NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ERIC HANNA,

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

MICHAEL CARUSO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
Counsel of Record
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court should grant certiorari, vacate the decision below, and remand (GVR) this case with directions that the Eleventh Circuit grant Petitioner a certificate of appealability ("COA") because reasonable jurists could debate:

(1) whether the Eleventh Circuit's resolution of open merits issues at the authorization stage of second or successive ("SOS") § 2255 motions exceeds its statutory authority under 28 U.S.C. § 2244(b)(3);

(2) whether the Eleventh Circuit's treatment of published opinions issued at the SOS authorization stage as "binding precedent" for all future appellate panels, precluding consideration of any new arguments, results in a denial of due process;

(3) whether the mode of analysis employed in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016) is inconsistent with the categorical approach, and has been abrogated by *Mathis v. United States*, 136 S.Ct. 2243 (2016);

(4) whether Hobbs Act robbery under 18 U.S.C. § 1951(b) is categorically a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A), if the plain language of § 1951(b) and several circuits' pattern Hobbs Act robbery instructions indicate the offense may be committed non-violently – by causing fear of purely economic harm to property, which can include intangible rights; and

(5) whether *aiding and abetting* a "crime of violence" is automatically and categorically a "crime of violence"?

II. Whether the Eleventh Circuit erred under *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017) in denying Petitioner a certificate of appealability based simply upon adverse circuit precedent?

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

Eric Hanna ("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 denying him a certificate of appealability.

OPINION BELOW

The Eleventh Circuit's order denying a certificate of appealability, *United States v. Hanna*, Slip Op. (11th Cir. July 25, 2019) (No. 17-13441), is included in the Appendix at A-1.

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 denying a certificate of appealability was entered on July 26, 2019. On October 11, Justice Thomas extended the time to file this petition until December 23, 2019. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

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.
>
> **(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. . . .

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.

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

28 U.S.C. § 2244. Finality of determination

(b)(3)(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this section.

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

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

28 U.S.C. § 2253. Appeal

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appeal ability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On September 29, 2011, Petitioner Eric Hanna was charged in a multi-count indictment with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a)(Count 1); two counts of Hobbs Act robbery/aiding and abetting that crime under 18 U.S.C. § 1951(a) and § 2 (Counts 6 and 14); and two counts of using/carrying a firearm in relation to a "crime of violence" as set forth in Counts 6 and 14, or possessing a firearm in furtherance of a "crime of violence" as set forth in those same counts, or aiding and abetting such crimes, pursuant to 18 U.S.C. § 924(c)(1)(A)(ii) & 2 (Counts 7 and 15).

Petitioner proceeded to trial with two co-defendants.

At the conclusion of the trial, the court instructed the jury that for purposes of Counts 6 and 14 (the Hobbs Act robbery charges), Petitioner could be found guilty if the government proved beyond a reasonable doubt certain that he took "property" (which included "intangible rights that are a source or element of income or wealth") by "causing the victim to fear harm, either immediately or in the future," with "fear" meaning "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).

Alternatively, the court explained, the jury could convict Petitioner of these counts if it simply found he "aided and abetted" one of his co-defendants in the robberies described. To be found guilty on an aiding and abetting theory, the court noted, the defendant "intentionally joins with the person to commit a crime," and if there is evidence that he "was a willful participant and not merely a knowing spectator," he is "criminally responsible for the acts of [the other] person."

Finally, with regard to the Count 7 and 15 charges, the court instructed the jury that Petitioner could be found guilty of these § 924(c) offense if (1) either he "or the person he aided

or abetted" "committed or aided and abetted in the crime of violence – that is, the robbery, charged in the specified Count of the Indictment; (2) he knowingly used, carried, or possessed a firearm or aided and abetted someone who did; and (3) he, or the person he aided or abetted, used or carried the firearm "in relation to" the violent crime, or possessed the firearm "in furtherance" of the violent crime.

The court told the jury that it could convict Petitioner of either or both § 924(c) counts on an aiding and abetting theory as well. [1]

After being so instructed, the jury returned a general verdict finding Petitioner guilty of all five counts as charged. The jury did *not* specify whether the convictions on Counts 6 and 14 were based on a finding that Petitioner committed the substantive offense, or simply aided and abetted a co-defendant. Nor did the jury specify whether the predicate for Petitioner's § 924(c) convictions was a substantive Hobbs Act robbery or aiding and abetting that offense, or whether they even unanimously agreed as to the predicate.

On June 11, 2012, the district court sentenced Petitioner to 51 months on Counts 1, 6 and 14 concurrent; followed by 84 months consecutive on Count 7 (the first § 924(c) count); and 300 months consecutive to that on Count 15 (the second § 924(c) count) – for a total of 435 months imprisonment, followed by 5 years supervised release. The court ordered $9,284 in restitution.

On June 21, 2016, Petitioner filed a *pro se* motion to vacate under 28 U.S.C. § 2255 (his first such motion), arguing that his two § 924(c) convictions should be vacated since §924(c)'s residual clause was unconstitutionally vague in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), and Hobbs Act robbery was not otherwise a "crime of violence." The Federal Public

[1] The aiding and abetting instruction notably did *not* comply with this Court's later clarification in *Rosemond v. United States*, 572 U.S. 65 (2014) that to hold a defendant guilty of a § 924(c) offense on an aiding and abetting theory the defendant must have advance knowledge that a firearm would be used or possessed. Petitioner's jury was not so advised.

Defender filed an amended motion on Petitioner's behalf, arguing *inter alia*, that Hobbs Act robbery was "indivisible" according to *Descamps v. United States*, 133 S.Ct. 2276 (2013); that one "means" of committing it was by putting someone in fear of injury to property (which included intangible assets); and that the offense thus did not require the use or threat of "violent force" in every case.

The government responded that Petitioner had procedurally defaulted these claims, and that both his challenge to the constitutionality of § 924(c)(3)(B) and to Hobbs Act robbery as a "crime of violence" lacked merit given the Eleventh Circuit's prior decision in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), holding Hobbs Act robbery necessarily qualifies as a "crime of violence" within § 924(c)(3)(A). Thus, the government argued, Petitioner could not show either "actual innocence" or prejudice from failing to challenge his convictions on these grounds previously; *Johnson* had no impact on his case; and it was unnecessary to consider whether *Johnson* invalidated § 924(c)'s residual clause.

