that argument. *Id.* And although Petitioner argued that "*St. Hubert* was wrongly decided," the panel was "bound by *St. Hubert*" under the prior panel precedent rule because neither the en banc court nor the Supreme Court had overruled it. *Id.* Because *In re Burgest* foreclosed Petitioner's appeal, the Eleventh Circuit did not otherwise address the merits of his argument or the conflicting Fifth Circuit decision in *Martinez-Romero*.

Given the panel's exclusive reliance on *In re Bugest*, Petitioner then sought rehearing en banc on whether the panel's application of the prior panel precedent rule violated his right to procedural due process. App. 12a, 17a, 21a, 35a–36a. He argued that affording preclusive effect to *In re Burgest* violated his procedural due process rights because it was decided in less than 30 days without meaningful legal argument or adversarial testing, and was insulated from further review. App. 28–35a. And, given the number of similar published merits rulings issued on successive applications, Petitioner argued that this due process question would affect the administration of justice in the Circuit for years to come. App. 21a, 35a–36a. Rather than take up that due process question, or address the merits of Petitioner's argument independent of *In re Burgest*, the court of appeals denied the petition. As a result, the due process question is now squarely before this Court.

2. Factually too, this case is ideal because of the extreme circumstances surrounding the decision in *In re Burgest*. Again, the applicant there used the Eleventh Circuit's mandatory form, in which he fit only 47 words of argument, none of which addressed whether Florida kidnapping was a "crime of violence," an issue outside the proper scope of the gatekeeping inquiry. The court of appeals did not hear from the government or hold oral argument. The court issued a published decision after only 23 days, a full week before the 30-day deadline. The court's analysis was wholly conclusory, failing to identify the elements of Florida kidnapping, explain why it constituted "generic" kidnapping, or address the Fifth Circuit's conflicting decision in *Martinez-Romero*. And the applicant there was unable to seek further review of that dubious ruling. Despite those extraordinary circumstances, the Eleventh Circuit still afforded that published order preclusive effect in Petitioner's direct criminal appeal. If ever an application of the prior panel precedent rule violated due process, it is this.

IV. THE ELEVENTH CIRCUIT'S APPLICATION OF THE PRIOR PANEL PRECEDENT RULE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS

Although this Court has never addressed whether such an application of the prior panel precedent offends procedural due process, two lines of its precedent—one general, one specific—compel an affirmative answer.

1. Generally, procedural due process claims are analyzed by balancing three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

safeguards; and finally, the Government's interest" in efficiency and the burden that the "substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). All three factors weigh heavily in Petitioner's favor.

a. The private interest here is his liberty from additional imprisonment. This Court has recognized that "any amount of [additional] jail time is significant, and has exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (citations and brackets omitted). And "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). That is particularly true with respect to an erroneous career-offender enhancement, which produces sentences "at or near the maximum," 28 U.S.C. § 994(h); *see United States v. LaBonte*, 520 U.S. 751, 752–53 (1997), a "particularly severe punishment," *Buford v. United States*, 532 U.S. 59, 60 (2001).

b. The risk of error was particularly high here. The Eleventh Circuit's decision-making process for adjudicating *Johnson*-based successive applications led to mistaken rulings. And there is no reason to believe that *In re Burgest* was any different, particularly given its conclusory analysis and contrary Fifth Circuit authority. *See Ovalles*, 905 F.3d at 1271–72 (Martin, J., dissenting) (discussing *In re Burgest*'s companion manslaughter holding as one example of a mistaken ruling). In that regard, this Court has recognized that time limits on decision-making *alone*

may "deprive litigants of a meaningful opportunity to be heard." *Miller v. French*, 530 U.S. 327, 350 (2000). Because *In re Burgest* did not, and procedurally could not, meaningfully consider any argument for why Florida kidnapping was not a "crime of violence," additional process was necessary to reduce an intolerable risk of error.

c. Yet the process that Petitioner seeks is not at all burdensome. To the contrary, he merely seeks what courts afford litigants every day: meaningful consideration of his argument. While the prior panel rule promotes efficiency and consistency, it presumes that the earlier panel issuing the precedential decision was afforded a meaningful opportunity to consider opposing legal argument and was subject to petitions for further review. Where those fundamental conditions are absent, due process precludes that decision from binding all subsequent panels.

2. In addition to *Mathews v. Eldridge*, this Court's issue-preclusion precedents support Petitioner's due process argument. In *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003), then-Professor, now-Seventh Circuit Judge Amy Coney Barrett explained that, given those precedents, application of the prior panel precedent rule "raises due process concerns, and, on occasion, slides into unconstitutionality." *Id.* at 1012, 1026. This was such an occasion.

a. In the issue-preclusion context, this Court has repeatedly held that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979).[3] Because "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings," *Richards*, 517 U.S. at 798 n.4, "determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard," *Blonder-Tongue*, 402 U.S. at 329. Thus, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin*, 490 U.S. at 762. "This rule is part of our deep-rooted historic tradition that everyone should have his own day in court." *Id*. (quotation omitted).

But the prior panel precedent rule "functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases." Barrett, s*upra*, at 1012. "Both are judge-made doctrines that use the resolution of an issue in one suit to determine the issue in later suits." *Id*. at 1033. Under both doctrines, "the merits are closed. A court will not listen to a litigant's arguments for a different result, regardless of whether she can argue persuasively that the first court wrongly decided the issue." *Id*. at 1034. And the doctrines "share similar goals:" both "seek to promote judicial economy, avoid the disrepute to the system that arises from inconsistent results, and lay issues to rest." *Id*.

Given their similar function and objective, the same due process principles constraining issue preclusion should likewise constrain the prior panel precedent

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[3] *Accord Taylor v. Sturgell*, 553 U.S. 880, 884, 891–93 (2008); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797–98 & n.4 (1996); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940).

rule. That is particularly true given that, in the former context, this Court has "rejected the broad form of virtual representation as inconsistent with due process," which "bears a striking resemblance" to the prior panel precedent rule. *Id.* at 1037–38 (citing *Richards*, 517 U.S. at 799–805); *see Taylor*, 553 U.S. at 884–85, 895–907. Under that rejected theory, non-parties would be "bound to a judgment simply because their interests are essentially identical to those of the parties." Barrett, *supra*, at 1038 (quotation marks omitted). Since that justification underlies the prior panel precedent rule, declining to extend similar due process protections to that rule would "create[ ] tension in the law." *Id.* at 1037–39.

