**No. _____**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

**LORANZO THOMAS,**

***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

---

James T. Skuthan
Acting Federal Defender

Lynn Palmer Bailey
Counsel of Record
Florida Bar No. 0605751
Federal Defender's Office
200 West Forsyth Street, Suite 1240
Jacksonville, Florida 32202
Telephone: (904) 232-3039
E-mail: lynn_bailey@fd.org

## QUESTIONS PRESENTED

The Eleventh Circuit denied a certificate of appealability (COA) after the district court denied Mr. Thomas's motion to vacate sentence under 28 U.S.C. § 2255. Mr. Thomas presents the following questions as at least debatable by reasonable jurists:

1. Whether, in light of *Borden v. United States*, -- U.S. --, -- S. Ct. - , 2021 WL 2367312 (U.S. June 10, 2021), aiding and abetting Hobbs Act robbery by causing a victim to fear injury is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

2. Whether the elements of aiding and abetting Hobbs Act robbery necessarily include the use, attempted use, or threatened use of physical force against the person or property of another and qualify the offense as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A).

In addition, Mr. Thomas presents the following question:

3. Whether, in conflict with other circuits, the Eleventh Circuit exceeded its authority under 28 U.S.C. § 2244 by reviewing the merits of an applicant's claim rather than limiting itself to determining whether the applicant made a "prima facie showing" of satisfaction of § 2244(b)'s pre-filing requirements, and whether application of that published decision under the Eleventh Circuit's prior precedent rule violates § 2244 and due process.

## LIST OF PARTIES

Petitioner, Loranzo Thomas, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitution**



**Statutes**



**Rules and Instructions**

**Other Authorities**

## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Loranzo Thomas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINION AND ORDER BELOW

The Eleventh Circuit's opinion denying Mr. Thomas's motion for a certificate of appealability (COA) is provided in Appendix A. The district court's final judgment denying his motion to vacate sentence under 28 U.S.C. § 2255 is provided in Appendix B.

## STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Thomas's motion to vacate sentence under 28 U.S.C. § 2255. The Eleventh Circuit issued its opinion denying a COA on January 15, 2021. This petition is timely filed under Supreme Court Rule 13.1 and this Court's Order of March 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

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

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

> cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 2 of Title 18 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

In 2010, Section 924(c) of Title 18 of the United States Code, provided:

> (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; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 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; and

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

(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.

Section 1951 of Title 18 of the United States Code provides:

(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 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.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Section 2244 of Title 28 provides:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not

presented in a prior application shall be dismissed unless--

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(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 or 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.
>
> (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.
>
> (c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.
>
> . . . .

Section 2253(c) of Title 28 of the United States Code provides:

> (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 appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> . . . .

Section 2255(a) of Title 28 of the United States Code, which addresses when an individual may collaterally attack a federal sentence, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

## STATEMENT OF THE CASE

1. In 2010, Mr. Thomas pled guilty to five counts of an indictment charging him and his codefendant with (1) conspiracy to commit robbery under 18 U.S.C. § 1951 (Hobbs Act robbery) and 18 U.S.C. § 2113(a) (bank robbery), in violation of 18 U.S.C. § 371 (Count One); (2) aiding and abetting one another in committing and attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and (b) and 2 (Count Two); (3) aiding and abetting the use and carrying of a firearm during and in relation to, and possession of a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A), (c)(1)(C), and (c)(3) and 2 (Count Three); (4) aiding and abetting one another in committing and attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and (b) and 2 (Count Four); and (5) aiding and abetting the use and carrying of a firearm during and in relation to, and possession of a firearm in furtherance of, a crime of violence, in violation of 18

U.S.C. §§ 924(c)(1)(A), (c)(1)(C), and (c)(3) and 2 (Count Five). Crim. Doc. 1.[1]

In particular, Count Three charged that Mr. Thomas and his codefendant

> aiding and abetting one another, did knowingly use and carry a firearm during and in relation to, and did knowingly possess a firearm in furtherance of, a crime of violence for which they may be prosecuted in a court of the United States, that is, interference with commerce by threats and violence as alleged in Count Two of this Indictment . . . [a]ll in violation of Title 18, United States Code, Section 924(c)(1)(A), (c)(1)(C), and (c)(3) and Title 18, United States Code, Section 2.