Defense counsel replied that *In re Saint Fleur* was not precedential outside the second or successor ("SOS") motion context, and its reasoning should be rejected under *de novo* review since the panel did not properly apply the categorical approach as required by prior circuit precedent (*United States v. McGuire*, 706 F.3d 133 (11th Cir. 2013), and *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016)); prior Supreme Court precedent (*Descamps* and *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013)); and intervening Supreme Court precedent, *Mathis v. United States*, 136 S.Ct. 2243 (June 23, 2016). These precedents, counsel argued, precluded a court from presuming that an offense met the elements clause simply from the language of the statute tracked in the indictment without considering either standard jury instructions or interpretive caselaw.

On April 28, 2017, the magistrate judge recommended that the district court deny Petitioner's § 2255 motion as procedurally barred. According to the magistrate, Petitioner's procedural default of his challenges to his § 942(c) convictions could not be excused by either cause and prejudice or actual innocence, since his Hobbs Act robbery convictions still qualified as "crimes of violence" within § 924(c)'s elements clause under *In re Saint Fleur*. He stated:

> Movant [] argues that if this Court conducts the proper analysis [under the categorical approach, as clarified by recent Supreme Court precedents], it will conclude that substantive Hobbs Act robbery does not qualify as a crime of violence for purposes of §924(c). ***That may well be true.*** The problem is that it would be futile for the Court to conduct any such analysis, because the Eleventh Circuit has already decided the issue in *Saint Fleur*. ...
>
> [R]egardless of whether the Eleventh Circuit in *Saint Fleur* should have undertaken a determination of whether *Saint Fleur*'s Hobbs Act conviction qualified as a "crime of violence," the fact remains that it did. Moreover, the Court's conclusion that *Saint Fleur*'s Hobbs Act conviction did qualify as a "crime of violence" was necessary to the result in that case, since his application for leave to file a successive § 2255 motion was denied on that basis. As such, *Saint Fleur* holds that Hobbs Act robbery is a "crime of violence" for purposes of § 924(c), and this Court is thus bound by it.

(Emphasis added).

Given that determination, the magistrate declined to "address the [then] unsettled [constitutional] question of whether *Johnson* invalidates § 924(c)'s residual clause." He recommended denial of a certificate of appealability ("COA") since the movant must show both that the procedural ruling and the constitutional issue were debatable, and in his view, "reasonable jurists would not find debatable the correctness of the court's procedural rulings."

Counsel filed timely objections, urging the district court at least to grant Petitioner a COA. However, on June 1, 2017, the district court entered a paperless order adopting the report and recommendation, and denying Petitioner a COA, stating:

> Petitioner objects to Judge White's reliance on *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016) to establish that the Hobbs Act robbery qualifies as a crime of

violence, instead of the Court conducting its own "categorical analysis" of the statute as required by *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See* Objections (ECF No. 14) at 5-6. In so doing, the Petitioner re-lodges arguments which he had previously proffered and which the Report already addressed and rejected. See Report (ECF No. 13) at 10-14. The Court finds that these objections are fully addressed in Judge White's Report.

Despite Plaintiff's arguments to the contrary, this Court is bound to apply the Eleventh Circuit's prior holdings. *See In re Hubbard*, 803 F.3d 1298, 1309 (11th Cir. 2015) (describing " the fundamental rule that courts of this circuit are bound by the precedent of this circuit"); *see also United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (The holding of a case is comprised both of the result of the case and those portions of the opinion necessary to that result by which we are bound.). The Court is not persuaded by Plaintiff's argument that the Eleventh Circuit's holdings in "successive" Section 2255 cases are not binding. *See* Objections (ECF No. 14) at 1-4 (citing *Jordan v. Secy Dept of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007); *In re Jackson*, 826 F.3d 1343, 1351 (11th Cir. June 24, 2016); *In re Rogers*, 825 F.3d 1335, 1340 (11th Cir. June 17, 2016); *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016)). Petitioner misconstrues the quotations he pulled from these cases, which merely stand for the proposition that a district court, in assessing the merits of habeas petition, does not need to defer to the Court of Appeals' *prima facie* determinations authorizing a successive petition because "in issuing a § 2244(b)(3)(A) order authorizing the filing of a second or successive petition in the district court, [the Court of Appeals] do[es] not make any factual determinations." *See Jordan*, 485 F.3d at 1357; *see also In re Jackson*, 826 F.3d at 1351; *In re Rogers*, 825 F.3d at 1340; *In re Gomez*, 830 F.3d at 1228.

In *Saint Fleur*, the Eleventh Circuit found that Defendant's companion conviction for Hobbs Act robbery clearly qualified as a crime of violence under the elements clause in Section 924(c)(3)(A). *See In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016). Judge White correctly noted that the *Saint Fleur* Court's conclusion that a Hobbs Act robbery conviction qualified as a "crime of violence" under the elements clause was necessary to determine the outcome in that case: holding that *Saint Fleur*'s sentence would be valid even if *Johnson* invalidated the Section 924(c) residual clause. Therefore, the Eleventh Circuit's assessment that a Hobbs Act robbery is a "crime of violence" was part of the holding and, accordingly, is binding on this Court. Thus, Judge White was correct to conclude as it did: Petitioner did not establish prejudice because regardless of whether *Johnson* applies to Section 924(c)'s residual clause, Petitioner's companion charges for substantive Hobbs Act robbery still qualify as "crimes of violence" under Section 924(c)'s elements clause.

Second, Petitioner objects to Judge White's conclusion that no Certificate of Appealability should issue because "reasonable jurists can and do debate" whether Hobbs Act robbery is a crime of violence under Section 924(c)'s elements clause. *See* Objections (ECF No. 14) at 9-10.

> As discussed above, Petitioner's claims are barred on procedural grounds. "Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both '(1) that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of a constitutional right and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. " *Pio v. United States*, No. 13-23666-CIV, 2014 WL 4384314, at *6 (S.D. Fla. Sept. 3, 2014) (quoting *Rose v. Lee*, 252 F.3d 676, 684 (4th Cir. 2001) (internal quotation marks omitted)). After reviewing the issues presented, the Court finds that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted.