And that tension would be unjustified. Some have sought to distinguish issue preclusion from *stare decisis* on the ground that the latter is a "flexible" doctrine that allows courts to reconsider issues previously decided. *See id.* at 1013–14, 1043–47, 1060–61. But, as this case aptly illustrates, the prior panel precedent rule is often applied inflexibly, precluding parties from any meaningful "opportunity to argue for a different rule." *Id.* at 1047. And, in that "rigid application," the prior panel rule may "unconstitutionally deprive[ ] a litigant of the right to a hearing on the merits of her claim. Thus, to avoid the due process problem," the prior panel precedent rule "must be flexible in fact, not just in theory." *Id.*

b. There was no such flexibility here. Recall that this is Petitioner's direct criminal appeal of his sentence: it is guaranteed by statute, *see* 18 U.S.C. § 3742(a); and, unlike successive applicants who have already received multiple rounds of review, it is his only opportunity to challenge his sentence, *see Spencer v.*

United States, 773 F.3d 1132 (11th Cir. 2014) (en banc) (holding that misapplication of advisory career-offender enhancement is not cognizable under § 2255). Yet at no time has any judge in the Eleventh Circuit ever considered his argument. The district court and the appellate panel both considered themselves bound by *In re Burgest*. Whether Florida kidnapping is a "crime of violence" did not satisfy the stringent criteria for en banc review. *See* Fed. R. App. P. 35(a). And, despite the circuit conflict, that Guidelines-specific issue is not a viable candidate for this Court's review either because the Sentencing Commission is charged with resolving such conflicts. *See United States v. Braxton*, 500 U.S. 344, 347–49 (1991).

So if this Court does not find a due process violation and remand to the court of appeals, no judge will ever consider the merits of Petitioner's argument. And, again, that is due solely to *In re Burgest*'s kidnapping holding, which was forged under the Eleventh Circuit's anomalous procedure for adjudicating successive *Johnson*-based applications. By affording that holding preclusive effect, the panel deprived Petitioner of any meaningful opportunity to challenge an unreviewable holding that was itself hurriedly made by a panel that did not—and procedurally could not—consider any opposing argument. It is one thing for a panel to rely on a prior decision that had the benefit of argument, adversarial testing, leisurely deliberation, and the failsafe of rehearing and certiorari review. It is quite another for a panel to uncritically rely on a prior decision lacking all those standard features of the adjudicative process. The Eleventh Circuit may not employ its judge-made rule of horizontal *stare decisis* to circumvent the Constitution's Due Process Clause.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14583
Non-Argument Calendar

D.C. Docket No. 1:16-cr-20840-PCH-8

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALEXIS VALDES GONZALEZ,

Defendant-Appellant.

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

(November 13, 2018)

Before WILSON, JORDAN and HULL, Circuit Judges.

PER CURIAM:

After pleading guilty, Alexis Valdes Gonzalez appeals his 160-month sentence for conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), and 846, and possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On appeal, Valdes Gonzalez argues that the district court erred in designating him a career offender under the Sentencing Guidelines. In particular, Valdes Gonzalez contends that his Florida conviction for kidnapping does not qualify as a "crime of violence" under U.S.S.G. § 4B1.2(a). After review, we affirm.

I. FACTUAL BACKGROUND

In the fall of 2015, as part of an investigation into a Miami-based drug trafficking organization, a confidential source made three controlled buys of methamphetamine from defendant Valdes Gonzalez. In early 2016, the confidential source purchased a firearm and ammunition from Valdes Gonzalez, who is a convicted felon. Among Valdes Gonzalez's prior felony convictions were: (1) Florida convictions for kidnapping with a weapon and armed burglary with assault or battery in February 1998; and (2) a Florida conviction for possession with intent to sell, manufacture or deliver cocaine and cannabis in November 2010.

Pursuant to a plea agreement, Valdes Gonzalez pled guilty to one count of conspiracy to possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii), and 846 (Count 1), and possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count 2).

At sentencing, the district court determined, based on Valdes Gonzalez's 1998 conviction for kidnapping and his 2010 conviction for possession of cocaine and marijuana with intent to sell, manufacture or deliver, that Valdes Gonzalez was a "career offender" under U.S.S.G. § 4B1.1(a). This designation resulted in an increased offense level and an enhanced criminal history category under U.S.S.G. § 4B1.1(b), producing an advisory guidelines range of 262 to 327 months' imprisonment. After hearing from the parties and considering the 18 U.S.C. § 3553(a) factors, the district court varied downward by 102 months and imposed a total sentence of 160 months' imprisonment, consisting of a 160-month sentence on Count 1 and a 120-month sentence on Count 2, to be served concurrently with the sentence on Count 1.

II. DISCUSSION

A. Career Offender Guidelines

A defendant is a career offender under the Sentencing Guidelines if: (1) he was at least 18 years old at the time he committed the instant offense of conviction;

(2) the instant offense of conviction is a felony that is either a "crime of violence" or a "controlled substance offense"; and (3) he has at least two prior felony convictions for either a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1(a). A "crime of violence" is defined as any felony that:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a) (emphasis added). Section 4B1.2(a)(1) is commonly referred to as the "elements clause," and § 4B1.2(a)(2) contains the "enumerated offenses clause." See United States v. Lockley, 632 F.3d 1238, 1240-41 (11th Cir. 2011). A "controlled substance offense" is defined as a felony that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

B. Valdes Gonzalez's Claim

In this appeal, Valdes Gonzalez does not dispute that he satisfies the first two career-offender criteria in U.S.S.G. § 4B1.1(a). As to the third criteria—whether Valdes Gonzalez has "at least two" qualifying prior felony convictions—Valdes Gonzalez does not dispute that his prior Florida felony conviction for

possession of cocaine and marijuana with intent to sell, manufacture, or deliver qualifies as a controlled substance offense. Thus, the only issue raised is whether Valdes Gonzalez has a second qualifying prior felony conviction. Valdes Gonzalez argues that his Florida kidnapping conviction does not qualify as a predicate crime of violence as defined in U.S.S.G. § 4B1.2(a).[1]

As the district court noted at the time of Valdes Gonzalez's sentencing, this Court has already concluded in In re Burgest, 829 F.3d 1285 (11th Cir. 2016), that Florida kidnapping categorically qualifies as a "crime of violence" under § 4B1.2(a)'s enumerated offenses clause. See In re Burgest, 829 F.3d at 1287. In that case, this Court said: "Burgest was classified as a career offender based on his two prior convictions for manslaughter and kidnapping. Both offenses are categorically crimes of violence. The commentary to section 4B1.2 states that 'crime of violence' includes . . . manslaughter [and] kidnapping . . . U.S.S.G. § 4B1.2 n.1." Id. (quotation marks omitted). The Burgest Court added that "we have recognized, based on the decision of the Supreme Court in Stinson v. United States, that 'the definition of 'crime of violence' provided by the Guidelines commentary is authoritative.'" Id. (quoting United States v. Hall, 714 F.3d 1270, 1274 (11th Cir. 2013)) (citation omitted).

[1]This Court reviews de novo whether a prior conviction qualifies as a "crime of violence" under the Sentencing Guidelines. Lockley, 632 F.3d at 1240.

