No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

MICHAEL LEE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does the Eleventh Circuit too rigidly apply its "prior panel precedent rule" – effectively denying Eleventh Circuit defendants their statutory right to appeal and constitutional right to due process of law– by holding that three-judge panels of that court must follow even an admittedly "flawed" prior panel decision that failed to consider precedent(s) of this Court in existence at the time, and whose mode of legal analysis is now demonstrably inconsistent with intervening precedents of this Court, when most other circuits broadly agree that a three-judge panel may not only reconsider but should decline to follow an obviously "flawed" prior precedent under such circumstances, as *stare decisis* requires that subsequent panels adhere to the correct mode of analysis dictated by precedents of this Court?

Is a state robbery offense that includes "as an element" the common law requirement of "putting in fear" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) (an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the Department of Justice has conceded that the state robbery offense is indivisible and that "putting in fear" is an alternate "means" of violating the statute when this Court in *Stokeling* did not resolve that issue because that "means" was not presented on certiorari?

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Michael Lee 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 vacating Mr. Lee corrected non-ACCA-enhanced sentence and remanding for imposition of the ACCA-enhanced sentence, *United States v. Lee*, 886 F.3d 1161 (11th Cir. Apr. 2, 2018), is included in Appendix A-1.

The Eleventh Circuit's decision denying rehearing, *United States v. Lee*, No. 16-16590-FF, slip op. (11th Cir. Feb. 27, 2019) is included in Appendix A-3.

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 was entered on April 2, 2018, and rehearing by the panel was denied on February 27, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, statutes, and guidelines:

U.S. Const. Amend. V

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

18 U.S.C. § 3742. Review of a sentence

> (a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –
>
> > (1) was imposed in violation of law;
> >
> > (2) was imposed as a result of an incorrect application of the sentencing guidelines . . .

18 U.S.C. § 924. Penalties

> **(e)(2)** As used in this subsection – . . .
>
> > **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
> >
> > > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

Fla. Stat. § 812.13. Robbery (1988 and 1999)

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. ...
>
> (3)(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or

subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

STATEMENT OF THE CASE

The Charge and Plea

On May 26, 2010, Mr. Lee pleaded guilty to one count of felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1).

The PSI and Sentencing

In the PSI, the Probation Officer opined that Mr. Lee was subject to enhanced sentencing as an Armed Career Criminal under 18 U.S.C. § 924(e) because three of his prior convictions were qualifying "violent felonies" or "serious drug offenses:" namely, three convictions for Florida robbery (two in 1988 and one in 1999) and one conviction for the sale, purchase, or delivery of cocaine.

On August 31, 2010, the district court found that Mr. Lee qualified for the Armed Career Criminal Act ("ACCA") enhancement under 18 U.S.C. § 924(e) and sentenced him to the corresponding statutory mandatory minimum of 180 months' imprisonment.

Direct Appeal and First Motion to Vacate his Sentence under 28 U.S.C. § 2255

Mr. Lee did not file a direct appeal. He filed his first motion under 28 U.S.C. § 2255 in 2011, which was denied by the district court. (Crim. DE 49).

Authorization to File a Successive § 2255

by the United States Court of Appeals for the Eleventh Circuit

On June 24, 2016, Mr. Lee, through counsel, filed his second § 2255, challenging his ACCA sentence, relying upon the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause of the ACCA, and *Welch v. United States*, 136 S. Ct. 1257 (2016), which

applied *Johnson* retroactively on collateral review. Through counsel, he also filed an application for leave to file a successive § 2255 with the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit granted authorization for Mr. Lee to file a successive § 2255 on June 29, 2016. Its reasoning for doing so was that it was unresolved whether Mr. Lee's Florida 1988 and 1999 robbery convictions remained violent felonies post-*Johnson*. Specifically, the Eleventh Circuit reasoned that its prior precedent in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), which held that Florida robbery qualified as an ACCA predicate under the elements clause, "may not govern [Mr.] Lee's 1988 and 1999 convictions for robbery" because "*Lockley* does not squarely govern here, and because [Mr.] Lee could have committed the robbery without using force as the ACCA's elements clause requires, he has made a prima facie showing that his conviction only could have counted under the residual clause, which *Johnson* invalidated."

The District Court's Grant of Mr. Lee's § 2255

and Imposition of a non-ACCA-enhanced Sentence

On August 23, 2016, the district court granted Mr. Lee's § 2255 motion, holding that both of his Florida robbery convictions (1988 and 1999) no longer qualified as "violent felonies" upon which the ACCA enhancement could be predicated post-*Johnson*. In its analysis, the district court concluded that the Florida robbery statute was an indivisible statute such that the categorical approach applied. It also concluded that, at the time of Mr. Lee's robbery

convictions in 1988 and 1999, Florida's robbery statute encompassed robbery-by-sudden-snatching. The district court rejected the government's assertion that earlier Eleventh Circuit precedent in the form of *Lockley* should control the outcome because *Lockley* "construed Florida's robbery scheme post-2000" and "does not squarely govern here" because Mr. Lee, unlike the defendant in *Lockley*, was convicted ***before*** 2000 and thus ***before*** the change in Florida's robbery scheme.

