No. 19-_____

IN THE

Supreme Court of the United States

YAMIL VEGA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit exceeds its statutory mandate under 28 U.S.C. § 2244(b)(3)(C) to determine only whether an inmate has made a "prima facie showing" when it issues second or successive orders to resolve the merits of open legal questions and subsequently treats those orders as binding precedent in later appeals.
2. Whether the Due Process Clause permits the Eleventh Circuit to afford preclusive effect to a prior panel decision that was: based on a mandatory form allowing only bare legal argument; issued under a strict 30-day deadline; and immune from any petition for rehearing or a writ of certiorari.
3. 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 offense is indivisible, and juries in three circuits are routinely instructed according to those circuits' pattern instructions that the "property" taken may include "intangible rights" and the offense may be committed by simply causing the victim to "fear harm" which includes "fear of financial loss as well as fear of physical violence."

PARTIES TO THE PROCEEDINGS

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

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Vega*, No. 1:15-cr-20056-RNS (S.D. Fla.) (Judgment entered Nov. 9, 2015).
- *United States v. Vega*, No. 1:16-cv-22119-RNS (S.D. Fla.) (Judgment entered June, 1, 2018), *aff'd*, *United States v. Vega*, No. 17-13933 (11th Cir. Dec. 23, 2019) (unreported).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

No: 19-_____

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PETITION FOR A WRIT OF CERTIORARI

Yamil Moises Vega ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's unpublished opinion affirming the denial of Petitioner's 28 U.S.C. § 2255 motion to vacate, *Vega v. United States*, 794 F. App'x 918 (11th Cir. Dec. 23, 2019), is included in the Appendix at App. A.

The district court's Order Adopting Magistrate Judge's Report and Recommendation denying Petitioner's motion to vacate, *Vega v. United States*, 2017 WL 2822072 (S.D. Fla. June 29, 2017), is included in the Appendix at App. B.

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 Eleventh Circuit entered judgment on December 23, 2019. Petitioner then sought, and the Court granted, a 60-day extension of time, until May 21, 2020, to file a petition for a writ of certiorari. Thus, the petition is timely filed pursuant to Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

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

28 U.S.C. § 2244(b)(3)

> **(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
> **(B)** A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

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

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

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

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) 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. . . .

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony

> **(2)** As used in this subsection – . . .
>
> > **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
> >
> > > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> > >
> > > **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

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.
> >
> > **(2)** The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

INTRODUCTION

The Eleventh Circuit is systematically depriving federal criminal defendants of due process. It utilizes a method of adjudication that, in a large number of cases, allows it to affirm convictions and sentences without meaningful consideration of the

defendant's arguments. The practice is widespread, and the issue is currently pending before this Court in numerous petitions. *See, e.g.*, *Gonzalez v. United States*, No. 18-7575 (pending distribution); *Williams v. United States*, No. 18-6172 (pending distribution); *St. Hubert v. United States*, No. 19-5267 (pending distribution); *Robinson v. United States*, No. 19-5451 (pending distribution); *Mack v. United States*, No. 19-6355 (pending distribution); *Alston v. United States*, No. 19-7672 (pending distribution); *Hunt et al. v. United States*, No. 19-7506 (pending distribution); *Smith v. United States*, No. 19-7527 (distributed for conference); *Boston v. United States*, No. 19-7148 (pending distribution). Petitioner supports this Court's review in any of the pending cases, as well as in his own.

STATEMENT OF THE CASE

I. Legal Background

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

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

Because *Welch* made *Johnson*'s new rule of constitutional law retroactive, the courts of appeal began authorizing *Johnson*-based successive applications, leaving it to district courts to sort out the details in the first instance. The Eleventh Circuit proceeded differently, however. Unlike the other circuits, it used its screening function to conduct full-blown merits analyses of an applicant's claim at the authorization stage. And, in so doing, it routinely opined on whether certain criminal

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

Despite that decision-making process, the Eleventh Circuit nonetheless designated for publication dozens of orders denying successive *Johnson*-based applications—far more than any other circuit. One example was *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016). Using the mandatory form, Mr. Saint Fleur sought authorization to file a successive § 2255 motion based on *Johnson*, arguing that his sentence for a violation of 18 U.S.C. § 924(c) could no longer stand because, in light of *Johnson*, Hobbs Act robbery no longer qualified as a crime of violence. App. C. He fit only 36 words of argument on the form:

> In light of two recent Supreme Court ruling(s) The Hobbs Act Robbery under 1951(a) is no longer a violent offense therefore the §924(c) in furtherance must be dismissed according to Johnson, and retroactively applied under Welch.

App. C at 10a. Abiding by the form's instructions, App. C at 6a–7a, he did not submit any briefing. And, as was customary, the government did not respond, and the court of appeals did not request such a response or hold oral argument.