Crim. Doc. 1 at 5. The charging language in Count Five is identical, except that it references Count Four as the companion offense instead of Count Two, and alleges a different date. *Id.* at 6-7.

Counts Two and Four charged the companion offenses to Counts Three and Five. Specifically, Count Two charged that Mr. Thomas and his codefendant

> *aiding and abetting* one another, *did knowingly and unlawfully obstruct, delay and affect, and attempt to obstruct, delay and affect, commerce* as that term is defined in Title 18 United States Code, Section 1951, and the movement of any article and commodity in such commerce, by robbery, as that term is defined in Title 18 United States Code, Section 1951, by knowingly and unlawfully taking and obtaining the personal property of another, that is, United States currency, form the person and in the presence of another, that is, a Marathon gas station, 1450 N. Washington Avenue, Titusville, Florida, and its employees, against their will, *by means of actual and threatened force, violence, and fear of injury to their person* in furtherance of a plan and purpose to commit robbery.

---

[1] References to Mr. Thomas's underlying criminal proceeding, *United States v. Thomas,* Case Number 6:10-cr-35-Orl-28GJK, will be cited as "Cr. Doc." His § 2255 proceeding, *Thomas v. United States*, Case Number 6:16-cv-1125-Orl-28GJK, will be cited as "Civ. Doc." The page citations refer to the computer-generated page numbers in the top headers of the pages.

> All in violation of Title 18, United States Code, Section 1951(a) and (b) and Title 18, United States Code, Section 2.

Crim. Doc. 1 at 4-5 (emphasis added). The charging language in Count Four is identical, except that it alleges a different date and location (Subway restaurant) for the crime. *Id.* at 5-6. As such, Count Two charged aiding and abetting a completed and an attempted Hobbs Act robbery for the crime at the Marathon gas station. Count Four charged aiding and abetting a completed and an attempted Hobbs Act robbery for the crime at the Subway.

Mr. Thomas entered guilty pleas to all five counts of the indictment without a plea agreement. Crim. Doc. 92 at 1-36. The district court conducted a plea colloquy, at which Mr. Thomas admitted facts which the district court deemed sufficient to satisfy a factual basis for the pleas. *See* Civ. Doc. 23 at 3-5 (summarizing plea colloquy); Crim. Doc. 92 at 1-26 (plea colloquy transcript).

The district court convicted him on all five counts and sentenced him to a total term of imprisonment of 163 months, consisting of concurrent terms of 79 months on Counts 1, 2, 4, and 5, and a consecutive term of 84 months on Count 3. Crim. Doc. 75 at 2. The court imposed a three-year term of supervised release. *Id.* This Court affirmed his convictions and sentences. *United States v. Thomas*, No. 10-14319 (11th Cir. 2011); Crim. Doc. 113.

2. In 2016, Mr. Thomas moved to vacate his sentence under § 2255. He asked the court to vacate his convictions on Counts Three and Five in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and he later amended that motion to add a

claim based on *Davis v. United States*, 139 S. Ct. 2319 (2019). Civ. Docs. 1, 20. On August 4, 2020, the district court denied the § 2255 motion, dismissed the case with prejudice, and denied and a COA. Civ. Doc. 29.

In the order denying the § 2255 motion, the district court concluded that Mr. Thomas's §§ 924(c) and 2 convictions are valid despite *Davis* because the Eleventh Circuit had determined that aiding and abetting Hobbs Act robbery categorically qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). Civ. Doc. 29 at 5. The district court was bound by the Eleventh Circuit's precedent of *In re Colon*, 826 F.3d 1301 (11th Cir. 2016), and cited several post-*Davis* cases from the Eleventh Circuit to support the continuing validity of *In re Colon*. Civ. Doc. 29 at 4-5.

3. On October 2, 2020, Mr. Thomas filed a timely notice of appeal. Civ. Doc. 32. On October 21, 2020, he applied for a COA from the Eleventh Circuit. The Eleventh Circuit denied his motion for a COA, finding that Mr. Thomas failed to make a substantial showing of the denial of a constitutional right. Appendix B.

## REASONS FOR GRANTING THE WRIT

In denying Mr. Thomas's § 2255 motion, the Eleventh Circuit's decision in *In re Colon* compelled the district court to conclude that aiding and abetting Hobbs Act robbery categorically qualifies as a "crime of violence" under the elements clause of § 924(c)(3)(A). Civ. Doc. 29 at 4-5. The Eleventh Circuit denied a COA.