On October 5, 2016, the district court entered an amended judgment, which reduced Mr. Lee's sentence from the ACCA statutory mandatory minimum of 180 months' imprisonment to 85 months' imprisonment.

The Government's Appeal

The government timely appealed. The basis of its argument was its belief that the Eleventh Circuit's decision in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) held that "all Florida robbery convictions, regardless of the date upon which the conviction occurred [we]re categorically violent felonies" under the ACCA's elements clause.

Mr. Lee timely filed his brief in opposition. In it, he argued: (1) *Fritts* did not control the outcome of Mr. Lee's case as it was factually and legally distinct; (2) Mr. Lee's 1988 and 1999 convictions no longer qualified as "violent felonies" for purposes of the ACCA enhancement; (3) neither the government nor *Fritts* addressed that the argument that even post-2000 Florida caselaw confirms that violent force is not categorically necessary to sustain a conviction for robbery; and (4) the district court's mode of analysis was consistent with what was required by the Supreme

Court of the United States and the mode of analysis applied by five federal circuit courts of appeals and three other federal district courts.

After oral argument, the United States Court of Appeals for the Eleventh Circuit issued its per curiam opinion vacating the amended non-ACCA-enhanced sentence imposed by the district court and remanding for re-imposition of the original ACCA sentence. *United States v. Lee*, 886 F.3d 1161 (11th Cir. 2018). The per curiam opinion explained that it was bound to follow *Fritts* despite the fact that the Eleventh Circuit cases upon which *Fritts* relied had been abrogated by intervening and superseding decisions by the Supreme Court of the United States and thus were of questionable continuing validity.

In a concurring opinion that was approximately three times the length of the per curiam portion of the decision, United States Circuit Judge Adalberto Jordan lamented the "mistaken" and "wrongly decided" Eleventh Circuit precedent that bound him and his colleagues on the panel. He concluded by setting out his wish that the Eleventh Circuit's myopic mode of analysis would be revisited:

> When we wrongly decided in *Dowd*, and then *Lockley*, that Florida robbery is categorically a violent felony under the elements clauses of the ACCA and the career offender provision of the Sentencing Guidelines, we dug ourselves a hole. We have since made that hole a trench by adhering to those decisions without analyzing Florida law. Hopefully one day we will take a fresh look at the issue.

Lee, 886 F.3d 1161, 1171 (Jordan, J., concurring).

Mr. Lee's Petition for Panel Rehearing

In the wake of this Court's decision in *Stokeling v. United States*, No. 17-5554, 139 S. Ct. 544 (Jan. 15, 2018), Mr. Lee filed a petition for panel rehearing on

February 14, 2019. The Eleventh Circuit denied that petition for panel rehearing on February 27, 2019.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's Rigid Application of its "Prior Panel Precedent Rule" Deliberately Circumvents and Contradicts This Court's Intervening and Superseding Decisions, Conflicts With the Approaches of Other Circuits, Contravenes Well-Settled Principles of *Stare Decisis*, and Denies Eleventh Circuit Defendants Their Statutory Right to Appeal and Due Process of Law.

Until this year, the Eleventh Circuit had applied its "prior panel precedent rule" consistently with the approach of most of its sister circuits. That, however, changed with the Eleventh Circuit's recent decisions in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), and the case below, *United States v. Lee*, 886 F.3d 1161 (11th Cir. 2018).

In *Fritts*, the Eleventh Circuit held for the first time that "[u]nder this Court's prior panel precedent rule, there is never an exception carved out for overlooked . . . Supreme Court precedent." *Id.* at 942 (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) where a prior panel held "[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at the time."). That, notably, was a misinterpretation – or over-reading of the holding – of *Smith*, as indeed, the *Smith* court explicitly recognized that "there was no 'clearly controlling Supreme Court precedent' on the issue [there before the court], when [the prior panel precedent] was decided." *Id.* at 1303-1304 (distinguishing *Tucker v. Phyfer*, 819 F.2d 1030, 1035 n. 7 (11th Cir. 1987) on that basis).

The denial of rehearing in Mr. Lee's case has confirmed that the Eleventh Circuit is entrenched in its decision to apply its "prior panel precedent" rule in a

novel and overly rigid manner, unlike any other circuit, contrary to well-settled principles of *stare decisis*. This Court's intervention is vital not only to prevent this far-reaching perversion of the "prior panel precedent rule" in the Eleventh Circuit, but to relieve Eleventh Circuit defendants from the yoke of the admittedly "flawed" decision in *Lockley* whose mode of analysis has been abrogated by this Court's decisions in *Leocal, Moncrieffe, Descamps*, *Mathis*, and *Elonis*.

A. The Eleventh Circuit's misinterpretation of the "prior panel precedent rule" effectively renders controlling Supreme Court precedent irrelevant—even in instances in which the prior panel did not consider the controlling Supreme Court precedent and even when intervening and superseding Supreme Court precedent has abrogated the prior circuit precedent. It is thus a perversion of what *stare decisis* requires.