Then, 30 days later, the court of appeals denied the application and designated its order for publication. Opining on the merits, the court ruled that even if *Johnson*

applied to § 924(c)(3)(B)'s residual clause, Mr. Saint Fleur would still not meet the statutory criteria for granting his § 2255(h) application because his conviction for Hobbs Act robbery clearly qualifies as a "crime of violence" under the elements clause in § 924(c)(3)(A). The court specifically held, for the first time in a published opinion, that Hobbs Act robbery qualifies as a categorical "crime of violence" under the elements clause. The court's analysis, however, was wholly conclusory. The court did not identify the elements of Hobbs Act robbery, nor apply the categorical approach to determine if Hobbs Act robbery was, in fact, a categorical crime of violence. Instead, the court found that because Mr. Saint Fleur pleaded guilty to committing robbery "by means of actual and threatened force, violence, and fear of injury," the robbery he committed required the use, attempted use, or threatened use of physical force "against the person or property of another."

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

the en bane Eleventh Circuit or this Court. *United States v. St. Hubert*, 909 F.3d 335, 345–46 (11th Cir. 2018) ("*St. Hubert II*") (emphasis in original).

With regard to Hobbs Act robbery then, the court readopted and reinstated its holding from its prior decision, *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018) ("*St. Hubert I*"), that a substantive Hobbs Act robbery "independently qualifies as a crime of violence under the § 924(c)(3)(A)'s use-of-force clause," as "already held" in *In re Saint Fleur*. *St. Hubert II*, 909 F.3d at 340–51 (citing *St. Hubert I*).

II. Proceedings Below

On January 30, 2015, a federal grand jury sitting in the Southern District of Florida charged Petitioner with Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 1), and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 2).

Petitioner pleaded guilty to both counts of the indictment on August 25, 2015. On November 9, 2015, the district court sentenced Petitioner to 43 months' imprisonment on Count 1, and a consecutive 84 months' imprisonment on the § 924(c) count, Count 2, for a total sentence of 127 months' imprisonment. Petitioner did not directly appeal his conviction or sentence.

On June 10, 2016, Petitioner filed a pro se motion to vacate his sentence pursuant to 28 U.S.C. § 2255, which was supplemented by appointed counsel on June 29, 2016. He argued in his motion, reply, and objections to the magistrate judge's Report and Recommendation that his § 924(c) conviction was void because the residual clause of § 924(c) was unconstitutionally vague, the court was not bound by

the Eleventh Circuit's opinion in *In re Saint Fleur*, and Hobbs Act robbery was not a categorical "crime of violence" under § 924(c)'s elements clause. Dist. Ct. Dkt. Nos. 8; 10; 13. The district court denied Petitioner's motion, adopting the magistrate judge's Report and Recommendation, and granted a certificate of appealability. Dist. Ct. Dkt. No. 14. More specifically, the district court found itself bound by the Eleventh Circuit's holding in *In re Saint Fleur* that Hobbs Act robbery qualified as a categorical "crime of violence" under § 924(c)(3)(A). *Id.* at 1. The district court rejected Petitioner's contention that *In re Saint Fleur* should not control because the opinion issued upon a pro se application to file a second or successive § 2255 motion wherein the Eleventh Circuit did not have the benefit of counseled briefing or the adversarial process before issuing its opinion. *Id.* at 1–2. As a result, the district court found that it could not consider anew whether Hobbs Act robbery was a categorical "crime of violence." *Id.*

Petitioner appealed the district court's denial of his § 2255 motion to the Eleventh Circuit. On appeal, he again challenged the precedential force of *In re Saint Fleur*, and argued that, when properly considered, Hobbs Act robbery is not a categorical "crime of violence" under the elements clause of § 924(c). With regard to *In re Saint Fleur*, he specifically noted that decisions issued in the second or successive context should not be afforded precedential force because they are often the product of applications submitted by pro se litigants, on a limited record without counseled briefing or adversarial testing, on an extremely limiting form that must be adjudicated within a tight timeline of 30 days. A panel of the Eleventh Circuit,

however, affirmed the district court's denial of Petitioner's § 2255 motion. The panel, finding itself bound by its prior decision in *In re Saint Fleur* under the prior panel precedent rule, rejected Petitioner's claims without considering the merits of his argument. *See* App. A at 3a ("Vega's challenge to his § 924(c) conviction fails. We are bound by our prior holding in *Saint Fleur* that Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause. *See St. Hubert*, 909 F.3d at 353; *In re Saint Fleur*, 824 F.3d at 1340. Accordingly, we affirm in this respect.").

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Exceeded its Statutory Mandate Under 28 U.S.C. § 2244(b)(3)(C) by Issuing an SOS Order Analyzing the Merits of an Open Legal Question and Treating That Order as Binding Precedent in Petitioner's Case

The procedures by which inmates are granted permission to file second or successive § 2255 motions is, by statute, strictly circumscribed. Notably, in reviewing these applications, appellate courts must determine only whether an inmate has made a "prima facie showing" that he meets the statutory requirements, and the court's determination is generally not subject to further review, not even in this Court. *See* 28 U.S.C. §§ 2244(b)(3)(C), (E). To be sure, if an inmate's claim is foreclosed by precedent, his application should be denied. But the Eleventh Circuit has used the limited authority provided by § 2244 to issue published orders on open merits questions, and has then used those orders as binding precedent in later appeals. Under the statute, however, the proper procedure is for these questions to go to the district court for consideration in the first instance.