Petitioner filed a timely notice of appeal to the Eleventh Circuit, and on August 3, 2017, sought a COA. In his motion, he acknowledged that to be granted a COA, according to 28 U.S.C. § 2253(c)(2), he needed to make a "substantial showing of the denial of a constitutional right." However, he noted, to meet that standard, he did ***not*** need to:

> show that he would win on the merits; he must only "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

He explained that:

> Where, as here, a district court denies a § 2255 on a procedural ground such as default, without reaching the underlying constitutional claim, the movant must show that reasonable jurists could debate both the correctness of the court's procedural ruling, as well as whether the petition states a valid claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484.
>
> That being said, the Supreme Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Under the "debatable among reasonable jurists" standard, the fact that there is adverse circuit precedent is not preclusive. If, for example, there is a split among various courts on the question, that will satisfy the standard for obtaining a COA. *See Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000).
>
> But notably, a circuit split is not even a prerequisite for a COA. Because a COA is necessarily sought in the context that a petitioner has lost on the merits, the Supreme Court has been adamant that it will "*not* require petitioner to prove, before the

> issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, *a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail*." *Miller-El*, 537 U.S. at 338 (emphasis added); *see also Buck v. Davis*, 137 S.Ct. 759, 774 (U.S. Feb. 22, 2017) (citing and following *Miller-El* on that point; "That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable;" "[W]hen a reviewing court ... inverts the statutory order of operations and 'first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage;" "*Miller-El* flatly prohibits" denying a COA based upon adjudication of the merits").
>
> Ultimately, any doubt about whether to grant a COA must be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).
>
> According to the Supreme Court, a COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

That standard was met here, Petitioner argued, because none of the issues he wished to raise on appeal were "beyond all debate." In fact, he noted, "reasonable jurists" would debate the district court's resolution of his case in multiple respects – specifically, on the questions of: (1) whether published SOS orders were binding outside the SOS context, and specifically in a first § 2255 case such as this one; (2) whether the *In re Saint Fleur* panel erroneously failed to apply the categorical approach under current Circuit and Supreme Court precedent; (3) whether Hobbs Act robbery categorically required "violent force" as an element in every case, when (as the Eleventh Circuit pattern Hobbs Act robbery instruction plainly stated) the offense can be committed by causing a victim to "fear harm" to "property" which includes "financial loss" to "intangible rights;" (4) whether aiding and abetting a Hobbs Act robbery is categorically a "crime of violence" within § 924(c)'s elements clause, notwithstanding *In re Colon*, 826 F.3d 1301 (11th Cir. 2016); and (5) whether *Johnson* had invalidated § 924(c)'s residual clause as unconstitutionally vague.

The Eleventh Circuit held the motion for COA – without ruling on it – for almost two years. In the interim, the court held in *Ovalles v. United States*, 905 F.3d 1231 (Oct. 4, 2018) (en banc) that § 924(c)'s residual clause was not unconstitutionally vague. Then, in *United States v. St. Hubert*, 909 F.3d 335, 345-46 (Nov. 15, 2018), a panel of the Eleventh Circuit held that Hobbs Act robbery was categorically a violent felony within § 924(c)'s elements clause based on its "binding precedent" in *In re Saint Fleur*. The appellant in *St. Hubert* had argued, notably, that decisions like *In re Saint Fleur* should not be treated as precedential outside the SOS setting. However, the Eleventh Circuit panel specifically rejected that argument, holding definitively as a matter of first impression (and unique rule) for the circuit that "law established in published three-judge orders issued pursuant to 28 U.SC. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, 'unless and until [it is] overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *Id.* at 346 (quotation omitted).

The Eleventh Circuit continued to hold Petitioner's motion for COA while it *sua sponte* considered whether to rehear *St. Hubert* en banc. Ultimately, a majority of the court refused to do so, but there was sharp disagreement within the court on the rule set forth in that case that published SOS orders were binding precedent for all future panels. *United States v. St. Hubert*, 918 F.3d 1174 (Mar. 19, 2019) (denying rehearing en 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 outside the SOS context. 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.[2]

Despite the en banc majority's refusal to reconsider the rule that published SOS orders (like *In re Saint Fleur* and *In re Colon*) were binding on all subsequent appellate panels, the Eleventh Circuit continued to hold Petitioner's motion for COA until after this Court resolved the circuit conflict on whether § 924(c)'s residual clause was unconstitutionally vague in *United States v. Davis*, No. 18-431.

Three days after the Court issued its decision in *United States v. Davis*, 139 S.Ct. 2319 (June 24, 2019), rejecting the Eleventh Circuit's reasoning in *Ovalles*, and agreeing with Petitioner's argument that § 924(c)'s residual clause was indeed unconstitutionally vague and therefore void, Eleventh Circuit Judge Julie Carnes issued an order denying Petitioner a COA. *Hanna v. United States*, Slip op. (11th Cir. July 26, 2019) (No. 17-13441). In that order, Judge Carnes found that Petitioner could not show prejudice or "actual innocence" to overcome the procedural bar in his case because (1) Hobbs Act robbery qualified as a crime of violence within § 924(c)'s elements clause based on the Eleventh Circuit's "precedent in *In re Saint Fleur*," (2) aiding and abetting a Hobbs Act robbery met the elements clause under the court's "precedent" in

[2] *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., 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").

In re Colon, 826 F.3d 1301 (11th Cir. 2018); and (3) according to *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1251, 1266 (11th Cir. 2015), "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." Appendix A-1.

REASONS FOR GRANTING THE WRIT

I. The Court should issue a GVR directing the Eleventh Circuit to grant Petitioner a COA because reasonable jurists could debate the correctness of the district court's denial of § 2255 relief in multiple regards.

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. But notwithstanding *Davis*' invalidation of the residual clause, the court below still found no reasonable jurist would debate the constitutionality of Petitioner's § 924(c) convictions on Count 7 or 15 for three reasons: *first*, the Eleventh Circuit's "binding precedent" in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016) held that Hobbs Act robbery is categorically a "crime of violence" within the § 924(c)(3)(A) elements clause; *second*, its binding "precedent" in *In re Colon*, 826 F.3d 1301 (11th Cir. 2016) held that aiding and abetting a Hobbs Act robbery is also categorically a "crime of violence" within § 924(c)(3)(A); and *finally*, according to *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1251, 1266 (11th Cir. 2015), reasonable jurists would follow controlling law.

For the reasons detailed below, the Court should grant certiorari, vacate the decision below, and remand ("GVR") Petitioner's case to the Eleventh Circuit to issue a COA because reasonable jurists both within and outside the Eleventh Circuit could easily debate Judge Carnes' adherence to – and the correctness of – *In re Saint Fleur* and *In re Colon* in multiple respects:[3]

[3] The blatant error inherent in the Eleventh Circuit's *Hamilton* standard is separately addressed as a ground for either plenary review or summary reversal in Issue II.

A. Reasonable jurists could debate the correctness of the Eleventh Circuit's rule that published SOS orders are "binding precedent" outside the SOS context for two reasons.

Reasonable jurists would debate the correctness of the Eleventh Circuit's treatment of published decisions resolving open merits issues at the authorization stage of a second or successive ("SOS") § 2255 motion as "binding precedent" in two respects: the first has to do with the court of appeals' limited statutory authority under 28 U.S.C. § 2244(b)(3)(C), and the second arises from the fact that treating SOS opinions as precedential and preclusive of any new argument outside the SOS context results in a denial of due process.

