No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

BRANDON BIVINS,
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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QUESTION PRESENTED FOR REVIEW

Does the Eleventh Circuit too rigidly apply its "prior panel precedent rule" – effectively denying Eleventh Circuit defendants their statutory right to appeal and constitutional right to due process of law– by holding that three-judge panels of that court must follow even an admittedly "flawed" prior panel decision that failed to consider precedent(s) of this Court in existence at the time, and whose mode of legal analysis is now demonstrably inconsistent with intervening precedents of this Court, when most other circuits broadly agree that a three-judge panel may not only reconsider but should decline to follow an obviously "flawed" prior precedent under such circumstances, as *stare decisis* requires that subsequent panels adhere to the correct mode of analysis dictated by precedents of this Court?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Brandon Bivins respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Mr. Bivin's enhanced sentence, *United States v. Brandon Bivins,* 2018 WL 4091822 (11th Cir. Aug. 28, 2018), is included in 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 decision of the court of appeals was entered on August 28, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, statutes, and guidelines:

U.S. Const. Amend. V

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

18 U.S.C. § 3742. Review of a sentence

> (a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –
>
> > (1) was imposed in violation of law;
> >
> > (2) was imposed as a result of an incorrect application of the sentencing guidelines . . .
>
> 18 U.S.C. § 3742(a).

18 U.S.C. § 924(e).

The Armed Career Criminal Act (ACCA) provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e).

18 U.S.C. § 924(e)(2)(B)(i).

The ACCA defines "violent felony," as relevant here, as:

> [A]ny crime punishable by imprisonment for a term exceeding one year
> . . . that-

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

18 U.S.C. § 924(e)(2)(B)(i).

Fla. Stat. § 784.011. Assault

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

(2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree . . .

Fla. Stat. § 784.021. Aggravated Assault

(1) An "aggravated assault" is an assault:

(a) With a deadly weapon without intent to kill; or

(b) With an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree . . .

STATEMENT OF THE CASE

Mr. Bivins was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Mr. Bivins was convicted after a jury trial. A Presentence Investigation Report ("PSR") was disclosed. Probation advised Mr. Bivins that he qualified for sentencing pursuant to the Armed Career Criminal Act ("ACCA"), based on his prior convictions under docket numbers 94-CF-10498, for aggravated assault, 95-CF-12020, for aggravated assault with a deadly weapon, without intent to kill, and 97-CR-13428, for possession of cocaine and marijuana with intent to deliver or sell. The PSR further calculated Mr. Bivins' guideline range at 262-327 months imprisonment, with a mandatory minimum of 180 months imprisonment. Without the finding that Mr. Bivins was an armed career criminal, his adjusted base offense level would have been 22 and his criminal history category would have remained at VI. His advisory guideline range would have been 84-105 months imprisonment.

On April 26, 2013, the district court sentenced Mr. Bivins to 235 months after making a finding that he qualified as an Armed Career Criminal. Mr. Bivins appealed his conviction, and his appeal was denied. *United States v. Brandon Bivins*, 560 Fed. Appx. 899 (11th Cir. Mar. 24, 2014).

On June 23, 2016, Mr. Bivins filed a motion pursuant to 28 U.S.C. § 2255 arguing that Mr. Bivins was no longer subject to the ACCA enhancement after *Johnson v. United States*, 135 S. Ct. 2551 (2015). Mr. Bivins argued that the two aggravated assault convictions relied upon by probation in the PSR were not enumerated offenses under ACCA and do not have as an element the use of force.

After both parties fully briefed the issues raised, the Magistrate Judge filed a Report recommending that Mr. Bivins' § 2255 motion be denied because "[t]he Eleventh Circuit has held that 'a conviction under section 784.021[, the statute under which Mr. Bivins was convicted,]' will always include 'as an element the . . . threatened use of physical force against the person of another,'" relying upon *Turner v. Warden Coleman FCI (Medium),* 709 F.3d 1328, 1338 (11th Cir. 2013) *abrogated on other grounds by Samuel Johnson v. United States,* 135 S. Ct. 2551 (2015). The Magistrate Judge acknowledged that Mr. Bivins argued in his § 2255 motion that *Turner* was wrongly decided, but held that even if *Turner* was wrongly decided, the court was bound by the prior precedent rule to follow it, citing to *United States v. Golden,* 854 F.3d 1256 (11th Cir.), *cert. denied* 138 S. Ct. 197 (2017) .

