NO: 19-7131

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

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutory and Other Authority:

REPLY ARGUMENT

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.

The government has failed to show that any of the issues raised by Petitioner are not debatable among reasonable jurists. The denial of the COA should be reversed.

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.

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)

In its Brief in Opposition ("BIO"), the government responds to this issue (at 6-7) by simply adopting the argument it made in its BIO in *Robinson v. United States*, No. 19-5451. In reply, Petitioner adopts and incorporates by reference the argument and authority in the Reply to the BIO in *Robinson* at 1-5 (filed Dec. 18, 2019).

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

In response to this issue, the government (BIO at 7) adopts its argument from the BIO in *Valdes Gonzalez v. United States*, No. 18-7575. It also argues (BIO at 5-6) as it did in its BIO in *St. Hubert v. United States*, No. 19-5267, that the due process issue was not pressed before the court of appeals. Rather than repeat the reply arguments from these cases which are equally applicable here, Petitioner adopts and incorporates by reference the arguments and authority in the Reply to the BIO and Supplemental Brief of the petitioner in *Valdes Gonzalez* (filed May 16, 2019 and Dec. 18, 2019 respectively) and in the Reply to the BIO in *St. Hubert* at 1-3 (filed Dec. 16, 2019).

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

On this issue as well, the government offers the exact response that it did in its BIO in *St. Hubert*. Accordingly, Petitioner adopts and incorporates by reference the argument and authority in the Reply to the BIO in *St. Hubert* at 2-5.

It is particularly egregious for the government – in this case – to disregard the language of the Eleventh Circuit pattern Hobbs Act robbery instruction, since that precise instruction was given by the district court to the jury here. And therefore, because Petitioner's jury was specifically instructed pursuant to the pattern instruction that it could convict him based upon causing "fear of financial loss," without a fear of "physical violence" (App. A-3 at 14-15), the instant case confirms that convictions on a non-violent basis are *not* a mere "hypothetical" as the Eleventh Circuit erroneously held in *United States v. St. Hubert*, 909 F.3d 335, 350 (11th Cir. 2018), *reh'g en banc denied*, 918 F.3d 1174 (Mar. 19 2019), *pet. for cert filed* July 18, 2019 (No. 19-5267). They are *real*. With daily convictions in the Eleventh Circuit just like Petitioner's based upon the overbroad language of the pattern instruction, followed by a general verdict, it cannot be said that a Hobbs Act robbery conviction categorially requires "as an element" the use or threat of physical force against either a person or property.

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"

The government's sole response to this issue (BIO at 8) is to invoke the argument and authorities in its BIO in *Richardson v. United States*, No. 18-7036 (filed May 15, 2019). But that is insufficient given that the petitioner in *Richardson* did not raise all of the arguments or authorities raised here. In particular, the petitioner in *Richardson* did not raise – and the BIO in *Richardso*n did not address, nor did *any* of the court of appeals decisions referenced in the

Richardson BIO (at 9) consider – Judge Jill Pryor's cogent argument in *Boston v United States*, 939 F.3d 1266, 12-72-74 (11th Cir. Sept. 30, 2019) (Jill Pryor, J., specially concurring), since *Richardson* was briefed (and resolved) prior to the Eleventh Circuit's decision in *Boston*.

The government, tellingly, ignores Judge Pryor's special concurrence in *Boston* because it cannot reasonable suggest that she is not a reasonable jurist. Nor can it reasonably suggest that based on Judge Pryor's analysis in *Boston*, other reasonable jurists could not now debate whether aiding and abetting a Hobbs Act robbery is categorically a "crime of violence."

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

After the filing of the Petition in this case, the Court dismissed the petition for writ of certiorari in *Walker v. United States*, No. 19-373 due to the death of the petitioner. *Walker v. United States*, ___ S.Ct. ___, 2020 WL 411558 (Jan. 27, 2020). Thereafter, the Court granted certiorari in *Borden v. United States*, No. 19-5410 to decide the same issue of whether the ACCA elements clause encompasses crimes with a *mens rea* of recklessness. *Borden v United States*, ___ S.Ct. ___, 2020 WL 981806 (Mar. 2, 2020).

Without mentioning either *Walker* or *Borden*, the government appears to suggest (BIO at 9, n 5) that there is no reason for the Court to hold this case pending its definitive resolution of the elements clause/*mens rea* issue in *Borden* because Petitioner has not cited any authority for the proposition there aiding and abetting a Hobbs Act robbery can be committed with a *mens rea* of recklessness. But that argument misses the point. In addressing the recklessness question in *Borden*, the Court will necessarily clarify whether every offense within the elements clause must have an intentional *mens rea*, or at least knowledge that force will be used or threatened by a principal. Aiding and abetting does not require that the government prove *as an element* that the

aider and abetter intended to use force, or attempted to aid the principal's use of force, or – at least prior to *Rosemond v. United States*, 134 S.Ct. 1240 (2014) – that the aider and abettor knew that the principal would use force.