1. The Eleventh Circuit's resolution of open merits issues at the authorization state of a SOS motion is inconsistent with 28 U.S.C. § 2244(b)(3)

As a threshold matter, as evidenced by the conflicting opinions respecting the denial of rehearing en banc in *St. Hubert*, there is a deep split within the Eleventh Circuit as to the propriety of resolving open merits issues at the authorization stage of SOS § 2255 motions. *See also In re Williams*, 898 F.3d 1098, 1106 (11th Cir. 2018) (Martin, J., joined by Wilson and Jill Pryor, J.J., specially concurring). But even beyond that, reasonable jurists from other circuits as well have sharply disagreed with the Eleventh Circuit's approach as exceeding the court's limited statutory mandate under 28 U.S.C. § 2244(b)(3). Section 2244(b)(3)(C) provides that an appellate court may grant an inmate permission to file such a motion only if the inmate makes a "*prima facie* showing" that he satisfies the requirements of that section. Making such a showing does not require an inmate to show that he will ultimately prevail, only that his claim should be further explored by the district court. As detailed in the pending petition for certiorari in *Robinson v. United States*, No. 19-5451 (pet. filed Aug. 2, 2019), at least three other circuits have held specifically – contrary to the Eleventh Circuit – that the *prima facie* showing determination does ***not*** involve a full blown merits analysis of a claim. *See In re Hoffner*, 870 F.3d 301, 310 n. 13 (3d

Cir. 2017) ("[W]e do not follow the Eleventh Circuit, which – contrary to our precedent – resolved a merits question in the context of a motion to authorize a second or successive habeas petition."); *Henry v. Spearman*, 899 F.3d 703, 708 (9th Cir. 2018) ("We review the State's contentions merely to determine whether relief is foreclosed by precedent or otherwise facially implausible, leaving the merits of teh claim for the district court to address in the first instance."); *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (stating that § 2244(b)(3)(C) "does not direct the appellate court to engage in a preliminary merits assessment").

Notably, although the government initially waived its response to the petition in *Robinson*, the Court requested a response on September 4, 2019. For the reasons more fully discussed in the *Robinson* petition and reply on this threshold procedural issue, reasonable jurists would debate whether the Eleventh Circuit even *had* the statutory authority in the first place to resolve the open merits issuesof whether Hobbs Act robbery was categorically a "crime of violence" in *In re Saint Fleur*, and the open merits issue of whether aiding and abetting a Hobbs Act robbery was a "crime of violence" in *In re Colon*. Given the direct circuit conflict on § 2244(b)(3)(C), the COA standard is easily met on this threshold procedural issue.

2. It is a denial of due process to treat published orders issued at the authorization stage of SOS applications as "binding precedent" in all subsequent appeals, including appeals of first § 2255 motions

The four judges dissenting from the denial of rehearing en banc in *St. Hubert* expressly "welcome[d] any avenue of Supreme Court review" of the Eleventh Circuit's rule that decisions like *Saint Fleur* and *In re Colon* are precedential and preclude consideration of new argument in cases arising outside the successive posture. *Id.* at 1198 n.4 (Wilson, J., dissenting from denial of rehearing en banc, joined by Martin, Jill Pryor, and Rosenbaum, JJ.). And notably, that very issue is now before the Court in several pending petitions arguing that the Eleventh Circuit's rule treating

published SOS orders as binding precedent in all subsequent appeals results in a denial of due process to defendants outside the SOS context.

That argument was initially set forth at length by the petitioner in in *Valdes Gonzalez v. United States*, No. 18-7575 (pet. filed Jan. 18, 2019), a case distributed for conference at the end of last term, and again at the beginning of this term, but which the Court has repeatedly "rescheduled." The petitioner in *St. Hubert v. United States*, No. 19-5267 (pet. filed July 18, 2019) adopted the due process argument from *Valdes Gonzalez*, applying it specifically to the precise issue Petitioner has raised here, by arguing that he was denied due process by the court's holding that *In re St. Fleur* was dispositive of whether Hobbs Act robbery was a "crime of violence" under the elements clause in 18 U.S.C. § 924(c)(3)(A), which precluded consideration of his new argument (not considered in *Saint Fleur*) that the Eleventh Circuit pattern Hobbs Act robbery instruction confirmed that the offense could be committed non-violently, and was categorically overbroad.

As the petitioner in *St. Hubert* has pointed out, *In re Saint Fleur* was a decision rendered upon denial of an application to file a successive 28 U.S.C. § 2255 motion; it was the product of irregular, truncated procedures in which open merits questions are not to be resolved; the *pro se* applicant in *In re Saint 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.[4]

[4] 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, including *In re Saint Fleur* and *In re Colon*. The Eleventh Circuit then held in *St. Hubert* 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 th[e] Court." 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 both *In re Saint Fleur* and *In re Colon* preclusive effect in Petitioner's case, 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. Petitioner adopts and incorporates by reference herein the arguments set forth in the *Valdes Gonzalez* petition, reply, and recently-filed supplemental brief.

Finally, he notes with significance that two additional petitions raising this same due process issue have come to this Court in his exact procedural posture. *See Robinson v. United States*, No. (pet. for cert. filed Aug. 2, 2019) and *Mack v. United States*, No.19-6355 (pet. for cert. filed Oct. 21, 2019). The petitioners in both *Robinson* and *Mack* were first § 2255 movants like Petitioner here. And notably, the Court has requested a response from the government in both *Robinson* and *Mack.*

The due process issue raised in *Valdes Gonzalez*, *St. Hubert*, *Robinson*, and *Mack* – if resolved in those petitioners' favor – could be case-dispositive for Petitioner here. Indeed, because the Eleventh Circuit deemed *Saint Fleur* binding below, it made no difference what new arguments Petitioner pressed in support of his motion for COA. The Eleventh Circuit steadfastly refused to

consider any new 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, the court could and should have found the issue of whether Hobbs Act robbery is categorically a "crime of violence" sufficiently debatable to issue a COA. Based on the arguments advanced in *Valdes Gonzalez*, *St. Hubert*, *Robinson*, and *Mack*, it is certainly debatable among reasonable jurists at this time whether it violates a § 2255 movant's procedural due process rights to afford precedential force to decisions like *In re Saint Fleur* and *In re Colon*.