The Magistrate Judge recommended that Mr. Bivins be granted a certificate of appealability ("COA") on the issue because reasonable jurists find the issue raised by Mr. Bivins debatable. The district court adopted the Report and sustained Mr. Bivins' objections. In the Order, the district court ruled that a Certificate of Appealability be granted on the issue set forth above.

Mr. Bivins' argued, to the Eleventh Circuit Court of Appeals, that his convictions for aggravated assault and aggravated assault with a deadly weapon, without intent to kill, pursuant to Fla. Stat. § 784.021, did not qualify as violent felonies under the ACCA's elements clause in 18 U.S.C. § 924(e)(2)(B)(i) because the statute lacks the *mens rea* necessary to qualify as the "use" of physical force, as that term is defined under federal law.

Mr. Bivins conceded, however, that this Court has ruled against his position in *Turner v. Warden Coleman FCI (Medium),* 709 F.3d 1256, 1257 (11th Cir. 2013), *abrogated on other grounds by Samuel Johnson v. United States,* 135 S. Ct. 2551 (2015) and *Golden*, but he raised the issue to preserve it for further review.

Mr. Bivins also argued that the reasoning in Judge Jill Pryor's concurring opinion in *Golden* should be adopted by the Eleventh Circuit Court of Appeals and it should reconsider *en banc* whether *Turner* is still good law in light of then-binding Eleventh Circuit precedent and subsequent opinions from this Court which, taken together, abrogate *Turner*. *Golden*, 845 F.3d at 1257-61 (J. Pryor, J., concurring). As Judge Pryor noted in her concurring opinion, Florida law allows a conviction for aggravated assault premised on recklessness. *Golden*, 845 F.3d at 1258 (J. Pryor, J., concurring).

Turner "reached the wrong conclusion . . . because it failed to consider the least of the acts Florida criminalizes in its aggravated assault statute." *Id.* Without consulting Florida case law, the Court, in *Turner,* "assumed based on the wording of the Florida statute that the offense of aggravated assault necessarily involves an *intentional act* –a *mens rea* the elements clause requires." *Id.*

Mr. Bivins further argued that by failing to consult Florida case law, the Eleventh Circuit "overlooked [its] earlier holding" in *United States v. Rosales-Bruno,* 676 F.3d 1017, 1021 (11th Cir. 2012), that it is "bound by Florida courts' determination and construction of the substantive elements of [the] state offense" when determining whether a conviction is a violent felony. *Id.*; see also *Curtis*

Johnson v. United States, 559 U.S. 133, 138 (2010). The Court, in *Turner,* also failed to consider Florida law permitting a conviction under the aggravated assault statute with proof of less than intentional conduct, including recklessness. *Id.* (citing *Kelly v. State,* 552 So.2d 206, 208 (Fla. Dist. Ct. App. 1989) and *LaValley v. State,* 633 So.2d 1126, 1127 (Fla. Dist. Ct. App. 1994). And binding Eleventh Circuit precedent prescribes that a conviction predicated on a *mens rea* of recklessness does not satisfy the "use of physical force" requirement of the elements clause. *Id.* (citing *United States v. Palomino Garcia,* 606 F.3d 1317, 1336 (11th Cir. 2010)). As such, "*Turner*'s holding that Florida aggravated assault categorically qualifies as a violent felony under the elements clause was in conflict with *Rosales-Bruno, Palomino Garcia,* and Florida law." *Id.*

Mr. Bivins also argued that a trilogy of intervening Supreme Court decisions clarified the proper application of the categorical approach and confirmed that *Turner*'s analysis cannot be correct. *Golden,* 845 F.3d at 1259 (J. Pryor, J., concurring). "Specifically, these three cases—*Moncrieffe v. Holder,* [569 U.S. 184 (2013)], *Descamps v. United States,* [570 U.S. 254 (2013)], and *Mathis v. United States,* [136 S. Ct. 2243 (2016)]—confirm that [the Eleventh Circuit] was right in *Rosales-Bruno* to consider state court decisions interpreting the elements of a state's criminal statute and mistaken in *Turner* to overlook this critical analytical step." *Id.*

