NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DERRICK HARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 13, 2021

QUESTIONS PRESENTED

1. Whether Hobbs Act robbery under 18 U.S.C. § 1951(b) is a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A), *i.e.*, one that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," where the Hobbs Act allows for robbery to be committed by instilling a fear of future harm, and the pattern jury instructions of three circuits allow for conviction based on threats of economic harm to intangible property rights.

2. Whether the Eleventh Circuit misapplies this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017), by holding that a certificate of appealability may not issue in the face of adverse circuit precedent, even where the issues are debatable among jurists of reason.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Harrell submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

1. *United States v. Harrell*, No. 10-cr-20700-FAM (S.D. Fla. Aug. 7, 2016).
2. *United States v. Harrell*, No. 11-15680-FF (11th Cir. May 14, 2014).
3. *United States v. Harrell*, No. 16-14845-C (11th Cir. Feb. 16, 2017).
4. *Harrell v. United States*, No. 20-cv-21870-FAM (S.D. Fla. Feb. 22, 2021).
5. *United States v. Harrell*, No. 10-mj-03411 (S.D. Fla. Oct. 8, 2010).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the Order of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in Case No. 21-11374, on July 15, 2021. *United States v. Derrick Harell*, No. 21-11374 (11th Cir. July 15, 2021) (Order denying Certificate of Appealability).

DECISION BELOW

The Eleventh Circuit's Order denying Mr. Harrell a Certificate of Appealability, *United States v. Derrick Harell*, No. 21-11374 (11th Cir. July 15, 2021), is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The Eleventh Circuit's decision was entered on July 15, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1 and the Court's March 19, 2020 Order, temporarily extending the time to file petitions for certiorari to 150 days from the judgment of the lower court. The Eleventh Circuit had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

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

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(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.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

18 U.S.C. § 924(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 (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> ...

(3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. . . .

18 U.S.C. § 1951

(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.

STATEMENT OF THE CASE

On February 20, 2015, Derrick Harrell pled guilty to Counts 1, 2, 3, and 4, of a second superseding indictment. (Cr-DE 283).[1] Count 1 charged conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); Count 2 charged that on June 26, 2010, the defendant committed a Hobbs Act robbery, violation of 18 U.S.C. §§ 1951(a) and (2). Count 3 charged that the defendant carried or possessed a firearm in connection with the Hobbs Act robbery alleged in Count 2, in violation of 18 U.S.C. § 924(c)(1)(A). Count 4 charged a second Hobbs Act robbery, also committed on June 26, 2010. (Cr-DE 283; Cr-DE 297). Count 5 contained an additional § 924(c) count, which was dismissed pursuant to the plea agreement.

On April 5, 2015, Mr. Harrell was sentenced to a total of 199 months' imprisonment, consisting of 115 months' on Counts 1, 2 and 4, to run consecutively to 84 months on Count 3. (Cr-DE 307). *See also* Cr-DE 318 (Amended Judgment).

In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court held that the residual clause in 18 U.S.C. § 924(c)(3)(B) — which defines the term "crime of violence" as one involving a "substantial risk that physical force ... may be used" in the commission of the offense — is unconstitutionally vague. Mr. Harrell subsequently filed a *pro se* motion to vacate his conviction and sentence pursuant to 28 U.S.C. §

[1] The abbreviation Cr-DE refers to the docket entry number from the underlying criminal case. *See United States v. Harrell*, 1:10-cr-20700-FAM (S.D. Fla. Aug. 7, 2016). Citations to record in the habeas proceeding, *Harrell v. United States*, 1:20-cv-21870-FAM (S.D. Fla. Feb. 22, 2021), will be referred to by the abbreviation "Cv-DE " followed by the docket entry number and the page number.

2255, alleging that his § 924(c) conviction in Count 3 must be vacated. (Cv-DE 1). He argued that Hobbs Act robbery is no longer a crime of violence for purposes of § 924(c), because it does not satisfy the remaining definition of crime of violence in § 924(c)(1)(A), *i.e.,* it does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See* 18 U.S.C. § 924(c)(3)(A).

The case was referred to a United States Magistrate Judge, who recommended that the motion be denied. *See* Cv-DE 20 (Report and Recommendation ("R&R")). The magistrate noted that Mr. Harrell had supported his argument with a case out of the Northern District of California, *United States v. Chea*, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019). (Cv-DE 20:6). "However, this argument [could not] offer Movant relief because the conclusion in *Chea* conflicts with binding Eleventh Circuit precedent holding that substantive Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause." (Cv-DE 20:6). The magistrate recommended that Mr. Harrell's motion be denied, and that no certificate of appealability ("COA") issue. (Cv-DE 20:12).

