NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MICHAEL ST. HUBERT,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a criminal defendant's right to Due Process in his direct appeal violated by the Eleventh Circuit's rule affording binding force and preclusive effect to a prior panel's published decision denying a *pro se* petitioner's application for authorization to file a successive § 2255 motion, which 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?

2. If a completed offense is categorically a "crime of violence" within 18 U.S.C. § 924(c)(3)(A)'s elements clause because it has the use or threat of "*violent* force" as an element, is the *attempted* commission of that offense automatically and categorically a "crime of violence," irrespective of whether the substantial step required for conviction is violent, and even if the attempt offense does not require specific intent?

3. Does Congress' express "*Clarification* of Section 924(c) of Title 18, United States Code" in Section 403 of the First Step Act apply to a defendant convicted and sentenced prior to the enactment of the Act, but whose sentence has not yet been "imposed" because his case remains "pending" on direct review?

INTERESTED PARTIES

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

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Michael St. Hubert ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Petitioner's convictions and sentence, *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. Nov. 15, 2018), is included in the Appendix at A-1. The decision denying rehearing en banc, *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. Mar. 19, 2019) (en banc), is included in the Appendix at A-2.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's convictions and sentence was entered on November 15, 2018. However, the full court *sua sponte* considered rehearing en banc after a member in active service called for a poll. On March 19, 2019, the en banc Court denied rehearing en banc. Pursuant to Supreme Court Rule 13(3), "[t]he time for filing a petition for writ of certiorari runs from the date of entry of the judgment . . . But . . . if the lower court . . . *sua sponte* considers rehearing, the time to file the petition for certiorari for all parties (whether or not they requested rehearing) runs from the date of the denial of rehearing." According to Rule 13(3), the petition for certiorari was due to be filed June 18, 2019. However, on May 31, 2019, Justice Thomas granted Petitioner a thirty-day extension of time to file his petition.

This petition is timely filed pursuant to Supreme Court Rules 13(3) and 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means –

> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or

device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

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

(c)(1)(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

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

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

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

The First Step Act of 2018, Pub. L. No. 115-391, enacted on December 21, 2018, amended §924(c)(1)(C) in Title IV, Section 403 of the Act, entitled "Clarification of Section 924(c) of Title 18, United States Code," which provides:

(a) IN GENERAL. – Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

(b) APPLICABILITY TO PENDING CASES. – This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

18 U.S.C. § 1951. Interference with commerce by threats or violence.

> **(a)** Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> **(b)** As used in this section –
>
> **(1)** The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his family or anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

The Charges, Motion to Dismiss, and Plea

Petitioner was charged in 2015, *inter alia,* with two counts of using and carrying a firearm during and relation to a crime of violence, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The alleged "crime of violence" in the first count (Count 8) was a substantive Hobbs Act robbery in violation of 18 U.S.C. § 1951, and in the second count (Count 12), it was an attempted Hobbs Act robbery in violation of that same statute. Petitioner moved to dismiss those counts, arguing that the charged crimes were not "crimes of violence" under either the elements or residual clause definitions in § 924(c)(3). However, the district court summarily denied that motion, and Petitioner ultimately pled guilty to the above charges. The district court sentenced him to 84 months on the first § 924(c) conviction, and a consecutive 300 months on the second.

The Appeal to the Eleventh Circuit, and the Decision in *St. Hubert I*

Petitioner appealed to the Eleventh Circuit, arguing that neither a substantive Hobbs Act robbery nor an attempted Hobbs Act robbery were qualifying "crimes of violence" under either the residual or elements clauses § 924(c)(3), and that this was an unwaivable jurisdictional defect in the indictment. Pertinent to Issue I herein, the government responded that in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), the Eleventh Circuit had found that Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-force clause in § 924(c)(3)(A)." In reply, Petitioner pointed out that *In re St. Fleur* was an opinion issued in the "procedurally distinct context" of a *pro se* defendant's application to file a successive § 2255 motion, without adversarial briefing, on a barebones form, in a truncated 30-day time period, and argued it was neither binding nor precedential outside of that context. Nor was *Saint Fleur* even persuasive, Petitioner argued, because its reasoning was inconsistent with the categorical approach as mandated by this Court in controlling precedents the *Saint Fleur* panel did not consider.

At oral argument, Petitioner explained that the reason orders in the successive § 2255 application context could *not* "bind" subsequent panels in cases on direct review is that the availability of appellate review (including by certiorari) is integral to the prior panel precedent rule. And by statute, 28 U.S.C. § 2244, Congress eliminated appellate review of three-judge panel denials of applications for authorization to file successive § 2255 motions. As such, Petitioner argued that *Saint Fleur* was neither binding nor persuasive, and the court should find as a matter of first impression in his case that (as argued in his Initial Brief) Hobbs Act robbery did *not* categorically meet the "crime of violence" definition in the elements clause, because the offense could be committed by causing future economic harm to intangible rights, without physical violence to person or property. This was not simply a "hypothetical" in the Eleventh

Circuit, Petitioner noted. The plain language of the Eleventh Circuit's pattern instruction for Hobbs Act robbery specifically allowed conviction for causing fear of future economic harm, "including financial loss as well as fear of physical violence," and defined the term "property" in § 1951(a) to include "intangible rights."

Post-oral argument, Petitioner filed a letter of supplemental authority pursuant to Fed. R. App. P. 28(j) responding to an assertion by one of the panelmembers at oral argument that several circuits had found *In re St. Fleur* "binding authority" in holding that Hobbs Act robbery was a "crime of violence" within § 924(c)'s element clause. Petitioner noted that *In re St. Fleur* plainly could not be "binding" in another circuit, and that none of the circuit decisions the panelmember had mentioned were persuasive in deciding *his* claim, which was supported by the Eleventh Circuit's pattern Hobbs Act robbery instruction. He explained that the Seventh Circuit did not have a pattern Hobbs Act robbery instruction; the Fifth Circuit did have such an instruction but did not rely upon it in the cited case; and the Second Circuit – in *United States v. Hill*, 832 F.3d 135 (2nd Cir. 2016) – could never have considered a "fear of injury" argument supported by a pattern jury instruction, because the Second Circuit had *no* pattern jury instructions at all. Appendix A-5.

The panel thereafter permitted supplemental briefing on the issue of whether an attempted Hobbs Act robbery met the elements clause. And as part of Petitioner's supplemental argument on attempt, he reiterated that the underlying Hobbs Act robbery offense was categorically overbroad, as confirmed by the Circuit's pattern instruction. Appendix A-7 at 2.

On February 28, 2018, the Eleventh Circuit affirmed Petitioner's § 924(c) convictions and consecutive sentences, rejecting his "crime of violence" challenges to both substantive Hobbs Act robbery and attempted Hobbs Act robbery, under both the elements and residual

clauses of 18 U.S.C. § 924(c)(3). *United States v. St. Hubert*, 883 F.3d 1319 (Feb. 28, 2018) ("*St. Hubert I*"). While agreeing with Petitioner as a threshold matter that his challenges to his § 924(c)convictions were constitutional, jurisdictional, and not waived by his plea, *id.* at 1324-27, the court nonetheless rejected his claims on the merits. *Id.* at 1327-37.

With regard to the "crime of violence" definition in § 924(c)(3)(B), the court noted that it had "already rejected a *Johnson*-based void-for-vagueness" challenge to that provision in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017). However, in the event § 924(c)(3)(B) were declared unconstitutionally vague and void, the court found that the elements clause in § 924(c)(3)(A) provided an "independent and alternative ground" upon which to uphold Petitioner's Count 8 and Count 12 convictions. *See id.* at 1328, 1334.

With regard to Petitioner's challenge to substantive Hobbs Act robbery as a "crime of violence" within § 924(c)(3)(A), the Eleventh Circuit noted that it had already held in *In re Saint Fleur*, 824 F.3d 1337, 1340-41 (11th Cir. 2016) that Hobbs Act robbery "independently" qualified as a "crime of violence" within the elements clause. And because of that, it held, it was "bound by *Saint Fleur*." *Id.* at 1329. The court squarely rejected Petitioner's argument that *Saint Fleur* was not binding precedent in a direct appeal because it had issued in the context of a *pro se* application for leave to file a second or successive § 2255 motion. The court stated: "Lest there be any doubt, we now hold in this direct appeal 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 are 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.'" *Id.* at 1329 (citation omitted).

