No. __________

IN THE
Supreme Court of the United States

MIGUEL ANTONIO TORRES,

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

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QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. A first conviction under § 924(c) carries a five-year mandatory minimum penalty, while each subsequent conviction carries an additional 25–year mandatory minimum. This petition presents the following questions:

I. Whether it is debatable among jurists that § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutional after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).[1]

II. Whether it is debatable among jurists that aiding and abetting a Hobbs Act robbery (18 U.S.C. §§ 1951(a) and 2) and aiding and abetting carjacking (18 U.S.C. §§ 2119 and 2) qualify as "crime[s] of violence" under § 924(c)'s force clause, 18 U.S.C. § 924(c)(3)(A).

III. Whether it is debatable among jurists that aiding and abetting a Hobbs Act robbery (18 U.S.C. §§ 1951(a) and 2) and aiding and abetting carjacking (18 U.S.C. §§ 2119 and 2) qualify as "crime[s] of violence" under § 924(c)'s force clause, 18 U.S.C. § 924(c)(3)(A).

IV. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA).

[1] The issue of whether the identically-worded residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague after *Samuel Johnson* is currently before this Court in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016). Reargument was held on October 2, 2017.

V. Whether it is debatable among jurists that published orders issued by a circuit court under 28 U.S.C. § 2244(b)(3) on applications to file second or successive (SOS) 28 U.S.C. § 2255 motions constitute binding precedent outside that unique context.

LIST OF PARTIES

Petitioner, Miguel Antonio Torres, 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.

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PETITION FOR A WRIT OF CERTIORARI

Miguel Antonio Torres respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for a certificate of appealability (COA) on the issue of whether his § 924(c) convictions on counts three and five are unconstitutional in light of this Court's decision in *Samuel Johnson*.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Torres' application for a COA in Appeal No. 16-17652 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Torres' criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. Torres' § 2255 motion on October 21, 2016, and denied his application for a COA on February 3, 2017. Mr. Torres subsequently filed a notice of appeal and an application for a COA in the Eleventh Circuit, which was denied on October 25, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

18 U.S.C. § 2 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 one, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 924(c) provides in pertinent part:

> (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—
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (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.
>
> . . .
>
> (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 provides in pertinent part:

> (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.

18 U.S.C. § 2119 states that a carjacking occurs when an individual "with the intent to cause death or serious bodily harm takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so . . . ."

STATEMENT OF THE CASE

Mr. Torres was convicted of two counts of aiding and abetting the brandishing of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (counts three and five). Specifically, the underlying "crimes of violence" alleged in each count were aiding and abetting Hobbs Act robbery under 18 U.S.C. § 1951(a) and 2 (count two) and aiding and abetting carjacking under 18 U.S.C. § 2119 and 2 (count four). On January 10, 2012, he was sentenced to 84 months' imprisonment on count three and 300 months' imprisonment on count five, to run consecutively, to be followed by sixty months' supervised release on each count, to run concurrently. Mr. Torres appealed, and his sentence was affirmed on October 4, 2012.

On June 10, 2016, Mr. Torres moved to vacate his sentence under 28 U.S.C. § 2255, stating that, in light of *Samuel Johnson*, his § 924(c) convictions were imposed in violation of due process. On October 21, 2016, the district court denied Mr. Torres' § 2255 motion, stating that the motion is untimely because *Johnson* does not apply to § 924(c). Mr. Torres timely appealed and filed an application for a COA in the district court, which was denied by February 3, 2017. Mr. Torres subsequently filed an application for a COA in the Eleventh Circuit Court of Appeals.

On October 25, 2017, the Eleventh Circuit denied Mr. Torres' application. The court stated that his § 2255 motion was untimely under § 2255(f), and he could not rely on *Samuel*

Johnson to render it timely under § 2255(f)(3) because *Samuel Johnson* does not extend to § 924(c)'s residual clause. The court went on to state that even if *Samuel Johnson* applied to § 924(c)'s residual clause, Mr. Torres still could not obtain relief since Hobbs Act robbery and carjacking both qualify as "crime[s] of violence" under § 924(c)'s force clause. In doing so, the court stated that its conclusion was compelled by its decision in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), which held that Hobbs Act robbery qualifies as a "crime of violence" under the force clause, and *In re Smith*, 829 F.3d 1276 (11th Cir. 2016), which held that carjacking qualifies as a "crime of violence" under the force clause. According to the court, those decisions precluded Mr. Torres from receiving a COA because, under Eleventh Circuit caselaw, a COA cannot issue where a claim is foreclosed by binding circuit precedent. In coming to that conclusion, the Eleventh Circuit also rejected Mr. Torres' argument that the orders published in *Colon* and *Smith* were not binding precedent given the unique context in which they were issued (on applications for leave to file second or successive § 2255 motions).