As stated, § 2244(b)(3)(C) provides appellate courts with limited authority to determine whether an inmate has made a "prima facie showing" that he meets the requirements of the statute. Making such a showing does not require an inmate to show that he will ultimately prevail, only that he may prevail and his claim should be further explored by the district court. It certainly does not involve a full blown merits analysis of a claim. And other circuits have said as much. *See In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017); *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007).

The Eleventh Circuit exceeds § 2244(b)(3)(C)'s mandate routinely, reaching the merits of open questions and using those orders as binding precedent in later appeals. What's particularly troubling is that these orders are generally appeal-proof. And in *St. Hubert*, the en banc Eleventh Circuit institutionalized this process.

These merits decisions are important and should be subject to the same robust process ordinarily undertaken on appellate review. Simply put, the § 2255 authorization procedure does not allow for such merits determinations. Because the Eleventh Circuit exceeded its statutory mandate in *In re Saint Fleur*—not to mention several other cases—*In re Saint Fleur* cannot be binding in Petitioner's case. This issue has caused deep, contentious divisions within the Eleventh Circuit, and among the circuit courts, and this Court's intervention is needed.

II. Criminal Defendants in the Eleventh Circuit Alone are Now Subject to a Superficial Judicial Process That Specifically Violated Petitioner's Right to Due Process

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

Unlike other circuits, the Eleventh Circuit requires all federal prisoners seeking successive authorization to use a form that, in all capital letters, "prohibits . . . additional briefing or attachments," and that "requires all argument to take place 'concisely in the proper space on the form.'" *In re Williams*, 898 F.3d 1098, 1101 (11th Cir. 2018) (Wilson, J., specially concurring) (quoting form); *see* 11th Cir. R. 22-3(a). Yet that form only "provides a 1" x 5.25" space in which to state a 'ground on which you now claim that you are being held unlawfully,'" and then a "2.5" x 5.25" space in which to assert that a claim relies on a new rule of constitutional law." *In re Williams*, 898 F.3d at 1101 (Wilson, J., specially concurring) (quotation marks and brackets omitted). That limited space allows applicants to do little more than include a few sentences about their claim. *See In re Williams*, 898 F.3d at 1102 & n.4 (Wilson, J., specially concurring) (noting that applicant "wrote thirteen words of argument" on the form).

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

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

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

doing so, it routinely decided whether an applicant's convictions were "violent felonies" or "crimes of violence" post-*Johnson*, even where that legal issue was one of first impression or elicited a dissent. *Id.* at 1108–09 & n.4 (citing examples). And, as explained above, evaluating those legal issues went far beyond "the prima facie showing called for under the statute." *Id.* at 1108. By contrast, and "[c]onsistent with the statute's command, [other] circuits . . . largely refrained from deciding the merits of a particular applicant's claim at the [authorization] stage." *Id.* at 1107; *see id.* at 1109 (describing Eleventh Circuit's practice as "an outlier from the practice of other circuits"); Noah Feldman, *This Is What 'Travesty of Justice' Looks Like*, Bloomberg Op. (July 22, 2016), available at https://www.bloomberg.com/opinion/articles/2016-07-22/appeals-court-fumbles-supreme-court-ruling. And "given the rushed, information-devoid, nonadversarial nature of the proceeding," *In re Williams*, 898 F.3d at 1104 (Wilson, J., specially concurring), the Eleventh Circuit often made mistakes. *See Ovalles v. United States*, 905 F.3d 1231, 1268–73 (11th Cir. 2018) (en banc) (Martin, J., dissenting) (discussing several examples).

Yet those mistaken rulings—and the underlying procedures that produced them—were not subject to any requests for further review. The statute itself provides that the "denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). Unlike other circuits, however, the Eleventh Circuit added to that procedural bar by prohibiting applicants from re-filing new applications, even if their original application was mistakenly

denied. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016); *see also* 11th Cir. R. 22-3(b) (prohibiting "motion[s] for reconsideration" as well). That ruling too elicited sharp criticism from several members of the court. *See Ovalles*, 905 F.3d at 1273–75 (Martin, J., dissenting); *In re Jones*, 830 F.3d 1295, 1297–1305 (11th Cir. 2016) (Rosenbaum and Jill Pryor, JJ., concurring in result).

Although the ability to seek further review of a panel decision undergirds the prior panel precedent rule, the Eleventh Circuit nonetheless designated for publication a staggering number of orders adjudicating successive applications. From May 25 through August 10, 2016—when *Johnson*-based successive applications were at their peak—the Eleventh Circuit published 30 such orders.[1] That averages to 2 published orders per week for 2.5 months straight. Yet for the entire year of 2016, no other circuit even hit double digits. That disparity reflects a broader trend over the last five years, where the Eleventh Circuit has published far more orders on