B. Reasonable jurists could debate whether Hobbs Act robbery is a "crime of violence" under § 924(c)'s elements clause for three reasons

After the Eleventh Circuit found in Part I of *St. Hubert* that it was bound by *In re Saint Fleur*, it acknowledged in a later portion of the decision (which was *dicta*) that the reasoning in *Saint Fleur* was not consistent with this Court's discussion of the categorical approach in *Descamps v. United States*, 570 U.S. 254 (2013); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); or *Mathis v. United States*, 136 S.Ct. 2243 (2016). *St. Hubert*, 909 F.3d at 347-49. In attempting to bolster the conclusion reached in *Saint Fleur* as consistent with the categorical approach, the Eleventh Circuit noted that every one of its sister courts to have considered whether Hobbs Act robbery was categorically a "crime of violence" within § 924(c)'s elements clause had reached the same conclusion: that it was. 909 F.3d at 349 (citing *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir. 2017); *United States v. Rivera*, 847, 848-49 (7th Cir. 2017); *United States v. Anglin*, 856 F.3d 954, 964-65 (7th Cir. 2017), *cert. granted & judgment vacated on other grounds*, 138 S.Ct. 126 (2017); *United States v. Hill*, 890 F.3d 51, 56 & n. 7 (2d Cir. 2018); and *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016)).

But notably, most of these other-circuit decisions did not consider either the dictates of *Mathis* which clarified proper application of the categorical approach, or the specific question

Petitioner has raised here of whether violating § 1951(b) by causing fear of future injury to property renders the offense as a whole categorically overbroad vis-a-vis the elements clause. Only a few circuits (*e.g.*, the Second in *Hill*) even acknowledged that § 1951(b) can be violated by causing future fear of injury to property, and in none of those cases did the court of appeals consider whether the plain meaning of the term "property" in § 1951(b) included "intangible rights;" whether "injury" could refer to purely economic harm; or whether the plain language of several circuits' pattern jury instructions interpreting the "fear of future injury . . . to property" language in § 1951(b) in precisely this, non-violent way was itself reason to hold a Hobbs Act robbery conviction categorically overbroad.

For the reasons detailed below, reasonable jurists would challenge the mode of analysis in *In re Saint Fleur* as inconsistent with the categorical approach. They would find it definitively abrogated by *Mathis*, and treat *Saint Fleur* as non-binding now for that reason. Properly applying the categorical approach consistent with *Mathis*, reasonable jurists could conclude (and have concluded) that Hobbs Act robbery is categorically overbroad vis-a-vis the elements clause, based on either the plain language of § 1951(b), or the plain language of pattern Hobbs Act robbery instructions that specifically direct juries that they can convict if the defendant caused fear of economic injury to intangible rights, with no threat of any physical injury to person or property.

1. The reasoning in *In re Saint Fleur* has been abrogated by this Court's subsequent decision in *Mathis v. United States*, which clarified proper application of the categorical approach

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 using or threatening physical force, that is, "*violent* force," against a "person *or property*." In *Descamps v. United States*, 570 U.S. 254 (2013), this Court clarified that the categorical approach requires an exact match between the elements of the offense at issue (Hobbs Act robbery), and the federal crime of violence definition (the elements clause). With nothing more than a surface-level analysis, the *In re Saint Fleur* panel found such a match due to the words "force" and "violence" in the indictment. The court did not undertake the divisibility analysis required by *Descamps*; it did not distinguish between "elements" and "means" in the manner thereafter mandated by *Mathis v. United States*, 136 S.Ct. 2243 (2016); and it failed to determine the least culpable conduct under the statute as required by *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

As petitioner pointed out in his motion for COA below, reasonable jurists could certainly debate whether the *In re Saint Fleur* panel erroneously failed to apply the categorical approach as dictated in these precedents. For indeed, almost immediately after the decision in *In re Saint Fleur* issued, one of the judges who joined that decision acknowledged in other cases that she may have overlooked the dictates of the non-clarified categorical approach. Specifically, Judge Martin stated,

> In my haste to rule in *Saint Fleur*, I overlooked the possibility that Hobbs Act robbery can be committed without the type of force described in *Curtis Johnson*. For example, the Eleventh Circuit's pattern jury instructions show that a jury can convict a defendant of Hobbs Act robbery so long as it believes 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." 11th Cir. Pattern Jury Instructions 70.3 (emphasis added). This "causing the victim to fear harm" can include causing fear of "financial loss," which "includes . . . intangible rights that are a source or element of income or wealth." *Id.*; *see also United States v. Local 560 of the Int'l Bhd, of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible property").
>
> It also bears repeating that Hobbs Act robbery can be committed "by means of

> actual or threatened force, or violence, or fear of injury." 18 U.S.C. §1951(b)(1). Even though this language says Hobbs Act robbery can be committed either with violence or mere intimidation, "our inquiry can't end with simply looking at whether the statute is written disjunctively (with the word 'or'). The text of a statute won't always tell us if a statute is listing alternative means or definitions, rather than alternative elements." *United States v. Lockett*, 810 F.3d 1262, 1268 (11th Cir. 2016). *Mathis v. United States*, 579 U.S., 136 S. Ct. 2243(2016), tells us what to do when faced with an alternatively phrased statute:
>
> > The first task for a sentencing court ... is [] to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.
>
> *Id.*at 2256. *Mathis* examined the distinction between the elements which define a crime and the means by which it can be committed in reference to a statute's use of the word "burglary." But this distinction may be even more significant for §924(c)'s "elements clause." The "elements clause" expressly requires a particular kind of "element"—the use, attempted use, or threatened use of physical force against the person or property of another. The law has long been clear that alternative means in a federal criminal statute are not alternative "elements." *See, e.g., Richardson v. United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999).
>
> And again, whether a crime is "within the ambit of 18 U.S.C. §924(c) ... is a question ... we must answer 'categorically'—that is, by reference to the *elements* of the offense." *McGuire*, 706 F.3d at 1336 (emphasis added). If *Saint Fleur* is wrong, then Mr. Davenport's § 924(c) sentence may be unlawful.

Davenport v. United States, Slip op. at 5-8 (11th Cir. Mar. 28, 2017) (No. 16-15939) (granting a COA for those reasons); *Wilkes v. United States*, Slip op. at 7-10 (No. 16-17658) (same); *see also In re Garcia*, Slip. Op. at 13-17 (Martin, J., concurring)(acknowledging that she "may have been mistaken" in joining the *Saint Fleur* opinion due to the panel's failure to apply the categorical approach, as dictated by this Court's prior precedent).

Thereafter, in *St. Hubert*, the different Eleventh Circuit panel that made *In re Saint Fleur* "binding precedent" for all future panels appeared to acknowledge (in *dicta*) that neither *In re Saint*

Fleur nor *In re Colon* had properly applied the categorical approach consistent with this Court's prior precedents. *See St. Hubert*, 909 F.3d at 347-48. The *St. Hubert* panel said that it would (accordingly) "take time to apply the categorical approach to the applicable statutes;" however, it simply followed the decisions of other circuits which claimed to have applied the categorical approach, and – for the reasons described below – did *not*.