As Petitioner has rightly argued, and the government has not disputed but simply ignored, for defendants prosecuted prior to *Rosemond*, the government most definitely did *not* need to prove that the defendant knew force would be used in the principal's offense. That is confirmed by the very vague aiding and abetting instruction given the jury here, where the district court told the jury that they could convict Petitioner of aiding and abetting "without evidence that the Defendant personally performed every act charged" — simply if he "intentionally associated with *or participated in the crime*." (Appendix A-3: 22-23). And since there was no further explanation by the court as to what such "participation" entailed – the court did not even give an instruction like that in *Richardson* specifying that the defendant had to take "active and intentional steps to facilitate the crime," *Richardson* BIO at 8 – the jury here easily could have convicted Petitioner here for some sort of lesser "participation" without knowledge of the precise details of how the robbery would occur.

As such, the resolution of the elements clause/*mens rea* issue *Borden* may well impact resolution of the aiding and abetting issue raised here. At the very least, it may require the issuance of a GVR for reconsideration of Petitioner's motion for COA on this issue by the Eleventh Circuit.

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

The government offers no response to this issue which is based upon Judge Jill Pryor's special concurrence in *Boston*. Plainly, the government cannot dispute that reasonable jurists

properly applying the rule of lenity could debate whether a pre-*Rosemond* conviction for aiding and abetting a Hobbs Act robbery is categorically a "crime of violence."

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.

The government, notably, likewise does not dispute that the Eleventh Circuit's rule that adverse ***circuit*** precedent "ends any debate among reasonable jurists," and precludes the grant of a COA, *Hamilton v. Sec'y, Fla. Dept. of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) is contrary to the COA standard set forth in *Buck* and *Miller-el*. Indeed, the government expressly concedes, citing *Buck*, 137 S.Ct. at 773, that "[t]he COA inquiry * * * is *not* coextensive with a merits analysis." (BIO at 9) (Emphasis added).

However, despite the clearly erroneous COA standard consistently applied in the Eleventh Circuit, the government urges the Court (BIO at 10) not to sound the death knell for the Eleventh Circuit's *Hamilton* rule in this case because (it claims) Petitioner's challenges "regarding Hobbs Act robbery are squarely foreclosed" "in every circuit to have decided these issues." That, however, is simply incorrect. As pointed out in the Reply to the BIO in *St. Hubert*, at 2-5, *every* circuit has *not* yet addressed the specific overbreadth challenge to Hobbs Act robbery raised here – that is, a challenge based on the language in the Eleventh Circuit pattern instruction. The Ninth Circuit, notably, has not yet issued *any* precedential decision on whether Hobbs Act robbery is a qualifying "crime of violence." And a district court within the Ninth Circuit has squarely rejected the reasoning in *St. Hubert* and of all the other circuits to have thus-far weighed in, for the precise reasons Petitioner has argued the issue he raised was debatable here. *See United States v. Chea*, 2019 WL 5061085 (N.D.Calif. Oct. 2, 2019).

Moreover, the government has inexplicably ignored the debatability of the aiding and abetting ruling by the court below for the reasons stated *supra*, I.C. No other circuit court mentioned by the government has yet considered Judge Jill Pryor's special concurrence in *Boston*, the specific question of *mens rea* in an aiding and abetting offense, or application of the rule of lenity in this context. As such, it cannot be argued that any of the issues raised herein have been "squarely foreclosed" by every – *or any* – court of appeals.

And indeed, even *if* every circuit court of appeals *had* "squarely foreclosed" Petitioner's challenge to either substantive Hobbs Act robbery or aiding and abetting a Hobbs Act robbery as a "crime of violence," the recent grant of certiorari and reversal of *every* circuit's prior conclusion as to the elements of a §922(g) conviction in *Rehaif v. United States*, 139 S.Ct 2191 (2019), confirms that an issue may still be "debatable" among reasonable jurists on this Court, even where lower courts have unanimously rejected the defendant's argument.

Finally, the government ignores that there is a petition for certiorari now pending before this Court, arguing that the Eleventh Circuit not only imposes an improper and burdensome COA standard that contravenes this Court's precedents, but that its COA approach has resulted in a complete "breakdown in the review process" which consistently denies Eleventh Circuit § 2255 petitioners a meaningful opportunity to be heard. *See* Pet. for Certiorari in *Tomlin v. Patterson, Warden, Holman Corr. Facility*, No. 19-7127 (filed Dec. 27, 2019). The *Tomlin* petition argues with the support of newly available statistical evidence and comparisons with the COA practice in other circuits, that the Eleventh Circuit's COA practice has resulted in a "stark disparity" in the grant rates in other circuits, and deepened a pre-existing circuit split on whether review of a COA application may be by a single judge (as permitted by 11th Cir. R. 22-1(3)), or instead, whether Fed. R. App. P 27(c) should be read to require a three-judge panel.

Although the government waived a response to the *Tomlin* petition, the Court requested a response on January 23rd. The current due date for the government's response in *Tomlin* is April 15th.

Because the issue raised herein may be impacted by resolution of the *Tomlin* petition, Petitioner asks the Court – if it does not summarily reverse on this issue – to hold his case pending its resolution of *Tomlin*.

CONCLUSION

Based on the foregoing argument and authority as well as that set forth in the Petition, 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*, and *Mack*; final decision on the elements clause/*mens rea* issue in *Borden*; and the Eleventh Circuit's COA standard in *Tomlin*.

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
March 30, 2020