Thus, Valdes Gonzalez's argument that his Florida kidnapping conviction is not a crime of violence is foreclosed by this Court's binding precedent. See United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (providing that under this Circuit's prior panel precedent rule, this Court is bound to follow a prior panel's holding that has not been overruled or undermined to the point of abrogation by this Court sitting en banc or by the Supreme Court).

Valdes Gonzalez argues that we are not bound by In re Burgest because it was decided in the context of an application for leave to file a second or successive 28 U.S.C. § 2255 motion. This Court recently rejected such an argument, however, holding in a direct appeal case that "law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file a second or successive § 2255 motions [is] binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, 'unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc.'" United States v. St. Hubert, 883 F.3d 1319, 1329 (11th Cir. 2018) (quoting Archer, 531 F.3d at 1352) (alterations omitted). While Valdes Gonzalez suggests St. Hubert was wrongly decided, we are bound by St. Hubert for the same reasons we are bound by In re Burgest. Neither this Court sitting en banc nor the Supreme Court has overruled or abrogated them.

In light of our binding precedent, the district court correctly concluded that Valdes Gonzalez's Florida kidnapping conviction qualified as a crime of violence under U.S.S.G. § 4B1.2(a)(2). Because Valdes Gonzalez had two qualifying prior felony convictions under U.S.S.G. § 4B1.2, the district court did not err in determining that Valdes Gonzalez was a career offender and calculating his advisory guidelines range under U.S.S.G. § 4B1.1(b).

AFFIRMED.

APPENDIX B

No. 17-14583-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
***Plaintiff/appellee*,**

v.

ALEXIS VALDES GONZALEZ,
Defendant/appellant.

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

PETITION FOR REHEARING EN BANC BY APPELLANT ALEXIS VALDES GONZALEZ

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL CASE)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States of America v. Alexis Valdes Gonzalez
Case No. 17-14583-HH

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1 and 11th Cir. R. 35-5(b).

Adler, Andrew L.

Amster, Steven Edward

Cariglio, Jr., Gennaro

Cannon, Aileen M.

Castro, Didier

Chapotin, Wifredo

Caruso, Michael

Cervantes, Daniel

Delgado, Louis Gustavo

Donnelly, Paul

Fajardo Orshan, Ariana

Fernandez, Eloisa Delgado

Ferrer, Wifredo A.

Flores, Hector L.

Garber, Hon. Barry L.

Golembe, Stephen J.

Gonzalez, Alexis Valdes

Gonzalez, Avelino Jose

Gonzalez, Ivan

Goodman, Hon. Jonathan

Greenberg, Benjamin G.

Guerra, Juan Carlos

Huck, Hon. Paul C.

Jauregui, Sabino

Lomax, Bunmi A.

Machado, Mario A.

Mariani, Nicole D.

McAliley, Hon. Chris M.

Perez, Andy Rodriguez

Petruzzi, Paul Domenic

Otazo-Reyes, Hon. Alicia M.

O'Sullivan, Hon. John J.

Rosales, Maria Victoria Oliva

Rubin-Smith, Elina A.

Schlessinger, Seth M.

Seitles, Marc David

Simonton, Hon. Andrea M.

Smachetti, Emily M.

Saurez, Jorge Antonio

Sundaram, Sivashree

Torres, Hon. Edwin G.

Turnoff, Hon. William C.

White, Hon. Patrick A.

Wylie, IV, John William

White, Hon. Patrick A.

EN BANC STATEMENT OF COUNSEL

Pursuant to 11th Cir. R. 35-5, undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that this case involves the following question of exceptional importance:

In *In re Burgest*, 829 F.3d 1285, 1287 (11th Cir. 2016), this Court held that Florida kidnapping is a "crime of violence" under U.S.S.G. § 4B1.2(a). However, because *In re Burgest* adjudicated a successive application, it was decided based on no more than a form permitting bare legal argument; it was decided in less than 30 days; its holding was conclusory and conflicted with a Fifth Circuit decision; and it was insulated from further review. Given that abnormal decision-making process, Valdes Gonzalez argued that, although directly on point, *In re Burgest* should not receive precedential effect in his direct criminal appeal challenging his career-offender sentencing enhancement. The panel disagreed. As a result, that binding precedent foreclosed his argument on appeal, and the panel declined to consider it on the merits. The question here is whether that application of the prior panel precedent rule violated Valdes Gonzalez's procedural due process rights.

/s/Andrew L. Adler
Counsel for Petitioner Valdes Gonzalez

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STATEMENT OF THE ISSUE MERITING EN BANC REVIEW

Whether application of the prior panel precedent rule violated Valdes Gonzalez's right to procedural due process.

COURSE OF PROCEEDINGS & DISPOSITION OF THE CASE

Valdes Gonzalez pled guilty to conspiracy to possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(b)(1)(A)(viii) and 846 (Count One), and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count Two). The probation officer determined that Valdes Gonzalez was subject to the career-offender enhancement in U.S.S.G. § 4B1.1 based in part on his prior Florida conviction for kidnapping. (PSI ¶¶ 72, 79). That enhancement increased his guideline range from 121–151 months to 262–327 months. (PSI ¶¶ 72, 89–90, 127; DE 304:88–89, 97).

Before sentencing, Valdes Gonzalez objected on the ground that his prior Florida kidnapping conviction was not a "crime of violence" under U.S.S.G. § 4B1.2. (DE 214:3). He relied on the Fifth Circuit's decision in *United States v. Martinez-Romero*, 817 F.3d 917, 920–24 (5th Cir. 2016), which had so held. (*Id.*). In response, the government acknowledged that *Martinez-Romero* was "directly on point" and "thorough in its reasoning," but it argued that this Court's contrary holding in *In re Burgest*, 829 F.3d 1285, 1287 (11th Cir. 2016) constituted binding precedent. (DE 233:2–3). At sentencing, the district court agreed that the "Eleventh Circuit has

pretty much ruled" on the issue. (DE 304:22–23). Valdes Gonzalez nonetheless observed that there was a "circuit split as to the kidnapping," and he was "preserving [his] arguments for further review." (*Id.* at 23). The court ultimately varied downward and sentenced him to 160 months. (*Id.* at 97–98). He "renew[ed] [his] objections to the career offender enhancement." (*Id.* at 100).