Mathis directly abrogated the "mode of analysis" employed in *In re Saint Fleur*. Issued two weeks after *Saint Fleur*, *Mathis* held that the lower court in that case had "erred in applying the modified categorical approach [and examining the indictment] to determine the means by which *Mathis* committed his prior crimes." 136 S.Ct. 2243, 2253 (2016). And indeed, the reasoning in *In re Saint Fleur* likewise centered on the language of the indictment, not the elements of the statute. In light of that, reasonable jurists could now debate whether *In re Saint Fleur* was correctly decided. At the very least, after *Mathis*, reasonable jurists could debate whether there is a categorical match between the elements of Hobbs Act robbery and § 924(c)'s elements clause. Post-*Mathis*, reasonable jurists would disregard the language of the indictment; instead consider the language of the statute as well as pattern Hobbs Act robbery jury instructions to determine divisibility; determine (thereby) the least culpable conduct under the statute; and conclude that the offense can indeed be committed non-violently, simply by causing fear of future injury to property.

2. The plain language of the Hobbs Act robbery statute is categorically overbroad vis-a-vis § 924(c)'s elements clause because it permits conviction for causing fear of future harm to property, which can include intangible rights, and necessitates no physical violence

As Petitioner noted in his motion for COA, reasonable jurists in the Ninth Circuit have long debated whether Hobbs Act robbery is categorically a "crime of violence." The Ninth Circuit has not yet definitively resolved that question, and district judges within the Ninth Circuit have routinely granted COAs on the precise issue on Petitioner sought (and was denied a COA) here.

Moreover, a district judge within the Ninth Circuit has just issued an extremely well-reasoned opinion, explaining in detail why the plain language of the "robbery" definition in § 1951(b) confirms that the Hobbs Act robbery offense is categorically overbroad vis-a-vis § 924(c)(3)(A).

Specifically, in granting the movant's first motion to vacate his § 924(c) conviction predicated on Hobbs Act robbery in *United States v. Chea*, 2019 WL 5061085 (N.D.Calif. Oct. 2, 2019), the district court held that Hobbs Act robbery is not categorically a "crime of violence" within § 924(c)(3)(A), because §1951(b)(1) clearly states that the offense can be committed by "causing fear of future injury to property," and committing the offense in this way does not involve "actual or threatened physical force that is 'violent.'" *Id.* at *8. On the latter point, the *Chea* court noted that the phrases "fear of injury," "future," and "property" are not defined in the statute, which means these terms carry their "ordinary meanings;" and

> [n]othing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of any physical force. Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. Even tangible property can be injured without using violent force.

Id.

In so concluding, the court noted with significance that its reading of the plain language of the statute was *not precluded* by any "binding authority" since "neither the Supreme Court nor the Ninth Circuit has addressed the question of whether Hobbs Act robbery by causing fear of future injury to property satisfies the violent physical force standard of *Johnson I*." *Id.* at *9. The *Chea* court found the prior Ninth Circuit panel's decision in *United States v. Howard*, 650 F. App'x 466, 467 (9th Cir. 2016) (unpublished), *as amended* (June 24, 2016) unpersuasive because the *Howard* panel did not specifically address – and in fact, declined to consider – whether causing fear of future injury to property (through no force at all) was categorically violent. *Id.* at *11.

Notably for this case, the *Chea* court rejected the Eleventh Circuit's decision in *In re Saint Fleur* as "unpersuasive or irrelevant," because it did "not apply the categorical approach correctly or at all." Id. at *12 & n. 14. Moreover, the *Chea* court found, all of the other circuit decisions cited by the government in that case were "irrelevant" as well, because those decisions either did "not consider or address the issue raised [t]here, namely that Hobbs Act robbery can be committed by causing fear of future injury *to property*," or they "rejected it as immaterial" without any meaningful analysis," or "on a ground inconsistent with the categorical approach, namely that the movant did not show prior convictions or instances of Hobbs Act robbery based on that theory." 2019 WL 5061085 at ** 12 & nn. 16 & 17. The decision in *Chea* has clarified that there is no circuit "consensus" on the *specific* issue raised here; it is therefore open to debate among reasonable jurists.

Petitioner's § 924(c) convictions and consecutive sentences would necessarily have been vacated by the *Chea* court. Petitioner's arguments below would not have been precluded by any "binding precedent" had he appealed to the Ninth rather than the Eleventh Circuit. And the Ninth Circuit would, at the very least, have granted Petitioner a COA to proceed further with his appeal. As a matter of due process and equal protection, the right to a meaningful appeal should not be a function of geography. At the very least, given the well-reasoned decision in *Chea*, a GVR should be granted with directions to the Eleventh Circuit to grant Petitioner a COA to further challenge whether Hobbs Act robbery is a proper § 924(c) predicate, given the plain language of § 1951(b).

Although the Eleventh Circuit stated in *dicta* in *St. Hubert* that the petitioner had not pointed to any reported "case" confirming that the Hobbs Act robbery statute could be committed by causing future injury to property without violence, 909 F.3d at 350 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)), reasonable jurists would debate the correctness of that

application of *Duenas-Alvarez*. Notably, both prior and subsequent to *St. Hubert*, the Eleventh Circuit's approach to *Duenas-Alvarez* has actually been consistent with the rule applied by the majority of circuits which hold that the plain statutory language can itself establish that an offense is categorically overbroad, *without* a reported "case" on point. *See, e.g, Bourtzakis v. U.S. Att'y Gen.*, 940 F.3d 616, 620, 624 (11th Cir. Oct. 9, 2019) (following *Ramos v. United States, Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013); *see also 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). Only the Fifth Circuit has taken a contrary view, and it was over a vigorous dissent in that court. *See, e.g, United States v. Castillo-Rivera*, 853 F.3d 218, 222-24 (5th Cir. 2017) (en banc).

If the Eleventh Circuit were released from blind adherence to *In re Saint Fleur*, and permitted to consider as a matter of first impression the plain language of § 1951(b), it might well vacate Petitioner's § 924(c) conviction and sentence for the reasons stated in *Chea*. At the very least, after *Chea*, the meaning of the plain language of § 1951(a) is being hotly debated among reasonable jurists, and a COA should be granted for the Eleventh Circuit to consider it as well.

3. The plain language of the Eleventh Circuit pattern Hobbs Act robbery instruction and the similar pattern instructions in two other circuits confirms that the offense may be committed non-violently, by causing fear of future economic harm to property, which can include intangible rights

It is clear after *Mathis* that a pattern jury instruction is highly relevant for correct application of the categorical approach. Indeed, such an instruction not only defines the "elements" of the offense which must be found by a jury beyond a reasonable doubt; it makes clear that there are different "means" of committing the offense and that (as here) the jury need not choose between them.