[1] *In re Parker*, 832 F.3d 1250 (11th Cir. 2016); *In re Chance*, 831 F.3d 1335 (11th Cir. 2016); *In re Bradford*, 830 F.3d 1273 (11th Cir. 2016); *In re Moore*, 830 F.3d 1268 (11th Cir. 2016); *In re Jones*, 830 F.3d 1295 (11th Cir. 2016); *In re Sams*, 830 F.3d 1234 (11th Cir. 2016); *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016); *In re Davis*, 829 F.3d 1297 (11th Cir. 2016); *In re Anderson*, 829 F.3d 1290 (11th Cir. 2016); *In re Watt*, 829 F.3d 1287 (11th Cir. 2016); *In re Burgest*, 829 F.3d 1285 (11th Cir. 2016); *In re Smith*, 829 F.3d 1276 (11th Cir. 2016); *In re Clayton*, 829 F.3d 1254 (11th Cir. 2016); *In re Hunt*, 835 F.3d 1277 (11th Cir. 2016); *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016); *In re Sapp*, 827 F.3d 1334 (11th Cir. 2016); *In re Gordon*, 827 F.3d 1289 (11th Cir. 2016); *In re Parker*, 827 F.3d 1286 (11th Cir. 2016); *In re Williams*, 826 F.3d 1351 (11th Cir. 2016); *In re Jackson*, 826 F.3d 1343 (11th Cir. 2016); *In re McCall*, 826 F.3d 1308 (11th Cir. 2016); *In re Colon*, 826 F.3d 1301 (11th Cir. 2016); *In re Rogers*, 825 F.3d 1335 (11th Cir. 2016); *In re Hires*, 825 F.3d 1297 (11th Cir. 2016); *In re Adams*, 825 F.3d 1283 (11th Cir. 2016); *In re Fleur*, 824 F.3d 1337 (11th Cir. 2016); *In re Hines*, 824 F.3d 1334 (11th Cir. 2016); *In re Pinder*, 824 F.3d 977 (11th Cir. 2016); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016); *In re Thomas*, 823 F.3d 1345 (11th Cir. 2016).

successive applications than other circuits. *See In re Williams*, 898 F.3d at 1102 (Wilson, J., specially concurring) (providing figures).

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

The result is that the Eleventh Circuit alone may now affirm convictions and sentences without any panel ever meaningfully considering the merits of the

defendant's argument. Only in the Eleventh Circuit may criminal appeals and initial § 2255 motions now be procedurally foreclosed by a prior panel opinion that: was not based on any legal argument or adversarial testing; was hurriedly issued in less than 30 days; exceeded the proper scope of the inquiry; and was immune from any requests for further review.

This practice has profound due process implications. Although this Court has never addressed whether such an application of the prior panel precedent rule offends procedural due process, two lines of precedent compel an affirmative answer. Generally, procedural due process claims are analyzed by balancing three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest" in efficiency and the burden that the "substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). All three factors weigh heavily in Petitioner's favor.

The private interest here is Petitioner's liberty from additional imprisonment. This Court has recognized that "any amount of [additional] jail time is significant, and has exceptionally severe consequences for the incarcerated individual. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (citations and brackets omitted). And, the risk of error was particularly high here. The Eleventh Circuit's decision-making process for adjudicating *Johnson*-based successive applications led to mistaken rulings. There is no reason to believe *In re Saint Fleur* was any different,

particularly given its blatant disregarding of the categorical approach. Because *In re Saint Fleur* did not, and procedurally could not, meaningfully consider any argument for why Hobbs Act robbery is not a categorical "crime of violence," additional process is necessary to reduce an intolerable risk of error. Finally, the process Petitioner seeks is not at all burdensome. To the contrary, Petitioner merely seeks what the courts afford litigants every day: meaningful consideration of his argument. While the prior-panel-precedent rule promotes efficiency and consistency, it presumes that the earlier panel issuing the precedential decision was afforded a meaningful opportunity to consider opposing legal argument and was subject to petitions for further review. Where those fundamental conditions are absent, due process precludes that decision from being binding on all subsequent panels.

In addition to *Matthews v. Eldridge*, this Court's issue-preclusion precedents also support Petitioner's due process argument. In the issue-preclusion context, this Court has repeatedly held that "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *accord Taylor v. Sturgell*, 553 U.S. 880, 884, 891–93 (2008); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797–98 & n.4 (1996); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940). Because "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings," *Richards*, 517 U.S. at 798 n.4, "determining whether the party against whom an

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

But the prior panel precedent rule "functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases." Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1012 (2003). "Both are judge-made doctrines that use the resolution of an issue in one suit to determine the issue in later suits." *Id.* at 1033. Under both doctrines, "the merits are closed. A court will not listen to a litigant's arguments for a different result, regardless of whether she can argue persuasively that the first court wrongly decided the issue." *Id.* at 1034. And the doctrines "share similar goals:" both "seek to promote judicial economy, avoid the disrepute to the system that arises from inconsistent results, and lay issues to rest." *Id.*

The prior panel precedent rule is often applied inflexibly, precluding parties from any meaningful "opportunity to argue for a different rule." *Id.* at 1047. And, in that "rigid application," the rule "unconstitutionally deprives a litigant of the right to a hearing on the merits of her claim." *Id.* Here, Petitioner had one year from the Supreme Court's decision newly recognizing a right to file his claim. *See* 28 U.S.C. § 2255(f)(3). Yet, no judge considered his merits arguments regarding Hobbs Act

robbery. Both the district court and the court of appeals found themselves bound by *In re Saint Fleur*. So, it is left to this Court to remedy the violation and afford Petitioner what the Due Process Clause requires.

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

III. As A Direct Result, The Eleventh Circuit Incorrectly Decided An Important And Far-Reaching Issue—Whether Hobbs Act Robbery Is A Categorical Crime Of Violence As Defined By 18 U.S.C. § 924(c)(3)(A) If Juries In Three Circuits Are Routinely Instructed That The Offense Can Be Committed In A Non-Violent Manner—Without The Benefit Of Adversarial Testing, Legal Argument, Or Further Review, And In An Expedited Manner

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*." Admittedly, several circuits applying the categorical approach have now held that Hobbs Act robbery categorically satisfies that "crime of violence" definition. *See St. Hubert I*, 883 F.3d at 1331–33 (citing *United States v. Gooch*, 850 F.3d 285, 291–92 (6th Cir.

2017); *United States v. Rivera*, 847 F.3d 847, 848–49 (7th Cir. 2017); *United States v. Anglin*, 856 F.3d 954, 964–65 (7th Cir. 2017), *cert. granted & j. vacated on other grounds*, 138 S. Ct. 126 (2017); *United States v. Hill*, 832 F.3d 135, 140–44 (2d Cir. 2016);[2] and *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016)).

But notably, none of the circuit decisions followed by the Eleventh Circuit in justifying its similar holding under the "categorical approach," have specifically considered the question raised by Petitioner herein, of whether a Hobbs Act robbery is categorically overbroad if juries are routinely instructed pursuant to a pattern Hobbs Act robbery instruction that a Hobbs Act robbery can be committed without the use, threat, or fear of any physical violence.

Eleventh Circuit Pattern Instruction O70.3 (Hobbs Act robbery), provides:

> It's a Federal crime to acquire someone else's property by robbery . . .
>
> The Defendant can be found guilty of this crime only if all the following facts are proved 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.

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[2] The Second Circuit amended its 2016 decision in *Hill* after *Dimaya*. *See United States v. Hill*, 890 F.3d 51 (2d Cir. 2018). In so doing, the Second Circuit revised its original discussion of § 924(c)(3)(A) in certain regards, and newly cited the Eleventh Circuit's decision in *St. Hubert* as among "a consistent line of cases from our sister circuits, concluding that Hobbs Act robbery satisfies the force clause." *Hill*, 890 F.3d at 56 & n. 7.

> "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) (App. D).

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, two judges on the Eleventh Circuit have specifically opined that an offense might *not* categorically be a "crime of violence" if juries were routinely instructed in Hobbs Act cases that the statute could be violated without the use or threat of physical violence, and simply by causing "fear of financial loss." *See Davenport v. United States*, No. 16-15939, Order at 6 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting certificate of appealability on whether Hobbs Act robbery is an offense that categorically meets §924(c)'s elements clause; noting that, given Eleventh Circuit Pattern Jury Instruction O70.3, a defendant could be convicted of that offense simply because he caused the victim to "fear harm" to "property," which includes "financial loss" and "intangible rights"); *In re Hernandez*, 857 F.3d 1162 (11th Cir. 2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (noting, based on the same definition of "fear" in the pattern Hobbs Act extortion instruction, that "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force;" citing *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013)).

Although at least four circuits—the Fifth Circuit in *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017), the Second Circuit in *Hill*, the Sixth Circuit in *Gooch*, and the Seventh Circuit in *Anglin*—have consistently held that Hobbs Act robbery categorically qualifies as a "crime of violence," *none* of those courts have specifically considered whether a pattern instruction like Eleventh Circuit Pattern O70.3, renders a Hobbs Act robbery offense categorically overbroad. To this day, the Seventh Circuit does not have a pattern Hobbs Act robbery instruction. When *Gooch* was decided, the Sixth Circuit did not. The Second Circuit has *no* pattern instructions at all. And, although the Fifth Circuit uses the same pattern instruction for both Hobbs Act extortion and Hobbs Act robbery, and defines both "property" and "fear" in that instruction just like the Eleventh Circuit does in its Pattern O70.3, the Fifth Circuit in *Buck* did not specifically consider that language in its own pattern instruction. Because none of these circuits have ever considered whether having a pattern instruction (like Eleventh Circuit Pattern O70.3) makes it "plausible" that a Hobbs Act conviction covers "non-violent conduct" such as the taking of the victim's intangible rights, by causing him to fear a financial loss, the other circuit decisions are not persuasive in resolving the specific "crime of violence" challenge raised herein by Petitioner.

The plain language in Eleventh Circuit Pattern Instruction O70.3 confirms that Hobbs Act robbery can "plausibly" be committed without the use or threat of physical violence. *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), supports this conclusion. There, former-Justice O'Connor, sitting by designation and writing

for the court, explained that § 924(c)(3)(A), by its terms, requires a categorical approach. And pursuant to that approach, the court "must ask whether the crime, in general, plausibly covers any non-violent conduct." *Id.* at 1337. *McGuire* was clear that "[o]nly if the plausible applications of the statute of conviction all require the use or threatened use of force can [a defendant] be held guilty of a crime of violence." *Id.* (parallel citations omitted).