However, this Court's decision in *Borden v. United States*, -- U.S. --, -- S. Ct. - , 2021 WL 2367312 (U.S. June 10, 2021), undermines *In re Colon*. In light of *Borden*, the Eleventh Circuit erred by denying Mr. Thomas a COA because reasonable jurists could debate whether aiding and abetting Hobbs Act robbery categorically qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). Under *Borden*, Mr. Thomas's convictions under §§ 924(c) and 2 violate due process because the companion offense of aiding and abetting Hobbs Act robbery (completed or attempted) does not qualify categorically as a crime of violence. Also the elements of, aiding and abetting Hobbs Act robbery do not qualify as a "crime of violence" under § 924(c)(3)(A).

In addition, as set forth below, Mr. Thomas maintains that the Eleventh Circuit exceeded its authority under 28 U.S.C. § 2244, in conflict with other circuits. On top of that error, the procedure used by the Eleventh Circuit to deny Mr. Thomas's motion based on the binding panel precedent of *In re Colon* conflicts with other circuits, runs afoul of § 2244, and violates due process.

### I. Reasonable jurists could debate whether aiding and abetting Hobbs Act robbery categorically qualifies as a "crime of violence" under the elements clause of § 924(c)(3)(A).

In *Davis*, this Court struck the so-called residual clause of 18 U.S.C.

§ 924(c)(3)(B) as unconstitutionally vague. As such, Mr. Thomas's convictions for § 924(c) can be upheld only if the companion crimes of aiding and abetting Hobbs Act robbery satisfy the elements clause of § 924(c)(3)(A).

To decide whether an offense satisfies an elements clause, courts use the categorical approach. *See, e.g., Borden*, 2021 WL 2367312, at *3 (noting that the familiar categorical approach applies in several statutory contexts). Under the categorical approach, "the facts of a given case are irrelevant." *Id.* "The focus is instead on whether the elements of the statute of conviction meet the federal standard." *Id.* Here, that means asking whether aiding and abetting Hobbs Act robbery necessarily involves a defendant's "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). "If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve" as a companion offense under § 924(c)(3)(A). *Borden*, 2021 WL 2367312, at *3.

### A. Aiding and abetting Hobbs Act robbery by causing a victim to fear injury is not a "crime of violence" under *Borden* because a perpetrator can commit that offense without using knowing or purposeful conduct.

In *Borden*, this Court held that a criminal offense that requires only a *mens rea* of recklessness—a less culpable mental state than purpose or knowledge—does not qualify as a "violent felony" for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *Borden*, 2021 WL 2367312 at *3. This Court explained that the phrase "against another," when modifying the "use of force" in the ACCA,

demands that the perpetrator direct his action at, or target, another individual. *Id.* at *5. "Reckless conduct is not aimed in that prescribed manner." *Id.*

The text of § 924(c) is identical to the relevant text of ACCA insofar as both statutes require the "use, attempted use, or threatened use of physical force *against the person*." *Compare* 18 U.S.C. § 924(c)(3)(A), *with* 18 U.S.C. § 924(e) (emphasis added). As such, the Court's holding in *Borden* that offenses with a *mens rea* of recklessness do not use physical force against the person extends to § 924(c)(3)(A). *See also Leocal v. Ashcroft*, 543 U.S. 1 (2004) (interpreting "against the person" in statutory context of 18 U.S.C. § 16(a)). Applying *Borden* in the § 924(c)(3)(A) context, an offense with a *mens rea* of recklessness is not a "crime of violence."

Aiding and abetting Hobbs Act robbery can be committed "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 company at the time of the taking or obtaining . . . " 18 U.S.C. § 1951 (b)(1) (emphasis added). The text plainly states that Hobbs Act robbery can be committed upon "fear of injury," which does not require the use, attempted use, or threatened use of physical force against the person or property of another. The perpetrator need not specifically intend to put the victim in fear. *See United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting that specific intent is not an element under § 1951). Although the *Gray* court relied on *United States v. Thomas*, 8 F. 3d 1552, 1562 (11th Cir. 1993), pre-*Borden*, for the proposition that the *mens rea* required for Hobbs Act robbery is knowledge, neither

court specifically addressed the "fear of injury" means of committing Hobbs Act robbery. Because "fear of injury" is evaluated from the perspective of a reasonable person in the victim's position, this means of committing the offense does not require a *mens rea* of knowledge.[2] As such, the *mens rea* required for aiding and abetting Hobbs Act robbery by means of "fear of injury" is akin to recklessness, which does not qualify it as a "crime of violence" under § 924(c)(3)(A) in light of *Borden*.