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists could debate whether § 924(c)'s residual clause is unconstitutionally vague.

This Court granted certiorari in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016), because the circuits are split regarding whether § 16(b)'s residual clause is unconstitutionally vague in light of *Samuel Johnson*. *Compare Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding that § 16(b)'s residual clause is unconstitutional), *and Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (same), *with United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) (holding that § 16(b)'s residual clause is constitutional). Not only are the residual clauses in § 16(b) and § 924(c) identically worded, but the circuits are also divided on whether § 924(c)'s residual clause in unconstitutionally vague in light of *Samuel Johnson*. *Compare United States* *v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)'s residual clause is unconstitutionally vague), *with Ovalles*, 861 F.3d at 1266–67 (holding that § 924(c)'s residual clause is constitutional), *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (same), *and United States v. Hill,* 832 F.3d 135, 150 (2d Cir. 2016) (same).

Based on this Court's consideration of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 924(c)'s residual clause, Mr. Torres respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm his position that § 924(c)'s residual clause is unconstitutionally vague, or, at a minimum, that reasonable jurists can debate the issue.

Section 924(c)'s residual clause suffers from the same vagueness problems as the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Samuel Johnson*, this Court determined that "[t]wo features of the [ACCA's] residual clause conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime," because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime" rather than "to real-world facts or statutory elements." *Id*. Second, the ACCA's residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," stating "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2558.

Like the ACCA's residual clause, § 924(c)(3)(B) requires an analysis of an "ordinary case" and the risk that it presents. *See United States v. McGuire*, 706 F.3d 1333, 1336–38 (11th Cir. 2013) (applying categorical approach to § 924(c)(3)(B)).[2] Section 924(c)(3)(B) therefore fails,

[2] Retired Supreme Court Justice O'Connor authored *McGuire*.

like the ACCA's residual clause, because it requires "courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). As this Court reemphasized in *Welch*, the "vagueness of the residual clause rests in large part on its operation under the categorical approach." *Id.* And like the ACCA, § 924(c)(3)(B) does not provide guidance as to what constitutes a substantial enough risk of force to fall within the statute.

Admittedly, the ACCA and § 924(c) are not identical insofar as the ACCA includes a list of enumerated offenses and § 924(c)(3)(B) does not. *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* 18 U.S.C. § 924(c)(3)(B). However, the ACCA's enumerated offenses were not necessary to this Court's vagueness determination. True enough, the Court considered the enumerated offenses in concluding that the ACCA's residual clause left too much uncertainty about "how much risk it takes for a crime to qualify as a violent felony," but that was not the central problem. *See Samuel Johnson*, 135 S. Ct. at 2558. To the contrary, the central problem was the ordinary-case analysis and uncertainty of the risk required to qualify as a predicate offense:

> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses."

Id. (emphasis in underline added). The Court addressed the enumerated offenses again in response to the argument that its decision would also invalidate other laws that used terms such as "substantial risk." *Id.* at 2561. After noting that "[a]lmost none" of these laws included "a confusing list of examples," the Court stated:

> More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct . . . . The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime.

Id. (emphasis in underline added). *Samuel Johnson* thus makes clear that the ordinary-case analysis drove its decision, and that problem is squarely presented by § 924(c)(3)(B). *See Welch*, 136 S. Ct. at 1262.

Moreover, the absence of any enumerated offenses in § 924(c)(3)(B), if anything, makes this provision even more vague. Without any enumerated offenses, there is no benchmark to measure the degree of risk required for an offense to be a "crime of violence." For example, the Court acknowledged that a commonsense approach had not provided "a consistent conception of the degree of risk posed by each of the four enumerated crimes"; it therefore doubted it would "fare any better with respect to thousands of unenumerated crimes." *Samuel Johnson*, 135 S. Ct. at 2559. It follows, then, that in the absence of enumerated offenses to anchor the analysis regarding the degree of risk, § 924(c)(3)(B) provides no guidance for determining whether an offense is a crime of violence. Accordingly, for the reasons set forth above, reasonable jurists can debate whether § 924(c)(3)(B), like the ACCA's residual clause, is unconstitutionally vague.