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

While the Court added that "[t]o show that realistic probability," an offender "must point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues," *id.*, that particular statement must be read in context. The offender in *Duenas-Alvarez* argued that California's aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190–91. But that argument found no support in either the statutory language, precedent establishing the scope of aiding-and-abetting liability, or any other source such as a pattern jury instruction. In the absence of such support, the Court required the

offender in *Duenas-Alvarez* to identify an actual case to support his novel, proposed application. Fatally for his argument, he could not. *See id.* at 187, 190–91.

Strictly applying *Duenas-Alvarez*, the Second Circuit held that the defendant in *Hill* likewise could not show a "realistic probability" that the "fear of injury" means of committing a Hobbs Act robbery could occur without fear of physical violence, unless he could identify a case on point. But again, there were no pattern instructions in the Second Circuit for the court to draw upon. The defendant in *Hill* did not offer anecdotal evidence as to how Second Circuit juries were instructed in Hobbs Act cases. Nor did he support his "fear of injury" argument with any other circuit's pattern, like Eleventh Circuit Instruction O71.3. His argument was based entirely upon hypotheticals. And for that reason, it was roundly rejected by the Second Circuit.

The defendant in *Buck* did not propose hypotheticals, but simply argued (for the first time on appeal) that based upon the plain language in § 1951(b), Hobbs Act robbery was not a "crime of violence" under § 924(c)(3)(A) because a person could be convicted "for nothing more than threatening some future injury to property." Br. of Appellant, *United States v. Buck*, 2016 WL 3035348, at *9 (5th Cir. May 26, 2015). He did not argue that the plain language in Fifth Circuit Pattern Instruction 2.73A ("'property' includes money and other tangible and intangible things of value;" "[t]he term 'fear' includes fear of economic loss or damage, as well as fear of physical harm") supported his argument. The government responded that Buck had not shown plain error, citing *Hill* as support. Br. of the United States, *United States v. Buck*, 2016

WL 5436198, **27–30 (5th Cir. Sept. 26, 2016). And in reply, the defendant did not distinguish *Hill* as Petitioner does here. Reply Br. of the Appellant, *United States v. Buck*, 2016 WL 5436198, at *1 (5th Cir. Sept. 26, 2016). Not surprisingly, given the briefing, the Fifth Circuit found no plain error, citing *Hill* and other decisions holding Hobbs Act robbery was categorically a "crime of violence." *Buck*, 847 F.3d at 274–75. *Buck* is now precedential, and will be preclusive of a contrary finding in the Fifth Circuit, even if a future defendant raises a challenge predicated upon the plain language of the Fifth Circuit's pattern instruction, similar to Petitioner's challenge here.

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 suggested could qualify as a Hobbs Act violation based upon the plain language of the Eleventh Circuit pattern instruction, was not even "minimally forceful." Taking a person's "intangible rights" by causing fear of a "financial loss" is not calculated to cause physical harm to any person, or to property. Under both *McGuire* and *Duenas-Alvarez*, the Eleventh Circuit improperly failed to consider that a *completely non-violent* commission of a Hobbs Act robbery was not only "plausible," but "probable," based upon the plain language of its own pattern instruction. The court erroneously followed *Hill* in finding "fear of injury" was categorically violent, and insisting that an actual case was necessary to show that means of committing the offense could occur without violence, notwithstanding the language in the court's pattern instruction.

This Court has not yet considered whether the case-specific requirement of *Duenas-Alvarez* should apply, where, as here, the plain language of a circuit's pattern jury instruction, establishes that an offense is overbroad vis-a-vis the elements clause. And indeed, it should grant certiorari in this case to specifically address that issue, since 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* Fifth Circuit Pattern Instr. 2.73A (Extortion by Force, Violence, or Fear, 18 U.S.C. § 1951(a) (Hobbs Act) ("The term 'property' includes money and other tangible and intangible things of value"; "The term 'fear' includes fear of economic loss or damage, as well as fear of physical

harm."); Tenth Circuit Pattern Instr. 2.70 ([Robbery][Extortion] By Force, Violence or Fear, 18 U.S.C. § 1951(a)(Hobbs Act)) (noting that 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").

No other circuits beyond the Fifth, Tenth, and Eleventh have similar Hobbs Act robbery instructions. And 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 Pattern Jury Instr. 6.18.1951B (noting the elements as one, "the defendant knowingly [committed physical violence] [threatened physical violence] while at . . ."). Ultimately, however, the number of circuits on either side of this sharp divide does not matter under the categorical approach. If it were only the Eleventh Circuit that had an instruction informing juries they could convict a defendant simply for causing fear of a financial loss, and not personal violence, "violent force" would still not be an "element" of *every* Hobbs Act crime. 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 of courts in finding that a Hobbs Act robbery by "fear of injury" is categorically violent, simply

because there is no reported "case" confirming the argument that "fear of injury" could simply be fear of financial loss (exactly as stated in the pattern instruction).