On August 28, 2018, the Eleventh Circuit issued a *per curiam* un-published opinion holding that Mr. Bivin's argument that his aggravated assault conviction

under Fla. Stat. § 784.021 was not a violent felony was foreclosed by prior precedent," namely, *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1337-38 & n. 6 (11th Cir. 2013), which remained "binding." *United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017). As a result, the admittedly "flawed" decision in *Turner* remains binding precedent in the Eleventh Circuit at this time. It will bind future Eleventh Circuit panels, and all Eleventh Circuit defendants, unless and until this Court intervenes.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's Too-Rigid Application of its "Prior Panel Precedent Rule" Conflicts With the Approaches of Other Circuits, Contravenes Well-Settled Principles of *Stare Decisis*, and Denies Eleventh Circuit Defendants Their Statutory Right to Appeal and Due Process of Law

Until recently, the Eleventh Circuit had applied its "prior panel precedent rule" consistently with the approach of most of its sister circuits. That, however, changed with the Eleventh Circuit's decisions in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) and in this case.

In *Fritts*, the Eleventh Circuit held for the first time that "[u]nder this Court's prior panel precedent rule, there is never an exception carved out for overlooked . . . Supreme Court precedent." *Id.* at 942 (citing *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) where a prior panel held "[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at the time.") That, notably, was a misinterpretation – or over-reading of the holding – of *Smith*, as indeed, the *Smith* court explicitly recognized that "there was no 'clearly controlling Supreme Court precedent' on the issue [there before the court], when [the prior panel precedent] was decided." *Id.* at 1303-1304 (distinguishing *Tucker v. Phyfer*, 819 F.2d 1030, 1035 n. 7 (11th Cir. 1987) on that basis).

In the decision below, the Eleventh Circuit has now signified that it is entrenched in its overly rigid application of that rule by refusing to reconsider *Turner*.

A. The Eleventh Circuit's Current Application of its "Prior Panel Precedent Rule" Conflicts With the Approach of Other Circuits

Until the recent decisions in *Fritts*, *Golden*, and this case, the Eleventh Circuit had applied its "prior panel precedent rule" in a manner generally consistent with the approach of other circuits and well-settled principles of *stare decisis*. Like most of its sister courts (with the exception of the Seventh Circuit which has adopted a more relaxed approach to *stare decisis* by rule[1]), the Eleventh Circuit had long held that "each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled *en banc* or by the Supreme Court." *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993). If prior precedents conflict, the Eleventh Circuit was "firm" and "emphatic" that the earlier precedent must control. *Walker v. Mortham*, 158 F.3d 1171, 1188-1189 (11th Cir. 1998) (recognizing that the "earliest case" rule is "essential to maintaining stability in the law;" it is "more respectful of the prior precedent rule" than a rule that would allow judges who "find a division of authority" to "throw precedent to the wind"). And notably, the Eleventh Circuit applied the same rule liberally to inter-circuit conflicts involving not only issues of substance, but also "the governing legal standard." *See United States v. Hornaday*, 392 F.3d 1306, 1315-1316 (11th Cir. 2004) (where a prior panel decision "did not purport to apply the governing legal

[1] The Seventh Circuit permits one panel to overrule another so long as the subsequent panel circulates the proposed opinion among the active members of the court "and a majority of them do not vote to rehear *en banc* the issue of whether the position should be adopted." 7th Cir. R. 40(e); *see generally United States v. Reyes-Hernandez*, 624 F.3d 405, 412-413 (7th Cir. 2010).

standard," even though that standard had been applied in earlier panel decisions," there is a conflict between the prior panel decision and those that came before it," and "we must follow the earlier ones").

In applying its "prior panel precedent rule," the Eleventh Circuit had consistently recognized that it was only bound to follow the holding of a prior decision, not dicta, and that "[t]he holding of a prior decision" could "reach only as far as the facts and circumstances presented to the Court in the case which produced that decision." *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000); *see also Edwards v. Prime Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010); *Anders v. Hometown Mortgage Services*, 346 F.3d 1024, 1031 (11th Cir. 2003). Admittedly, the Eleventh Circuit did hold *en banc* in 1998 that "under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v. Steele*, 147 F.3d 1316, 1317-1318 (11th Cir. 1998) (*en banc*).