On appeal, he reiterated his argument that Florida kidnapping was not a "crime of violence" under § 4B1.2(a), relying in part on *Martinez-Romero*. In response, the government acknowledged (at 5 n.3, 8 n.6, 14) that the career-offender enhancement turned on that issue and (at 15) that Florida kidnapping did not satisfy the elements clause in § 4B1.2(a)(1). Thus, the only question was whether it satisfied the enumerated-offense clause in § 4B1.2(a)(2). In that regard, the government argued (at 18–22) that *In re Burgest* was binding precedent and foreclosed Valdes Gonzalez's appeal. It alternatively argued (at 23–31) that, while that precedent was dispositive, the Fifth Circuit's contrary decision in *Martinez-Romero* was unpersuasive. In reply, Valdes Gonzalez acknowledged (at 5) that, in *United States v. St. Hubert*, 883 F.3d 1319, 1329 (11th Cir. 2018), this Court had held that published

orders resolving successive applications were precedential in all contexts.[1] He nonetheless argued (at 5) that *St. Hubert* was wrong and (at 2–4) that *In re Burgest* "should not constitute binding precedent here" because the "truncated decision-making process in [the second or successive] context is not amenable to precedential decisions."

The panel affirmed his sentence. It recognized that "the only issue" was whether Florida kidnapping was a "crime of violence." Panel Op. 5. The panel concluded that it was because *In re Burgest* had so held, and, under the prior panel precedent rule, that holding "foreclosed" Valdes Gonzalez's argument on appeal. *Id.* at 5–6. Relying on *St. Hubert*, the panel rejected his argument that *In re Burgest* was not binding precedent because it was decided in the context of a successive application. *Id.* at 6–7. The panel made no mention of the Fifth Circuit's decision in *Martinez-Romero* and did not otherwise address the merits of Valdes Gonzalez's argument.

[1] The *St. Hubert* panel recently modified parts of its original opinion, but it did not modify that particular holding, contained in Part III(C). __ F.3d __, 2018 WL 5993528, at *1, *8–9 (11th Cir. Nov. 15, 2018).

ARGUMENT & AUTHORITIES

Perhaps no issue has divided this Court more in recent years than its procedure for adjudicating successive applications based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). While those applications are now long resolved, the procedure used to adjudicate them continues to have far-reaching effects. That is so because this Court published dozens of orders resolving those applications and, in doing so, opined on various substantive issues. Hence the question: are those published orders precedential in direct criminal and 28 U.S.C. § 2255 appeals?

In *St. Hubert*, a panel of this Court affirmatively answered that question, but it did not consider the due process implications. Because those published orders were produced by an *ex parte*, form-based, frenetic process insulated from further review, affording them preclusive effect under the prior panel rule raises a serious due process question. And because there are numerous published orders holding that numerous offenses qualify as violent felonies and crimes of violence, that question is one of exceptional importance. Indeed, it will affect the administration of justice in this Circuit for years, if not decades, to come. Accordingly, the due process question presented here warrants en banc review.

A. THIS COURT'S UNIQUE PROCEDURE FOR ADJUDICATING SUCCESSIVE APPLICATIONS BASED ON *JOHNSON*

Although the Court is familiar with how it adjudicated *Johnson*-based successive applications, it is necessary to summarize the salient features of that procedure to set up the due process problem.

1. Unlike other circuits, this Court required all applicants to use a form that "prohibit[ed] . . . additional briefing or attachments, and require[d] all argument to take place 'concisely in the proper space on the form.'" *In re Williams*, 898 F.3d 1098, 1101 (11th Cir. 2018) (Wilson, J., specially concurring) (quoting form). That form "provide[d] a 1# x 5.25# space in which to state a 'ground on which you now claim that you are being held unlawfully," and then a "2.5# x 5.25# space in which to assert that a claim relies on a new rule of constitutional law." *Id.* (quotation marks and brackets omitted). That limited space allowed for only the barest legal argument. *Id.* at 1101–02 & n.4.[2]

2. This Court resolved the applications at a breakneck pace. While the statute requires resolution of the applications within 30 days, 28 U.S.C. § 2244(b)(3)(D), the eight circuits to address that deadline have

[2] Notably, the Court has since revised the form to provide more space.

all considered it hortatory, *In re Williams*, 898 F.3d at 1102–03 & n.5 (Wilson, J., specially concurring). This Court, by contrast, considered it mandatory, notwithstanding the overwhelming volume of *Johnson*-based applications and the difficult legal issues they often presented. On the one occasion where a panel declared that deadline hortatory, the en banc Court *sua sponte* vacated the panel opinion. *Id.* (citing *In re Johnson*, 814 F.3d 1259, 1262 (11th Cir. 2016), *vacated by* 815 F.3d 733 (11th Cir. 2016) (en banc)).[3]

3. The applications were not subject to adversarial testing. The Court "never grant[ed] oral argument," and the government did not "file[ ] an individualized brief" in response to any application resulting in a published order. *Id.* at 1103 & n.9. By contrast, "other circuits often consider[ed] briefing from the government," appointed counsel, and "entertain[ed] oral argument from both parties." *Id.* at 1103 & n.8.

4. Notwithstanding the constraints above, the Court used its gatekeeping function to opine on the merits of the applicant's claim. *See id.* at 1106–10 (Martin, J., specially concurring). That was so even

[3] Notably, however, the Court recently embraced the view that the deadline is hortatory after all. *See* Gen. Order No. 43 (May 17, 2018).

though the statute requires that the applicant make only a "*prima facie*" showing that his claim satisfies the statutory criterion, 28 U.S.C. § 2244(b)(3)(C); if so, the district court must evaluate that criterion in the first instance, *id.* § 2244(b)(4), and then the merits of the claim. "Consistent with the statute's command, [other] circuits have largely refrained from deciding the merits of a particular applicant's claim at the [authorization] stage." *In re Williams*, 898 F.3d at 1107, 1109 & n.5 (Martin, J., specially concurring). This Court, however, routinely decided whether offenses remained a violent felony post-*Johnson*, even where that legal issue was one of first impression. *Id.* at 1108–09. That led to mistakes. *See Ovalles v. United States*, 905 F.3d 1231, 1268–73 (11th Cir. 2018) (en banc) (Martin, J. dissenting) (discussing examples).

5. And those merits rulings were unreviewable. The statute provides that the "denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). And, over sharp criticism, *see Ovalles*, 905 F.3d at 1273–75 (Martin, J., dissenting); *In re Jones*, 830 F.3d 1295, 1297–1305 (11th Cir. 2016) (Rosenbaum and Jill Pryor, JJ., concurring in

result), this Court added to that procedural bar by prohibiting applicants from re-filing new applications, even if their original application was incorrectly denied, *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016).

6. Although the ability to seek further review is a pillar of the prior panel precedent rule, the Court nonetheless designated for publication numerous orders denying successive applications. From May 25 through August 10, 2016, when *Johnson*-based successive applications were at their peak, the Court published 29 orders; that averaged to 2 per week for 2.5 months straight. And, "[i]n the last five years, [it] ha[s] published forty-five second or successive panel orders, while all of the other circuits combined have published eighty." *In re Williams*, 898 F.3d at 1102 (Wilson, J., specially concurring).