In this case, Petitioner was convicted of Hobbs Act robbery after a jury trial in which the Eleventh Circuit Pattern Instruction on Hobbs Act robbery (O.70.3) was given. As Petitioner argued to the court below in his motion for COA, and Judge Carnes did not consider due to *In re Saint Fleur*, that instruction 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).

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 by making *Saint Fleur* "binding" in *St. Hubert*, two judges on the Eleventh Circuit – not only Judge Martin, but Judge Jill Pryor as well – 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 (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)).

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 specifically 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 has 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. The Eleventh Circuit – in

reliance on *In re Saint Fleur* – has consistently and improperly failed to consider that a *completely non-violent* commission of a Hobbs Act robbery is not only "plausible," but "probable," based upon the plain language of its own pattern instruction.

Under the categorical approach, if *any* defendant may be convicted for causing or threatening future economic harm to "intangible rights," as the plain language of the Eleventh Circuit pattern instruction states, a conviction for Hobbs Act robbery cannot *categorically* require the use or threat of violent force "as an element." And notably, not only the Eleventh Circuit but the Fifth and Tenth Circuits as well have pattern instructions defining the "property" taken in a Hobbs Act robbery to include purely "intangible rights," and specifying that the offense may be committed by causing "fear" of purely economic harm. *See* Tenth Circuit Pattern Instruction 2.70 ([Robbery][Extortion] By Force, Violence of Fear, 18 U.S.C. § 1951(a)(Hobbs Act)) (In a robbery, "[p]roperty' includes money and other tangible and intangible things of value. 'Fear' means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances").

While no other circuit beyond the Fifth, Tenth, and Eleventh have similar Hobbs Act robbery instructions, at least one circuit – the Eighth (which decided *House*) – has a model instruction specifying very differently, that a Hobbs Act robbery can only be committed by "committing physical violence," or "threatening physical violence." *See* Eighth Circuit Model Jury Instruction 6.18.1951B (2017, ed). Ultimately, the number of circuits on either side of this sharp divide does not matter under the categorical approach. Even if it were only the Eleventh Circuit that had an instruction routinely informing juries that they could convict a defendant simply for causing fear of a financial loss, not personal violence, "violent force" would still not be an "element" of *every* Hobbs Act robbery crime. But indeed, the fact that courts in three circuits

(covering Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) now routinely instruct juries in all Hobbs Act robbery cases that this offense does not necessitate the use, threat, or fear of physical violence, underscores the error by the court below in finding that based in *In re Saint Fleur* (which did not consider the pattern instruction) no reasonable jurist could debate that a Hobbs Act robbery is a "crime of violence."

As a matter of due process, Petitioner should have the right on appeal from the district court's denial of his first § 2255 motion to have a reviewing court ***at least consider*** the merits of his argument that the pattern instruction confirms that Hobbs Act robbery is categorically over-broad vis-a-vis the elements clause. And indeed, 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 related conclusion in *In re Colon* that aiding and abetting a Hobbs Act robbery is also a qualifying "crime of violence."

C. Reasonable jurists could likewise debate whether aiding and abetting a Hobbs Act robbery, the least culpable conduct for conviction under Counts 6, 7, 14, and 15, is "crime of violence"

Even the district court's threshold finding that Petitioner's §924(c) convictions were clearly predicated upon Hobbs Act robbery could be seriously debated by reasonable jurists. For indeed, here as in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016), the indictment charged more than one "crime of violence" – a substantive Hobbs Act robbery, and aiding and abetting that crime – in support of each §924(c) offense, and the jury returned a general verdict. Under those circumstances, *Gomez* held, the jury could have convicted on the §924(c) offense "without reaching unanimous agreement on during which crime it was that [the defendant] possessed the firearm." *Id*. at 1227. And the "lack of specificity" in the verdict had Sixth Amendment

significance under *Alleyene v. United States*, 133 S.Ct. 2151, 2155 (2013) since the jury's undifferentiated findings increased a minimum mandatory. *Gomez*, 830 F.3d at 1228-1229.

Since it is impossible to know the true basis for Petitioner's Count 7 and 15 convictions, and *Alleyne* and the Sixth Amendment preclude any further judicial fact-finding on that point, this Court must presume that Counts 6 and 14 rested upon the least culpable crime charged – aiding and abetting a Hobbs Act robbery. Even Judge Carnes below did not dispute that such analysis was required by the categorical approach, as indeed, any other conclusion would be tantamount to the type of judicial fact-finding prohibited by *Alleyne*. 830 F.3d at 1227-1228.

Notably, only a two-judge panel majority reasoned in *In re Colon* that aiding and abetting a "crime of violence" will always be a "crime of violence" since the acts of the principal "become those of the aider and abettor as a matter of law," 826 F.3d at 1305, and therefore "an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery." *Id.* (citing *United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003)). Reasonable jurists within the Eleventh Circuit have repeatedly and increasingly questioned that logic. And indeed, reasonable jurists elsewhere could easily debate whether aiding and abetting a Hobbs Act robbery categorically qualifies as a "crime of violence" within §924(c)'s elements clause for the following reasons.

1. Aiding and abetting does not require the defendant's use or intended use of any physical force, and can be committed by conduct that is simply reckless as to another participant's use of force

Notably, in *In re Colon*, Judge Martin vigorously dissented from the majority's holding that aiding and abetting a Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-of-force clause in §924(c)(3)(A)," for two reasons. First, she argued, sole authority for the majority's holding was the 2003 *Williams* decision which "may not have survived *Johnson*," and

second, it was certainly "plausible that a defendant could aid and abet a robbery without using, threatening, or attempting any force at all." *Colon*, 826 F.3d at 1306-1307 (Martin, J., dissenting)(citing *Rosemond v. United States*, 134 S.Ct. 1240, 1246-47 (2014), for the principle that "[e]ven when a principal's crime involves an element of force, there is 'no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather, *... courts have never thought relevant the importance of the aid rendered*.") (emphasis in original).

Judge Martin was "not willing to assume, as the majority [did in *Colon*], that aiding and abetting crimes meet the 'elements clause' definition simply because an aider and abettor 'is punishable as a principal.' 18 U.S.C. §2(a)." *Colon, id.* at 1308 (Martin, J., dissenting). Instead, because a defendant could clearly be convicted of aiding and abetting a Hobbs Act robbery "based on his aid of an element of robbery that involved no force," Judge Martin concluded that aiding and abetting a Hobbs Act robbery should not satisfy §924(c)'s elements clause.