The Eleventh Circuit erred by denying Mr. Thomas a COA because reasonable jurists could debate whether aiding and abetting Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A) in light of *Borden*. This Court should grant Mr. Thomas's petition for a writ of certiorari, vacate the Eleventh Circuit's order denying him a COA, and remand this case for further proceedings in light of *Borden*.

### B. The elements of aiding and abetting Hobbs Act robbery do not necessarily include the use, attempted use, or threatened use of physical force against the person or property of another.

A defendant "can be convicted as an aider and abettor [under 18 U.S.C. § 2] without proof that he participated in each and every element of the offense." *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014). Indeed, "[t]he quantity of assistance [is] immaterial, so long as the accomplice did something to aid the crime." *Id*. (internal quotation marks and citation omitted; emphasis in original). An aider and abettor does not have to personally use, attempt to use, or threaten physical force to be convicted of aiding and abetting Hobbs Act robbery. As such, aiding and

[2] The Eleventh Circuit pattern jury instruction states that 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." 11th Cir. Pattern Jury Instr. O70.3.

abetting Hobbs Act robbery does not qualify as a "crime of violence" under § 924(c)(3)(A).

But as the district court described *In re Colon* in Mr. Thomas's case, "the Eleventh Circuit Court of Appeals determined that aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c)(3)(A) because a substantive conviction of Hobbs Act robbery is a crime of violence." Civ. Doc. 29 at 4. Indeed, two out of three judges on the *Colon* panel said that "[b]ecause an aider and abettor is responsible for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a . . . Hobbs Act robbery." *Id.* at 1305. "And because the substantive offense of Hobbs Act robbery 'has as an element the use, attempted use, or threatened use of physical force . . . ,' then an aider and abettor of a Hobbs Act robbery necessarily commits a crime that 'has as an element the use, attempted use, or threatened use of physical force . . . .'" *Id.* Mr. Thomas respectfully submits that the Eleventh Circuit wrongly decided *In re Colon* on the merits for the reasons articulated in Judge Martin's dissent in *In re Colon* and Judge Jill Pryor's concurrence in *Boston v. United States,* 939 F.3d 1266, 1272 (11th Cir. 2019), *cert denied*, 141 S. Ct. 103 (2020). .

In Judge Martin's dissent in *In re Colon,* she highlighted the shortcomings of the majority's analysis stating, "[a]s best I can tell (though we have not had any briefing on this question, and I have not had much time to think through the issue), a defendant can be convicted of aiding and abetting a robbery without ever using, attempting to use, or threatening to use force." *In re Colon*, 826 F.3d at

1306 (Martin, J., dissenting). After noting that the case cited by the *Colon* majority was not helpful to the instant categorical inquiry, because it had addressed the distinct inquiry of whether a defendant who had committed Hobbs Act robbery as a principal had aided and abetted a co-defendant's use of force, Judge Martin explained why an aider or abettor to the robbery does not necessarily commit the crime-of-violence elements of § 924(c)(3)(A):

> It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Colon's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the "elements clause" definition. The law has long been clear that a defendant charged with aiding and abetting a crime is not required to aid and abet (let alone actually commit, attempt to commit, or threaten to commit) every element of the principal's crime. *See Rosemond*[, 572 U.S. at 74] ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor *without proof that he participated in each and every element* of the offense. In proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence—even if that aid relates to only one (or some) of a crime's phases or elements." . . . ).

*In re Colon*, 826 F.3d at 1306-07 (emphasis in original).