Rather than limit the precedential effect of those orders to other successive applications, a panel of this Court recently held that they "are binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks." *St. Hubert*, 883 F.3d at 1329. That holding was controversial. Over the preceding two years, there had been fierce debate within this Circuit about whether those orders should receive precedential effect. And for good reason: the Court

typically has "essentially unlimited time to decide the case, there are usually attorneys on both sides, we have extensive briefing, and we have the entire record in front of us (including an order from the court below)." *In re Williams*, 898 F.3d at 1102 (Wilson, J., specially concurring). "And the large majority of [its] published merits opinions come from [its] oral argument calendar, where the attorneys for each party argue for at least fifteen minutes." *Id*. Yet, "after *St. Hubert*, published panel orders—typically decided on an emergency thirty-day basis, with under 100 words of argument (often written by a pro se prisoner), without any adversarial testing whatsoever, and without any available avenue of review—bind all future panels." *Id*. at 1101. Those orders "now enjoy the same precedential heft" as any other published opinion, "equally binding on future panels . . . unless and until overruled by the [C]ourt sitting en banc" or the Supreme Court. *Id*. at 1102.

B. A PUBLISHED BYPRODUCT OF THE PROCEDURE: *IN RE BURGEST*

One published byproduct of the truncated and frenzied decision-making process was *In re Burgest*, 829 F.3d 1285 (11th Cir. 2016). Using the mandatory form, Mr. Burgest sought authorization to file a successive § 2255 motion to correct his sentence in light of *Johnson*,

arguing that he was no longer a career offender absent the residual clause in § 4B1.2(a). 11th Cir. No. 16-14597 (June 28, 2016). He fit 47 words of argument on the form: he could do no more than state *Johnson*'s holding and add that the district court relied on the Guidelines' residual clause to count his kidnapping and manslaughter offenses. Abiding by the form's instructions, he did not attach legal argument. The government did not respond. And the Court did not hold oral argument.

Twenty-three days later (a full week early), this Court published an order denying the application. Opining on the merits, it held that the claim failed because the Court had previously held that *Johnson* did not invalidate § 4B1.2(a)'s residual clause. *In re Burgest*, 829 F.3d at 1287. But it then went further, alternatively holding that the claim failed regardless in part because Florida kidnapping remained a "crime of violence," since § 4B1.2's commentary enumerated "kidnapping." *Id.* The Court's analysis, however, was conclusory: it did not identify the elements of Florida kidnapping or the "generic" offense to which it should have been compared; and it did not acknowledge the Fifth Circuit's contrary decision in *Martinez-Romero*.

C. AFFORDING *IN RE BURGEST* PRECLUSIVE EFFECT VIOLATED VALDES GONZALEZ'S RIGHT TO PROCEDURAL DUE PROCESS

The panel's application of the prior panel precedent rule, affording *In re Burgest* preclusive effect, violated Valdes Gonzalez's procedural due process rights. Although the Supreme Court has never addressed whether an unduly rigid or extreme application of that rule of horizontal *stare decisis* can offend due process, two lines of precedent—one general, one specific—compel an affirmative answer.

1. Generally, procedural due process claims are analyzed by balancing three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest" in efficiency and the burden that the "substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). All three factors weigh in Valdes Gonzalez's favor.

First, the private interest is his liberty from extra imprisonment. The Supreme Court has recognized that "any amount of [additional] jail time is significant, and has exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles v. United States*, 138 S. Ct.

1897, 1907 (2018) (citations and brackets omitted). And "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). That is particularly true with respect to an erroneous career-offender enhancement, which is designed to produce sentences "at or near the maximum," 28 U.S.C. § 994(h); *see United States v. LaBonte*, 520 U.S. 751, 752–53 (1997), a "particularly severe punishment," *Buford v. United States*, 532 U.S. 59, 60 (2001).

Second, the risk of error was particularly high due to the procedure generating *In re Burgest*. Again, that decision: was the product of a form including only 47 words of argument, none of which addressed whether kidnapping was a "crime of violence"; lacked adversarial testing; was issued after only 23 days;[4] and was insulated from further review. As noted above, that hurried and abbreviated decision-making process has led to other mistaken rulings. And there is no reason to believe that *In*

[4] The Supreme Court has recognized that, by itself, time limits on judicial decision-making may alone "deprive litigants of a meaningful opportunity to be heard." *Miller v. French*, 530 U.S. 327, 350 (2000).

re Burgest was different given its conclusory analysis and contrary Fifth Circuit authority. *See Ovalles*, 905 F.3d at 1271–72 (Martin, J., dissenting) (discussing *In re Burgest*'s companion manslaughter holding as example of mistaken ruling). Because *In re Burgest* did not receive or consider any argument for why Florida kidnapping was not a "crime of violence"—and was procedurally unable to do so—more process was necessary to reduce the risk of error. Yet the panel here blindly followed *In re Burgest* and did not address the merits. Where legal arguments cannot be meaningfully advanced, tested, and considered, the adjudicative process is skeletal, and outcomes are prone to error.

Third, the process that Valdes Gonzalez seeks is not burdensome. Rather, he merely seeks what this Court affords litigants every day: a decision after considering his argument. And while the prior panel rule promotes efficiency, it does not trump fundamental fairness and accuracy. For example, that rule would not apply to a prior decision made via coin flip. It similarly presumes that at least one panel of the Court has received briefing and meaningfully considered an argument before cementing a contrary circuit precedent. That did not happen here.

2. In addition to *Mathews v. Eldridge*, the Supreme Court's issue-preclusion precedents also support Valdes Gonzalez's due process argument. In her article, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003), then-Professor, now-Seventh Circuit Amy Coney Barrett has explained that, given those precedents, application of the prior panel rule "raises due process concerns, and, on occasion, slides into unconstitutionality." *Id.* at 1012, 1026. This was such an occasion.

a. In the issue-preclusion context, the Supreme Court has consistently held that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979).[5] Because "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings," *Richards*, 517 U.S. at 798 n.4, "determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard," *Blonder-Tongue*,

[5] *Accord Taylor v. Sturgell*, 553 U.S. 880, 884, 891–93 (2008); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797–98 & n.4 (1996); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940).

402 U.S. at 329. Thus, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin*, 490 U.S. at 762. "This rule is part of our deep-rooted historic tradition that everyone should have his own day in court." *Id.* (quotation omitted).

Yet the prior panel precedent rule "functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases." Barrett, s*upra*, at 1012. "Both are judge-made doctrines that use the resolution of an issue in one suit to determine the issue in later suits." *Id.* at 1033. Under both doctrines, "the merits are closed. A court will not listen to a litigant's arguments for a different result, regardless of whether she can argue persuasively that the first court wrongly decided the issue." *Id.* at 1034. And the two doctrines "share similar goals": "[b]oth seek to promote judicial economy, avoid the disrepute to the system that arises from inconsistent results, and lay issues to rest so that people can order their affairs." *Id.*

Given their similar function and objective, the same due process principles constraining issue preclusion should similarly constrain the prior panel rule. That is particularly true given that, in the former

context, the Supreme Court has "rejected the broad form of virtual representation as inconsistent with due process," which "bears a striking resemblance" to the prior panel rule. *Id.* at 1037–38 (citing *Richards*, 517 U.S. at 799–805); *see Taylor*, 553 U.S. at 884–85, 895–907. Under that rejected theory, non-parties would be "bound to a judgment simply because their interests are essentially identical to those of the parties." Barrett, *supra*, at 1038 (quotation marks omitted). Declining to extend similar due process protections to the prior panel rule would "create[ ] tension in the law." *Id.* at 1037–39.