While holding that it was "bound by *Saint Fleur*," *id.* at 1329, the court acknowledged in *dicta* in a later portion of the decision that *St. Fleur* had ignored "the Supreme Court's discussion of the categorical approach in [*Moncrieffe v. Holder*, 569 U.S. 184 (2013), *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S.Ct. 2243 (2016)]," which were "relevant to St. Hubert's appeal." *Id.* at 1229. Then, in an ensuing discussion which – despite its length – was also *dicta*, the court attempted to justify the result in *Saint Fleur* by the fact that several other circuits had ruled that Hobbs Act robbery was categorically a "crime of violence" within the elements clause. *Id.* at 1331. In particular, it agreed with the Second Circuit in *Hill* that "a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a 'realistic probability' that Hobbs Act robbery could encompass nonviolent conduct." 883 F.3d at 1332 (citing *Hill*, 832 F.3d at 139-40, 142-43; *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); and *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013)(citing *Duenas-Alvarez*). And here, the court stated:

> St. Hubert ha[d] not pointed to any case at all, much less one in which the Hobbs Act applied to a robbery or attempted robbery, that did not involve, at a minimum, a threat to use physical force. Indeed, St. Hubert does not offer a plausible scenario, and we can think of none, in which a Hobbs Act robber could take property from the victim against his will and by putting the victim in fear of injury (to his person or property) without at least threatening to use physical force capable of causing such injury. *See Curtis Johnson v. United States*, 559 U.S. 133, 140 [(2010)].

883 F.3d at 1332. For that reason, the court stated, *Saint Fleur* "properly concluded that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)." *Id.* at 1332-33.

At no time, even in this lengthy *dicta* on "fear of injury" under the Hobbs Act, did the court acknowledge that Petitioner's *specific* "fear of injury" argument was *different* than the one rejected in *Hill*, because it was *based upon the plain language of Eleventh Circuit Pattern*

Instruction 70.3, which confirmed – even without a reported case – that a defendant in this circuit may be convicted for Hobbs Act robbery for causing fear of non-violent economic harm to intangible rights. The court mischaracterized Petitioner's argument as just "like" the one rejected in *Hill*, *id.* at 1332, ignoring the fact that (as pointed out in Petitioner's Rule 28(j) letter) the Second Circuit in *Hill* could *not* have considered whether language in a pattern instruction confirmed the overbreadth of the Hobbs Act robbery statute, when the Second Circuit had no pattern instructions.

With regard to the Count 12 conviction – which had triggered the harsh, consecutive 25-year sentence – the court acknowledged that it had not yet squarely considered the separate question of whether an *attempted* Hobbs Act robbery was a "crime of violence" within § 924(c)(3)(A). *Id.* at 1329, 1333. In addressing that question of first impression, it ruled as the government had argued that *attempted* Hobbs Act robbery was indeed a "crime of violence," reasoning that because the underlying substantive offense was categorically violent, "the attempted taking of [] property in such manner must also include at least the "attempted use' of force." *Id.* at 1333-34 (citing as support *United States v. Wade*, 458 F.3d 1273, 1278 (11th Cir. 1006); *Hill v. United States*, 877 F.3d 717, 718-19 (7th Cir. 2017); *United States v. Armour*, 840 F.3d 904, 908-09 (7th Cir. 2016)).

In reaching that conclusion, the court embraced and adopted the Seventh Circuit's reasoning in *Hill* that because "a defendant must intend to commit every element of the completed crime in order to be guilty of attempt," an attempt to commit *any* crime "'should be treated as an attempt to commit every element of that crime.'" *Id*. at 1334 (citing *Hill*, 877 F.3d at 719). Although *Hill* was an ACCA case involving an attempted murder predicate, the Eleventh Circuit found *Hill* completely "analogous." *Id*. at 1334. "Under *Hill*'s analysis," it

found, the intent to commit violence was an element of a Hobbs Act robbery crime due to the "taking in a forcible manner" requirement, and given that intent, an attempted Hobbs Act robbery was a "crime of violence." *Id.* (noting with significance that "under *Hill*'s analysis," § 924(c)(3)(A) "equates the use of force with attempted use of force;" "thus, the text of § 924(c)(3)(A) makes clear that actual force need not be used for a crime to qualify under § 924(c)(3)(A)").

Because Petitioner attempted to commit a "crime of violence" (Hobbs Act robbery), the court found he intended to commit violence, that intent met the elements clause, and for that alternative and independent" reason, his *attempted* Hobbs Act robbery was a "crime of violence" under § 924(c). *Id.* & n. 15; 1336-37.

The Decision in *St. Hubert II*

Petitioner sought certiorari to review the Eleventh Circuit's residual and elements clause holdings as to both § 924(c) predicates, but this Court denied review. *St. Hubert v. United States*, 139 S.Ct. 246 (2018) (No. 18-5269). That denial of certiorari, however, did not end the direct appeal process in this case since all through the proceedings upon certiorari, the Eleventh Circuit held the mandate in *St. Hubert I*. And indeed, after this Court's decision in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) declaring 18 U.S.C. § 16(b) unconstitutionally vague, the Eleventh Circuit continued to hold the mandate while it reconsidered its prior precedent finding § 924(c)(3)(B) distinguishable from § 16(b) and not unconstitutionally vague.

On October 4, 2018, a sharply divided Eleventh Circuit issued its decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. Oct. 4, 2018) (en banc), reaffirming that § 924(c)(3)(B) was *not* unconstitutionally vague – but for a different reason. Specifically, while acknowledging that § 924(c)(3)(B) would be unconstitutionally vague under *Dimaya*, *id.* at 1233, 1238-40, the

majority abandoned the categorical approach with regard to that provision, and adopted instead a "conduct-based approach that accounts for the actual, real-world facts of the crime's commission." *Id.* at 1253. Four Eleventh Circuit judges strenuously dissented. *See id*. at 1277-99 (Jill Pryor, J., joined by Wilson, Martin, and Jordan, JJ., dissenting).

After that decision, the *St. Hubert* panel elicited supplemental briefing on whether Petitioner's predicate offenses qualified as "crimes of violence" under *Ovalles*' "conduct-based approach." In Part IV of his supplemental brief, Petitioner continued to press his argument that Hobbs Act robbery was not categorically a "crime of violence" under the elements clause based upon the Eleventh Circuit pattern instruction, and that the other circuit cases the court had found persuasive in its prior opinion had *not* considered a similar issue. In particular, he emphasized that the Second Circuit decision the panel had previously found persuasive was actually inapposite since the Second Circuit had no pattern instructions. With regard to *Duenas-Alvarez*, he argued, the plain language of Eleventh Circuit Pattern Instruction 70.3 "itself creates a 'reasonable probability'" that his Hobbs Act robbery conviction was "plausibly" based on non-violent conduct, and that was all that was required under *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013). He asked the panel to reconsider its suggestion in the decision that a reported appellate case was additionally necessary, when under *McGuire* it clearly was not.

Finally, in Part V of his supplemental brief, Petitioner also asked the panel to reconsider its all-attempts-qualify ruling in *St. Hubert I* based upon *James v. United States*, 550 U.S. 192, 201 (2007), *overruled on other grounds* by *Johnson v. United States*, 135 S.Ct. 2551 (2015), which had rejected that precise type of presumptive logic. He pointed out that the Eleventh Circuit in *James* had presumed that every attempt to commit an enumerated "violent felony" (such as burglary) in 18 U.S.C. § 924(e)(2)(B)(ii), was necessarily a "violent felony" within the

residual clause. *United States v. James*, 430 F.3d 1150, 1155-58 (11th Cir. 2005). But this Court had refused to sanction such reasoning, and had clearly stated that "preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure" would not even meet the then-all-inclusive residual clause. *James*, 550 U.S. at 204-05. Petitioner urged the panel to find similarly that preparatory conduct sufficient for an attempted Hobbs Act robbery offense (temporally or locationally separated from the crime scene or designated victim) such as that in *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016), did not meet the much-narrower elements clause.

On November 18, 2018, the court vacated *St. Hubert I* in light of *Dimaya* and the en banc decision in *Ovalles*, and issued a new opinion. *United States v. St. Hubert*, 909 F.3d. 335 (11th Cir. Nov. 15, 2018) ("*St. Hubert II*"). That new opinion readopted and reinstated the jurisdictional and substantive Hobbs Act robbery rulings from *St. Hubert I* "as previously written." *Id.* at 337, 340-51. While the court reaffirmed both § 924(c) convictions under the residual clause, it did so now based upon *Ovalles*' "conduct-based approach." *Id.*at 344-45.