Counsel was appointed, and timely objected to the magistrate's conclusion that a conviction for Hobbs Act robbery qualifies as a "crime of violence" under the use-of-force clause in § 924(c)(3)(A). (Cv-DE 21; Cv-DE 24:4). Mr. Harrell acknowledged that the Eleventh Circuit had previously held that Hobbs Act robbery is a crime of violence under the use-of-force clause. He argued, however, that those cases were wrongly

decided because the plain statutory language and Eleventh Circuit's pattern jury instructions allow for a defendant to be convicted of Hobbs Act Robbery based on threats of future financial harm, or fear of intangible economic loss. (*See* Cv-DE 24:5-8). Because the full range of conduct covered by the Hobbs Act robbery statute does not require the use or threat of "violent force" to a person or property in every case, it does not qualify as a crime of violence under the categorical approach, as clarified by *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013), and *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

Mr. Harrell further argued that, notwithstanding the Eleventh Circuit's contrary precedent, the court should issue a COA because reasonable minds could debate whether he was entitled to relief. In *Hamilton v. Secretary, Fla. Dept. of Corr*., the Eleventh Circuit held that a COA could not issue in the face of adverse precedent because circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent." 793 F.3d 1261, 1266 (11th Cir. 2015) (citation omitted). Mr. Harrell argued that this rule misapplies this Court's precedents in Miller-*El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis,* 137 S. Ct. 759 (2017).

On February 26, 2021, the district court entered an Order Adopting Magistrate Judge's Report and Recommendation And Order Denying Motion to Vacate. (Cv-DE 26:1). The court "agree[d] that Hobbs Act Robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)'s elements, which forecloses relief in this case." (Cv-DE 26:1)

(citing *United States v. St. Hubert*, 909 F.3d 335, 346, 351 (11th Cir. 2018)*, abrogated in part on other grounds by United States v. Davis*, 139 S. Ct. 2319, 2336 (2019)). DE 26:1-2. The court denied issuance of a COA. (Cv-DE 26:2).

Mr. Harrell filed a timely notice of appeal (Cv-DE 29), followed by a motion for a COA on the following questions:

1. Whether Hobbs Act Robbery is categorically a crime of violence within the meaning of 18 U.S.C. § 924(c)(3)(A);

2. Whether the Eleventh Circuit's inflexible application of its jurisprudential prior panel precedent rule violates due process; and

3. Whether the Eleventh Circuit's decision in *Hamilton v. Secretary, Fla. Dept. of Corr.,* 793 F.3d 1261, 1266 (11th Cir. 2015), that a COA may not issue in the face of contrary circuit precedent, misapplies this Court's precedents and violates due process.

On July 15, 2021, the Eleventh Circuit issued an Order denying the COA. The Order states:

> Derrick Harrell moves for a certificate of appealability to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).
>
> This petition follows.

REASONS FOR GRANTING THE PETITION

This case presents two important questions of federal law warranting review. First, the Eleventh Circuit has decided an important and far-reaching question of federal law which has not been, but should be, resolved by this Court – namely, whether Hobbs Act robbery is categorically a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A).

In *Johnson v. United States*, 559 U.S 133 (2010), this Court construed the "physical force" language in a similarly-worded statute (18 U.S.C. § 924(e)(2)(B)(i)) 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" or "use-of-force" 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*."

Several circuits have held that Hobbs Act robbery categorically satisfies that "crime of violence" definition. But the language of the Hobbs Act encompasses threats of future harm to property that is not even in the victim's immediate possession. And, at least three circuits, including the Eleventh, routinely instruct juries that the offense may be committed in a clearly non-violent manner. The pattern jury instructions of the Fifth, Tenth, and Eleventh Circuits expressly allow for conviction based on conduct which merely instills fear of "financial harm," or damage to intangible property rights. This case thus asks whether Hobbs Act robbery is truly a

crime of violence, where juries are routinely instructed that the crime may be accomplished without the use, threat, or fear, of any physical violence.

Second, this case asks whether the Eleventh Circuit applies an erroneous COA standard. In the Eleventh Circuit, COAs are not granted where binding circuit precedent forecloses a claim. In the view of the Eleventh Circuit, "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton v. Sec'y, Fla. Dept. of Corr.,* 793 F.3d 1261, 1266 (11th Cir. 2015). The Eleventh Circuit's rule that adverse circuit precedent precludes a finding that "reasonable jurists could debate" an issue is a gross misapplication of this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). Because the issue herein is both subject to, and the subject of, debate among reasonable jurists, Mr. Harrell was entitled to a COA. The Eleventh Circuit's contrary ruling misapplies the Court's precedents and warrants review.

I.

Hobbs Act robbery under 18 U.S.C. § 1951(b) is not categorically a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A), because it encompasses acts which necessitate no physical force.

A. An offense is only a "crime of violence" for purposes of 18 U.S.C. § 924(c) if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Title 18 U.S.C. § 924(c)(1)(A) criminalizes the use or possession of firearms during or in furtherance of specified predicate "crimes of violence." After *United States v. Davis*, 139 S. Ct. 2319 (2019), an offense may only qualify as a "crime of violence" under § 924(c) only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." In *Johnson v. United States*, 559 U.S 133 (2010), the Court construed the "physical force" language in a nearly identical statute (18 U.S.C. § 924(e)(2)(B)(i)), to require "violent force," which means a "substantial degree of force" "capable of causing pain or injury." 559 U.S. at 140.

By focusing on the elements of the offense, § 924(c)(3)(A) requires the application of the categorical approach. The categorical approach focuses "solely on whether the elements of the crime ... sufficiently match the elements of [the specified offense] while ignoring the particular facts of the case." *See Mathis v. United States,* 136 S. Ct. 2243, 2248 (2016) (citing *Taylor v. United States*, 495 U.S. 575, 600-601

(1990)). In *Descamps v. United States*, 570 U.S. 254, 261 (2013)) the Court clarified that the categorical approach requires an exact match between the elements of the offense at issue (Hobbs Act robbery), and the federal crime of violence definition (the elements clause). Thus, if an alleged predicate crime "sweeps more broadly" than the use-of-force clause allows, "a conviction under that law cannot count as [a] predicate ... even if the defendant actually" did use or threaten the use of force in committing the crime. *See Mathis*, 136 S.Ct.at 2248. *See also Descamps*, 570 U.S. a 265 ("Whether Descamps did break and enter makes no difference.") (emphasis in original).

B. Hobbs Act robbery may be committed without the use, attempted use, or threatened use of physical force against the person or property of another.

Application of the categorical approach to 18 U.S.C. § 1951 yields the conclusion that Hobbs Act robbery is not a "crime of violence" under § 924(c)(3)(A). Rather, the plain language of 18 U.S.C. § 1951(b) allows for conviction based solely on threats of future harm to property that is not even in the defendant's possession. *See* § 924(c)(3)(A) (encompassing threats to the "person or property of a relative or member of his family or of anyone in his family"). Further still, at least three circuits routinely instruct juries that Hobbs Act robbery may be accomplished merely by causing a fear of purely economic harm to intangible property rights. Such offenses do not require the use of force, and fail to qualify as a "crime[s] of violence" under 18

U.S.C. § 924(c)(3)(A). Under the categorical approach, therefore, Hobbs Act Robbery is overbroad and is categorically not a crime of violence for purposes of § 924(c).

Title 18 U.S.C. § 1951(b)(1) (the "Hobbs Act"), in pertinent part, criminalizes the interference with commerce by robbery and defines "robbery" to mean:

> 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.

18 U.S.C. § 1951(b)(1).

By the statute's plain terms, the offense can be committed by putting one in fear of "future" injury to either his person or to his property (or the property of another). And neither type of fear of future of injury is an exact match to the elements clause in § 924(c)(3)(A).

Further still, "[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." *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) (emphasis added); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question "are unanimous in extending the Hobbs Act to protect intangible as well as tangible property"); *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"). Such threats to intangible economic interests are ***not*** threats of "violent force" to property.

C. Juries in three circuits are routinely instructed that they may find a defendant guilty of Hobbs Act robbery in the absence of any use or threat of physical violence.

Consistent with the broad statutory language, the pattern jury instructions of three circuits allow for defendants to be convicted of Hobbs Act robbery based on the non-violent acts of threating harm to intangible property rights, or causing fear of financial loss.

Eleventh Circuit Pattern Instruction on Hobbs Act robbery (O70.3) states, in relevant part:

> It is a Federal crime to acquire someone else's property by robbery and in doing so to obstruct, delay, or affect interstate commerce.
>
> 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***; and
> >
> > (3) the Defendant's actions obstructed, delayed, or affected interstate commerce.
>
> "Property" includes money, tangible things of value, ***and intangible rights that are a source or element of income or wealth***.

> "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***.

Eleventh Circuit Pattern Instruction O70.3 (2020) (emphasis added).

The Fifth and Tenth Circuit similarly have pattern instructions defining the "property" taken in a Hobbs Act robbery to include purely "intangible rights." *See* Tenth Circuit Pattern Instruction 2.70 ([Robbery][Extortion] By Force, Violence of Fear, 18 U.S.C. § 1951(a)(Hobbs Act)) (In a robbery, "[p]roperty' includes money and other tangible and intangible things of value"); Fifth Circuit Pattern Jury Instructions (Criminal Cases) 2.73B (2019) (Affecting Commerce By Robbery 18 U.S.C. § 1951(a) (Hobbs Act); "The term 'personal property' includes money and other tangible things of value."). The Tenth Circuit also specifies that "fear" may include the apprehension of purely economic harm. *See* Tenth Circuit Instruction 2.70 ("'Fear' means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.").

In these circuits, a defendant's threat to take intangible rights (such as a stock option, or the right to conduct business) or actions causing a victim to fear a financial loss –without causing the victim to fear *any* physical violence – are plausible means of committing Hobbs Act robbery. Hence, federal courts in three circuits, covering 12 states (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 the offense does not necessitate the use, threat, or fear of physical violence.

D. The question presented warrants review.

The Eleventh Circuit first held that Hobbs Act robbery constitutes a crime of violence under § 924(c)(3)(A) in the context of ruling on a motion for leave to file a second or successive § 2255 petition, pursuant to 28 U.S.C. § 2244(b)(3). *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016). Shortly after *Saint Fleur* issued, one of the Eleventh Circuit judges who joined that decision acknowledged that she may have overlooked the dictates of the categorical approach. *See Davenport v. United States,* No. 16-15939, Order at 5-6 (11th Cir. Mar. 28, 2017) (Martin, J.) (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"). Judge Jill Pryor later joined Judge Martin in recognizing, 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.'" *In re Hernandez*, 857 F.3d 1162 (2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (citation omitted). *See also United States v. Chea,* 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019) (holding that Hobbs Act robbery offense is categorically overbroad vis-a-vis § 924(c)(3)(A)).

Nonetheless, the Eleventh Circuit reaffirmed its decision in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), noting that other circuits had similarly agreed that Hobbs Act robbery qualifies as a crime of violence under the use-of-force clause. *See St. Hubert*, 909 F.3d at 348-49 (citing *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir. 2017); *United States v. Rivera*, 847 F.3d 847, 848-51 (7th Cir. 2017); *United States v. Anglin*, 856 F.3d 954, 964-65 (7th Cir. 2017), *cert. granted & judgment vacated on other grounds*, 138 S.Ct. 126 (2017); *United States v. Hill*, 832 F.3d 135, 140-140-44 (2d Cir. 2016); and *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016)).

Notwithstanding the absence of a circuit conflict, certiorari is warranted herein because of the importance of proper application of the categorical approach under the elements clause. The pattern jury instructions of three circuits expressly allow for a defendant to be convicted of Hobbs Act robbery based on conduct that is not even minimally forceful. This Court has not yet considered – but should consider – whether the "realistic probability" standard of *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) is met where, as here, the plain language of a circuit's pattern jury instruction establishes that the offense can be committed in a non-violent fashion.

II.

This Court should grant certiorari to resolve whether a COA may issue in the face of adverse circuit precedent.

A certificate of appealability ("COA") must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant need not show that he would win on the merits; he must only "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

The Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context that a petitioner has lost on the merits, the Court has been adamant that it will "not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338 (emphasis added); *see also Buck v. Davis*, 137 S.Ct. 759, 774 (2017) (following *Miller-El*). Any doubt about whether to grant a COA is resolved

in favor of the petitioner, and the severity of the penalty may be considered in making this determination. See *Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

In the Eleventh Circuit, however, COAs are not granted where circuit precedent forecloses a claim. In that court's view "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton v. Secretary, Fla. Dept. of Corr.,* 793 F.3d 1261, 1266 (11th Cir. 2015) ("we are bound by our Circuit precedent, not by Third Circuit precedent"; circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted). *See also Tompkins v. Secretary, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

The Eleventh Circuit's rule that adverse circuit precedent precludes a finding that "reasonable jurists could debate" an issue is an egregious misapplication – evidencing complete disregard – of this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S. Ct. 759 (2017). In *Buck*, the Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims

or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit's rule improperly requires that a claim be decided on the merits and places too heavy a burden on movants at the COA stage. As the Court explained in *Buck*:

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

Id. at 774 (emphasis in original) (citations omitted). Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the

district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

That is not the case here. As Mr. Harrell argued to the district court, a district court in California held that Hobbs Act robbery offense is categorically overbroad vis-a-vis § 924(c)(3)(A) because it can be committed by "causing fear of future injury to property." *United States v. Chea*, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019). The *Chea* court noted that the phrases "fear of injury," "future," and "property" are not defined in the statute, which means these terms carry their "ordinary meanings;" and, importantly, "[w]here the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility." *Id.* Furthermore, as noted above, even one of the judges who joined the Eleventh Circuit's *Saint Fleur* decision has since questioned its propriety. *See Davenport v. United States,* No. 16-15939, Order at 5-6 (11th Cir. Mar. 28, 2017) (Martin, J.) (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").

Because reasonable jurists can – and do – debate whether Hobbs Act robbery qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A), Mr. Harrell was entitled to a COA. The Eleventh Circuit's unduly restrictive interpretation of the 'reasonable jurists' standard misapplies this Court's precedents and warrants review.

CONCLUSION

Based upon the foregoing, the petition should be granted.

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