And that tension would be unjustified. The conventional basis for distinguishing issue preclusion from *stare decisis* is that the latter is a "flexible" doctrine that allows courts to reconsider issues previously decided. *See id.* at 1013–14, 1043–47, 1060–61. But, in practice, the prior panel precedent rule is often applied inflexibly, precluding parties from any meaningful "opportunity to argue for a different rule." *Id.* at 1047. And, in that "rigid application," the prior panel rule may "unconstitutionally deprive[ ] a litigant of the right to a hearing on the merits of her claim. Thus, to avoid the due process problem," the prior panel precedent rule "must be flexible in fact, not just in theory." *Id.*

b. Whatever the outer limits that due process places on the prior panel rule, they were exceeded here. This is Valdes Gonzalez's direct criminal appeal: it is guaranteed by statute, 18 U.S.C. § 3742(a); and, unlike successive applicants who have already received multiple rounds of review, this is his only opportunity to challenge his sentence. Yet at no time has any judge considered his argument that he was improperly classified as a career offender. Nor will that change: whether Florida kidnapping is a "crime of violence" does not satisfy the criteria for en banc review, *see* Fed. R. App. P. 35(a); and, despite the circuit conflict, that Guidelines-specific issue is not a candidate for Supreme Court review because the Sentencing Commission is charged with resolving such conflicts, *see United States v. Braxton*, 500 U.S. 344, 347–49 (1991).

Significantly, the reason why no judge ever has or will consider the merits of his argument is *In re Burgest*. But, again, its kidnapping holding was made without the benefit of any briefing or argument. Constrained by this Court's mandatory form, the applicant was not afforded a meaningful opportunity to argue that kidnapping was not a crime of violence. Indeed, that merits issue was outside the proper scope of the gatekeeping inquiry altogether. Exacerbating the absence of

briefing or argument, the panel published an unreviewable holding a mere twenty-three days later. And its conclusory analysis failed to consider any opposing argument or the Fifth Circuit's contrary decision.

Affording that holding preclusive effect violated Valdes Gonzalez's right to procedural due process. He lacked a meaningful opportunity to urge correction of an unreviewable holding that was hurriedly made by a panel that did not, and procedurally could not, receive or consider any argument. That extraordinary dynamic sets this case apart from other rigid applications of the prior panel rule. It is one thing for a panel to rely on a prior decision that had the benefit of argument, adversarial testing, leisurely deliberation, and the failsafe of rehearing and certiorari. It is quite another for a panel to uncritically rely on a prior decision lacking *all* those standard features of the adjudicative process.

* * *

At the very least, this due process question is one of "exceptional importance." Fed. R. App. P. 35(a)(2). *In re Burgest* is but one of numerous published orders forged under the same procedure. And Valdes Gonzalez is but one of numerous litigants whose appeals will be foreclosed by such an order, if they are deemed precedential. Absent

resolution by the en banc Court, those litigants will continue advancing the same due process argument that Valdes Gonzalez advances here. And reliance interests will only increase over time. Thus, the full Court should resolve the due process issue now. Moreover, convening en banc would be a fitting way to conclude the years-long controversy that has engulfed this Court's unique procedure for adjudicating successive applications. And because all (and only) the active Judges of this Court participate in that procedure, the en banc Court is the appropriate body to resolve whether affording precedential effect to published orders comports with due process.

CONCLUSION

Valdes Gonzalez respectfully requests that the Court grant rehearing en banc to address the due process question.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
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ASS'T FEDERAL PUBLIC DEFENDER
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CERTIFICATE OF COMPLIANCE

I certify that that this petition complies with the 3,900 word limit prescribed by Fed. R. App. 35(b)(2)(A) and 11th Cir. R. 35-1, because it contains 3,894 words, excluding the items exempted by 11th Cir. R. 35-5(a), (b), (c), (d), (j), and (k).

This petition also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook font.

/s/ Andrew L. Adler

CERTIFICATE OF SERVICE

I certify that on this 27th day of November 2018, 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 via CM/ECF on Emily M. Smachetti and Aileen M. Cannon, Assistant U.S. Attorneys, 99 N.E. 4th Street, Miami, Florida 33132.

/s/ Andrew L. Adler

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14583-HH

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ALEXIS VALDES GONZALEZ,

Defendant - Appellant.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, JORDAN and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled no rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP 2)

ENTERED FOR THE COURT:

Frank M. Hull

UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY

Name Earl Burgest Prisoner Number 53598-004

Institution Terre Haute FCI

Street Address 4200 Bureau Road North

City Terre Haute, State Indiana Zip Code 47808

INSTRUCTIONS--READ CAREFULLY

(1) This application must be legibly handwritten or typewritten and signed by the applicant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.

(2) All questions must be answered concisely in the proper space on the form.

(3) The Judicial Conference of the United States has adopted the 8½ x 11 inch paper size for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings must be on 8½ x 11 inch paper, otherwise we cannot accept them.

(4) All applicants seeking leave to file a second or successive petition are required to use this form, except in capital cases. In capital cases only, the use of this form is optional.

(5) Additional pages are not permitted except with respect to additional grounds for relief and facts which you rely upon to support those grounds. DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC., EXCEPT IN CAPITAL CASES.

(6) In accordance with the "Antiterrorism and Effective Death Penalty Act of 1996," as codified at 28 U.S.C. § 2255, effective April 24, 1996, before leave to file a second or successive motion can be granted by the United States Court of Appeals, it is the applicant's burden to make a prima facie showing that he satisfies either of the two conditions stated below.

> A second or successive motion must be certified as provided in [28 U.S.C.] section 2255 by a panel of the appropriate court of appeals to contain—
>
> > (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.