Thus, Judge Martin identified the correct crux of the § 2 analysis when applying the categorical approach to a statute like § 924(c)(3): we do not ask how the defendant is punished or held responsible, but rather how that liability is established in the first place. Specifically, an aider or abettor may be convicted of a crime, *without committing all of that crime's elements*. *Id.* at 1306-07. And it is only the

statutory elements of an offense which can make it a "crime of violence." *See United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016). A conviction pursuant to § 2 inherently fails the distinct inquiry for determining whether that conviction is a "violent felony," as the aider and abettor did not *necessarily* "use" force, as required in §§ 924(c)(3)(A) or *commit* an offense with those elements. *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018). Judge Martin went on to favorably compare the aiding and abetting issue with post-*Johnson* decisions finding that conspiracy and attempt offenses do not satisfy the force/elements clause, and stated, "I am not willing to assume, as the majority does here, that aiding and abetting crimes meet the "elements clause" definition simply because an aider and abettor "is punishable as a principal." *In re Colon*, 826 F.3d at 1307-08 (quoting § 2(a)).

In *Boston*, Judge Jill Pryor explained:

> The problem I see with the reasoning in *Colon* is 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 a getaway car driver actually committed a crime involving the element of force.

*Boston*, 939 F.3d at 1273 (Pryor, J. Jill, concurring in judgment). Like a "violent felony," a "crime of violence" suggests a category of violent, active crimes. *Johnson v. United States*, 559 U.S. 133, 140 (2010). And a "person who merely aids and abets a crime by definition plays a less active role in the crime than the principal." *Boston*, 939 F.3d at 1273 (Pryor, J. J., concurring in judgment). While a "person who aids or abets another in committing armed robbery *may* use, attempt to use, or threaten to use physical force, . . . he may only be a getaway driver." *Id.* Aiding and abetting

does not necessarily involve the use, attempted use, or threatened use of physical force required for a "crime of violence." *See also In re Colon*, 826 F.3d at 1306-08 (Martin, J., dissenting).

Mr. Thomas adopts the reasoning of Judge Martin's dissent in *Colon* and Judge J. Pryor's concurrence in *Boston*. He further submits that the Eleventh Circuit Court's analysis in *Colon* is insufficient because it substitutes the categorical approach required to find a "crime of violence" under § 924(c)(3)(A) with a contextually-distinct conclusion that an aider or abettor is punishable or responsible for the acts of the substantive perpetrator. *See* 826 F.3d at 1305 (citing *United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003)).

The Eleventh Circuit erred by denying Mr. Thomas a COA because reasonable jurists could debate whether aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c)(3)(A). This Court should grant Mr. Thomas's petition, vacate the Eleventh Circuit's order denying him a COA, and remand for further proceedings.

## II. The Eleventh Circuit exceeded its limited authority under § 2244 and violated Mr. Thomas's right to due process by affording precedential effect to an order denying authorization to file a second or successive § 2255 motion.

In the Eleventh Circuit, published orders denying applications for authorization to file a second or successive § 2255 motion ("SOS applications") bind district courts and subsequent panels of the Eleventh Circuit on merits issues. *See United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *cert. denied,* 140 S. Ct. 1727 (2020) (holding that law established in published three-judge orders issued pursuant to §2244(b) in the context of SOS applications is binding precedent on all

subsequent panels of the Eleventh Circuit, unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or the Eleventh Circuit sitting en banc); *United States v. Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) ("To be clear, our prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions. In other words, published three-judge orders issued under § 2244(b) are binding precedent in our circuit."); *see also United States v. St. Hubert*, 918 F.3d 1174 (2019) (statements respecting the denial of rehearing en banc). One such published order denying an SOS application is *In re Colon*, 826 F.3d at 1301. Bound by *In re Colon*, the district court concluded that Mr. Thomas's § 924(c) convictions were valid, despite *Davis*. Civ. Doc. 29 at 4-5 (observing that *In re Colon* "remains binding precedent" after *Davis*).[3]

Mr. Thomas challenged the Eleventh Circuit's rule assigning binding precedential value to published orders denying SOS applications in the district court. Civ. Doc. 23 at 6-9; Civ. Doc. 26 at 9-12. He asserted that the application of the prior precedent rule both exceeded the statutory mandate under 28 U.S.C. § 2244(b)(3)(C) and violated his constitutional right to due process. Civ. Doc. 23 at 6-9; Civ. Doc. 26 at 9-12. Mr. Thomas also presented this issue in his application for a certificate of appealability, which the Eleventh Circuit denied. Appendix B.

[3] The district court relied on *Mack v. United States*, No. 19-11138-H, 2019 WL 2725846 (11th Cir. May 22, 2019), *cert. denied*, 141 S. Ct. 103 (2020) (Mem.), and *Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 320 (2020) (Mem.). Civ. Doc. 29 at 4-5.