And in any event, there are at least three cases that have recognized that the concept of "property" under the Hobbs Act extends to "intangible rights." *See United States v. Local 560 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 780 F.2d 267, 281 (3d Cir. 1986) (the Hobbs Act was written, and has been interpreted, broadly to "protect intangible, as well as tangible property; describing the circuits as "unanimous" on this point); *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) ("[t]he concept of 'property' under the Hobbs Act is an expansive one" that includes "*intangible assets*, such as rights to solicit customers and to conduct a lawful business"), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003); *United States v. Iozzi,* 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when boss threatened "to slow down or stop construction projects unless his demands were met").

While admittedly, these cases were Hobbs Act extortion and not Hobbs Act robbery cases, in the Eleventh Circuit—as in the Fifth Circuit—the pattern instructions on Hobbs Act robbery and Hobbs Act extortion define the terms "fear" and "property" *identically*. *See* Eleventh Circuit Pattern Instr. O70.1 (Hobbs Act Extortion) (defining "extortion" as "obtaining property from a person who consents to give it up because of the wrongful use of actual or threatened force, violence, or fear"; defining "property" to include "intangible rights that are a source or part of income

or wealth, and "fear" to include "the fear of financial loss as well as fear of physical violence") (App. E).

Given the complete identity of the pattern robbery and extortion instructions in these material respects in the Eleventh and Fifth Circuits, it is notable that the Court granted, vacated, and remanded a § 924(c) case after *Dimaya*, where the predicate "crime of violence" was Hobbs Act extortion, and the petitioner had specifically pointed out that courts "routinely" charge juries in Hobbs Act extortion cases "that fear of economic injury is sufficient." *See* Pet. for Writ of Cert., *Xing Lin v. United States*, No. 17-5767, at 18–19 (Aug. 28, 2017); *Xing Lin v. United States*, 138 S. Ct. 1982 (June 15, 2018) (granting certiorari, vacating the judgment, and remanding the case for further consideration in light of *Dimaya*).

While the government noted in response to the *Xing Lin* petition that the Second Circuit "found it 'far from clear that the 'ordinary case' of Hobbs Act extortion would not entail a substantial risk of the use of physical force for purposes of Section 924(c)(3)(B)," Mem. for the United States, *Xing Lin v. United States*, No. 17-5767, at 2–3 (Oct. 30, 2017), the government nonetheless conceded that *Xing Lin* "may be affected by *Dimaya*" and should be held pending that decision. And presumably, the government took that position because it knew the "ordinary case" is irrelevant under § 924(c)(3)(A); the categorical approach required by the "elements" language in that provision is an "every case" analysis; and Hobbs Act extortion is indeed categorically overbroad under an "elements-only," every-case approach, if juries are "routinely"

instructed that they may convict a defendant for causing fear of financial loss, without any physical violence.[3]

IV. The Questions Presented Are Recurring And Important

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

And, because the Eleventh Circuit has endowed those published orders with precedential effect under its rigidly-applied prior panel precedent rule, subsequent

[3] Notably, in the First, Third, and Ninth Circuits, as well as the Fifth and Eleventh Circuits, juries are routinely instructed that Hobbs Act extortion may be committed by causing fear of economic loss, without the use or threat of physical force. *See* First Circuit Pattern Instr. 4.18.1951 ("To prove extortion by fear, the government must show . . . that the victim believed that economic loss would result from failing to comply with defendant's demands"); Third Circuit Pattern Instr. 6.18.1951-4 (Hobbs Act—"Fear of Injury" Defined") (citing an extortion case in the "Comment" section, for the proposition that "fear" "may be of economic or physical harm"); Ninth Circuit Pattern Instr. 8.142A (Hobbs Act—Extortion or Attempted Extortion by Nonviolent Threat)("the defendant [[induced][intended to induce]][name of victim] to part with property by wrongful threat of [economic harm][specify other nonviolent harm]").

panels may now uncritically rely on them to dispose of direct criminal and § 2255 appeals. That is precisely what happened to Petitioner here. The panel, finding itself bound by its prior holding in *In re Saint Fleur* that Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause, affirmed the denial of Petitioner's § 2255 motion.

Unsurprisingly, other Eleventh Circuit panels have wasted no time doing the same in other cases. Thus far, at least 60 panels resolving direct criminal and § 2255 appeals have cited 14 different published orders adjudicating Johnson-based successive applications. *See* App. E, *Gonzalez v. United States*, No. 18-7575 (collecting cases). And, only two short years have passed since the publication of those orders. That number will continue to grow in the coming years. The Eleventh Circuit will continue to invoke its prior panel precedent rule, obviating any need for panels (or district courts) to independently consider the merits of a defendant's claim. Thus, absent intervention by this Court, countless federal prisoners will continue to be prejudiced by this unique method of adjudication. Accordingly, the Court's immediate intervention is necessary.

Not only will the Eleventh Circuit's unique method of adjudication continue to prejudice countless criminal defendants in that Circuit, but that method "depart[s] from the accepted and usual course of judicial proceedings." Sup. Ct. R. l0(a). There is direct evidence of that: as explained above, no other circuit employed a similar procedure for adjudicating successive applications, let alone afforded the published byproduct precedential effect. More broadly, Petitioner is unaware of any comparable

method of adjudication, where courts are free to reject properly-raised arguments without ever meaningfully considering them. Indeed, "[t]he core of due process is the right to . . . a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). And the opportunity to be heard is not meaningful where courts are powerless to accept the arguments presented to them. In the criminal justice context, that judicial impotence strips criminal defendants of their only mechanism of judicial enforcement. Without that enforcement mechanism, their rights will become illusory. The questions presented are thus of great public importance warranting review by this Court.