The court devoted more attention in *St. Hubert II*, however, to the question of whether – under the categorical approach – an attempted Hobbs Act robbery meets the elements clause. While stating that it was "readopt[ing] and reinstat[ing]" Section IV of *St. Hubert I* on that issue, it acknowledged that it had also added "some additional analysis along the way." *Id.* at 337. Specifically, the panel re-adopted its prior discussion stating that to be convicted of an "'attempt' of a federal crime," a defendant "must (1) have the specific intent to engage in the criminal conduct with which he is charged; and (2) have taken a substantial step toward the commission of the offense that strongly corroborates his criminal intent." *Id.* at 351 (citing *United States v. Jockisch*, 857 F.3d 1122, 1129 (11th Cir. 2017); *United States v. Yost*, 479 F.3d 815, 819 (11th

Cir. 2007); and *United States v. Murrell*, 368 F.3d 1283, 1286-87 (11th Cir. 2004)). But notably, none of these cases were attempted Hobbs Act robbery cases. They involved the very different crime of attempted solicitation of a minor.

Second, the court re-adopted and continued to follow the analysis in *Hill v. United States*, 877 F.3d 717, 718-19 (7th Cir. 2017), which had in turn adopted Judge Hamilton's concurring opinion in *Morris v. United States*, 827 F.3d 696 (7th Cir. 2016), in explaining why "an attempt to commit a violent felony under the ACCA is also a violent felony." *Id.* at 352. The court continued to believe *Hill*'s analysis was "analogous" and controlled the § 924(c) case before it here, stating – again, without support – that "an attempt to commit Hobbs Act robbery requires that St. Hubert intended to commit every element of Hobbs Act robbery." *Id.*

What the court added to its prior discussion of this issue in *St. Hubert I* was explicit recognition that as "St. Hubert argues," (1) "a robber could plan the robbery and travel with a gun to the location of the robbery but be caught before entering the store and still be guilty of attempted Hobbs Act robbery," and therefore, (2) "the substantial step required for an attempt conviction will not always involve an actual or threatened use of force." *Id.* at 352-33. Nonetheless, the court rejected Petitioner's suggestion that this was relevant to the elements clause analysis in any way. It stated:

> [A]s before, we agree with the Seventh Circuit that even if the completed substantial step falls short of actual or threatened force, the robber has attempted to use actual or threatened force because he has attempted to commit a crime that would be violent if completed. *See Hill*, 877 F.3d at 718-19. Thus, we reject St. Hubert's claim that the substantial step itself in an attempt crime must always involve the actual or threatened use of force for an attempt to commit a violent crime to qualify under § 924(c)(3)(A)'s elements clause.

Id. at 353. In so stating, the court did not mention *Wrobel*, and completely ignored Petitioner's argument that a contrary finding was compelled by this Court's decision in *James*.

Petitioner did not seek either a panel rehearing or rehearing en banc after *St.Hubert II*. Rather, on February 13, 2019, he sought this Court's review of the decision, arguing that § 924(c)(3)(B) was unconstitutionally vague and that the decision was inconsistent with *James* on the attempt issue. He also argued that Section 403 of the just-enacted First Step Act of 2018 applied to cases like his that were sentenced before the effective date of the Act, if those sentences were not yet final on direct appeal.

The Eleventh Circuit's *Sua Sponte* Denial of Rehearing En Banc in *St. Hubert II*

Just before that petition was conferenced, on March 19, 2019, the Eleventh Circuit unexpectedly, and narrowly, denied rehearing en banc *in St. Hubert II*. *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. 2019) (noting that a member of the Court in active service had requested a poll on whether the case should be reheard on banc).

The six separate opinions respecting the denial of rehearing en banc totalled 90 pages, and brought to the fore a deep fracture within the Eleventh Circuit on whether orders issued by three-judge panels on applications for leave to file second or successive § 2255 motions should resolve the merits of open issues, whether such orders should be published, and if they are, whether those published orders should have precedential value in cases on direct appeal like Petitioner's. Five members of the court (in two opinions) defended *St. Hubert*'s holding as to the precedential value of these orders, and five others (in four opinions) criticized it. Both the divisive nature of the debate and the sharpness of the discourse reflect the significance of *St. Hubert*'s holding on this issue.[1]

[1] *E.g.*, *St. Hubert*, 918 F.3d at 12199 (Wilson, J., dissenting from denial of rehearing en banc) ("I will continue to express disagreement when important issues are at stake."); *id.* at 1209-10 (Martin, J., dissenting from denial of rehearing en banc) (*St. Hubert* "has great consequence. It curtails our review of claims made by prisoners like Mr. St. Hubert, even on direct appeal. . . . Congress gave us a gatekeeping function. We've used it to lock the gate and throw away the key. The full court should have taken up this matter of great consequence."); *id.* at 1210 (Jill Pryor, J.,

Moreover, as indicated by Judge Jill Pryor's dissent, joined by Judges Wilson and Martin, the Eleventh Circuit was also sharply divided on the precise question Petitioner had raised as to whether an attempt to commit an offense that is a "crime of violence" or "violent felony" within the elements clause "itself necessarily constitutes an elements clause offense." *Id.* at 1210.

Although certiorari was denied several days later, *St. Hubert v. United States*, 139 S.Ct. 1394 (March 25, 2019), the *sua sponte* denial of rehearing en banc has restarted the clock for certiorari and permits a new petition.

REASONS FOR GRANTING THE WRIT

In *United States v. Davis*, 139 S.Ct. 2319 (2019), the Court declared the "crime of violence" definition in the residual clause of 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague and void. *Id.* at 2336. *Davis*' holding in that regard has unquestionably abrogated the contrary holding of *United States v. St. Hubert*, 909 F.3d 335, 344-45 (11th Cir. Nov. 15, 2018) (*St. Hubert II*). Petitioner's convictions on Counts 8 and 12 can continue to stand now only if they qualify as "crimes of violence" within § 924(c)(3)(A), the "elements clause."

Unfortunately, due the Eleventh Circuit's holding in the decision below that published orders by three-judge panels upon the denial of authorization for a successive § 2255 motion are "binding" in subsequent cases on direct review, even if the Court were to GVR this case in light of *Davis* Petitioner will have no opportunity to have the Eleventh Circuit consider well-founded arguments as to why his conviction for Hobbs Act robbery is not a "crime of violence" within the elements clause. These arguments were not before the panel in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), but the Eleventh Circuit has found *Saint Fleur* binding, dispositive, and preclusive of any further argument on the issue.

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dissenting from denial of rehearing en banc) ("The institutional (and, possibly, constitutional) problems with treating published panel orders as binding on all subsequent panels are significant and, at a minimum, worthy of en banc review").

The four judges dissenting from the denial of rehearing en banc in *St. Hubert II* expressly "welcome[d] any avenue of Supreme Court review" of the Eleventh Circuit's rule that decisions like *Saint Fleur* are precedential and preclude consideration of new argument in cases on direct review. *Id.* at 1198 n.4 (Wilson, J., dissenting from denial of rehearing en banc, joined by Martin, Jill Pryor, and Rosenbaum, JJ.). The Court should take that opportunity now, grant certiorari on that issue here, and hold that Petitioner has been denied his right to Due Process of law in his appeal due to the Eleventh Circuit's erroneous holding – alone among the circuits – that published panel decisions adjudicating a successive § 2255 application are binding in a direct criminal appeal and preclude reconsideration of a merits determination rendered therein.

I. The Eleventh Circuit denied Petitioner Due Process by affording preclusive effect in his direct criminal appeal to a prior panel decision adjudicating a successive § 2255 application.

In *In re St. Fleur*, 824 F.3d 1337 (11th Cir. 2016), a panel of the Eleventh Circuit held as a matter of first impression that Hobbs Act robbery was a "crime of violence" under the elements clause in 18 U.S.C. § 924(c)(3)(A). *Id.* at 1341. That decision was rendered upon denial of an application to file a successive 28 U.S.C. § 2255 motion and was the product of irregular, truncated procedures in which open merits questions are not to be resolved. Notably, the *pro se* applicant in *In re Fleur* was required to use a standardized form limiting the space for any legal argument; the Eleventh Circuit panel felt statutorily obligated to resolve the application in less than 30 days; it exceeded the limited statutory scope of review by opining on the merits of his claim; it did not hear from the government or hold oral argument; and it precluded the applicant from seeking further review of the panel's ruling. *See* 11th Cir. No. 16-12299.[2]

[2] In fact, the applicant in *In re Saint Fleur* filed two additional successive applications seeking reconsideration of the initial published ruling, but the panel refused to consider the merits of his argument. *See* 11th Cir. Nos. 16-13974 & 16-14022.

No other circuit employs any of those procedures. Yet the Eleventh Circuit nonetheless designated for publication dozens of orders denying successive applications, one of which was *In re Saint Fleur*. The Eleventh Circuit then held in Petitioner's case that the "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." 909 F.3d 335, 346 (11th Cir. 2018) (emphasis in original). That holding generated substantial conflict within the Eleventh Circuit, as reflected in the separate opinions respecting the denial of rehearing en banc.

By affording *In re Saint Fleur* preclusive effect in Petitioner's direct criminal appeal, the Eleventh Circuit violated Petitioner's procedural due process rights—both under the framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and under this Court's issue-preclusion precedents. This due process argument is set forth in greater detail in the pending certiorari petition in *Valdes Gonzalez v. United States* (U.S. No. 18-7575) (distributed for conference of Oct. 1, 2019), which this Court has repeatedly "rescheduled." Rather than repeat the arguments made in *Valdes Gonzalez* here, Petitioner adopts and incorporates by reference herein the arguments set forth in the *Valdes Gonzalez* petition and the petitioner's reply.

The Due Process issue raised in *Valdes Gonzalez* – if resolved in the Petitioner's favor – could be case-dispositive here. Because the Eleventh Circuit deemed *Saint Fleur* binding, it made no difference how many times Petitioner pressed his argument that Eleventh Circuit Pattern Instruction 70.3 confirmed that a Hobbs Act robbery conviction did not categorically require the use or threat of violence force against property. The Eleventh Circuit steadfastly refused to even consider that argument pursuant to its "prior panel precedent" rule which – as noted in the *Valdez Gonzalez* reply at 10 – admits of no "overlooked reason" exception. Had

Saint Fleur not "bound" the court below and foreclosed consideration of Petitioner's argument based upon the pattern instruction, the court should have reached a different conclusion under both this Court's and Circuit categorical approach precedents.

> Eleventh Circuit Pattern Instruction 70.3 on Hobbs Act robbery provides:
>
> It's a Federal crime to acquire someone else's property by robbery . . .
>
> The Defendant can be found guilty of this crime only if all the following facts beyond a reasonable doubt.
>
> > (1) the Defendant knowingly acquired someone else's personal property;
> >
> > (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence or causing the victim to *fear harm*, either immediately or in the future; ...
>
> "Property" includes money, tangible things of value, *and intangible rights that are a source or element of income or we*alth.
>
> "Fear means a state of anxious concern, alarm, or anticipation of harm. *It includes the fear of financial loss as well as fear of physical violence*.

(Emphasis added) (Appendix A-6).

According to this instruction, a defendant's taking of intangible rights (such as a stock option, or the right to conduct business) by causing a victim to simply "fear" a financial loss – but without causing the victim to fear *any* physical violence – is a plausible means of committing a Hobbs Act robbery. Indeed, before the Eleventh Circuit definitively resolved the "crime of violence" issue against Petitioner in the decision below, two judges on the Eleventh Circuit had specifically opined that an offense might *not* categorically be a "crime of violence," if juries were routinely instructed in Hobbs Act cases, that the statute could be violated without the use or threat of physical violence, and simply by causing "fear of financial loss." *See Davenport v. United States*, No. 16-15939, Order at 6 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting

certificate of appealability on whether Hobbs Act robbery is an offense that categorically meets §924(c)'s elements clause; noting that, given Eleventh Circuit Pattern Jury Instruction O70.3, a defendant could be convicted of that offense simply because he caused the victim to "fear harm" to "property," which includes "financial loss" and "intangible rights"); *In re Hernandez*, 857 F.3d 1162 (11th Cir. 2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (noting, based on the same definition of "fear" in the pattern Hobbs Act extortion instruction, that "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force;" citing *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013)).

Petitioner urged the Eleventh Circuit to hold as a matter of first impression in his case that the plain language in Eleventh Circuit Pattern O70.3 confirmed that Hobbs Act robbery could "plausibly" be committed without the use or threat of physical violence. As support for that standard, he cited *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), where former-Justice O'Connor writing for the court had explained that § 924(c)(3)(A), by its terms, requires a categorical approach. And pursuant to that approach, the court "must ask whether the crime, in general, plausibly covers any non-violent conduct." *Id.* at 1337. *McGuire* was clear that "[o]nly if the plausible applications of the statute of conviction all require the use or threatened use of force can [a defendant] be held guilty of a crime of violence." *Id.* (parallel citations omitted).

In so holding, the court cited *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 192-93 (2007), where this Court addressed how to identify the scope of an offense for purposes of applying the categorical approach, and had cautioned that doing so "requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [federal] definition." While the Court added that "[t]o show that realistic probability," an offender "must

point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues," *id.* that particular statement must be read in context. The offender in *Duenas-Alvarez* had argued that California's aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190-91. And that argument found no support in either the statutory language, precedent establishing the scope of aiding-and-abetting liability, or any other source such as a pattern jury instruction. In the absence of such support, the Court required the offender in *Duenas-Alvarez* to identify an actual case to support his novel, proposed application. Fatally for his argument, he could not. *See id.* at 187, 190-91.

In *McGuire*, the Eleventh Circuit notably did not require the defendant to identify a reported case confirming that there had been an actual prosecution under 18 U.S.C. § 32(a)(1), for a non-violent commission of the offense (disabling an aircraft in the special jurisdiction of the United States). Instead, the *McGuire* court simply considered the "possibilities" of purportedly non-violent means of committing the offense of "disabling an aircraft" suggested by the defendant – such as deflating the tires or disabling the ignition while the plane is on the ground, or disconnecting the onboard circuitry or the radio transponder while the plane is airborne – and found that because each of these "minimally forceful acts" is calculated to seriously interfere with the freedom, safety and security of the passengers, or cause damage to the plane, it involves the "use of force against that plane or its passengers." 706 F.3d at 1337-38.

Here, by contrast, the conduct Petitioner suggested could qualify as a Hobbs Act violation based on the plain language of the Eleventh Circuit pattern instruction, was *not even* "minimally forceful." Taking a person's "intangible rights" by causing fear of a "financial loss" is not calculated to cause physical harm to any person, or to property. Under both *McGuire* and

Duenas-Alvarez, the Eleventh Circuit should have considered that a *completely non-violent* commission of a Hobbs Act robbery was not only "plausible," but "probable," based upon the plain language of its own pattern instruction. It did not, due to the binding force of *Saint Fleur*.

Although this Court has not yet considered whether the case-specific requirement of *Duenas-Alvarez* should apply where, as here, the plain language of a circuit's pattern jury instruction, establishes that an offense is overbroad vis-a-vis the elements clause, Petitioner's argument is certainly viable given that a pattern instruction construes the plain language of a statute, and the First, Third, Sixth, Ninth, and Tenth Circuits have held that plain statutory language can establish that an offense is overbroad, notwithstanding the absence of a reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017); *Jean Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009); *United States v. Lara*, 590 Fed. App'x 574, 584 (6th Cir. 2014); *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (en banc); *United States v. Tittles*, 852 F.3d 1257, 1274-75 & n. 23 (10th Cir. 2017). While admittedly, the majorities on the en banc Fifth and Eleventh Circuits have taken the contrary view, there have been vigorous dissents in both courts. *See United States v. Castillo-Rivera*, 853 F.3d 218, 222-24 (5th Cir. 2017) (en banc); *United States v. Vail-Bailon*, 868 F.3d 1293, 1305-07 (2017)(en banc).

This is plainly a live issue at this time. As a matter of Due Process, Petitioner has the right in his direct appeal to have a reviewing court ***at least consider*** the merits of his argument that the pattern instruction itself satisfied *Duenas-Alvarez*, without a confirmatory reported "case." And of course, If the Eleventh Circuit's holding that Hobbs Act robbery is "categorically" a "crime of violence" were to fall, without *Saint Fleur*, so would its conclusion that attempted Hobbs Act robbery is also a qualifying "crime of violence." The Due Process issue here could be case-dispositive for Petitioner and many other Eleventh Circuit defendants.

II. The Eleventh Circuit's holding that an *attempted* Hobbs Act robbery automatically qualifies as an "crime of violence" within § 924(c)'s elements clause simply because Hobbs Act robbery is categorically a "crime of violence," and irrespective of the fact that an attempted Hobbs Act robbery does not require specific intent, conflicts with this Court's decision in *James v. United States*, 550 U.S. 192 (2007) and the Seventh Circuit's decision in *United States v. D.D.B.*, 903 F.3d 684 (7th Cir. 2018).

In *Curtis Johnson v. United States*, 559 U.S 133 (2010), this Court construed the "physical force" language in the ACCA's elements clause to require "*violent* force," which it explained was a "substantial degree of force" "capable of causing pain or injury to another person." *Id.* at 140. The elements clause in § 924(c)(3)(A) is worded identically to § 924(e)(2)(B)(i), except that it may be satisfied by any offense that "has as an element the use of threat of physical force," that is, "*violent* force," against a "person *or property*." As such, if an *attempted* Hobbs Act robbery does not categorically require the use or threat of *violent* force against person or property, Petitioner's Count 12 conviction, and 25-year consecutive sentence must be vacated. The Court should grant certiorari for the following reasons.

A. The decision below conflicts with *James v. United States*, 550 U.S. 192 (2007).

The fact that a completed offense is categorically a "violent felony" does not necessarily lead to the conclusion that an attempt to commit that offense automatically is also categorically a "violent felony." In *James v. United States*, 550 U.S. 192, 201 (2007), *overruled on other grounds* by *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court rejected that very logic by the very same court of appeals. The Eleventh Circuit in *James* had presumed that every attempt to commit a "violent felony" – in that case, burglary – enumerated in 18 U.S.C. § 924(e)(2)(B)(ii), was necessarily a "violent felony" within the residual clause. *United States v. James*, 430 F.3d 1150, 1156-57 (11th Cir. 2005), *aff'd*, 550 U.S. 192. In so doing, it relied on prior circuit case law holding that an attempt to commit an offense that was a "violent felony"

under the residual clause was also a violent felony under the residual clause. *Id*. at 1156 (citing *United States v. Wilkerson*, 286 F.3d 1324, 1326 (11th Cir. 2002)). But upon certiorari, this Court rejected such presumptive reasoning. The Court instead delved deeply into Florida law to determine the showing required to support a conviction for Florida attempted burglary, and then considered whether that conduct was sufficient to qualify the attempted burglary offense as a "violent felony" under the ACCA.

First, the Court noted, although "Florida's attempt statute requires only that a defendant take 'any act toward the commission' of a completed offense," the Florida courts had "considerably narrowed its application." *James*, 550 U.S. at 202. Specifically, the Court concluded that although the statutory language could be read to "sweep[] in merely preparatory activity that poses no real danger of harm to others – for example, acquiring burglars' tools or casing a structure while planning a burglary," the Florida Supreme Court had read the statute, "in the context of attempted burglary," to "require[e] an 'overt act directed toward entering or remaining in a structure or conveyance," such that "[m]ere preparation is not enough." *Id*. Once the Court had carefully examined Florida law in this way, it characterized the "pivotal issue" in *James* as "whether overt conduct directed toward entering or remaining in a dwelling, with the intent to commit a felony therein," qualifies as a "violent felony" under the ACCA.

Only after determining precisely what Florida law required to support a conviction for attempted burglary did the Court conclude that the risk created by such conduct was sufficient to qualify Florida attempted burglary as a "violent felony" within the ACCA's residual clause. *James*, 550 U.S. at 201-05. It did not assume that simply because burglary was a qualifying ACCA predicate, *attempted* burglary automatically qualified as well. Instead, the Court accepted Florida's delineation of the reach of its criminal attempt statute, and then considered whether the

conduct so delineated qualified as an ACCA predicate. And, *James* was clear that mere "preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure" would not meet the then-all-inclusive residual clause. *Id*. at 204-05.

In the decision below, the Eleventh Circuit did precisely what *James* refused to do. It concluded that because a substantive Hobbs Act robbery is categorically a "crime of violence" within § 924(c)'s elements clause, an attempt to commit that offense must categorically qualify as well. But not only did the Eleventh Circuit adopt the automatic rule rejected in *James*, it also did so with respect to an offense that plainly allows a conviction premised on mere preparatory conduct that does not involve violent force. And similar preparatory conduct for a Hobbs Act robbery offense (temporally or locationally separated from the crime scene or designated victim) should not meet the much-narrower elements clause.

B. The decision below conflicts with the Seventh Circuit's decision in *United States v. D.D.B*.

The caselaw on *attempted* Hobbs Act robbery confirms that the "substantial step" needed for conviction need not itself involve the use, attempted use, or threatened use of violent force against any person or property. Indeed, it may involve no more than planning, preparing for, travelling to, beginning one's travel to an agreed-upon robbery destination – without intending to ever engage in violencet. *See, e.g.*, *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016)(defendants made plans to travel from Chicago to New York to rob a diamond merchant, they believed he would turn the diamonds over *without the need to do anything to him*, and they travelled as far as New Jersey in a rented van before they were arrested) (emphasis added); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007) (defendant and his compatriots planned a robbery, surveilled the target, prepared vehicles, and gathered at the designated

assembly point on the day scheduled for the robbery); *United States v. Gonzalez*, 322 Fed. App'x. 963, 969 (11th Cir. 2009)(defendants simply planned a robbery, and travelled to a location in preparation for it).

To the extent the court below blindly adopted – and has continued to adhere to – the Seventh Circuit's presumption in *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017) that the mere "intent" to commit a violent crime alone suffices to qualify an attempt offense as a violent crime, it erred for multiple reasons.

As a threshold matter, the other-circuit cases *Hill* relied upon including *United States v. Wade*, 458 F.3d 1273, 1278 (11th Cir. 2006)) were either distinguishable, abrogated, or both. None focused upon whether an attempt should categorically be treated the same as the object of the attempt under the ACCA. In *James*, this Court expressly rejected the reasoning in *Wade* (which had followed the Eleventh Circuit's wrong decision in *James*). See 458 F.3d at 1277-78. *Hill* ignored that.

Second, *Hill* adopted the concurring opinion in *Morris v. United States*, 827 F.3d 696 (7th Cir. 2016), which proposed that an attempt to commit an ACCA violent felony should categorically be an ACCA "violent felony," based upon the completely unsupported assumption – of no relevance in a § 924(c) case, and one expressly rejected in *James* – that Congress must have intended the ACCA to include attempts. *See* 827 F.3d at 699 ("I suspect the Congress that enacted ACCA would have wanted the courts to treat such attempts at violent felonies as violent felonies under the Act.").

Third, *Hill* was an ACCA case predicated upon an Illinois attempted murder conviction. The issues there were not "analogous" to whether an attempted Hobbs Act robbery is a crime of violence within §924(c)(3)(A), for the same reasons the attempted carjacking offense in *Ovalles*

is not analogous: namely, there is no "intent to kill" requirement in a Hobbs Act robbery, as there is in attempted murder or attempted carjacking case.

Most importantly, however, in continuing to adhere to *Hill* in *St. Hubert II*, the court below neglected to determine whether *Hill* even remained good law in the Seventh Circuit. And in fact, after the decision in *St. Hubert I* – which adopted *Hill*'s inapposite reasoning *in toto*, and applied it to a completely different statute and predicate – the Seventh Circuit made clear in *United States v. D.D.B.* 903 F.3d 684 (7th Cir. 2018), that the rule in *Hill* must be limited to attempt offenses that require specific intent to commit the underlying offense. Writing for a unanimous Seventh Circuit panel, Judge Rovner explained in *D.D.B*, that the "critical" premise of *Hill* – and Judge Hamilton's concurrence in *Morris* which *Hill* adopted – was that "the attempt law contains an intent provision because 'one must intend to commit every element of the completed crime in order to be guilty of attempt." *Id.* at 690. But while that premise is true "[i]n most criminal attempt statutes," such as the Illinois statute at issue in *Hill*, Judge Rovner explained, it was *not* true for Indiana attempted robbery. That statute, as interpreted by the Indiana courts, does not require the state to show any intent – *i.e.*, that the defendant intended to commit the robbery; rather, the state must simply show that he took a substantial step towards commission of the robbery crime. *Id.*

And in this unique regard, attempted Hobbs Act robbery is analogous to Indiana robbery. Section 1951(a) of the Hobbs Act statute includes the inchoate offense of "attempted Hobbs Act robbery," together with the completed crime. The Eleventh Circuit has repeatedly emphasized that there is no specific intent requirement for a completed Hobbs Act robbery under § 1951(a) – indeed, "the only *mens rea* required for a Hobbs Act robbery conviction is that the offense be committed knowingly." *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001).

Accordingly, there can be no intent requirement for an attempted Hobbs Act robbery conviction under § 1951(a) either. *See also United States v. Thomas*, 8 F.3d 1552, 1562-63 (11th Cir. 1993 (distinguishing Hobbs Act robbery, from common law robbery, in that the latter requires specific intent but the former does not).

For the same reasons the Seventh Circuit in *D.D.B.* held that that attempted Indiana robbery was not a "violent felony" within the ACCA's elements clause, attempted Hobbs Act robbery is not a "crime of violence" within § 924(c)'s elements clause. Plainly, had Petitioner appealed his conviction to the Seventh Circuit, that court would have been compelled by *D.D.B.*, to find that attempted Hobbs Act robbery is *not* categorically a "crime of violence."

C. Because of the important and far-reaching nature of the decision in *St. Hubert*, and given the Eleventh Circuit's refusal to reconsider the attempt ruling in *St. Hubert* en banc, these conflicts warrant review and resolution, and this case is an excellent vehicle in which to do that.

The fallout from the Eleventh Circuit's wholesale adoption of *Hill*, without considering either *James* or *D.D.B.*, has been swift, expansive, and extremely prejudicial not only to defendants identically-situated to Petitioner with § 924(c) convictions, but to defendants sentenced under the two harshest recidivist enhancements in the Criminal Code. Before the panel vacated *St. Hubert I* and issued *St. Hubert II*, in *Hylor v. United States*, 896 F.3d 1219 (11th Cir. July 18, 2018), the Eleventh Circuit extended the reasoning of *St. Hubert I* to the ACCA, holding that attempted murder is categorically a "violent felony" within the ACCA's elements clause, based upon the defendant's mere *intent* to commit murder, a violent crime. *Hylor*, 896 F.3d at 1223. Judge Jill Pryor concurred in the result only, agreeing that she was bound to do so because the majority's holding that "an attempted elements clause offense is always itself an elements clause offense" was "a correct application of *St. Hubert*'s holding and necessary reasoning." *Id.* at 1225 (Jill Pryor, J., concurring in the result) (citing *Smith v. GTE*

Corp., 236 F.3d 1292, 1301-04 (11th Cir. 2001), where the court categorically rejected any exception to the requirement that prior precedent be followed, even where the prior panel overlooked a valid argument or precedent, and mandated that subsequent panels "obediently" follow prior panel precedents even if convinced they are wrong).

While "obediently" applying the holding and "necessary reasoning" of *St. Hubert*, Judge Pryor harshly criticized that reasoning for some of the very reasons Petitioner has done so here. *St. Hubert*'s logic was not only "flawed," but "plainly wrong," Judge Prior explained, because (1) an attempt offense "may be completed without the perpetrator every actually using, attempting to use, or threatening to use physical force," and (2) "having the *intent* to commit a crime involving the use of force simply is not the same thing as using, attempting to use, or threatening to use force." *Id.* at 1225-26 (Jill Prior, J., concurring) (noting that in an attempted robbery, it is "readily conceivable" that a person may engage in an overt act such as simply renting a van, without having used or attempted to use force).

Hylor confirms that because of its rigid "prior panel precedent" rule, the Eleventh Circuit will continue to extend its erroneous attempt ruling in Petitioner's case well beyond the § 924(c) context, to the elements clause of the ACCA. And notably, the Eleventh Circuit has not stopped at the ACCA. Recently, in denying a motion for certificate of appealability in a § 2255 case where a defendant convicted of attempted Hobbs Act robbery was sentenced to mandatory life imprisonment pursuant to 18 U.S.C. § 3559(c), the Eleventh Circuit held it "clear" based upon *St. Hubert* that attempted Hobbs Act robbery" met § 3559(c)(2)(F)(ii)'s elements clause. *Richitelli v. United States*, Order at 8 (No. 17-10482) (11th Cir. Feb. 7. 2019). In finding that conclusion not even "debatable" among reasonable jurists, *id.* at 7-8, the Eleventh Circuit ignored that this Court had GVR'd in *Richitelli* after *Dimaya* based upon the Solicitor General's

concession that § 3559(c)(2)(F)(ii)'s residual clause was "similar to" § 16(b), and the Eleventh Circuit had "incorrect[ly]" denied Richitelli a COA on grounds that attempted Hobbs Act robbery categorically met § 3559(c)(3)(F)(ii)'s elements clause. The Solicitor General explained:

> The Hobbs Act includes robberies committed "by means of actual or threatened force or violence, or fear of injury" to the victim's "person *or property*, 18 U.S.C. §1951(b)(1) (emphasis added), while Section 3559(c) refers only to the use or threatened use of force "against the *person* of another," 18 U.S.C. §3559(c)(2)(F)(ii) (emphasis added).

Memorandum of United States, *Richitelli v. United States*, at 2 (May 29, 2018)(No. 17-8244); *see Richitelli v. United States*, 139 S.Ct. 59 (Oct. 1, 2018) (granting certiorari, vacating, and remanding for further consideration of the mandatory life sentence pursuant to §3559(c), in light of *Dimaya*).

As a result of the Eleventh Circuit's extension of *St. Hubert*'s reasoning to the ACCA and § 3559(c), and its unforgiving "prior panel precedent rule," Eleventh Circuit defendants with a host of state and federal attempt offenses involving no force or attempted use of force,[3] and/or no specific intent to commit a violent offense, now qualify for the two most draconian enhancements in the Criminal Code. Moreover, courts throughout the country – both at the circuit court and district court level – have now followed *St. Hubert* to deny relief on attempt crimes used as predicates for both § 924(c) and the ACCA. *See, e.g.*, *United States v. Neely*, 763 Fed. Appx. 770, 780 (10th Cir. Feb. 20, 2019)(citing *United States v. Rinker*, 746 Fed. Appx. 769, 772 & n. 19 (10th Cir. Aug. 21, 2018) which had also so held, citing *St. Hubert*), *pet. for cert. filed* May 21, 2019 (No. 18-9415); *United States v. Holland*, 749 Fed. Appx. 162, 165 (4th Cir. 2018); *United States v. Doyle*, No. 2:18cr177 (E.D.Va. July 17, 2019) (and other E.D.Va.

[3] Florida's attempt offense only requires commission of "'[s]ome appreciable *fragment* of the crime,'" *Hylor*, 896 F.3d at 1226 (Jill Pryor, J., concurring)(quoting *Hernandez v. State*, 117 So. 3d 778, 784 (Fla. Dist. Ct. App. 2013)(emphasis added; internal quotation marks omitted).

cases cited therein); *Jones v. Warden, FMC Lexington*, 2019 WL 3046101 at *3 (E.D.Ky. July 11, 2019); *United States v. Romero-Lobato*, 2019 WL 2179633 at *4 (D.Nev. May 17, 2019); *United States v. Lopez*, 2019 WL 2077031 at *2 (E.D.Calif. May 10, 2019); *Savage v. United States*, 2019 WL 1573344 at *4(S.D.Ohio Apr. 11, 2019); *United States v. Johnson*, 2018 WL 3518448 at *4 & n.19 (D.Nev. July 19, 2018). All of these courts have followed *St. Hubert* reflexively, without even noticing that the Seventh Circuit in *D.D.B.* had limited *Hill* in a manner that would be directly applicable to attempted Hobbs Act robbery.

And indeed, an even greater snowballing effect of the Eleventh Circuit's ruling in *St. Hubert* is possible now that Section 401 of the just-enacted First Step Act specifically incorporates the "serious violent felony" definition in § 3559(c)(2)(F)(ii) as a new basis for § 851 enhancements in drug cases, while Section 402 of the First Step Act (which otherwise broadens the applicability of the Safety Valve), precludes a Safety Valve reduction if the defendant has a prior 2-point "violent offense" as defined in 8 U.S.C. § 16. There will be *no* independent analysis of these issues by a reviewing court in the Eleventh Circuit, in § 924(c), ACCA, or even § 3559 cases, unless this Court intervenes. The denial of rehearing en banc in *St. Hubert* has effectively closed the book, and precludes meaningful judicial review, of any attempt crime used as a § 924(c), ACCA, or § 3559(c) predicate.

Although *Hill* will not have a similarly-broad impact in the Seventh Circuit, due to that court's significant limitation of *Hill* in *D.D.B*, other circuits have not recognized the Seventh Circuit's limitation of *Hill.* The Fourth Circuit in *Holland*, notably, broadly cited both *Hill* and *St. Hubert* in a manner that will sweep in every possible attempt offense as ACCA predicate. *See, e.g., Holland*, 2018 WL 4361158 at *3 (4th Cir. Sept. 13, 2018) (citing *Hill* and *St. Hubert* as confirming that "[s]everal circuits have held that attempting to commit a substantive offense

that qualifies as violent felony also constitutes a qualifying violent felony"). The Tenth Circuit did the same in *Neely*, a case now pending before this Court. The prejudice from the erroneous decision below will increase unless the Court grants certiorari to clarify the law in this regard.

As Judge Jill Prior has rightly noted, district courts within the Eleventh Circuit already "lead the pack" in imposing sentences under the ACCA and § 924(c). *See* 2019 WL 1262257 *31 & n.2 (noting that in 2016, the Sentencing Commission's data indicates that the most ACCA sentences were imposed in the Eleventh Circuit and only the Fourth Circuit surpassed the Eleventh in handing down more sentences under § 924(c)). For that reason, Judge Pryor rightly stated, "It is critically important that we of all circuits get this right." *St. Hubert*, 918 F.3d at 1213 n. 2. This case presents an excellent vehicle for the Court to assure that not only the Eleventh Circuit – but the other courts that have reflexively followed the Eleventh on this issue – "get it right." The attempt/elements clause issue was pressed and passed upon below, and will be case-dispositive of the Count 12 conviction here since *Davis* voided the residual clause. Petitioner received a consecutive 25 year sentence for Count 12, predicated upon an attempted Hobbs Act robbery. A ruling in his favor on this issue would have a tremendous impact.

III. Whether 18 U.S.C. § 924(c)(1)(C), as expressly "clarified" by Congress in Section 403 of the First Step Act of 2018, applies to a defendant convicted and sentenced prior to the enactment of the Act, but whose sentence has not yet been finally "imposed" because his case remains "pending" on direct review, is an important issue that should be immediately resolved for pipeline defendants.

The First Step Act of 2018, Pub. L. No. 115-391, enacted on December 21, 2018, expressly "clarifi[ed]" that the consecutive mandatory sentence under § 924(c)(1)(C) applies only to a "violation of [§ 924(c)] that occurs *after* a prior conviction under [§ 924(c)] has become final." First Step Act of 2018, Pub. L. No. 115-391, at § 403(a). Before the Act, when Petitioner was sentenced, a second § 924(c) count of conviction in a single indictment required a 25-year

mandatory minimum penalty to be imposed consecutive to the sentences for each other count of conviction. That was due to this Court's opinion in *Deal v. United States*, 508 U.S. 129 (1993), which interpreted the phrase "second or subsequent conviction" to mean each additional offense in the same case with no intervening final conviction. In light of Section 403 of the First Step Act, however, which was enacted to "*clarify*" that the stacking practice sanctioned by *Deal* was in fact a misapplication of Congress' original intent, the district court's 25-year consecutive sentence on Count 12 here was imposed in error.

Unlike any other provision in the First Step Act, Congress specifically titled Section 403 a "***Clarification*** of Section 924(c) of Title 18, United States Code." (Emphasis added). And consistent with that "clarification," § 403(b), entitled "Applicability to Pending Cases," provides that "the amendments made by this section . . . shall apply to any offense that was committed before the date of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]." While Petitioner was sentenced prior to the date of enactment, Congress' "clarification" applies to his "pending case" on direct review, because a sentence is not "final" (and is not finally "imposed") so long as a case is still "pending" on direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 321 at n. 6 (1987) (holding in a criminal case that "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"); *see also United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997) ("A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' . . . because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error.").

The specific question before the Sixth Circuit in *Clark* was whether the safety valve statute, 18 U.S.C. § 3553(f), "should be applied to cases pending on appeal when it was enacted." *Id*. at 17. As here, Congress stated that § 3553(f) applied "to all sentences imposed on or after" the date of enactment, and did "not address the question of its application to cases pending on appeal." *Id*. (citing Pub. L. No. 103-322, § 80001(a), 108 Stat. 1796, 1985-1986 (1994)). The Sixth Circuit not only found that the sentence was not yet "imposed" when the sentence was still being reviewed on direct appeal, but that applying the safety valve to cases pending on appeal when it was enacted was "consistent with its remedial intent." *Id*.

That is true here as well, as confirmed by the legislative history. [4]

Notably, in a recent case where a petitioner argued for the first time in a *supplemental brief* that Section 403 applies retroactively to cases not yet final on direct review, the Court granted certiorari, vacated the judgment, and remanded to the Sixth Circuit for consideration of

[4] Senator Mike Lee, one of the primary sponsors of what became Section 403, explained that he first became aware of the problem created by this Court's interpretation of § 924(c)(1)(C) in *Deal* when a defendant named Weldon Angelos was sentenced to 55 years in the District of Utah. Senator Lee stated: "Because Mr. Angelos had a gun on his person at the time of these transactions, because of the way he was charged, and *because of the way some of these provisions of law have been interpreted-including a provision of law in 18 USC, section 924(c)*-Mr. Angelos received a sentence of 55 years in prison." 162 Cong. Rec. S5045-02, 162 Cong. Rec. S5045-02, S5049 (July 13, 2016) (emphasis added). Senator Lee recognized that *Deal*'s interpretation as applied to Mr. Angelos was cruel, arbitrary and capricious: "What on Earth was this judge thinking? How could such a judge be so cruel, so arbitrary, so capricious as to sentence this young man to 55 years in prison for selling three dime-bag quantities of marijuana?" *Id*. "The judge didn't have a choice," and indeed "took the unusual-the almost unprecedented, almost unheard of-step of issuing a written opinion prior to the issuance of the sentence, disagreeing with the sentence the judge himself was about to impose." *Id*. at S5049-50. The judge stated: "This is a problem. This young man is about to receive a sentence that is excessive under any standard. It is a longer sentence than he would have received had he engaged in many acts of terrorism or kidnapping." *Id*. at S5050. "But, the judge said: This is a problem I cannot address. This is a problem I am powerless to remedy. Only Congress can fix this problem. " *Id*. at S5050. Section 403 of the First Step Act fixes the problem, by clarifying that that the majority in *Deal* was wrong and § 924(c)(1)(C) has been applied erroneously for years, inconsistent with Congress' original intent.

the First Step Act in the first instance. *Richardson v. United States*, __ S.Ct. ___, 2019 WL 2493913 (June 17, 2019) (No. 18-7036). And indeed, in a prior case, where the petitioner likewise argued in a supplemental brief that Section 401 of the First Step Act applied to defendants on direct review, the Court GVR'd as well, sending the case back to the Third Circuit to consider the First Step Act in the first instance. *Wheeler v. United States*, ___ S.Ct. ___, 2019 WL 2331301 (June 3, 2019) (No. 18-7187). Given the Court's GVR orders in *Richardson* and *Wheeler*, at the very least Petitioner is entitled to a GVR here. The instant case is materially indistinguishable from *Richardson*, and there is no legal or logical basis to treat these identically-situated petitioners differently.

The argument for retroactive application of § 403 to pipeline defendants does *not* hinge upon any single term in the text, but rather the significance of all of the terms Congress chose to include in this remedial provision together. This Court has consistently emphasized that no statutory term can exist in a vacuum; that a term takes its meaning from the surrounding statutory text and context; and that indeed, the same term may have different meanings in different statutes as a result of different contexts and different legislative intent. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *Curtis Johnson v. United States*, 559 U.S. 133, 139-40 (2010) ("context determines meaning;" citing *Leocal*); *United States v. Castleman*, 572 U.S. 157 (2014) (construing the same "physical force" language differently than in *Curtis Johnson*, due to different context).

Construing the word "imposed" in § 403(b) in its broader statutory context here the Court must consider other clues as to Congressional intent: namely, Congress' express statements that (1) the amendment was a "***clarification***" to be applied to (2) "any offense that was committed before the date of enactment," (3) if a "***case***" was still (4) "***pending***" (because the "sentence for the offense has not been imposed as of such date of enactment").