Reasonable jurists not only can debate, but have debated, whether the Eleventh Circuit's process for deciding and affording precedential value to orders denying applications to file second or successive motions is consistent with due process or the statute. *See St. Hubert v. United States*, 140 S. Ct. 1727 (2020) (Mem.) (statement of J. Sotomayor respecting denial of certiorari); *see also St. Hubert*, 918 F.3d at 1196-99 (Wilson, J., dissenting from denial of rehearing en banc); *id.* at 1199-1210 (Martin, J., dissenting from denial of rehearing en banc); *id.* at 1210-13 (Pryor, J. Jill, dissenting from denial of rehearing en banc); *id.* at 1197-99 (Rosenbaum, J, joining in part of dissent from denial of rehearing en banc); *In re Hoffner*, 870 F.3d 301, 308, 310 n.13 (3d Cir. 2017); *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007). Indeed, Justice Sotomayor has recognized the "troubling tableau" presented by the Eleventh Circuit's decisionmaking and assignment of precedential value in this area that "raise[s] a question whether the Eleventh Circuit's process is consistent with due process." *St. Hubert*, 140 S. Ct. at 1728 (Sotomayor, J., statement regarding denial of certiorari).

As Justice Sotomayor explained, "[d]ecisions that bind other litigants should, at the very least, be based on more than minimal briefing." *Id.* at 1730. But applications seeking authorization to file a second or successive § 2255 motion must be submitted on a highly constrained form that often results in a claim and the factual support for that claim being expressed in fewer than 100 words. *See St. Hubert*, 918 F.3d at 1174 (Wilson, J., dissenting from the denial of rehearing en banc); *In re Williams*, 898 F.3d 1098, 1101 (11th Cir. 2018) (Wilson, J., concurring). "This form

prohibits petitioners from additional briefing or attachments." *Williams*, 898 F.3d at 1101. Furthermore, unlike the other circuits, the Eleventh Circuit has interpreted the relevant statutes as mandating a decision on the SOS application within 30 days, leaving the Eleventh Circuit little time to consider a complex inmate application. *St. Hubert*, 140 S. Ct. at 1727 (Sotomayor, J., statement respecting the denial of certiorari); *Williams*, 898 F.3d at 1102 (Wilson, J., concurring). In addition, applicants cannot seek rehearing of SOS application denials in the Eleventh Circuit or appeal the denials to this Court. 28 U.S.C. § 2244(b)(3)(E).

### A. The circuits are split about whether appellate courts may review the merits of an applicant's claim when determining whether the applicant has made a "prima facie showing" that he has satisfied § 2244(b)'s pre-filing requirements.

Section 2244(b)(3)(C) of Title 28 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. A "prima facie showing" does not require an inmate to show that he will ultimately prevail, only that he may prevail and that the district court should further explore his claim.[4] A "prima facie showing" certainly does not involve a full-blown merits analysis of the claim. *See Hoffner*, 870 F.3d at 308; *Ochoa*, 485 F.3d at 541. Indeed , The Third, Ninth, and Tenth Circuits have held that circuit courts should not assess the merits of an applicant's claim when deciding whether to grant the applicant leave to file a second or successive § 2255

[4] To be sure, if precedent clearly forecloses an inmate's claim, his application should be denied. *See St. Hubert*, 918 F.3d at 1203 (Martin, J., dissenting from denial of rehearing en banc).

motion. *See Hoffner*, 870 F.3d at 310 n.13 ("[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 the claim for the district court to address in the first instance."); *Ochoa*, 485 F.3d at 541 (stating that § 2244(b)(3)(C) "does not direct the appellate court to engage in a preliminary merits assessment"); *see also In re Williams*, 898 F.3d 1098, 1106 (11th Cir. 2018) (Martin, J., specially concurring); *United States v. Peppers*, 899 F.3d 211, 223 (3d Cir. 2018) (citing *Hoffner*, 870 F.3d at 308); *In re Arnick*, 926 F.3d 787, 791 (5th Cir. 2016) (Elrod, J., dissenting).

The leading practice manuals also say as much. *See, e.g.*, BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 11:85 (2019 ed.) ("If the petitioner seeks to file a second or successive petition based on a new rule of law made retroactive on collateral review by the Supreme Court, the appellate court does not conduct any assessment of the merits of the underlying claim, preliminary or otherwise." (citations omitted)); *see also In re Fleur*, 824 F.3d 1337, 1343 n.5 (11th Cir. 2016) (Martin, J., dissenting). Under the statute, the proper procedure is for the district court to be the first to consider the merits of the question.

When issuing *In re Colon,* the Eleventh Circuit exceeded its statutorily mandated, limited authority under § 2244(b)(3)(C) to determine whether an applicant has made a "prima facie showing" that he has met the requirements of the statute.

Instead, the Eleventh Circuit used the limited authority provided by § 2244 to issue a published order on an open merits question, which would later be used to bind future litigants in other appeals. As such, the Eleventh Circuit exceeded § 2244(b)(3)(C)'s mandate in *In re Colon* and the application of *In re Colon* as binding precedent in Mr. Thomas's case violates due process.

### B. The application of the Eleventh Circuit's prior-precedent rule violated Mr. Thomas's right to due process.

"The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). The Eleventh Circuit's binding prior precedent rule and process for deciding that prior precedent—*In re Colon*—denied Mr. Thomas a meaningful opportunity to be heard on his claim. *See St. Hubert*, 918 F.3d at 1206 (Martin, J., dissenting) (In *In re Colon*, the Eleventh Circuit reached "beyond the question of whether an inmate's request to file a § 2255 motion contains a new rule and whether he has made a prima facie showing" to instead address the merits of his claim).

Courts generally evaluate procedural due process claims 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 Mr. Thomas's favor.

First, Mr. Thomas has a private interest in liberty from 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). Mr. Thomas is serving 84 months on Count 3, which runs consecutive to all his other sentences. Crim. Doc. 75 at 2. He is serving 79 months on Count 5, which runs concurrent with the sentences on Counts 1, 2, and 4. *Id.*

Second, the risk of error was particularly high, given the Eleventh Circuit's speedy and abbreviated decision-making process for adjudicating the SOS application in *In re Colon*. Moreover, *In re Colon* was not a unanimous decision on the merits, and it has since been criticized. *See In re Colon*, 826 F.3d at 1306-08 (Martin, J., dissenting); *Boston*, 939 F.3d at 1272-74 (Pryor, J. Jill, concurring in judgment).

Third, the process Mr. Thomas advocates is not burdensome but rather entails a meaningful opportunity to consider opposing legal argument and opportunities for further review, rather than binding future litigants and depriving them of that opportunity. Moreover, the government's interest in efficiency cannot outweigh Mr. Thomas's right to due process.

In addition, the issue-preclusion doctrine supports Mr. Thomas's due process arguments. Justice Barrett, while a professor, explained that, given this Court's precedents regarding issue-preclusion, application of the prior precedent rule "raises

due process concerns, and, on occasion, slides into unconstitutionality."[5] Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1012, 1026 (2003). Mr. Thomas's case is such an occasion.

The prior panel precedent rule "functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases." Barrett, *supra*, at 1012. "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.* Because they have a similar function and objective, the same due process principles constraining issue preclusion should likewise constrain the prior panel precedent rule. *See id.* at 1037-39.[6]

The combination of the Eleventh Circuit's decision-making process for adjudicating SOS applications—such as *In re Colon*—and its decision to afford published SOS orders—such as *In re Colon*—precedential effect in all subsequent

---

[5] *See, e.g., Parkland Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefor has never had an opportunity to be heard.").

[6] Although Justice Sotomayor stated that *St. Hubert* rested on *stare decisis*, not issue preclusion, she observed that the two doctrines stemmed from a common concern. *St. Hubert*, 140 S. Ct. at 1730 (statement respecting denial of certiorari).

cases violates due process and the statute. Mr. Thomas asks this Court to grant certiorari on this important question.

## CONCLUSION

For the foregoing reasons, this Court should grant Mr. Thomas's petition for writ of certiorari.

Respectfully submitted,

James T. Skuthan
Acting Federal Defender

*/s/ Lynn Palmer Bailey*
Lynn Palmer Bailey
Florida Bar No. 0605751
Federal Defender's Office
200 W. Forsyth Street, Suite 1240
Jacksonville, FL 32202
Telephone: (904) 232-3039
E-mail: lynn_bailey@fd.org
Counsel of Record for Petitioner