What is remarkable about Mr. Lee's case in front of the Eleventh Circuit is the frank acknowledgment from the panel, in a two-page per curiam opinion, that "we are not free to evaluate the substantive correctness, or current viability, of [its precedents] *Dowd* and *Lockley*, and we remain bound to follow both of them" even though "*Dowd* pre-dated [*Curtis Johnson*, *Moncrieffe, Descamps*, and *Mathis*]" and even though "the panel in *Dowd* performed no legal analysis whatsoever, much less the analysis [Mr. Lee argues] is commanded by the Supreme Court." *United States v. Lee*, 886 F.3d 1161, 1164 (11th Cir. 2018). The panel then offered its unvarnished assessment: "Were we free to evaluate them anew, we might well agree with [Mr. Lee]." *Id.* Remarking that even "subsequent to the Supreme Court cases referenced by Mr. Lee, we have held that both *Dowd* and *Lockley* remaining binding precedent," such that Mr. Lee's "arguments are therefore foreclosed." *Id.* at 1164.

Even more striking is United States Circuit Judge Adalberto Jordan's concurrence, which eviscerated the Eleventh Circuit's misinterpretation and misapplication of the "prior panel precedent" rule and which was three times the length of the per curiam opinion of the Court. In his concurrence, Judge Jordan opened by asserting that "the panel in [*Dowd*] got it wrong[,s]o did the panel in [*Lockley*]." *Lee*, 886 F.3d at 1165 (Jordan, J., concurring). He explained that "[b]oth cases failed to conduct the analysis commanded by the Supreme Court, and did not consider or apply relevant Florida case law." *Id.* Therefore, he reasoned "[s]ubsequent cases which followed *Dowd* and *Lockley*—such as [*Seabrooks*], [*Fritts*], and [*Joyner*], among others—are likewise mistaken." *Lee*, 886 F.3d at 1165 (Jordan, J., concurring).

Applying the categorical approach as the mode of analysis required by this Court to Mr. Lee's case, Judge Jordan concluded that "[t]here simply is no way of getting around the conflict between *Johnson I, Castleman*, and the Florida cases on the one hand, and [the Eleventh Circuit's prior precedent in] *Dowd, Lockley*, and their progeny on the other." *Lee*, 886 F.3d at 1170 (Jordan, J., concurring).

Judge Jordan recognized and lamented that in the Eleventh Circuit

> It does not matter whether a prior case was wrongly decided, *see United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("a panel cannot overrule a prior one's holding even though convinced it is wrong"); whether it failed to consider certain critical issues or arguments, *see Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006) ("a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the panel"); or whether it lacked adequate legal analysis to support its conclusions, *see Smith*, 236 F.3d at 1303 (stating that a

> prior panel decision cannot be avoided even if there are significant defects in legal reasoning or analysis).

Lee, 886 F.3d at 1163 n.3 (Jordan, J., concurring).

Recognizing the futility of the Eleventh Circuit's mechanistic and misguided interpretation and application of the "prior panel precedent rule," Judge Jordan wisely observed

> When we wrongly decided in *Dowd* and then *Lockley*, that Florida robbery is categorically a violent felony under the elements clauses of the ACCA and the career offender provision of the Sentencing Guidelines, we dug ourselves a hole. We have since made that hole a trench by adhering to those decisions without analyzing Florida law. Hopefully one day we will take a fresh look at the issue.

Lee, 886 F.3d at 1171 (Jordan, J., concurring).

B. Unsurprisingly, the Eleventh Circuit's misinterpretation and misapplication of its "prior panel precedent rule" conflicts with the approach of other circuits.

Until the recent decisions in *Fritts*, , and *Lee*, the Eleventh Circuit had applied its "prior panel precedent rule" in a manner generally consistent with the approach of other circuits and well-settled principles of *stare decisis*. Like most of its sister courts (with the exception of the Seventh Circuit which has adopted a more relaxed approach to *stare decisis* by rule[1]), the Eleventh Circuit had long held that "each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc or by the Supreme Court."

[1] The Seventh Circuit permits one panel to overrule another so long as the subsequent panel circulates the proposed opinion among the active members of the court "and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted." 7th Cir. R. 40(e); *see generally United States v. Reyes-Hernandez*, 624 F.3d 405, 412-413 (7th Cir. 2010).

United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993). If prior precedents conflict, the Eleventh Circuit was "firm" and "emphatic" that the earlier precedent must control. *Walker v. Mortham*, 158 F.3d 1171, 1188-1189 (11th Cir. 1998) (recognizing that the "earliest case" rule is "essential to maintaining stability in the law;" it is "more respectful of the prior precedent rule" than a rule that would allow judges who "find a division of authority" to "throw precedent to the wind"). And notably, the Eleventh Circuit applied the same rule liberally to inter-circuit conflicts involving not only issues of substance, but also "the governing legal standard." *See United States v. Hornaday*, 392 F.3d 1306, 1315-1316 (11th Cir. 2004) (where a prior panel decision "did not purport to apply the governing legal standard," even though that standard had been applied in earlier panel decisions," there is a conflict between the prior panel decision and those that came before it," and "we must follow the earlier ones").