V. This Is An Ideal Vehicle

This case presents the perfect opportunity for the Court to resolve two exceedingly important questions that will have a resounding effect on countless individuals.

Both in the district court and on appeal, Petitioner was denied relief because the courts found themselves bound by the Eleventh Circuit's prior precedent in *In re Saint Fleur*, declaring Hobbs Act robbery a categorical "crime of violence" under the elements clause of § 924(c). Before the district court, Petitioner argued that *In re Saint Fleur* should not control because it was issued off of a pro se application seeking permission to file a second or successive § 2255 motion wherein the Eleventh Circuit did not have the benefit of counseled briefing and the arguments were not subjected to the adversarial process. Additionally, he argued that *In re Saint Fleur* was wrongly decided and that Hobbs Act robbery was not a categorical crime of violence. His

motion was denied because the district court found *In re Saint Fleur* "binding on th[e] Court."

Petitioner pressed the same arguments before the Eleventh Circuit, to no avail. He argued both that *In re Saint Fleur*'s holding, issued in the second or successive context, should not be given preclusive effect, and that when properly considered using the categorical approach, Hobbs Act robbery is not a categorical "crime of violence" under the elements clause of § 924(c). The Eleventh Circuit, however, found itself bound by its prior precedent, which "includes decisions rendered in the case of a second or successive habeas application." App. A at 2a. As a result, the court affirmed the district court's denial of Petitioner's § 2255 motion, finding itself "bound by [its] prior holding in Saint Fleur that Hobbs Act robbery is a crime of violence under § 924(c) elements clause." App. A at 3a. The court did not consider Petitioner's merits arguments with regard to Hobbs Act robbery, because it found itself precluded from so doing. As a result, both the due process and Hobbs Act robbery questions are properly before this Court.

Factually, too, this case presents an ideal vehicle because of the extreme circumstances surrounding the decision in *In re Saint Fleur*. Again, the applicant there used the Eleventh Circuit's mandatory form, in which he fit only 36 word of argument, none of which addressed whether Hobbs Act robbery was a categorical "crime of violence," an issue outside the proper scope of the gatekeeping inquiry. The court of appeals did not hear from the government or hold oral argument. Instead, the court issued a published opinion after 30 days. The court's analysis was wholly

conclusory, failing to identify the elements of Hobbs Act robbery, consider the Eleventh Circuit's pattern jury instructions, or apply the categorical approach. And, the applicant there was unable to seek further review of the dubious ruling. Despite those extraordinary circumstances, the Eleventh Circuit still afforded that published order preclusive effect in Petitioner's § 2255 motion, effectively halting any further inquiry into whether Hobbs Act robbery is, in fact, a categorical crime of violence.

This case will permit the Court to definitively determine two issues of great importance and impact: (1) whether the Due Process Clause permits the Eleventh Circuit to afford preclusive effect in a criminal case to a prior panel decision that was: based on a mandatory form allowing only bare legal argument; issued under a strict 30-day deadline; and immune from any petition for rehearing or a writ of certiorari; and (2) whether Hobbs Act robbery is categorically a "crime of violence," as many other courts have held, after considering—fully and finally—all of the relevant circumstances, which include the fact that juries are routinely instructed in three circuits that the offense can be committed without the use, threat, or fear of any personal violence.

In resolving this relevant issue of whether this frequent § 924(c) predicate can remain a predicate after *United States v. Davis*, 139 S. Ct. 2319 (2019), declared the residual clause of § 924(c)(3)(B) unconstitutional, the Court would be able to also clarify still-unresolved questions as to proper application of *Duenas-Alvarez*'s "reasonable probability" standard. Lower courts need to know whether an "actual case" is *always* necessary to show a statute extends to non-violent conduct, as the

court below found, or whether "reasonable probability" of a non-violent application may be shown in other ways, such as by the plain language of the statute,[4] or the plain language of a pattern jury instruction defining key statutory terms. If the Court finds the Eleventh Circuit erred in requiring an "actual case," because the definitional language in Eleventh Circuit O71.3 was itself sufficient to satisfy *Duenas-Alvarez*, that clarification assure proper application of the categorical approach in all § 924(c), ACCA, and § 16(a) cases going forward.

[4] The First, Third, Sixth, Ninth, and Tenth Circuits have held that plain statutory language can establish that an offense is overbroad, notwithstanding the absence of a reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017); *Jean Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009); *United States v. Lara*, 590 F. 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). By contrast, the en banc Fifth and Eleventh Circuits have taken the contrary view, over vigorous dissents in both courts. *See United States v. Castillo-Rivera*, 853 F.3d 218, 222–24 (5th Cir. 2017) (en banc); *United States v. Vail-Bailon*, 868 F.3d 1293, 1305–07 (11th Cir. 2017) (en banc).

CONCLUSION

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

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