(7) When this application is fully completed, the original and three copies must be mailed to:

> **Clerk of Court**
> **United States Court of Appeals for the Eleventh Circuit**
> **56 Forsyth Street, N.W.**
> **Atlanta, Georgia 30303**

APPLICATION

1. (a) State and division of the United States District Court which entered the judgment of conviction under attack Southern District of Florida

   (b) Case number 05-80146-Cr-Marra

2. Date of judgment of conviction February 13, 2006

3. Length of sentence 360 months Sentencing Judge Kenneth A. Marra

4. Nature of offense or offenses for which you were convicted:
   Possession with intent to distribute at least five grams or mor of crack cocaine, counst 1 and 2

5. Related to this conviction and sentence, have you ever filed a motion to vacate in any federal court?
   Yes (X) No ( ) If "yes", how many times? _____ (if more than one, complete 6 and 7 below as necessary)
   (a) Name of court Southern District of Florida
   (b) Case number 09-80899-Civ-Marra
   (c) Nature of proceeding Motion to Vacate
   (d) Grounds raised (list all grounds; use extra pages if necessary)
   Ineffective Assistance of Counsel
   (e) Did you receive an evidentiary hearing on your motion? Yes ( ) No (X)
   (f) Result Motion to Vacate was denied
   (g) Date of result April 29, 2011

6. As to any second federal motion, give the same information:
   (a) Name of court _____
   (b) Case number _____
   (c) Nature of proceeding _____

(d) Grounds raised (list all grounds; use extra pages if necessary)_____

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )
(f) Result _____
(g) Date of result _____

7. As to any third federal motion, give the same information:
(a) Name of court _____
(b) Case number _____
(c) Nature of proceeding _____

(d) Grounds raised (list all grounds; use extra pages if necessary)_____

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )
(f) Result _____
(g) Date of result _____

8. Did you appeal the result of any action taken on your federal motion? (Use extra pages to reflect additional petitions if necessary)

(1) First motion	No (x) Yes ( )	Appeal No. _____
(2) Second motion	No ( ) Yes ( )	Appeal No. _____
(3) Third motion	No ( ) Yes ( )	Appeal No. _____

9. If you did not appeal from the adverse action on any motion, explain briefly why you did not: District Court denied Motion for Certificate of Appealability

10. State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

A. Ground one: Increasing Burgest's sentence under the career offender residual clause violated his due process rights.

Supporting FACTS (tell your story briefly without citing cases or law):

In United States v. Johnson, 135 S.Ct. 2551 (2015), the Supreme Court held that residual clause of ACCA was unconstiutionally vague. Increasing a defendant's sentence under the advisory GL is a violation due process. The district court releid on the residual clause when it enhanced Mr. Burgest's sentence based on kidnapping and manslaughter.

Was this claim raised in a prior motion? Yes ( ) No (X)

Does this claim rely on a "new rule of law?" Yes (X) No ( )
If "yes," state the new rule of law (give case name and citation):

Does this claim rely on "newly discovered evidence?" Yes ( ) No (X)
If "yes," briefly state the newly discovered evidence, and why it was not previously available to you

B. Ground two:

Supporting FACTS (tell your story briefly without citing cases or law):

Was this claim raised in a prior motion? Yes ( ) No ( )

Does this claim rely on a "new rule of law?" Yes ( ) No ( )
If "yes," state the new rule of law (give case name and citation):

_____

_____

Does this claim rely on "newly discovered evidence?" Yes ( ) No ( )
If "yes," briefly state the newly discovered evidence, and why it was not previously available to you _____

_____

_____

_____

_____

_____

_____

_____

[Additional grounds may be asserted on additional pages if necessary]

11. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes ( ) No (X)
If "yes," name of court _____ Case number _____

Wherefore, applicant prays that the United States Court of Appeals for the Eleventh Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Motion to Vacate under 28 U.S.C. § 2255.

_____
Applicant's Signature
for Earl Burgest

I declare under Penalty of Perjury that my answers to all the questions in this Application are true and correct.

Executed on 6/27/2016
[date]

_____
Applicant's Signature
for Earl Burgest

PROOF OF SERVICE

Applicant must send a copy of this application and all attachments to the United States Attorney's office in the district in which you were convicted.

I certify that on 6/27/2016 [date], I mailed a copy of this Application* and all attachments to United States Attorney's Office for the Southern District of Florida

at the following address:

99 NE 4th St., Miami, FL 33132

Applicant's Signature

for Earl Burgest

* Pursuant to Fed.R.App.P. 25(a), "Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day of filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

APPENDIX E

Eleventh Circuit Appellate Decisions Citing a Merits Ruling Contained in a Published Order Adjudicating a Successive Application Based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (as of Jan. 17, 2019)

A. "Violent Felonies" Under the Armed Career Criminal Act, 18 U.S.C. § 924(e)

1. *In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016) (Florida robbery is a "violent felony" under the ACCA's elements clause).

   Cited in: *United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016); *United States v. Seabrooks*, 839 F.3d 1326, 1340 (11th Cir. 2016).

2. *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016) (Florida armed robbery is a "violent felony" under the ACCA's elements clause).

   Cited in: *United States v. Shotwell*, 708 F. App'x 989, 991–92 (11th Cir. 2017); *United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016); *United States v. Seabrooks*, 839 F.3d 1326, 1339 (11th Cir. 2016).

3. *In re Hires*, 825 F.3d 1297, 1301–02 (11th Cir. 2016) (Florida robbery and aggravated assault were "violent felonies" under the ACCA's elements clause; and sale of cocaine was a "serious drug offense" under the ACCA).

   Cited in: *United States v. Fitzgerald*, 743 F. App'x 971, 972 (11th Cir. Nov. 28, 2018); *United States v. Deshazior*, 882 F.3d 1352, 1355 (11th Cir. 2018); *Shuman v. United States*, 2017 WL 8683596, at *3 (11th Cir. Nov. 9, 2017) (COA denial); *United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016); *United States v. Seabrooks*, 839 F.3d 1326, 1339 (11th Cir. 2016); *United States v. Towns*, 668 F. App'x 886, 886 (11th Cir. 2016); *United States v. Thomas*, 656 F. App'x 951, 955 (11th Cir. 2016).

4. *In re Rogers*, 825 F.3d 1335, 1340–41 (11th Cir. 2016) (Florida aggravated assault and aggravated battery are "violent felonies" under the ACCA's elements clause).

   Cited in: *United States v. Butler*, 714 F. App'x 980, 981–82 (11th Cir. 2018); *Brooks v. United States*, 723 F. App'x 703, 706 n.2 (11th Cir. 2018).

5. *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016) (Florida armed robbery is a "violent felony" under the ACCA's elements clause).

   Cited in: *United States v. Shotwell*, 708 F. App'x 989, 991–92 (11th Cir. 2017); *United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016); *United States v. Seabrooks*, 839 F.3d 1326, 1339 (11th Cir. 2016).

B. "Crimes of Violence" Under the Sentencing Guidelines, U.S.S.G. § 4B1.2

6. *In re Griffin*, 823 F.3d 1350, 1354–56 (11th Cir. 2016) (*Johnson* does not apply to the Sentencing Guidelines, whether advisory or mandatory).