In applying its "prior panel precedent rule," the Eleventh Circuit had consistently recognized – until the decisions in *Fritts, Golden*, and *Lee* – that it was only bound to follow the holding of a prior decision, not dicta, and that "[t]he holding of a prior decision" could "reach only as far as the facts and circumstances presented to the Court in the case which produced that decision." *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000); *see also Edwards v. Prime Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010); *Anders v. Hometown Mortgage Services*, 346 F.3d 1024, 1031 (11th Cir. 2003).

Admittedly, the Eleventh Circuit did hold en banc in 1998 that "under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v. Steele*, 147 F.3d 1316, 1317-1318 (11th Cir. 1998) (en banc). A subsequent panel of the Eleventh Circuit went even further in *Smith v. GTE* by holding that there was simply no "overlooked reason" exception to the "prior panel precedent rule." But notably, in neither *Steele* nor *Smith* did the legal error involve a failure to follow a controlling precedent of this Court, as is the case here.

Until *Fritts*, *Golden*, and *Lee*, the rule in the Eleventh Circuit was that a subsequent panel was *not* required to follow a prior panel decision that had overlooked, and did not apply the legal dictates of, a governing Supreme Court case "in existence at the time." In *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987), the Eleventh Circuit notably refused to follow a decision of a prior panel that had not referenced two decisions of this Court that compelled a different result – opining that if the Supreme Court decisions had "been called to the attention of the [prior] panel, the panel would have come to the conclusion we reach today." *Id.* at 1035 n. 7. In following the dictates of this Court's decisions, rather than blindly adhering to a prior panel decision that did not consider them, the *Tucker* court clarified:

> [W]e do not view ourselves as violating the prior panel rule; rather, we are simply discharging our duty to follow clearly controlling Supreme Court precedent. We hasten to add that had the [prior] panel expressly considered [the overlooked Supreme Court decisions], we would be bound by its interpretation and application of those decisions.

Id.

Notably, the rule applied by the Eleventh Circuit in *Tucker* – that a subsequent panel is not bound by a prior panel decision if the prior panel failed to consider controlling Supreme Court precedent – is consistent with the rule applied in at least three other circuits. *See, e.g.*, *The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (a panel need not defer to "binding circuit precedent" "in the usual situation where binding circuit precedent overlooked earlier Supreme Court authority"); *Atl. Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 838 n. 2 (Fed. Cir. 1992) ("A decision that fails to consider Supreme Court precedent does not control if the court determines the prior panel would have reached a different conclusion if it had considered controlling precedent."); *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981) (in the "unusual and delicate situation" where a prior circuit case did not consider the impact of intervening Supreme Court precedent, rejecting prior panel's holding "under the authority" of the Supreme Court because the court must apply the Supreme Court decision, not the later-issued circuit case" because the prior panel was "without power to disregard the Supreme Court precedent").[2] Plainly, had Mr. Lee appealed his sentence in the Fifth, Sixth, or Federal Circuits, those courts would have followed this Court's dictates in *Leocal, Curtis John*son, *Moncrieffe*, *Descamps*, *Mathis*, and *Elonis* rather than its own obsolete and flawed decisions in *Dowd, Lockley*, and *Fritts*.

[2] Decisions of the former Fifth Circuit Unit B remain binding on the Eleventh Circuit. *Stein v. Reynolds*, 667 F.2d 33, 34 (11th Cir. 1982).

Prior to *Fritts*, *Golden*, and *Lee*, the Eleventh Circuit – like its sister courts – had rightly recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court." And for that reason, it had also recognized that it "*must consider*" whether intervening Supreme Court decisions had "effectively overruled" a prior precedent. *United States v. Contreras*, 667 F.2d 976, 979 (11th Cir. 1982).

While the other circuits have uniformly recognized an exception to the force of prior circuit precedent for an "intervening" Supreme Court decision, they do "differ in how much the earlier decision must be undermined before it can be overruled." Joseph Mead, "*Stare Decisis* in the Inferior Courts of the United States," 12 Nev. L. J. 787 (2012). The First Circuit, notably, does not require that the intervening decision of this Court be "directly controlling;" it need only "offer a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind."[3] The Second Circuit likewise does not require that the intervening decision "address the precise issue already decided by [the] court," but simply that the decision of this Court "casts doubt upon the circuit's reasoning," due to some "conflict, incompatibility, or 'inconsisten[cy]' between th[e] Circuit's precedent and the intervening Supreme Court decision. In the Second Circuit, "[t]he effect of intervening precedent may be 'subtle,' but if the impact is

[3] *United States v. Tava*res, 843 F.3d 1, 11 (1st Cir. 2016)(citing *United States v. Pires*, 642 F.3d 1, 9 (1st Cir. 2011).

nonetheless 'fundamental,' it requires [the court] to conclude that a decision of a panel [] is 'no longer good law.'"[4]

The Fourth Circuit finds it sufficient if there is simply a new "legal landscape" dictating a new mode of analysis, such that the prior decision is "clearly undermined" to the extent that it did not engage in the required mode of analysis.[5]