Each of these statutory clues is significant, and together they support Petitioner's reading of Section 403 as applying to pipeline cases like his, which are not yet final on direct appeal. The reference to "pending" cases is significant, particularly by contrast to § 3553(f), where Congress made no mention – either express or implied – of that provision's applicability to pending cases (and the court still found, from Congress' remedial purpose, that the provision was to apply to cases on direct review). *See Clark*, 110 F.3d at 17. Notably, § 3553(f) was an entirely new provision. Section 403 of the First Step Act, by contrast, re-enacts *but clarifies* an old provision, by providing different, reduced, penalties. There are thus *even stronger* reasons – not only in the text but also in the relevant caselaw – for applying § 403 of the First Step Act to § 924(c) cases pending on direct appeal, than there were for the statute considered in *Clark*.

This Court has long held that a repeal of a criminal statute while an appeal is pending, including any "repeal and re-enactment with different penalties ... [where only] the penalty was reduced," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), must by applied by the court of appeals, absent "statutory direction ... to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The "statutory direction" in this case, far from suggesting that a "contrary" presumption should govern, states expressly that the amendments "shall apply to any offense that was committed before the date of enactment of this Act." First Step Act of 2018, Pub. L. No. 115-391, at § 403(b). This language also confirms that the general federal "saving statute," 1 U.S.C. 109 (1871), which states that the repeal of a statute does not extinguish a penalty incurred under such statute unless the repealing Act so provides, cannot bar the application of Section 403 here.

Here, there is no "statutory direction" in the First Step Act that would bar application of the reduced penalty structure to cases on direct appeal. To the contrary, Congress indicated its

intent that Section 403 be applied to pipeline cases, by expressly titling Section 403 "Clarification of Section 924(c)," and addressing applicability of that "clarification" to "pending" cases in § 403(b). Its statement in § 403(b) that the amendment shall apply to any offense committed before the date of enactment if a sentence for the offense has not been "*imposed*" as of such date – read in conjunction with "pending cases" and Congress' intent to "clarify" its original intent – indicates that Congress intended its now-clarified language to apply to cases on direct appeal, but not to those on collateral review.

Where Congress has enacted a new law prohibiting prosecution for certain conduct, this Court has held such a law must apply to defendants previously convicted of such conduct if they are still challenging their convictions on direct appeal, even if Congress did not mention direct appeal in the enactment. *Hamm v. City of Rock Hill*, 379 U.S. 306, 308, 317 (1964). In *Hamm*, the Court vacated the convictions of defendants who had staged "sit-ins" at lunch counters that refused to provide services based on race. After the defendants were convicted of trespass, but before their convictions became final on direct review, Congress passed the Civil Rights Act of 1964, which prohibited prosecution for their conduct. In applying the new Civil Rights Act to vacate these defendants' convictions, the Court traced the rule requiring such a result to *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), where Chief Justice Marshall had explained over 150 years earlier:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Hamm, 379 at 312-13. The "reason for the rule," the Court said in *Hamm*, is that "'[p]rosecution for crimes is but an application or enforcement of the law, and, if the prosecution continues, the

law must continue to vivify it.'" *Id*. at 313 (quoting *United States v. Chambers*, 291 U.S. 217, 226 (1934)). That principle "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose," and is to be "read wherever applicable as part of the background against which Congress acts," even where Congress made no allusion to the issue in enacting the new law. *Id*. at 313-14.

This Court in *Hamm* declined to find that the general "saving statute," 1 U.S.C. § 109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a *greater* schedule of penalties was held to abate the previous prosecution." *Id*. at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id*. Here, Section 403 substitutes a *lesser* schedule of penalties: a sentence of 14 years for a sentence of 32 years, which does not abate the "prosecution" at all. Where, as here, the law merely "clarifies" Congress' original intent that a lesser sentence be imposed – thus confirming that the law has been misapplied for years – there is even more reason to apply such a law to pipeline cases, not yet final.

In civil contexts, lower courts have long applied a clearly-clarifying statutory amendment to cases pending on direct appeal. *See Brown v. Thompson*, 374 F.3d 253, 259-60, 261 n.6 (4th Cir. 2004) (applying Medicate Prescription Drug, Improvement and Modernization Act of 2003 to a case on direct appeal, since that Act "merely clarified" prior law; noting with significance that Congress "formally declared" the amendment was "clarifying" in its title); *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1057 (9th Cir. 2002) (holding it "well-established that the enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; in legal

theory it simply states the law as it was all the time, and no question of retroactive application is involved. Where an amendment to a statute is remedial in nature and merely serves to clarify the existing law, the Legislature's intent that it be applied retroactively may be inferred"); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[I]f the amendment clarifies prior law rather than changing it, no concerns about retroactive application arise and the amendment is applied to the present proceeding as an accurate restatement of prior law").

While this Court has rejected the suggestion that a statute is "clarifying" if there is no textual indication in that regard, or any possible ambiguity in the prior statutory language, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S 631, 647-48 (2005), here Congress specifically designated only *one* section of the First Step Act – the amendment to § 924(c)(1)(C) – as a "clarification" of the prior statutory provision, in the title to Section 403, without any similar designation in the titles of other sections. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

A "clarifying" amendment to a criminal statute is not only applicable to cases on direct appeal for all of the foregoing reasons; it is also applicable by analogy to the uniform rule applied by the courts of appeals regarding "clarifying amendments" to the Guidelines. While parties can and often do dispute whether a Guideline amendment is clarifying or substantive *if* the Sentencing Commission *does not* state that the amendment was intended to be clarifying, *see United States v. Descent*, 292 F.3d 703, 708 (11th Cir. 2002), where the Commission *does* specifically designate an amendment to the Guidelines as "clarifying," the amendment applies without question to cases on direct appeal "regardless of the sentencing date." Every circuit in

this country follows this rule,[5] reasoning that "clarifying amendments do not represent a substantive change in the Guidelines, but instead "provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline." *Descent*, 292 F.3d at 707-08. For similar reasons, Congress' express "clarification" of § 924(c)(1)(C) by Section 403 of the First Step Act to preclude a consecutive 25-year penalty absent a prior final conviction, likewise evidences Congress' original intent, and thus should be applied to cases that are not yet final on direct appeal.

Even if a different reading of Congress' use of the words "pending," "imposed," and "clarification" together in § 403 were possible, such a reading should be rejected based upon the rule of lenity which requires laws to be interpreted in favor of the defendants subject to them. *Moskal v. United States*, 498 U.S. 103, 107 (1990); *United States v. Santos*, 553 U.S. 507, 514-14 (2008) (plurality opinion); *Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.).

Should the Court harbor any doubt over resolution of this issue, Petitioner respectfully requests that the Court resolve it in favor of lenity, vacate his sentence and remand this case to the district court for resentencing under the First Step Act. *See Burns v. Hein*, 419 U.S. 989 (1974) (vacating judgment, and remanding case to district court for reconsideration in light of Department of Agriculture's clarifying amendment to its regulations). At the very least, as the

[5] *See, e.g., United States v. Godin*, 522 F.3d 133, 135 (1st Cir. 2008) (noting that where the Sentencing Commission has not specifically made an amendment "retroactively applicable," it would not be applicable to defendants whose sentences have become "final" because it "is no longer subject to review on direct appeal in any court;" however, in the "peculiar" posture of a case where the "pending appeal has not yet resulted in a final disposition," a clarifying amendment may be applied); *United States v. Perdono*, l927 F.2d 111, 116-17 (2nd Cir. 1991); *United States v. Remoi*, 404 F.3d 789, 795 (3rd Cir. 2005); *United States v. Deigert*, 916 F.2d 916 (4th Cir. 1990); *United States v. Maseratti*, 1 F.3d 330, 340 (5th Cir. 1993); *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016); *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11th Cir. 2016); *United States v. Caballero*, 936 F.2d 1292, 1922 & n. 8 (D.C. Cir. 1991).

Court did in *Wheeler* and *Richardson* the Court should grant this petition, vacate the judgment, and remand Petitioner's case to the court of appeals for consideration of the First Step Act.

CONCLUSION

The Court should grant the writ. If the Court grants certiorari on the Due Process issue in *Valdez Gonzalez*, it should hold this case pending resolution of the issue there. At the very least, in light of the recent GVRs in *Wheeler* and *Richardson*, the Court should grant certiorari, vacate the judgment below, and remand for consideration of whether Section 403 of the First Step Act applies to pipeline defendants still on direct appeal.

Respectfully submitted,

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