   Cited in: *Paucar v. United States*, __ F. App'x __, 2019 WL 102501, at *1 (11th Cir. Jan. 4, 2019); *Livingston v. United States*, __ F. App'x __, 2018 WL 6431531, at *1–2 (11th Cir. Dec. 6, 2018); *Sterling v. United States*, __ F. App'x __, 2018 WL 5096322, at *2 (11th Cir. Oct. 18, 2018); *Upshaw v. United States*, 739 F. App'x 538, 541 (11th Cir. 2018); *Foxx v. United States*, 736 F. App'x 253, 253–54 (11th Cir. 2018); *Lewis v. United States*, 733 F. App'x 501, 502 (11th Cir. 2018); *Wilson v. United States*, 710 F. App'x 435, 436–37 (11th Cir. 2018); *United States v. Harris*, 727 F. App'x 610, 613 (11th Cir. 2018); *Cottman v. United States*, 2017 WL 6765256, at *2 (11th Cir. Oct. 24, 2017) (COA denial); *Prosser v. United States*, 2017 WL 4678152, at *2 (11th Cir. Apr. 26, 2017) (COA denial); *McKay v. United States*, 2017 WL 3597200, at *3 (11th Cir. Apr. 17, 2017) (COA denial).

7. *In re Burgest*, 829 F.3d 1285, 1287 (11th Cir. 2016) (Florida manslaughter and kidnapping are "crimes of violence" under U.S.S.G. § 4B1.2)

   Cited in: *United States v. Valdes Gonzalez*, __ F. App'x __, 2018 WL 5919904, at *2 (11th Cir. 2018) (decision below); *United States v. Watkins*, 718 F. App'x 849, 854 (11th Cir. 2017); *United States v. Woods*, 688 F. App'x 718, 718 (11th Cir. 2017).

C. "Crimes of Violence" Under 18 U.S.C. § 924(c)

8. *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) (federal armed bank robbery is a "crime of violence" under the elements clause of § 924(c)(3)(A)).

   Cited in: *Rose v. United States*, 738 F. App'x 617, 630 n.10 (11th Cir. 2018); *Mercado v. United States*, 720 F. App'x 1018, 1019 (11th Cir. 2018); *Sanchez v. United States*, 717 F. App'x 974, 975 (11th Cir. 2018); *United States v. Faurisma*, 716 F. App'x 932, 933 (11th Cir. 2018); *Williams v. United States*, 709 F. App'x 676, 676–77 (11th Cir. 2018); *United States v. McCollum*, 697 F. App'x 627, 628 (11th Cir. 2017); *Freeman v. United States*, 2017 WL 3923326, at *2–3 (11th Cir. Mar. 30, 2017) (COA denial).

9. *In re Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016) (Hobbs Act robbery is a "crime of violence" under the elements clause in § 924(c)(3)(A)).

   Cited in: *United States v. St. Hubert*, 909 F.3d 335, 345–49 (11th Cir. 2018); *United States v. Wiles*, 723 F. App'x 968, 969 (11th Cir. 2018); *Charlton v. United States*, 725 F. App'x 881, 889 (11th Cir. 2018); *King v. United States*, 723 F. App'x 842, 844 (11th Cir. 2018); *United States v. Harris*, 704 F. App'x 919, 919 (11th Cir. 2017); *United States v. Davis*, 711 F. App'x 605, 610, 612 (11th Cir. 2017); *United States v. Grace*, 711 F. App'x 495, 503 (11th Cir. 2017); *Campos v. United States*, 2017 WL 3224647, at *1 (11th Cir. Mar. 2, 2017) (COA denial); *United States v. Rosales-Acosta*, 679 F. App'x 860, 863 (11th Cir. 2017); *United States v. Langston*, 662 F. App'x 787, 794 (11th Cir. 2016).

10. *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (aiding and abetting Hobbs Act robbery is a "crime of violence" under the elements clause in § 924(c)(3)(A)).

    Cited in: *United States v. St. Hubert*, 909 F.3d 335, 345–49 (11th Cir. 2018); *United States v. Ellis*, 736 F. App'x 855, 860 (11th Cir. 2018); *Charlton v. United States*, 725 F. App'x 881, 889 (11th Cir. 2018); *United States v. Langston*, 662 F. App'x 787, 794 (11th Cir. 2016).

11. *In re Smith*, 829 F.3d 1276, 1280–81 (11th Cir. 2016) (federal carjacking is a "crime of violence" under the elements clause in § 924(c)(3)(A)).

    Cited in: *Williams v. United States*, 740 F. App'x 707, 707 (11th Cir. 2018); *Ovalles v. United States*, 905 F.3d 1300, 1303–04 (11th Cir. 2018); *United States v. Hinton*, 730 F. App'x 719, 723 (11th Cir. 2018); *Marcano v. United States*, 714 F. App'x 955, 958 (11th Cir. 2017); *Craig v. United States*, 703 F. App'x 798, 802 (11th Cir. 2017); *Johnson v. United States*, 701 F. App'x 917, 921 (11th Cir. 2017); *Grant v. United States*, 694 F. App'x 756, 757 (11th Cir. 2017).

12. *In re Watt*, 829 F.3d 1287, 1289–90 (11th Cir. 2016) (aiding and abetting assault of federal postal employee is a "crime of violence" under the elements clause in § 924(c)(3)(A)).

    Cited in: *United States v. Ellis*, 736 F. App'x 855, 860 (11th Cir. 2018)

13. *In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016) (federal unarmed bank robbery is a "crime of violence" under the elements clause in § 924(c)(3)(A)).

    Cited in: *Gibson v. United States*, __ F. App'x __, 2019 WL 140820, at *2 (11th Cir. Jan. 9, 2019); *Cooper v. United States*, __ F. App'x __, 2018 WL 6807247, at *1 (11th Cir. Dec. 27, 2018); *United States v. St. Hubert*, 909 F.3d 335, 349 (11th Cir. 2018); *Ovalles v. United States*, 905 F.3d 1300, 1304 (11th Cir. 2018); *Rose v. United States*, 738 F. App'x 617, 630 n.10 (11th Cir. 2018); *Charlton v. United States*, 725 F. App'x 881, 889 (11th Cir. 2018); *McKinley v. United States*, 698 F. App'x 597, 598 (11th Cir. 2017); *United States v. Watson*, 709 F. App'x 619, 620–21 (11th Cir. 2017); *Freeman v. United States*, 2017 WL 3923326, at *1 (11th Cir. Mar. 30, 2017) (COA denial); *United States v. Horsting*, 678 F. App'x 947, 949 (11th Cir. 2017).

14. *In re Hunt*, 835 F.3d 1277, 1277 (11th Cir. 2016) (federal armed bank robbery is a "crime of violence" under the elements clause in § 924(c)(3)(A)).

    Cited in: *Mercado v. United States*, 720 F. App'x 1018, 1019 (11th Cir. 2018).

APPENDIX F

STATUTORY PROVISIONS

28 U.S.C. § 2255(h)

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

* * *

(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. § 2244(b)

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) 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.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.