The Fifth Circuit applies what it terms a "rule of orderliness," pursuant to which the intervening decision of this Court must "be unequivocal" in its overruling of prior precedent, "not a mere 'hint' of how the Court might rule in the future."[6]

The Sixth Circuit does not require the intervening decision of this Court to be "precisely on point, if the legal reasoning is directly applicable," and "requires modification of [a] prior decision."[7]

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[4] *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 201 (2nd Cir. 2003) (citations, and internal quotation marks omitted); *Wojchowiski v. Daines*, 498 F.3d 99, 106 (2nd Cir. 2007). Notably, the Second Circuit also "permits a panel that believes an intervening Supreme Court decision has abrogated a prior decision to present that view to the active judges, and in the absence of objection, disregard the prior decision." *McCullough v. World Wrestling Entertainment, Inc.*, 838 F.3d 201 (2nd Cir. 2016).

[5] *See, e.g., United States v. Winston*, 850 F.3d 677, 684, 683, 685 (4th Cir. 2017) (prior circuit precedent holding that Virginia common law robbery was a "violent felony" within the elements clause of the ACCA was clearly undermined by the fact that it did not address the Virginia state courts' interpretation of the terms "by violence or intimidation").

[6] *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016); *United States v. Boche-Perez*, 755 F.3d 327 (5th Cir. 2014).

[7] *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *The Northeast Ohio Coalition for the Homeless v. Hu*sted, 831 F.3d 686, 720-721 (6th Cir. 2016) (and cases cited therein).

The Eighth Circuit, like several of the others, requires only that this Court have rendered a decision that "casts into doubt" or "undermines" the prior decision."[8]

The Ninth Circuit, appears somewhat different in requiring that the intervening decision be "clearly irreconcilable with the reasoning or theory of intervening higher authority."[9] But what that means, the Ninth Circuit has clarified, is not that the issues need to be "identical to be controlling;" a prior circuit decision is deemed "effectively overruled" if the intervening decision of this Court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable."[10]

The Tenth Circuit's test is simply whether the intervening Supreme Court's decision "invalidates [its] previous analysis."[11] And the Federal Circuit, like the Sixth and the Ninth, holds that issues determined by an intervening decision of this Court "need not be identical to be controlling." Rather, the Federal Circuit has clarified – citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L.

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[8] *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014).

[9] *See, e.g.*, *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 n. 4 (8th Cir. 2009) ("In the Ninth Circuit, a three-judge panel may reexamine a prior panel decision only if a supervening Supreme Court decision is 'clearly irreconcilable.' By contrast, we may reconsider a prior panel's decision if a supervening Supreme Court decision 'undermines or casts doubt on the earlier panel decision.'" (citation omitted).

[10] *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *United States v. Benally*, 843 F.3d 350 (9th Cir. 2016).

[11] *United States v. White*, 782 F.3d 1118, 1123 n. 2 (10th Cir. 2015).

Rev. 1175, 1177 (1989) – lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'"[12]

Plainly, therefore, the majority of the circuits recognize that an intervening decision of this Court need not be on "all fours" factually or legally to have undermined a prior precedent to the point of abrogation, and relieve a subsequent panel from following it. Rather, the intervening decision must simply dictate a different "mode of analysis" applicable to the issue before the lower court.

Until three years ago, the Eleventh Circuit's approach was broadly consistent with the majority approach in that regard. Like most of the circuit courts, the Eleventh Circuit had easily declared prior precedents "effectively overruled," or "undermined to the point of abrogation," based simply upon a different "mode of analysis" dictated by an intervening decision of this Court. *See, e.g.*, *United States v. Howard*, 742 F.3d 1334, 1343-1345 (11th Cir. 2014) (holding that "[t]wo crucial aspects of our decision in [*United States v.*] *Rainer*, [616 F.3d 1212 (11th Cir. 2010)] are no longer tenable after *Descamps v. United States*, 133 S.Ct. 2276 (2013)); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (finding *Begay v. United States*, 553 U.S. 137 (2008) "clearly on point," and that it had undermined *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998) "to the point of abrogation," even though *Gilbert* involved a different prior, and the Guidelines rather than the ACCA); *Dawson v. Sc*ott, 50 F.3d 884, 892 n. 20 (11th Cir. 1995) (finding prior panel's decision in *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1983) no longer

[12] *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014).

controlled because it failed to conduct the threshold inquiry required by one subsequent decision of this Court, and also failed to defer to an administrating agency's reasonable interpretation of a statute as required by two later decisions of the Supreme Court as well; "In view of these intervening Supreme Court precedents, *Johnson* does not control this case and appears to be overruled").

Before *Fritts*, *Golden*, and *Lee*, the Eleventh Circuit had never required complete identity between the issues in the prior case and intervening Supreme Court case to find "undermining to the point of abrogation." In *Santiago-Lugo v. Warden*, 785 F.3d 467 (11th Cir. 2015), the Eleventh Circuit notably found that separate decisions of this Court had abrogated a prior habeas precedent, even though one of the intervening decisions dealt with a different section of the habeas statute, and the other involved a different statute altogether. *See id*. at 474 n. 4. And in *United States v. Lopez*, 562 F.3d 1309 (11th Cir. 2009), the court held that a prior panel decision holding criminal filing deadlines were jurisdictional had been abrogated by an intervening decision of this Court dealing with civil filing deadlines. *See id*. at 1312.