The rule in the Eleventh Circuit was that a subsequent panel was *not* required to follow a prior panel decision that had overlooked, and did not apply the legal dictates of, a governing Supreme Court case "in existence at the time." In *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987), the Eleventh Circuit notably refused to follow a decision of a prior panel that had not referenced two decisions of this Court that compelled a different result – opining that if the Supreme Court decisions had "been called to the attention of the [prior] panel, the panel would have come to the conclusion we reach today." *Id.* at 1035 n. 7. In following the dictates of

this Court's decisions, rather than blindly adhering to a prior panel decision that did not consider them, the *Tucker* court clarified:

> [W]e do not view ourselves as violating the prior panel rule; rather, we are simply discharging our duty to follow clearly controlling Supreme Court precedent. We hasten to add that had the [prior] panel expressly considered [the overlooked Supreme Court decisions], we would be bound by its interpretation and application of those decisions.

Id.

Notably, the rule applied by the Eleventh Circuit in *Tucker* – that a subsequent panel is not bound by a prior panel decision if the prior panel failed to consider controlling Supreme Court precedent – is consistent with the rule applied in at least three other circuits. *See, e.g., The Northeast Ohio Coalition for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (a panel need not defer to "binding circuit precedent" "in the usual situation where binding circuit precedent overlooked earlier Supreme Court authority"); *Atl. Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 838 n. 2 (Fed. Cir. 1992) ("A decision that fails to consider Supreme Court precedent does not control if the court determines the prior panel would have reached a different conclusion if it had considered controlling precedent."); *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981) (in the "unusual and delicate situation" where a prior circuit case did not consider the impact of intervening Supreme Court precedent, the court must apply the Supreme Court decision, not the later-issued circuit case"). Plainly, had Mr. Bivins appealed his sentence in the Fifth, Sixth, or Federal Circuits, those courts would have followed the dictates of *Leocal* and *Curtis Johnson*, rather than *Turner*.

Prior to *Fritts* and *Golden*, the Eleventh Circuit – like its sister courts – had rightly recognized that its "first duty" is always "to follow the dictates of the United States Supreme Court." And for that reason, it had also recognized that it "*must consider*" whether intervening Supreme Court decisions had "effectively overruled" a prior precedent. *United States v. Contreras*, 667 F.2d 976, 979 (11th Cir. 1982).

While the other circuits have uniformly recognized an exception to the force of prior circuit precedent for an "intervening" Supreme Court decision, they do "differ in how much the earlier decision must be undermined before it can be overruled." Joseph Mead, "*Stare Decisis* in the Inferior Courts of the United States," 12 Nev. Law Journal 787 (2012). The First Circuit, notably, does not require that the intervening decision of this Court be "directly controlling;" it need only "offer a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind."[2] The Second Circuit likewise does not require that the intervening decision "address the precise issue already decided by [the] court," but simply that the decision of this Court "casts doubt upon the circuit's reasoning," due to some "conflict, incompatibility, or 'inconsisten[cy]' between th[e] Circuit's precedent and the intervening Supreme Court decision. In the Second Circuit, "[t]he effect of intervening precedent may be 'subtle,' but if the impact is

[2] *United States v. Tava*res, 843 F.3d 1, 11 (1st Cir. 2016)(citing *United States v. Pires*, 642 F.3d 1, 9 (1st Cir. 2011).

nonetheless 'fundamental,' it requires [the court] to conclude that a decision of a panel [] is 'no longer good law.'"[3]

The Fourth Circuit finds it sufficient if there is simply a new "legal landscape" dictating a new mode of analysis, such that the prior decision is "clearly undermined" to the extent that it did not engage in the required mode of analysis.[4]

The Fifth Circuit applies what it terms a "rule of orderliness," pursuant to which the intervening decision of this Court must "be unequivocal" in its overruling of prior precedent, "not a mere 'hint' of how the Court might rule in the future."[5]

The Sixth Circuit does not require the intervening decision of this Court to be "precisely on point, if the legal reasoning is directly applicable," and "requires modification of [a] prior decision."[6]

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[3] *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 201 (2nd Cir. 2003) (citations, and internal quotation marks omitted); *Wojchowiski v. Daines*, 498 F.3d 99, 106 (2nd Cir. 2007). Notably, the Second Circuit also "permits a panel that believes an intervening Supreme Court decision has abrogated a prior decision to present that view to the active judges, and in the absence of objection, disregard the prior decision." *McCullough v. World Wrestling Entertainment, Inc.*, 838 F.3d 201 (2nd Cir. 2016).