II. Reasonable jurists could debate whether aiding and abetting a Hobbs Act robbery and substantive Hobbs Act robbery have as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

Mr. Torres additionally seeks this Court's review because reasonable jurists may debate whether aiding and abetting a Hobbs Act robbery, as well as the underlying substantive Hobbs Act robbery, satisfy § 924(c)'s force clause. 18 U.S.C. § 924(c)(3)(A). For an offense to qualify under the force clause, it must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* Under § 924(c)'s force clause, the term "physical force" means "violent force," "force that is capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*).

Whether aiding and abetting a Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See McGuire*, 706 F.3d at 1336. Pursuant to this categorical approach, if aiding and abetting a Hobbs Act robbery may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "crime of violence" under § 924(c)'s force clause. Because aiding and abetting a Hobbs Act robbery may be committed without the use of "physical force," it does not qualify as a "crime of violence" under § 924(c)'s force clause.

A defendant may aid and abet a Hobbs Act robbery without using, attempting to use, or threatening to use any force. It is well-established that an aider and abettor need not participate in each element of the substantive offense. *Rosemond v. United States*, 134 S. Ct. 1240, 1254 (2014) ("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.") (quotation and citations omitted) (emphasis added); *United States v. Kroesser*, 731 F.2d 1509, 1516 (11th Cir. 1984). To convict a defendant of aiding and abetting, the government must only prove: (1) someone else committed the substantive offense; (2) the defendant intended to aid in the commission of the offense; and (3) the defendant contributed to and furthered the offense. *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015); *see Rosemond*, 134 S. Ct. at 1245 ("As at common law, a person is liable under § 2 for aiding and abetting a crime if . . . he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission."). While the intent element extends to the entire substantive offense, the act element does not. *Rosemond*, 134 S. Ct. at 1248. Thus, the defendant need "not advance each element of the offense; all that matters is that [he] facilitated one component." *Id.* at 1247.

An aider and abettor's contribution to the offense "can rest on a wide range of underlying conduct, including acts, words, or gestures encouraging the commission of the offense, either before or at the time of the offense." *Williams v. Trammell*, 782 F.3d 1184, 1192 (10th Cir. 2015) (quotation and citations omitted)*; see Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) ("'aid and abet' 'comprehends all assistance rendered by words, acts, encouragement, support, or presence.'") (quoting Black's Law Dictionary 68 (6th ed. 1990)). "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." *In re Colon,* 826 F.3d 1301, 1306 (11th Cir. 2016) (Martin, J., dissenting); *see, e.g.*, *United States v. May*, 419 F.2d 553 (8th Cir. 1969); *United States v. Irons*, 475 F.2d 40 (8th Cir. 1973); *Pinkney v. United States*, 380 F.2d 882, 885 (5th Cir. 1967). Indeed, this Court has emphasized how "minimal" the contribution need be "so long as the accomplice did '*something*' to aid the crime." *Rosemond*, 134 S. Ct. at 1246 (quoting R. Desty, A Compendium of American Criminal Law § 37a, p. 106 (1882)) (emphasis added). Therefore, even when a principal's crime involves an element of force, there is "no authority for demanding that an affirmative act [of the aider and abettor] go toward an element considered peculiarly significant; rather . . . courts have *never thought relevant the importance of the aid rendered*." *Colon*, 826 F.3d at 1307 (11th Cir. 2016) (Martin, J., dissenting) (quoting *Rosemond*, 134 S. Ct. at 1247).

To be sure, aiding and abetting a Hobbs Act robbery would likely qualify as a "crime of violence" under § 924(c)'s residual clause. But, without the residual clause, it would have to qualify under the force clause to qualify as a "crime of violence." And, since a conviction for aiding and abetting Hobbs Act robbery may be based on a contribution to the commission of an element of Hobbs Act robbery that does not require the use of any force, reasonable jurists could, at a minimum, debate whether the offense qualifies as a "crime of violence" after *Samuel Johnson*. In fact, they do debate the issue. *Colon*, 826 F.3d at 1305–08.

In *Colon*, the Eleventh Circuit held that aiding and abetting a Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause simply because: (1) it previously held that Hobbs Act robbery qualifies under the force clause; and (2) an aider and abettor is punishable as a principal. *Colon*, 826 F.3d at 1305 ("Because 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 principal Hobbs Act robbery."); *see In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016) (holding that Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause). But the elements clause is only satisfied where a defendant used, attempted, or threatened force—not simply where the defendant was held legally accountable for force used by another person. Indeed, a dissenting member of the *Colon* panel questioned whether aiding and abetting qualifies under the force clause based simply on the aider and abettor's *legal* culpability. *Colon*, 826 F.3d at 1306–08 (Martin, J., dissenting).