Although the Fifth Circuit's "rule of orderliness" is somewhat analogous to the *Fritts-Golden-Lee* iteration of the "prior panel precedent rule" in the Eleventh Circuit, the more flexible approach of the First, Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Federal Circuits stands in direct conflict. Plainly, had Mr. Lee appealed his sentence in any of these circuits, these courts would have applied the new "mode of analysis" dictated by this Court's intervening decisions in *Moncrieffe*,

Descamps, and *Mathis*. They would have found the analysis in *Lockley, Dowd*, and *Fritts* of no import in determining whether a Florida robbery conviction and instead would have applied the mode of analysis required by intervening and superseding Supreme Court precedent in *Leocal, Moncrieffe, Descamps, Mathis,* and *Elonis*—which is precisely what Judge Jordan lamented in the concurrence in Mr. Lee's case, as discussed earlier. *Lee*, 886 F.3d at 1170 (Jordan, J., concurring) (citations to Florida appellate cases omitted) ("If we are going to follow the analytical road map the Supreme Court has drawn for us, [Mr. Lee's predicate offenses] cannot categorically qualify as a violent felony under the ACCA's element clause.'").

C. The "prior panel precedent rule" properly understood and applied required the Eleventh Circuit to reconsider its prior "putting in fear" analysis of *Lockley* in light of *Leocal, Moncrieffe, Descamps, Mathis,* and *Elonis* –and which this Court's decision in *Stokeling* specifically did not reach.

In *Stokeling v. United States*, 139 S.Ct. 544 (U.S. Jan. 15, 2019) (No. 17-5554), a sharply divided Supreme Court held 5-4 that even the slightest amount of force sufficed to satisfy the overcoming resistance element of a robbery-by-force both at common law and in Florida after *Robinson v. State*, 692 So.2d 883 (Fla. April 24, 1997) constitutes "physical force" for purposes of 18 U.S.C. §924(e)(2)(B)(i). *Id.* at 554-55. The majority reasoned that the word "force" in the ACCA's elements clause evidenced Congress' intent to include slight-force common law robberies as "violent felonies." *Id.* at 550-52.

But *Stokelin*g did not resolve – nor could it have resolved – the separate question raised in Mr. Lee's briefing to the Eleventh Circuit of whether a Florida

robbery-by-putting in fear meets the ACCA's elements clause. The government conceded in *Stokeling* that the Florida robbery statute is indivisible, Gov't. Initial Br., *United States v. Stokeling*, No. 16-12951, at 9-13 (11th Cir. Aug. 18, 2018); Gov't Reply Br. at 1 (11th Cir. October 27, 2016), and it has conceded here that "putting in fear" is an alternative "means" of violating the statute. Gov't. Initial Br.at 9.

The only question before the Supreme Court in *Stokeling* pertained to a robbery-by-force, which was the only "means" under the Florida robbery statute with an "overcoming resistance" element, and—as Justice Gorsuch recognized at the *Stokeling* oral argument—the only "means" addressed in *Robinson*. *See* Tr. of *Stokeling* oral argument, 2018 WL 4898964 at **37-38 (Oct. 9, 2018). When Justice Gorsuch asked why "putting in fear" was not a "problem for the government," counsel for the government advised (correctly) that *Stokeling* had not pressed a separate "putting-in-fear" challenge on certiorari. *Id.* at 38.

Unlike *Stokeling*, Mr. Lee *did* vigorously press such a challenge before the Eleventh Circuit and now on certiorari. Specifically, he asked the panel to affirm his non-ACCA sentence, based upon controlling Supreme Court precedent that was not considered in, and had effectively abrogated the holding of, *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) that it was "inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force." *Id.* at 1245.

In finding Mr. Lee's argument based upon controlling Supreme Court authority "unfortunately" "foreclosed by our [circuit] precedents," *United States v. Lee*, 886 F.3d 1161, 1163-65 (11th Cir. 2018), however, the panel over-read and misapplied the "prior panel precedent rule." That rule, correctly applied, did not "foreclose" the Eleventh Circuit panel from considering controlling Supreme Court precedents never-considered in *Lockley*. In fact, it required the panel to specifically consider the effect of never-considered Supreme Court precedents upon *Lockley*'s reasoning and holding at this time.

The *Lockley* panel recognized that "putting in fear" does not "specifically require the use or threatened use of physical force," but found it "inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force." 632 F.3d at 1245. While this panel rightly recognized that *Lockley*'s "reasoning" in that regard "was brief and conclusory, and the panel did not analyze Florida caselaw," *Lee*, 886 F.3d at 1164, the error by the *Lockley* panel went beyond failing to analyze Florida law.

As Judge Jordan recognized in his concurrence, Florida caselaw makes clear that a robbery-by-putting in fear does not require touching, or any actually threatening words or conduct, and instead, is judged by a "reasonable person" standard. *See id.* at 1166-69 (Jordan, J., concurring) (citing cases). However, even if the *Lockley* panel had considered the many Florida decisions identified by Judge Jordan, the *Lockley* panel could not have appreciated the legal significance for the elements clause analysis of Florida's "reasonable person" standard for "putting in

fear," without considering the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Court held that a conviction under Florida's DUI statute, Fla. Stat. § 316.193(3)(c)(2)(2003), did not have "as an element" the "use ... of physical force *against the person .... of another*," as required by 18 U.S.C. § 16(a). *Id.* at 9-10 (emphasis in original). The Court acknowledged that in *Bailey v. United States*, 516 U.S. 137, 145 (1995), it had previously held that the word "'use' requires active employment." *Id.* at 9. However, the Court explained, the word "use" in § 16(a) must also be construed "in its context and in light of the terms surrounding it." *Id.* And the "key" or "critical aspect" of § 16(a) was "*against the person ... of another*," language which "naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 10. Florida's "reasonable person" standard for "putting in fear" is a negligence standard. And negligent conduct does not meet the elements clause under *Leocal*.

As *Leocal* was not cited in the *Lockley* briefing, or decision, and there is no basis to believe *Leocal* was otherwise brought to the *Lockley*'s panel attention, *Wilson* and *Tucker* require that the panel specifically consider the significance of *Leocal* to the "putting in fear" analysis here. Notably, in *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015), the Ninth Circuit found – based upon *Leocal* – that a California robbery offense which demonstrably could be committed with a negligent *mens rea* did not meet the elements clause. *Id.* at 1197-98 (citing *Leocal*, 543 U.S. at 12-13, as holding that a use of force accidentally or negligently "fails the element test of 18 U.S.C. § 924(e)(2)(B)(i)).

While the issue here involves a threatened use of force rather than a direct use of force, the same reasoning applies. If a state robbery offense can be committed without intent to put someone in fear, and a "reasonable person" standard governs, the robbery statute is overbroad. The *mens rea* element for the least culpable conduct under the Florida robbery statute does not match the heightened *mens rea* of the elements clause.

Moreover, *Contreras*, *Archer*, and the other precedents cited *supra* required that the panel also specifically consider the many intervening Supreme Court precedents that have undermined *Lockley*'s superficial "inconceivability" analysis "to the point of abrogation." Such "intervening/abrogating" precedents include *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 clarified that a proper application of the categorical approach requires determining the least culpable conduct for conviction, and the "matching" of elements rather than presumptive reasoning.

But the panel should also consider another "intervening/abrogating" precedent, namely, *Elonis v. United States*, 135 S.Ct. 2001 (2015), which is directly-on-point on what constitutes a "threatened use of force against the person of another." That is the determinative issue here.

In *Elonis*, the Supreme Court held that the term "threat" in 18 U.S.C. § 875(c) necessitates awareness by the defendant of the threatening nature of his communication, and may not be based solely upon what a "reasonable person"

would understand from his conduct. *Id.* at 2011-12. Indeed, the Supreme Court explained, a "threat" requires a showing of some *mens rea* on the part of the perpetrator beyond mere negligence, namely, that he at least "knew" the threatening character of what he said. *Elonis*, 135 S.Ct. at 2011-12 (reversing conviction where jury was erroneously instructed that all the government needed to prove for conviction was that "a reasonable person" would regard *Elonis'* communications as threats; holding that was error because "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state").

Those principles govern here. The term "threatened" in § 924(e)(2)(B)(i) must be read consistently with the Supreme Court's interpretation of the term "threat" in *Elonis*. Just like Elonis' jury, Florida juries are instructed every day in robbery cases that "If the circumstances were such as to ordinarily induce fear in the mind of a reasonable person, then the victim may be found to have been in fear, and actual fear on the part of the victim need not be shown." Fla. Std. Instr. 151.1 (Robbery) (2019).

Accordingly, for the same reason the Supreme Court found the "threat" instruction erroneous in *Elonis*, this Court should find that a robbery-by-putting in fear is *not* a "threatened use of physical force against the person of another" within the ACCA's elements clause; that the Florida robbery statute is categorically overbroad for that reason; and that Mr. Lee's robbery convictions are therefore not qualifying ACCA "violent felonies."

The fact that *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) and *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) adhered to *Lockley* without specifically considering *Elonis*, did not preclude this panel from considering *Elonis*. Although the *Fritts* panel declared that "[u]nder this Court's prior panel rule, there is never an exception carved out for overlooked . . . Supreme Court precedent," *id.* at 942 (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001)), in so declaring the *Fritts* panel misinterpreted and over-read the holding of *Smith*. As noted above, the holding of *Smith* cannot extend to overlooked Supreme Court precedent, since there was no "clearly controlling Supreme Court precedent' on the issue before the Court in *Smith*. Indeed, the *Smith* panel specifically distinguished *Tucker* on that basis. *See* 236 F.3d at 1303-04.

But *Tucker* (and *Wilson*) cannot be so distinguished here. *Elonis* was not brought to the panel's attention in either *Seabrooks* or *Fritts*, and *Tucker* and *Wilson* specifically require the panel to now consider this clearly controlling Supreme Court precedent. To the extent the *Fritts* panel's articulation of the "prior panel precedent rule" is inconsistent with *Tucker* and *Wilson*, the "prior panel precedent rule" itself dictates that the earlier cases (*Tucker* and *Wilson*) control over *Fritts*. *See Walker v. Mortham*, 158 F.3d 1171, 1188-89 (11th Cir. 1998) (the "earliest case' rule is "essential to maintaining stability in the law"); *United States v. Hornaday*, 392 F.3d 1306, 1315-16 (11th Cir. 2004) (same rule applies to inter-circuit conflicts involving "the governing legal standard"); *In re Rogers*, 825 F.3d

1335, 1339 n. 6 (11th Cir. 2016)(even if statements in two prior precedents are not in direct conflict, but simply "in tension," the earliest case still controls).

If the *Fritts* panel had been alerted not only to *Elonis*, but also to the many above precedents which make clear that the "prior panel precedent rule" itself requires consideration of never-before-considered Supreme Court precedents that have definitively abrogated *Lockley*'s "putting in fear" analysis, the *Fritts* panel could not have cited *Lockley* "alone" as an "alternate and independent" ground for its finding that a Florida robbery conviction under § 812.13(a) "categorically qualifies as a violent felony under the ACCA's elements clause." 841 F.3d at 942.

Governing Supreme Court law requires a finding here that a Florida robbery-by-putting in fear is not a categorical "match" to a "threatened use of force against the person of another" under the ACCA's elements clause. For that reason, a conviction under Florida's indivisible robbery statute is categorically overbroad, and Mr. Lee is not an Armed Career Criminal. The district court correctly resentenced him to a non-ACCA sentence, and the Eleventh Circuit should have affirmed his sentence.

D. The Eleventh Circuit's Application of its "Prior Panel Precedent Rule" Denies Defendants Their Statutory Right to Appeal and Due Process of Law

Mr. Lee had a statutory right to appeal his sentence, and Congress gave the Eleventh Circuit jurisdiction over that appeal. 18 U.S.C. § 3742. The Eleventh Circuit did not have discretion to refuse to exercise that jurisdiction. *See Sprint Communications v. Jacobs*, 134 S. Ct. 584, 588 (2013) ("In the main, federal courts

are obliged to decide cases within the scope of federal jurisdiction."); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-17 (1976) (holding that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule" because of "the virtually unflagging obligation to exercise the jurisdiction given them."). While the obligation to exercise jurisdiction entails a duty to consider every argument that has not been waived, the Eleventh Circuit's decision below effectively holds that the defendant in *Lockley* waived Mr. Lee's argument *for him* by *not* raising it. And that cannot be the law, because that would deny Mr. Lee due process.

For Mr. Lee to truly have a statutory right to appeal his sentence, his appeal must, at a minimum, afform him a meaningful opportunity to formulate arguments and have them considered by a neutral and detached court. That is why the right to an attorney on appeal is guaranteed – to assure a meaningful appeal. *See generally Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.") Moreover, the statutory right to appeal entails the right to develop and present a complete argument and to have it considered by the appellate court. And that right is hollow if the appellate court may simply refuse to consider the arguments on the authority of a judge-made, overly-rigid, new iteration of the circuit's "prior panel precedent rule."

Notably, that rule is most definitely not a mere "procedural rule" like the prior Eleventh Circuit rule that issues not raised in an opening brief are forfeited –

a rule the Court allowed to stand, albeit with great criticism, in *Joseph v. United States*, 135 S.Ct. 705 (2014). *See id.* at 706-707 (statement by Kagan, J., joined by Ginsburg and Breyer, JJ. respecting the denial of certiorari) (noting that "[n]ot a single other court of appeals" refused to accept a supplemental brief based upon an intervening Supreme Court decision such as *Descamps*, and "[t]here is good reason for this near unanimity;" however, "deferring, for now, to the Eleventh Circuit in the hope that it will reconsider whether its current practice amounts to a 'reasoned exercise[]' of its authority")(citation omitted).[13]

Here, the rule misapplied by the Eleventh Circuit – contrary to the rule applied by other circuits – is a rule of crucial substance. It goes to the very foundation of our federal court system of law: the principle of *stare decisis*. And therefore, it should not be allowed to stand.

[13] In *United States v. Durham*, 795 F.3d 1329 (11th Cir. 2015) (en banc), the Eleventh Circuit quickly responded to the criticism leveled in *Joseph*, by recognizing that there were indeed "some reasons not to [maintain its rigid procedural default] rule," and holding anew – consistent with the rule applied by the other circuits – that "where there is an intervening decision of the Supreme Court on an issue that overrules either a decision of that Court or a published decision of this Court that was on the books when the appellant's opening brief was filed, and that provides the appellant with a new claim or theory, the appellant will be allowed to raise that new claim or theory in a supplemental or substitute brief." *Id.* at 1331.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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