And indeed, in light of *Rosemond* (not considered by the *Colon* majority) reasonable jurists could well debate whether an aiding and abetting crime categorically meets §924(c)(3)(A). As Judge Martin correctly observed, the Eleventh Circuit had never held until *In re Colon* "that aiding and abetting crimes fall under §924(c)(3)(A)." *Id.* Notably, Judge Jill Pryor has likewise opined that the issue is still debatable notwithstanding *In re Colon* as well. Not only did she grant a COA on that very issue in *Levatte v. United States*, Case No. 16-17685 (11th Cir. June 6, 2017); but indeed, she recently wrote a lengthy special concurrence in *Boston v. United States*, 939 F.3d 1266 (11th Cir. 2019), explaining her "doubts" as to the correctness of the reasoning in *In re Colon*. *Id.* at 1272 (Jill Pryor, J., specially concurring in the judgment).

The issue in *Boston* was whether aiding and abetting an armed bank robbery was a "violent felony" within the analogous ACCA elements clause.[5] Judge Pryor noted that under Florida law an aider and abettor of any robbery is treated as a "principal." "But this is a legal fiction," she explained. "[B]y the Florida statute's own terms, an aider or abettor does not even have to be 'actually or constructively present at the commission of [the] offense.' Does a person who is not even present for the commission of a robbery necessarily use, attempt to use, or threaten to use physical force against another during that robbery? No," she opined, notwithstanding *In re Colon*.

The problem with the reasoning in *Colon*, Judge Pryor explained, was that "it takes a legal fiction – that one who aids and abets a robbery by, say, driving a getaway car, is deemed to have committed the robbery itself – and transforms it into a reality – that the getaway car driver actually committed a crime involving the element of force." *Id.* at 1273. That "transformation isn't grounded in ACCA's text," she noted, because although the elements clause specifically included "attempted or threatened force" "it does not expressly include aiding or abetting a person who uses, attempts to use, or threatens to use force." *Id.*

That same argument applies equally to the § 924(c) elements clause. With both statutes, Congress could have imposed aiding and abetting liability expressly if it intended such crimes to trigger the harsh penalties of these statutes. But it did not – and that she found significant. *Id.*

A final reason jurists of reason throughout the country are now vigorously debating whether aiding and abetting a "crime of violence" is itself a "crime of violence" has to do with the recent grant of certiorari in *Walker v. United States*, No. 19-373, to resolve "Whether a criminal

[5] Notably, that very issue is before this Court now in *Mojica v. United States*, No. 19-35 (pet. for cert. filed July 2, 2019). In *Mojica*, the government initially waived its response, but the Court requested one on August 23rd. *Mojica* will be considered at the upcoming January 10th conference. If certiorari is granted in *Mojica*, that will directly impact this case and Petitioner would request that his case be held pending *Mojica*.

offense that can be committed with a *mens rea* of recklessness can qualify as a violent felony" under the ACCA elements clause. Resolution of that question will have tremendous bearing on the aiding and abetting issue here, since aiding and abetting does *not* necessitate the defendant's actual use or threatened use of physical force. Rather, an aider and abettor – particularly, one like Petitioner convicted prior to *Rosemond* – may simply have been criminally "reckless" as to whether force would be used in his case, and not have intended the use of force at all. If the Court holds in *Walker* that a *mens rea* greater than recklessness is essential for any elements clause offense, that would disqualify Petitioner's aiding and abetting offenses here as § 924(c) predicates and require resentencing.

For all of the above reasons, particularly after *Rosemond* and given the cert grant in *Walker*, the Court should find that reasonable jurists could debate whether aiding and abetting a Hobbs Act robbery is categorically a "crime of violence." This case should be held pending *Walker*. At minimum, it should be GVR'd so that a COA may be granted on this issue as well.

2. To the extent § 924(c)'s elements clause is ambiguous as to whether Congress intended to include aiding and abetting offenses, reasonable jurists would apply the rule of lenity and exclude aiding and abetting convictions as predicates

In *Boston*, Judge Pryor concluded her special concurrence by noting that to the extent it was "ambiguous" from the text of the elements clause, whether Congress intended aiding and abetting would qualify as an "act having as an element, the use, attempted use, or threatened use of physical force against another person," she "would apply the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor' – here, by excluding from the scope of ACCA aiding and abetting." *Boston*, 939 F.3d at 1274 n. 3 (citing *United States v. Davis*, 139 S.Ct. 2319, 2333 (2019)). Reasonable jurists would debate the correctness of the decision below on "rule of lenity" grounds as well – which also warrants a COA.

II. The Eleventh Circuit consistently misapplies the COA standard set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017) to cut off appellate review when reasonable jurists both within and outside that circuit would debate the correctness of its precedent.

In the Eleventh Circuit, COAs are not granted where binding circuit precedent forecloses a claim. In the view of the Eleventh Circuit, "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton v. Sec'y, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) ("we are bound by our Circuit precedent, not by Third Circuit precedent, and circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted); *see also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). Judge Carnes specifically cited *Hamilton* in denying the COA below on grounds that reasonable jurists could not debate whether either a substantive Hobbs Act robbery or aiding and abetting that offense were "crimes of violence" within § 924(c)'s elements clause, given the court's "precedents" in *In re Saint Fleur* and *In re Colon*.

The Eleventh Circuit's *Hamilton* rule is an egregious misapplication – evidencing complete disregard – of this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck*, the Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided

without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a baseless and wrong rule requiring that COAs be adjudicated on the merits. Such a rule places too heavy a burden on movants at the COA stage. As this Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774. Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). That was *not* the case here.

The Eleventh Circuit's continued adherence to its *Hamilton* rule is not only denying Eleventh Circuit defendants on collateral review the same right to a meaningful appeal that similarly-situated defendants with identical claims routinely receive in other circuits; it is placing an extreme burden on this Court. COAs are consistently denied in the Eleventh Circuit under the

Hamilton standard, leaving § 2255 movants no recourse except to this Court to reverse the COA denial on grounds that reasonable jurists both within and outside the circuit could debate an issue. To end the flood of petitions challenging COA denials under the erroneous *Hamilton* standard, the Court should grant plenary review or at least issue a summary reversal on this issue.

CONCLUSION

The Court should grant certiorari, vacate the decision below, and remand (GVR) for issuance of a certificate of appealability on all of the sub-issues within Issue I, as they are debatable among reasonable jurists. Alternatively, the Court should grant the writ on Issue II to clarify for the Eleventh Circuit that its *Hamilton* standard misapplies this Court's COA standard. At the very least, the Court should hold this case pending determination of the petitions in *Valdes Gonzalez*, *St. Hubert*, *Robinson*, *Mack*, and *Mojica*, and final decision on the recklessness issue in *Walker*.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Brenda G. Bryn*
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
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