This dissenting jurist also noted that a person who commits *conspiracy* to commit Hobbs Act robbery is also punished as a principal, yet the Eleventh Circuit has held that offense may no longer qualify as a "crime of violence" after *Samuel Johnson*. *In re Pinder*, 824 F.3d 977, 979 (11th Cir. 2016).[3] Thus, the majority's reliance on how an aider and abettor is punished as a

[3] The same reasons why the *Pinder* Court questioned whether conspiracy to commit Hobbs Act robbery requires violent force apply equally to the aiding and abetting statute. A conviction for conspiracy to commit Hobbs Act robbery requires the government to show: (1) two or more people agreed to commit a Hobbs Act robbery; (2) the defendant knew of the conspiratorial goal; and (3) the defendant voluntarily participated in furthering that goal. *United States v. Ransfer*, 749 F.3d

principal was misplaced. Additionally, the dissenting opinion explained, as Mr. Torres has above, that an individual may be convicted of aiding and abetting a Hobbs Act robbery without using any force, let alone violent "physical force." Therefore, *Colon* was not only incorrectly decided but, at a minimum, proves that reasonable jurists can debate this issue.

But even assuming *arguendo* an aiding and abetting offense qualifies under the force clause simply if the substantive offense qualifies, the Eleventh Circuit's decision in *Colon* would still be erroneous since Hobbs Act robbery does not qualify under the force clause.

Hobbs Act robbery may be committed "by *means* of actual or threatened force, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1) (emphasis added). Because the statute lists alternative means, and not alternative elements, this Court has no occasion to decide which statutory alternative was at issue, and must presume Mr. Torres was convicted of the least culpable act. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

The pattern jury instruction for Hobbs Act robbery in a number of circuits define the term "fear of injury" to include the fear of financial or economic loss. 11th Cir. Pattern Jury Instructions 70.3; 10th Cir. Pattern Jury Instructions 2.70; 3d Cir. Pattern Jury Instructions 6.18.1951-4; *see also United States v. Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible property"). Thus, under the least-culpable-act rule, the Court must presume Mr. Torres' underlying robbery offense occurred by causing a victim to fear financial

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914, 930 (11th Cir. 2014). The defendant does not need to engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999). Like aiding and abetting, a conspiracy may be committed without the defendant committing every element of the substantive offense.

loss. Because a Hobbs Act robbery committed by causing a victim to fear financial loss does not necessarily have as an element "the use, attempted use or threatened use" of violent physical force, Hobbs Act robbery does not categorically qualify as a "crime of violence" under § 924(c)'s force clause.

Based on the foregoing, Mr. Torres respectfully submits that, at a minimum, reasonable jurists may debate whether Hobbs Act robbery categorically qualifies as a "crime of violence" under § 924(c)'s force clause. Indeed, some have said as much. *See Davenport v. United States*, No. 16-15939, Order at 5–8 (11th Cir. March 28, 2017) ("[R]easonable jurists could debate whether Hobbs Act robbery is a crime of violence for the purposes of § 924(c)"); *In re Garcia*, No. 16-14320, Order at 13–16 (11th Cir. July 27, 2016) (Martin, J., concurring) ("Though I joined the court's unanimous decision in *Saint Fleur*, I may have been mistaken in doing so."); *see also Wilkes v. United States*, No. 16-17658, Order at 7–10 (11th Cir. May 4, 2017). Given the important and recurring nature of this issue, Mr. Torres respectfully seeks this Court's review.

III. Reasonable jurists could debate whether aiding and abetting a carjacking and substantive carjacking have as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

Section 2119 states that a carjacking occurs when an individual "with the intent to cause death or serious bodily harm takes a motor vehicle . . . from the person or presence of another *by force and violence or by intimidation*, or attempts to do so . . . ." 18 U.S.C. § 2119 (emphasis added); *see* 11th Cir. Pattern Jury Instructions 78. Mr. Torres was convicted of aiding and abetting carjacking, which does not require proof of all of the elements required for a conviction under the substantive carjacking statute. Thus, even assuming *arguendo* that an element of substantive carjacking required physical force, an aider and abettor of that carjacking would not necessarily have to aid and abet in the commission of that element to be convicted. *Id.*