[4] *See, e.g., United States v. Winston*, 850 F.3d 677, 684, 683, 685 (4th Cir. 2017) (prior circuit precedent holding that Virginia common law robbery was a "violent felony" within the elements clause of the ACCA was clearly undermined by the fact that it did not address the Virginia state courts' interpretation of the terms "by violence or intimidation").

[5] *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016); *United States v. Boche-Perez*, 755 F.3d 327 (5th Cir. 2014).

[6] *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *The Northeast Ohio Coalition for the Homeless v. Hus*ted, 831 F.3d 686, 720-721 (6th Cir. 2016) (and cases cited therein).

The Eighth Circuit, like several of the others, requires only that this Court have rendered a decision that "casts into doubt" or "undermines" the prior decision."[7]

The Ninth Circuit, appears somewhat different in requiring that the intervening decision be "clearly irreconcilable with the reasoning or theory of intervening higher authority."[8] But what that means, the Ninth Circuit has clarified, is not that the issues need to be "identical to be controlling;" a prior circuit decision is deemed "effectively overruled" if the intervening decision of this Court has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable."[9]

The Tenth Circuit's test is simply whether the intervening Supreme Court's decision "invalidates [its] previous analysis."[10] And the Federal Circuit, like the Sixth and the Ninth, holds that issues determined by an intervening decision of this Court "need not be identical to be controlling." Rather, the Federal Circuit has clarified – citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L.

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[7] *United States v. Anderson*, 771 F.3d 1064, 1067 (8th Cir. 2014).

[8] *See, e.g.*, *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 n. 4 (8th Cir. 2009) ("In the Ninth Circuit, a three-judge panel may reexamine a prior panel decision only if a supervening Supreme Court decision is 'clearly irreconcilable.' By contrast, we may reconsider a prior panel's decision if a supervening Supreme Court decision 'undermines or casts doubt on the earlier panel decision.'" (citation omitted).

[9] *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*); *United States v. Benally*, 843 F.3d 350 (9th Cir. 2016).

[10] *United States v. White*, 782 F.3d 1118, 1123 n. 2 (10th Cir. 2015).

Rev. 1175, 1177 (1989) – lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'"[11]

Plainly, therefore, the majority of the circuits recognize that an intervening decision of this Court need not be on "all fours" factually or legally to have undermined a prior precedent to the point of abrogation, and relieve a subsequent panel from following it. Rather, the intervening decision must simply dictate a different "mode of analysis" applicable to the issue before the lower court.

Until the *Golden* opinion, the Eleventh Circuit's approach was broadly consistent with the majority approach in that regard. Like most of the circuit courts, the Eleventh Circuit had easily declared prior precedents "effectively overruled," or "undermined to the point of abrogation," based simply upon a different "mode of analysis" dictated by an intervening decision of this Court. *See, e.g., Dawson v. Scott*, 50 F.3d 884, 892 n. 20 (11th Cir. 1995) (finding prior panel's decision in *Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1983) no longer controlled because it failed to conduct the threshold inquiry required by one subsequent decision of this Court, and also failed to defer to an administrating agency's reasonable interpretation of a statute as required by two later decisions of the Supreme Court as well; "In view of these intervening Supreme Court precedents, *Johnson* does not control this case and appears to be overruled"); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (finding *Begay v. United States*, 553 U.S. 137 (2008) "clearly on point," and that it had undermined *United States v.*

[11] *Troy v. Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014).

Gilbert, 138 F.3d 1371 (11th Cir. 1998) "to the point of abrogation," even though *Gilbert* involved a different prior, and the Guidelines rather than the ACCA); *United States v. Howard*, 742 F.3d 1334, 1343-1345 (11th Cir. 2014) (holding that "[t]wo crucial aspects of our decision in [*United States v.*] *Rainer*, [616 F.3d 1212 (11th Cir. 2010)] are no longer tenable after *Descamps v. United States*, 570 U.S. 254 (2013)).

Before *Fritts* and *Golden*, the Eleventh Circuit had never required complete identity between the issues in the prior case and intervening Supreme Court case to find "undermining to the point of abrogation." In *Santiago-Lugo v. Warden*, 785 F.3d 467 (11th Cir. 2015), the Eleventh Circuit notably found that separate decisions of this Court had abrogated a prior habeas precedent, even though one of the intervening decisions dealt with a different section of the habeas statute, and the other involved a different statute altogether. *See id.* at 474 n. 4. And in *United States v. Lopez*, 562 F.3d 1309 (11th Cir. 2009), the court held that a prior panel decision holding criminal filing deadlines were jurisdictional had been abrogated by an intervening decision of this Court dealing with civil filing deadlines. *See id.* at 1312.

Although the Fifth Circuit's "rule of orderliness" is somewhat analogous to the *Fritts-Golden* iteration of the "prior panel precedent rule" in the Eleventh Circuit, the more flexible approach of the First, Second, Fourth, Sixth, Eighth, Ninth, Tenth, and Federal Circuits stands in direct conflict. Plainly, had Mr. Bivins appealed his sentence in any of these circuits, these courts would have applied the

new "mode of analysis" dictated by this Court's intervening decisions in *Moncrieffe*, *Descamps*, and *Mathis*. They would have found the analysis in *Turner* of no import in determining whether a Florida aggravated assault conviction – which Florida case law indicates can be predicated upon mere recklessness – is a "violent felony" within the elements clause. And indeed, with an on-point and therefore binding circuit precedent like *Palomino Garcia*, clearly holding that an offense with a reckless *mens rea* is categorically not a "violent felony," these courts would have followed that precedent unless and until it was overruled by the *en banc* Court or this Court.

B. The Eleventh Circuit's Application of its "Prior Panel Precedent Rule" Denies Defendants Their Statutory Right to Appeal and Due Process of Law

Mr. Bivins had a statutory right to appeal his sentence, and Congress gave the Eleventh Circuit jurisdiction over that appeal. 18 U.S.C. § 3742. The Eleventh Circuit did not have discretion to refuse to exercise that jurisdiction. *See Sprint Communications v. Jacobs*, 571 U.S. 69, 72 (2013) ("In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction."); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-17 (1976) (holding that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule" because of "the virtually unflagging obligation to exercise the jurisdiction given them."). While the obligation to exercise jurisdiction entails a duty to consider every argument that has not been waived, the Eleventh Circuit's decision below effectively holds that the defendant in *Turner* waived Mr. Bivin's argument *for him*

by *not* raising it. And that cannot be the law, because that would deny Mr. Bivins due process.

For Mr. Bivins to truly have a statutory right to appeal his sentence, his appeal must, at a minimum, afford him a meaningful opportunity to formulate arguments and have them considered by a neutral and detached court. That is why the right to an attorney on appeal is guaranteed – to assure a meaningful appeal. *See generally Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.") Moreover, the statutory right to appeal entails the right to develop and present a complete argument and to have it considered by the appellate court. And that right is hollow if the appellate court may simply refuse to consider the arguments on the authority of a judge-made, overly-rigid, new iteration of the circuit's "prior panel precedent rule."

Notably, that rule is most definitely not a mere "procedural rule" like the prior Eleventh Circuit rule that issues not raised in an opening brief are forfeited – a rule the Court allowed to stand, albeit with great criticism, in *Joseph v. United States*, 135 S. Ct. 705 (2014). *See id.* at 706-707 (statement by Kagan, J., joined by Ginsburg and Breyer, JJ. respecting the denial of certiorari) (noting that "[n]ot a single other court of appeals" refused to accept a supplemental brief based upon an intervening Supreme Court decision such as *Descamps*, and "[t]here is good reason for this near unanimity;" however, "deferring, for now, to the Eleventh Circuit in

the hope that it will reconsider whether its current practice amounts to a 'reasoned exercise[]' of its authority")(citation omitted).[12]

Here, the rule misapplied by the Eleventh Circuit – contrary to the rule applied by other circuits – is a rule of crucial substance. It goes to the very foundation of our federal court system of law: the principle of *stare decisis*. And therefore, it should not be allowed to stand.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[12] In *United States v. Durham*, 795 F.3d 1329 (11th Cir. 2015) (*en banc*), the Eleventh Circuit quickly responded to the criticism leveled in *Joseph*, by recognizing that there were indeed "some reasons not to [maintain its rigid procedural default] rule," and holding anew – consistent with the rule applied by the other circuits – that "where there is an intervening decision of the Supreme Court on an issue that overrules either a decision of that Court or a published decision of this Court that was on the books when the appellant's opening brief was filed, and that provides the appellant with a new claim or theory, the appellant will be allowed to raise that new claim or theory in a supplemental or substitute brief." *Id.* at 1331.