Moreover, substantive carjacking does not qualify as a "crime of violence" under § 924(c)'s force clause. Under the least-culpable-act rule, courts must presume Mr. Torres' carjacking offense occurred by the use of intimidation rather than by force or violence. *See Moncrieffe,* 133 S. Ct. at 1684. According to the Eleventh Circuit's pattern jury instruction, an individual may be convicted of carjacking by intimidation where "an ordinary person" would be put in fear of bodily harm. Notably, it does not require proof of a defendant's mental state, as required by *Leocal v. Ashcroft*, 543 U.S. 1 (2004), nor does it require the threatened use of violent physical force, as required by *Curtis Johnson*. Accordingly, a carjacking conviction does not require the threatened "use" of "physical force" so it cannot qualify as a "crime of violence" under § 924(c)'s elements clause.

In *Smith*, 829 F.3d at 1280, the Eleventh Circuit held that carjacking qualifies as a "crime of violence" under § 924(c)'s force clause. In coming to its holding, the *Smith* panel relied solely on *United States v. Moore*, 43 F.3d 568 (11th Cir. 1994) (holding that carjacking categorically qualifies as a crime of violence under the 924(c)'s force and residual clauses). 829 F.3d at 1280. But *Moore* was decided prior to *Leocal*, *Descamps*,[4] *Moncrieffe*, *Curtis Johnson*, and *Welch*. And the *Moore* panel's *ipse dixit* conclusion that "[t]he term 'crime of violence' as Congress defined it in 18 U.S.C. § 924(c)(3) clearly includes carjacking" — which lacked explanation or analysis — cannot be squared with those decisions and the strict, element-by-element comparison required by the categorical approach. *See Moore*, 43 F.3d at 572–73. Based upon the different "mode of analysis" now dictated by *Curtis Johnson*, *Welch*, *Moncrieffe*, and *Descamps*, the *Smith* court's reliance on *Moore* was incorrect.

Moreover, and perhaps more to the point for purposes of a COA showing, the *Smith* panel

[4] 570 U.S. 254 (2013).

was split, with one panel member dissenting. 829 F.3d at 1281–85. This alone demonstrates that reasonable jurists can debate this issue. First, the dissenting jurist argued that the Eleventh Circuit has never held on its own that carjacking categorically meets the force clause, because the *Moore* Court's holding appeared to rely, in part, on the residual clause. *Id.* at 1282–83 (quoting *Moore*, 43 F.3d at 572–73). This jurist acknowledged:

> [I]t is perhaps possible to read *Moore* as holding that carjacking qualifies as a crime of violence solely under the elements clause. But I also think it fair to intuit that **both the elements clause and the residual clause were necessary to the panel's conclusion that carjacking categorically qualified as a crime of violence**. The panel in *Moore* stated, for example, that the carjacking statute "encompasses" the elements clause. In doing so, it intimated that a part of the carjacking statute was broader than the elements clause. We can therefore infer **that the panel referenced the residual clause because it was necessary to make up for what the elements clause did not cover**.

Id. at 1283 (citation omitted) (emphasis added).

Second, the dissenting panel member questioned whether an act of intimidation under the statute necessarily implicates force, where intimidation is analyzed from the perspective of the reasonable observer rather than the actions or threatened actions of the defendant. *Id.* (citing *United States v. Kelley*, 412 F.3d 1240, 1244–45) (11th Cir. 2005) ("It is thus possible for a defendant to engage in intimidation without ever issuing a verbal threat by, for example, slamming a hand on a counter, as occurred in *Kelley*").

Moreover, this jurist explained, the intent element of the offense ("with intent to cause death or serious bodily harm") and the conduct element ("by force and violence or by intimidation") concern separate inquiries—that is, the court could not infer that a defendant used or threatened violence merely because he possessed an intent to injure. *Id.* at 1283–84; *see Holloway v. United States*, 526 U.S. 1, 11 (1999) (noting that where a victim surrendered or lost control of his car without any attempt from the defendant to inflict serious harm, the government could prove carjacking's intent element as long as the defendant *would* have attempted to inflict such harm *if* the action had been necessary to secure the car).

Given the foregoing, this jurist concluded, "I have serious doubts about whether Mr. Smith's carjacking conviction can qualify him for a § 924(c) enhanced sentence after *Johnson*." *Id.* at 1285. Clearly, at least one member of the Eleventh Circuit believes that the substantive offense of carjacking may not qualify under § 924(c)'s force clause. Mr. Torres respectfully submits that in light of the above, he has shown that reasonable jurists could at least debate whether *aiding and abetting* this substantive offense would qualify under the force clause.

IV. The Eleventh Circuit's rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck*, 137 S. Ct. at 773 (citing *Miller-El,* 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit's rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton*, 793 F.3d 1261 ("[R]easonable jurists will follow controlling law."); *see also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.,* 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Torres' case using the proper terms—that reasonable jurists would not debate whether Mr. Torres is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Colon* and *Smith* are binding circuit precedent. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit's rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

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

Id. at 774.

Indeed, as this Court stated in *Miller-El,* "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. Here, we know that is not the case, particularly because members of the Eleventh Circuit have written that these issues are debatable. *Colon*, 826 F.3d at 1306–08 (Martin, J., dissenting); *Smith*, 829 F.3d at 1281–85 (Jill Pryor, J., dissenting). Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Torres respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

V. Reasonable jurists could debate whether published orders issued by a circuit court under 28 U.S.C. § 2244(b)(3) on applications to file second or successive (SOS) 28 U.S.C. § 2255 motions are binding precedent outside that unique context.

Assuming *arguendo* that the Eleventh Circuit's *Hamilton* rule is an appropriate application of the COA standard, the Eleventh Circuit nevertheless erred in denying Mr. Torres' COA application based on *Saint Fleur* and *Smith* because those cases are not binding outside the unique SOS context. The Eleventh Circuit has held that published orders in the SOS context are binding outside that context. *In re Lambrix*, 776 F.3d at 794. However, *Lambrix* was itself a published decision in the SOS context, and reasonable jurists could debate whether any conclusion about the reach of *Lambrix* outside the SOS context is dicta. As the Eleventh Circuit itself has explained: "A decision can hold nothing beyond the facts of that case." *United States v. Birge*, 830 F.3d 1229, 1233 (11th Cir. 2016).

One member of the Eleventh Circuit recently explained why SOS orders should not be binding outside the SOS context:

> When Courts of Appeals rule on applications from prisoners who want to file a second or successive habeas petition, the governing statute limits our role to merely deciding whether a prisoner has made a prima facie showing that his claim involves "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). And because the decision on whether to allow a second or successive motion is not a ruling on the merits of a prisoner's habeas claims, the process by which we make these rulings falls well short of what one expects for decisions requiring precedential deference. These applications are almost always filed by prisoners with no lawyers. They include no briefs. In fact, the form used by prisoners for

> these applications forbids the prisoner from filing briefs or any attachments, unless the form is filed by a prisoner suffering under a death sentence. Application for Leave to File a Second or Successive Motion to Vacate, Set Aside or Correct Sentence, U.S. Ct. of Appeals Eleventh Circuit (last updated Jan. 2, 2001), http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Form2255APP.pdf. The statute requires us to act on these applications within thirty days. 28 U.S.C. § 2244(b)(3)(D). Unlike our Court's merits decisions, the statute strictly prohibits any review of our rulings on these applications. Id. § 2244(b)(3)(E). Our Court has even ruled that we can't consider a prisoner's application if that prisoner has already made substantively the same claims in an earlier application. *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). This makes it possible for a three-judge ruling (or even a two-judge ruling) on one of these applications to say things rejected by every other member of the court.
>
> It is neither wise nor just for this type of limited ruling, resulting from such a confined process, to bind every judge on this court as we consider fully counseled and briefed issues in making merits decisions that may result in people serving decades or lives in prison.

United States v. Seabrooks, 839 F.3d 1326, 1349–50 (11th Cir. 2016) (Martin, J., concurring) (footnote omitted); *see also United States v. Rosales-Acosta*, No. 16-10090, 2017 WL 562439, at *3 (11th Cir. Feb. 13, 2017) (stating that that a SOS order may not be controlling because of the unique context in which it was issued).

It is also worth mentioning that had the applications in *Saint Fleur* and *Smith* been granted, that grant would have had no binding effect on the § 2255 proceeding that followed in the district court. *Jordan v. Sec'y Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007) (holding that the district court should decide every aspect of such a case "fresh or in the legal vernacular, *de novo*"). Moreover, had the district court then denied Mr. Saint Fleur's application or Mr. Smith's application under its *de novo* review, on appeal, nothing in the Eleventh Circuit's orders authorizing their second or successive § 2255 motions would have been binding on their merits panels. *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013). Thus, this is another reason to doubt the precedential value of orders published in the SOS context.

Based on the foregoing, Mr. Torres respectfully requests that this Court grant this petition to review whether it is debatable among jurists that orders published in the SOS context are binding outside that context.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX