NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

PATRICK HENRY JOSEPH,

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

MICHAEL CARUSO
Federal Public Defender
BRENDA G. BRYN
Assistant Federal Public Defender
Counsel for Petitioner
One East Broward Boulevard, Suite 1100
Ft. Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTION PRESENTED FOR REVIEW

Whether the Court should overturn the Eleventh Circuit's "appellate procedural default" rule, which categorically prohibits the Eleventh Circuit from considering the merits of issues not raised in an appellant's opening brief – under *any* standard of review – and as applied in criminal cases contravenes the retroactivity principle of *Griffith v. Kentucky*, and conflicts with the rules applied in every other circuit (all of which accord at least some form of merits review, where as here, the new issue is raised for the first time on appeal)?

INTERESTED PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

No:

PATRICK HENRY JOSEPH,

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

Patrick Henry Joseph respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 12-16167 in that court on March 21, 2014, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, *United States v. Patrick Henry Joseph*, ___ Fed. Appx. ___, 2014 WL

1099391 (11th Cir. March 21, 2013), is contained in the Appendix (A-1).

A copy of the unpublished order of the United States Court of Appeals for the Eleventh Circuit, which denied Mr. Joseph's unopposed motion for leave to withdraw his initial brief and file a replacement brief adding a plain error challenge to his Career Offender designation in light of this Court's intervening decision in *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (June 20, 2013), is contained in Appendix (A-6).

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 OF THE UNITED STATES. The decision of the court of appeals was entered on March 21, 2014. This petition is timely filed pursuant to SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

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, . . . nor shall any person. . . be deprived of life, liberty, or property without due process of law. . .

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

U.S. Const. amend. IVX

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed. R. Crim. P. 52(b)

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

U.S.S.G. §4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. §4B1.2. Definitions of Terms Used in Section 4B1.1

(b) The term "controlled substance offense" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Notes:

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. §843(b)) is a "controlled substance offense" if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."

21 U.S.C. § 843. Prohibited Acts

(b) Communication facility

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

STATEMENT OF THE CASE

The Proceedings in the District Court

On May 22, 2012, a federal grand jury sitting in the Southern District of Florida charged Patrick Joseph with possessing with intent to distribute 28 grams or more of cocaine base on January 19, 2012, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(B)(iii) (Count 1); possessing with intent to distribute 28 grams or more of cocaine base on February 29, 2012 in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii) (Count 2); and possession with intent to distribute a detectable amount of cocaine base on April 11, 2012 in violation of §841(b)(1)(C) (Count 3). Mr. Joseph pled not guilty to the charges.

On September 18, 2012, the grand jury returned a superseding indictment, charging in the new Count 3, that the mixture or substance Mr. Joseph possessed was a detectable amount of cocaine – *not* "cocaine base." Mr. Joseph was arraigned on the superseding indictment later that day, and immediately thereafter, entered a guilty plea "open" to all three counts of the superseding indictment. The court found his plea was knowing, voluntary, and supported by a factual basis. It adjudged Mr. Joseph guilty as charged.

In the "Offense Level Computation" section of the Pre-Sentence Investigation Report (PSI), the Probation Officer held Mr. Joseph accountable for 73.9 grams of cocaine base, and 41.2 grams of cocaine powder, which – after converting both substances to their marijuana equivalents – resulted in a base offense level of 26 pursuant to U.S.S.G. §2D1.1(a)(5). Although Mr. Joseph's "adjusted offense level" was 26, the Probation Officer advised that he qualified as a Career Offender due to two prior federal offenses – a September 2001 Florida conviction for possession with intent to distribute cocaine and cocaine base; and a June 2002 federal conviction for using a communication

facility in committing or facilitating the commission of a felony, in violation of 21 U.S.C. §843(b). By operation of U.S.S.G. §4B1.1(a) and (b)(2), Mr. Joseph's recommended offense level as a Career Offender rose to a 34.

While acknowledging that Mr. Joseph "clearly demonstrated acceptance of responsibility for his offense," the Probation Officer recommended only a 2-level decrease in his offense level pursuant to U.S.S.G. §3E1.1(a) – *not* the 3-level decrease in §3E1.1(b) – because the government had not moved for the additional 1-level reduction. With a thus-calculated total offense level of 32, and the mandatory Criminal History Category of VI as a Career Offender, Mr. Joseph's recommended advisory Guideline range was 210-262 months imprisonment.

Based upon the settled law of the Eleventh Circuit at the time of sentencing, Mr. Joseph did *not* challenge his Career Offender designation. However, he *did* object to the government's failure to recommend an additional point for his acceptance of responsibility pursuant to U.S.S.G. §3E1.1(b), and requested that the court grant him that reduction and reduce his offense level to 31. At an offense level 31, and criminal history category of VI, his advisory Guideline range would have been 188-235 months imprisonment.

At the November 28th sentencing, defense counsel argued that the government's reasons for refusing to file the motion were not legitimate given that the government itself had made certain untimely, "eve of trial" discovery disclosures. The court, however, overruled Mr. Joseph's objection, finding:

> Under Section 3E1.1(b) of the United States Sentencing Guidelines, the third point is controlled by the Government and can only be awarded upon formal motion by the Government at the time of sentencing and the Government has elected not to file that formal motion." . . .

> The Court finds that the purpose of the acceptance is to avoid trial preparation and the Court finds that it came too late.
>
> So the objection is respectfully overruled.

The court sentenced Mr. Joseph to a term of 210 months imprisonment (the bottom of Mr. Joseph's advisory range as a Career Offender) to run concurrently on all three counts, followed by a term of 4 years supervised release.

Mr. Joseph's Initial Brief on Appeal

Mr. Joseph timely filed a notice of appeal after he was sentenced. On May 31, 2013, he filed his Initial Brief in the Eleventh Circuit Court of Appeals, in which he challenged the district court's refusal to award him the third point for acceptance of responsibility.

This Court's Intervening Decision in *Descamps v. United States*

Within days after Mr. Joseph filed his initial brief in the Eleventh Circuit, this Court issued *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (June 20, 2013). *Descamps* overturned a longstanding and widespread practice among many federal circuits – including the Eleventh Circuit – that had misused the "modified categorical approach" to judicially substitute a "facts-based inquiry for an elements-based one." in determining 4B1.2 and other similar recidivist enhancements. *Id.* at 2293. The "modified approach," the Court clarified in *Descamps*, "has no role to play" where the prior statute of conviction contains a single, "indivisible" set of elements, rather than an "alternative" list of elements. *Id.* at 2285. Where there is only *one* manner of violating the statute, the sentencing court is limited to the "categorical approach," and may *not* look behind the judgment and consider non-elemental facts, even if they are "admitted" by the defendant. *See id.* at 2289. The "categorical" inquiry, by contrast to the modified approach, is narrow and limited to determining whether the

elements of the statute of the prior conviction "match" – or do not "match" – the elements of a "generic" federally-listed crime. *Id.* at 2292. If it turns out from the categorical inquiry and this comparison, that the state statute is either "overbroad" or "missing" an element of the generic crime, the Court held in *Descamps*, the prior conviction may *not* be used for federal enhancement purposes. *See id.* at 2290-2292.

The Court emphasized the "Sixth Amendment underpinnings" of its holding, stating:

> [C]onsider (though [the Ninth Circuit in *United States v.*] *Aguila-Montes* [655 F.3d 915 (2011) (*en banc*)] did not) the categorical approach's Sixth Amendment underpinnings. We have held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348 [] (2000). Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. Those concerns, we recognized in *Shepard*, counsel against allowing a sentencing court to "make a disputed" determination "about what the defendant and the state judge must have understood as the factual basis of the prior plea," or what the jury in a prior trial must have accepted as the theory of the crime. 544 U.S., at 25, 125 S.Ct. 1254 (plurality opinion); *see id.*, at 28, 125 S.Ct. 1254 (THOMAS, J., concurring in judgment) (stating that such a finding would "giv[e] rise to constitutional error, not doubt"). Hence our insistence on the categorical approach.
>
> Yet again, the Ninth Circuit's ruling flouts our reasoning – here, by extending judicial factfinding beyond the recognition of a prior conviction. Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction as we have held the Sixth Amendment permits. But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. *See Aguila-Montes*, 655 F.3d at 937. And there's the constitutional rub. The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances. *See, e.g., Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707 [] (1999). Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous

> facts cannot license a later sentencing court to impose extra punishment. *See* 544 U.S. at 24-26, 125 S.Ct. 1254 (plurality opinion). So when the District Court here enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement (that he "broke and entered") irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence.

Descamps, 133 S.Ct. at 2288-2289.

The California burglary statute the Court examined in *Descamps* "swept widely," the Court noted, and included many crimes "beyond the normal, 'generic' definition of burglary." 133 S.Ct. at 2282. Since it did not require "breaking and entering" or any other form of "unlawful entry," but instead criminalized "entering" a "house or other building, tent, vessel ..., floating home, ... railroad car .... with intent to commit grand or petit larceny or any felony," it even covered "simple shoplifting." *See id.* at 2285-2286. There was no "match" between the elements of such a statute and those of "generic burglary," the Court explained, "because generic burglary's unlawful-entry element excludes any case in which a person enters premises open to the public, no matter his intent; the generic crime requires breaking and entering or similar unlawful activity." *Id.* at 2292. The California statute was "missing" the generic unlawful entry element, and that rendered any California burglary conviction categorically "overbroad." *See id.*

The Court was emphatic in *Descamps* that a district court presented with a prior conviction under a non-generic, "overbroad," and "indivisible" statute may *not* go behind the judgment to consult the information or any other "*Shepard* documents" to determine the "conduct" of conviction. When considering a conviction under a statute which defines the crime "not alternatively," but "more broadly than the generic offense," the Court held, *Shepard*'s "modified approach" *cannot* convert the conviction into the narrower enumerated crime. *Id.* at 2286. It is legally "irrelevant" – after

Descamps – that as a factual matter, the defendant may have "committed" or "admitted" the generic offense. *Id.* at 2288-2289.

Mr. Joseph's *Unopposed* Motion to File a Replacement Brief,
Adding a "Plain Error" *Descamps* Challenge to his Career Offender Designation

On June 25, 2013 – five (5) days after *Descamps* was decided, and nine (9) days prior to the due date for the government to file its Answer Brief (July 3, 2013) – undersigned counsel filed an "*Unoppposed* Motion to Withdraw Previously-Filed Initial Brief in Order to File a Replacement Brief" that would add a "plain error" challenge to his Career Offender designation, based upon the just-issued decision by this Court in *Descamps*. As grounds therefor, counsel advised the Eleventh Circuit:

> 1. Undersigned counsel filed Mr. Joseph's Initial Brief on May 31, 2013.
>
> 2. The government's Answer Brief is currently due to be filed on July 3rd.
>
> 3. In Mr. Joseph's Initial Brief, undersigned counsel challenged the district court's interpretation and application of U.S.S.G. §3E1.1 as "procedural error." Counsel did not, however, challenge any other aspect of the district court's Guideline determination.
>
> 4. After the Initial Brief was filed, the Supreme Court issued its decision in *Descamps v. United States*, ___ S.Ct. ___, 2013 WL 3064407 (June 20, 2013), holding that courts may not, consistent with the Sixth Amendment, use the "modified categorical approach" to determine whether a conviction under an "indivisible statute" qualifies as an ACCA predicate.
>
> 5. In light of *Descamps*, an argument can and should be made on Mr. Joseph's behalf that the district court plainly erred in designating him a Career Offender, where one of the predicates for that designation was his conviction under 21 U.S.C. §843(b)(using a communication facility to cause or facilitate the commission of "a felony under any provision of this subchapter ... or subchapter II of this chapter") – an "indivisible" statute that, by its "elements," is not "categorically" a "controlled substance offense." *See generally United States v. Henderson*, 133 S.Ct. 1121 (2013) (an error is "plain" within the meaning of the "plain error" rule, as long as it is plain at the time of appellate review).

> 6. Mr. Joseph has specifically asked counsel to raise this issue on his behalf, and it would be constitutionally ineffective for counsel not to seek to do at this time. As a matter of equal protection, the Supreme Court has guaranteed a criminal defendant's right to the benefit of any intervening decision of constitutional law, so long as the defendant's conviction is not yet final and his case is on direct appeal. *Griffith v. Kentucky*, 479 U.S. 314, 322-324, 107 S.Ct. 708, 713-714 (1987).
>
> 7. AUSA Lisa Rubio, who is writing the government's Answer Brief in this case, has no opposition to counsel's request to withdraw her previously-filed Initial Brief, in order to file a replacement Initial Brief on Mr. Joseph's behalf which adds a challenge to his Career Offender designation based the recent decision in *Descamps*. The government asks that the briefing schedule be stayed pending the Court's ruling on this motion, and that the government be allowed 30 days from the filing of Mr. Joseph's replacement Initial Brief, to file its Answer Brief.
>
> 8. Mr. Joseph is incarcerated, serving the enhanced "Career Offender" term of 210-months imprisonment imposed by the district court.
>
> WHEREFORE, the appellant, Patrick Joseph, respectfully requests that the Court allow him to withdraw his previously-filed Initial Brief, and file a replacement Initial Brief that adds a "plain error" challenge to his Career Offender designation, based upon *Descamps*; that the Court stay the briefing schedule pending its ruling on this motion; that undersigned counsel be allowed 30 days from the Court's ruling to file Mr. Joseph's replacement Initial Brief; and that the government be allowed 30 days from the filing of the replacement Initial Brief to file its Answer Brief.

Appendix (A-5).

On July 8, 2013, the Eleventh Circuit summarily denied that *unopposed* motion, stating:

> Appellant's motion for leave to file a replacement brief is DENIED. *See United States v. Hembree*, 381 F.3d 1109 (11th Cir. 2004) (as Court's precedent establishes that new issues may not be raised by a supplemental brief, motion to file a substitute or amended principal brief should be construed as motion to file a supplemental brief and should be denied).
>
> The Government's answer brief shall be due thirty (30) days from the date of entry of this Order.

Appendix (A-6)

The Eleventh Circuit's Decisions in *Howard* and Jones

After the government filed its Answer Brief – while Mr. Joseph's appeal on the §3E1.1 issue was pending – the Eleventh Circuit explicitly recognized in *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014), that *Descamps* had "unsettled" the prior "settled" law of the Circuit, as previously set forth in *United States v. Rainer*, 616 F.3d 1212, 1213 (11th Cir. 2010). *Howard*, 742 F.3d at 1337 (the "settled" law of the Circuit "has been unsettled by the Supreme Court's recent decision in *Descamps*"). Specifically, the Eleventh Circuit explained, "[t]wo crucial aspects of our decision in [*Rainer*] are no longer tenable after *Descamps*" – first, *Rainer's* "assumption that the modified categorical approach could be applied to any non-generic statute," and second, *Rainer*'s "application of the modified categorical approach" "by asking whether the factual allegations of the indictments charged the defendant with an act that fit under the generic definition of burglary of a building." *Howard*, 742 at 1343, 1345. *See also id.* at 1345 ("*Descamps* declared that the modified categorical approach should "focus on the elements, rather than the facts, of a crime;" "if the statute under which the defendant was previously convicted is indivisible, the modified categorical approach is inapplicable;" "[a]nd if the modified categorical approach is inapplicable, the *Shepard* documents are irrelevant to the ACCA issue").

After recognizing the substantial jurisprudential changes effected by *Descamps*, the Eleventh Circuit further clarified *Descamps'* new "divisibility" analysis – by explaining that even if a statute is "divisible" in the sense that there are alternative ways of violating the statute, if "none of the alternatives" "match the elements of the generic crime," the court "should skip over any *Shepard* documents and simply declare that the prior conviction is not a predicate offense based on the statute itself." *Howard*, 742 F.3d at 1346. Applying these new dictates to a conviction under the Alabama

burglary statute, the Eleventh Circuit concluded that the Alabama burglary statute "is non-generic and indivisible" because it includes as "illustrative examples" of buildings "any vehicle, aircraft or watercraft," and "illustrative examples are not alternative elements" – which "means that a conviction under Alabama Code §13A-7-7 cannot qualify as a generic burglary under the ACCA." *Id.* at 1348-1349. Because none of the statutory "alternatives" under the Alabama burglary statute (in particular, the "building alternative") "matched" the elements of generic burglary, the Court concluded, an Alabama burglary conviction could no longer be deemed a "violent felony" under the Armed Career Criminal Act. *See Howard*, 742 F.3d at 1346-1349.

In its ensuing decision in *United States v. Jones*, 743 F.3d 826 (11th Cir. 2014), the Eleventh Circuit concluded that even an unobjected-to ACCA enhancement predicated on conviction under Alabama's non-generic, indivisible burglary statute was reversible "plain error," after *Howard*. *Jones*, 743 F.3d at 829-830 (Carnes, C.J.). And notably, in both *Howard* and *Jones*, the Eleventh Circuit vacated the defendants' enhanced ACCA sentences and remanded with instructions for the defendants to be resentenced "without the ACCA enhancement." *Howard*, 742 F.3d at 1349; Jones, 743 F.3d at 830.

The Eleventh Circuit's Decision on the Merits of Mr. Joseph's Appeal

On March 21, 2014, the Eleventh Circuit affirmed Mr. Joseph's sentence in an unpublished decision, holding that the district court did not clearly err in determination that his notification of his intent to plead guilty came too late to warrant application of the 3rd point for acceptance of responsibility. *United States v. Joseph*, ___ Fed. Appx. ___, 2014 WL 1099391 (11th Cir. March 21, 2014)

REASON FOR GRANTING THE WRIT

The Eleventh Circuit's "Appellate Procedural Default" Rule, Which Categorically Prohibits the Eleventh Circuit From Considering the Merits of Issues Not Raised in an Appellant's Opening Brief – Under *Any* Standard of Review, Notwithstanding an Intervening Constitutional Decision of Criminal Procedure Such as *Descamps v. United States*, Which Indisputably has "Unsettled" the Settled Law" of the Eleventh Circuit – Contravenes the Retroactivity Principle of *Griffith v. Kentucky*, and Conflicts With the Rules Applied in Every Other Circuit (All of Which Accord at Least Some Form of Merits Review Under Identical Circumstances)

Like the California burglary statute construed in *Descamps*, and the Alabama burglary statute construed by the Eleventh Circuit in *Howard* and *Jones*, one of the predicates for Mr. Joseph's Career Offender designation in this case – his conviction under 21 U.S.C. §843(b) – was erroneously counted as a predicate, because §843(b) is categorically overbroad, "*indivisible*," and its elements do *not* "match" those of the generic "controlled substance offenses" listed by the Sentencing Commission in U.S.S.G. §4B1.2(b). According to the commentary, "Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. §843(b)) is a "controlled substance offense" ***if*** the offense of conviction established that the ***underlying offense . . . was a "controlled substance offense***." U.S.S.G. §4B1.2, comment n. 1 (emphasis added). While there are multiple ways to violate §843(b), every one of those "alternatives" is non-generic as compared to the "controlled substance offense" predicates listed in §4B1.2, because each alternative under §843(b) is dependent upon a wide spectrum of underlying drug "felonies" that are *not* "controlled substance offenses" within the meaning of §4B1.2.

The circuits have long recognized that 21 U.S.C. §843(b) is non-generic. *United States v. Henao-Melo*, 591 F.3d 798, 805 (5th Cir. 2009), citing *United States v. Williams*, 176 F.3d 714, 717 n.3 (3d Cir. 1999) (Alito, J.) (recognizing the non-generic nature of 21 U.S.C. §843(b) due to the fact

that §843(b) provided for convictions that could be predicated on use of a telephone to facilitate the mere possession of a drug; "We avoid concluding that all §843(b) convictions are "controlled substance offense[s]" because a defendant could be convicted under §843(b) without engaging in any of the activities enumerated in §4B1.2(2). . . . For example [when the underlying crime is] the mere possession of a controlled substance [which] can be considered a felony under 21 U.S.C. §844(a) . . . "); *United States v. Jimenez*, 553 F.3d 1110, 1113 & n.2 (9th Cir. 2008) (finding that conviction for 21 U.S.C. §843(b) constituted a drug trafficking and controlled substance offense when the underlying crime being facilitated constituted a "controlled substance offense," but also noting that not every conviction under §843(b) could be categorically considered a drug trafficking crime); *United States v. Orihuela*, 320 F.3d 1302, 1304-05 (11th Cir. 2003) (recognizing by citation to U.S.S.G. §4B1.2 n.1 and *United States v. Walton*, 56 F.3d 551, 555-56 (4th Cir. 1995) that 21 U.S.C. §843(b) qualified as a "drug trafficking" or "controlled substance" offense when the underlying offense being facilitated met the Guidelines definition of a "controlled substance offense.").

But § 843(b) statute is not only "non-generic." It is categorically overbroad and "indivisible" according to *Descamps*, because its "felony element" is itself overbroad and "indivisible." Accordingly, after *Descamps*, a conviction under § 843 cannot properly be counted as a "controlled substance offense" under §4B1.2, and serve as a predicate for the harsh Career Offender enhancement in §4B1.1. *See Descamps*, __ U.S. at __, 133 S.Ct. at 2293 ("The modified approach does not authorize a sentencing court to substitute . . . a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a ***divisible*** statute formed the basis of the defendant's conviction."). Under *Descamps*, *Howard*, and

Jones, since §843(b) is categorically overbroad *and indivisible*, it was impermissible for the district court to use Mr. Joseph's §843(b) conviction as the predicate for the enhanced Career Offender sentence it imposed upon him.

Unfortunately, as indicated by the Eleventh Circuit's Order denying Mr. Joseph's *unopposed* motion to file a replacement brief to add a plain error challenge to his Career Offender sentence in light of this Court's intervening decision in *Descamps*, the Eleventh Circuit has categorically refused to consider the merits of any new *Descamps* challenge – even under the "plain error" standard of review – if, as here, the defendant did not raise a similar challenge in his (pre-*Descamps*) opening brief on appeal. The Eleventh Circuit purports to apply a "well-established" "prudential rule" – pursuant to which, issues not previously briefed are deemed waived or "abandoned," and may not be raised in a substitute or supplemental brief. Notably, in its Order denying Mr. Joseph's request to file a replacement brief, the Eleventh Circuit simply cited and followed its prior decision in *United States v. Hembree*, 381 F.3d 1109 (11th Cir. 2004) – where it previously recognized that "This court's precedent establishes that a party may not raise through a supplemental brief an issue not previously raised in his principal brief." *Id.* at 1110 (citing *inter alia United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004); *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000)). The Eleventh Circuit added in *Hembree* that "[t]o the extent that Appellant's motion seeks to file a substitute principal brief for the purpose of raising a *Blakely* issue, we hold that such *Blakely* motions to file a substitute or amended principal brief should be construed as motions to file a supplemental brief and should be denied." "Otherwise," the Eleventh Circuit reasoned in *Hembree* (and in Mr. Joseph's case, by following *Hembree)*,

> this court would be permitting Appellant, through a motion for a substituted or amended principal brief, to circumvent improperly our above precedent and to do indirectly what Appellant cannot do directly. Nor will we *sua sponte* order the filing of substituted or amended principal briefs. To do so is impermissible as it too would circumvent improperly the above precedent of this court that forbids raising new issues by supplemental briefs.

381 F.3d at 1110.

In so holding, the Eleventh Circuit has not simply ignored the clear dictates of *Griffith v. Kentucky*, 479 U.S. 314 (1987). In affirmatively precluding any consideration of the merits of a newly-available *Descamps* claim, the Eleventh Circuit has widened and exacerbated the 11-1 circuit split on this issue that has existed since this Court handed down its decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005). Notably, as will be detailed *infra*, after *Booker* was decided, defendants in every other circuit of this country received at least some form of merits review of previously-unraised *Booker* claims (usually, under the "plain error" standard). Not only have defendants in the Eleventh Circuit long been treated differently and more harshly than identically-situated defendants in all the other circuits; but lawyers in the Eleventh Circuit must also practice differently – quite defensively, in fact – as the circuit's uniformly-applied "issues-not-briefed-are-waived" rule requires civil and criminal attorneys alike to "raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable." *United States v. Vanorden*, 414 F.3d 1321, 1324 (Tjoflat, J. specially concurring).

The end result of the Eleventh Circuit's "appellate procedural default" rule has ***not*** been the touted "judicial economy." It has been, and will continue to be, complete inefficiency both for the judiciary and the bar.

For the reasons set forth more fully below, Mr. Joseph urges the Court to grant a writ of certiorari in his case, and put a definitive end to the divisions, inequities, and ineconomies that have resulted from the Eleventh Circuit's unreasoned rule.

I. The Eleventh Circuit's "Appellate Procedural Default" Rule Conflicts with this Court's Decisions in *Griffith*, *Booker*, and *Shea*

A. This Court's Decision in *Griffith v. Kentucky*.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court held that a criminal defendant has a constitutional right to take advantage of a favorable constitutional rule of criminal procedure established by the Court while his or her case is pending on direct appeal. To assure both due process and equal protection, the Court explained in *Griffith*, an appellate court ***may not*** "disregard current law, when it adjudicates a case pending before it on direct review." 479 U.S. at 326; *see also* 479 U.S. at 322 ("failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication"); *id*. at 327 (noting the "actual inequity" that results where "only one of many similarly situated defendants receives the benefit of the new rule"). According to *Griffith*, a new decision impacting the conduct of criminal prosecutions "is to be applied retroactively to ***all cases***, state or federal, pending on direct review or not yet final" – whether or not the new decision "constitutes a 'clear break' with the past." 479 U.S. at 326-328 (emphasis added).

B. The "Invention" and Early Development of the Eleventh Circuit's "Appellate Procedural Default" Rule – Without Regard to *Griffith*.

Although the Eleventh Circuit commonly refers to its issue-abandonment rule as both "well-established" and "long-standing," *see, e.g, United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir.

2004), in reality, such an absolute rule is of relatively recent origin in the Circuit. As Judge Tjoflat has pointed out, the Court "invented" the rule only a decade ago, in an effort to blunt the impact of this Court's decision in *Apprendi*. *Vanorden*, 414 F.3d at 1325 (Tjoflat, J., specially concurring). It was in the post-*Apprendi* decision of *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000), that the Eleventh Circuit held ***for the first time*** that criminal defendants ***cannot*** raise new issues in supplemental briefing (even where such issues only arose based upon an intervening decision of this Court, such as *Apprendi*) – indeed, that issues not raised in initial brief are forever abandoned. *See* 232 F.3d at 830-831. In so holding, the Eleventh Circuit notably made no mention – and apparently gave ***no*** thought – to *Griffith* (which was directly on point). Instead, the Eleventh Circuit miscited a ***civil*** case, *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1495-1496 (11th Cir. 1998), as support for its new "issue abandonment" rule. Consistent with Rule 52(b)'s plain error standard, however, *McGinnis* had merely recognized that an appellate court ***has discretion*** to address new issues based upon intervening decisions of this Court, where necessary to prevent a "miscarriage of justice." In *Nealy*, the Eleventh Circuit novelly transformed *McGinnis'* rule of discretion into a categorical prohibition, and then transferred the new categorical prohibition from the civil to criminal context – without any regard to *Griffith*, or the due process and equal protection rights of criminal defendants.

A year later in *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001), the Eleventh Circuit extended *Nealy*'s categorical preclusion of new issue consideration to criminal cases vacated and remanded by this Court for further consideration in light of *Apprendi* ("GVR" cases). Notably, however, there was still no mention of *Griffith*. Thereafter, armed with the dual precedents of *Nealy* and *Ardley*, the Eleventh Circuit continued quite comfortably to ignore the dictates of *Griffith* – well

into the post-*Blakely* era. In *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004), for instance, the court reflexively applied the *Nealy-Ardley* "issue abandonment" rule, rejecting the defendant's new Sixth Amendment sentencing challenge premised upon *Blakely* because the argument was raised for the first time in a petition for rehearing. *Levy*, 379 F.3d at 1243-1244. While candidly acknowledging that *Nealy* and *Ardley* had ***not*** been consistently followed by all Eleventh Circuit panels, the *Levy* panel disavowed the inconsistent decisions, and applied *Nealy* and *Ardley* strictly – in purported reliance upon the "prior precedent rule." 379 F.3d at 1245.

C. <u>The Eleventh Circuit's Belated, Post-*Hoc* Attempts to Rationalize its "Appellate Procedural Default" Rule as "Consistent" with *Griffith*, *Booker*, and *Shea*</u>.

Notably, it was not until the defendant in *Levy* petitioned the full Eleventh Circuit for a rehearing *en banc*, and three judges dissented from the majority's denial of rehearing – specifically arguing that *Griffith*'s retroactivity rule (applicable, by its terms to ***all*** cases still pending on direct review) required application of *Blakely* to a case like Levy's which was pending on direct review at the time *Blakely* was decided, and that the panel's decision "unjustifiably limits the principle of *Griffith*," *United States v. Levy*, 391 F.3d 1327, 1336-1339 (11th Cir. Dec. 3, 2004) (Tjoflat, J. joined by Wilson, J., dissenting from denial of rehearing *en banc*); *see also id.* at 1351-1352 (Barkett, J., dissenting from denial of rehearing *en banc*) (asserting that *Griffith* applies to all pipeline cases, without exception) – that ***any*** of the judges in the Eleventh Circuit majority felt compelled to even discuss *Griffith*. *Levy*, 391 F.3d at 1328 (Hull, J., concurring in denial of rehearing *en banc*, in which Anderson, J., Carnes, J., and Prior, J. joined). And indeed, far from acknowledging the patent inconsistency between a firm rule of "issue abandonment," and *Griffith*'s mandate to apply a new constitutional rule of criminal procedure to ***all*** cases still pending on direct review, the four

concurring judges writing separately in *Levy* justified continued application of the *Nealy-Ardley* rule by distinguishing *Griffith* on its facts. Pointing out that the defendant in *Griffith* had preserved a *Batson*-type claim at both the trial and appellate levels prior to this Court's "clear break" with prior law in *Batson v. Kentucky*, 476 U.S. 79 (1986), these judges claimed that "*Griffith* cannot, and does not, control a situation in which the defendant, such as Levy, never raised nor preserved a constitutional challenge" in the original round of briefing before the appellate court, "but, instead, raises it for the first time in a petition for rehearing after this Court has affirmed his conviction and sentence." *Levy*, 391 F.3d at 1331. The concern in *Griffith*, these concurring judges stated, was "fairness for defendants who were similarly situated to the defendant in *Batson* – that is, defendants who, like Batson, had preserved their objections to the prosecution's race-based peremptory challenges during trial and on appeal. The *Griffith* Court did not require, however, that a dissimilarly situated defendant – one who did not preserve his objections to race-based peremptory challenges – would somehow benefit from the retroactive application of *Batson*." *Levy*, 391 F.3d at 1330. Characterizing the Eleventh Circuit's rule as a "well-established procedural default rule," *id.*, "which had "operated independently of *Griffith* for a long time because it is not inconsistent in any way with the preserved-error *Batson* issue addressed in *Griffith*," *id.* at 1332, these judges also cited as support for the "appellate procedural default" rule, this Court's decision in *Shea v. Louisiana*, 470 U.S. 51 (1985), stating:

> [T]he Supreme Court itself has recognized that the retroactivity rule is "subject, or course, to established principles of waiver, harmless error, and the like." *Shea*, 470 U.S. at 58 n. 4[]. This is another way of saying that the retroactivity rule is subject to procedural rules and does not operate in a vacuum. . . .
>
> The dissent attempts to confuse the issue by discussing the difference between waiver, forfeiture, and abandonment. The issue is not whether this Court has the

> power to consider issues not raised in the initial brief; of course it does. Rather, this Court, our of concerns for judicial economy and finality, has *elected* to adopt and apply procedural rules universally and equally. This is not only fair and consistent, but a logical extension of the Supreme Court's decision in *Shea*.

Levy, 391 F.3d at 1332, 1335. According to the four concurring judges in *Levy*, the Circuit's "appellate procedural default rule" was "clear, consistent, and workable," "not overly harsh," and therefore, eminently "prudent." *Id.* at 1334-1335.

Notably, however, when this Court handed its decision in *Booker* several months later, it impliedly rejected these judges' cramped reading of *Griffith*, and any possible suggestion of insurmountable "appellate procedural default," by broadly reaffirming *Griffith*'s binding force in ***all*** criminal cases – instructing the lower courts explicitly, pursuant to *Griffith*, that both the constitutional and remedial holding of *Booker* "***must***" be applied to "***all cases on direct review***." *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 769 (2005) (emphasis added). Indeed, because some of the cases on direct review would necessarily include those in which a defendant did ***not*** previously articulate a constitutional argument, the Court explained that reversibility in Guideline cases would hinge on the application of "ordinary prudential doctrines," such as review for "plain error." *Id.*

But, notwithstanding this explicit and broad application of *Griffith* in *Booker*, the Eleventh Circuit's approach did not change even an iota. On the authority of *Nealy* – and without any further reference to *Griffith* – the court still found *Booker* claims "abandoned" if they were not raised in a defendant's initial brief. *See, e.g.*, *United States v. Duncan*, 400 F.3d 1297, 1299 n. 1 (11th Cir. Feb. 24, 2005). And in fact, even after this Court began issuing GVR orders in Eleventh Circuit cases in which Sixth Amendment claims had ***not*** been raised in the original appellate briefing, and

remanding such cases back to the Eleventh Circuit "for further consideration in light of *Booker*," the Eleventh Circuit continued to adhere rigidly to both *Nealy* and *Ardley*, and to apply its "well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned." *United States v. Dockery*, 401 F.3d 1261, 1262-1263 (11th Cir. 2005); *Vanorden*, 414 F.3d at 1323. Even in the few post-*Booker* decisions acknowledging *Griffith*, the Eleventh Circuit simply adopted the position of the concurring judges in *Levy* – namely, that *Griffith* "applies only to defendants who preserved their objections throughout the trial and appeals process." *See, e.g., United States v. Verbitskaya*, 406 F.3d 1324, 1340 n. 18 (11th Cir. 2005); *United States v. Higdon*, 418 F.3d 1136, 1138 (11th Cir. 2005) (Hull, Anderson, and Carnes, JJ., concurring in denial of rehearing *en banc*); *United States v. Levy*, 416 F.3d 1273, 1278 n. 6 (11th Cir. July 12, 2005) ("the *Griffith* holding is necessary to 'treat[] similarly situated defendants the same," but "[p]arties who fail to raise timely claims of error are not similarly situated to those who properly preserved their claims;" reaffirming prior decision after GVR order for "further consideration in light of *Booker*").

The ***only*** things that have noticeably changed in the Eleventh Circuit post-*Booker* are (1) that the court began characterizing its categorical "appellate procedural default" rule as simply an ordinary "prudential rule," *see, e.g.*, *Higdon*, 418 F.3d at 1137; *Levy*, 416 F.3d at 1276 -1277, and (2) as confirmed by the Order issued in the instant case, the Eleventh Circuit will not even relax that "prudential rule" and permit a criminal defendant to file a replacement brief when the government has *not* been prejudiced because it has not yet filed its Answer Brief, and the government explicitly *agrees* that the Appellant should indeed have an opportunity to file a replacement brief that raises a claim based upon an intervening decision from this Court – such as *Descamps* – that has indisputably "unsettled" the "settled law" of the Circuit.

D. The Eleventh Circuit's "Appellate Procedural Default" Rule is *Inconsistent* With *Griffith*, *Booker*, and *Shea*.

Contrary to the Eleventh Circuit, a categorical "appellate procedural default" rule cannot in any way be squared with *Griffith*'s holding – reaffirmed in *Booker* – that a new constitutional decision of criminal procedure must be applied to "***all cases . . . pending on direct review or not yet final.***" While indeed, the Court stated in *Griffith* that retroactive application is necessary to "treat [] similarly situated defendants the same," 479 U.S. at 323, the Eleventh Circuit has mistakenly suggested that defendants with unpreserved claims of error are not "similarly situated" to those with preserved claims. For retroactivity purposes, the Court in *Griffith* clearly considered all defendants with "cases pending on direct review or not yet final" to be "similarly-situated" – the concern in *Griffith* being the "actual inequity" that would result if only the one "lucky individual whose case was chosen as occasion for announcing the new principle'" were to benefit from the new rule, with all others having their claims "'adjudicated under the old doctrine.'" *Id.* at 327 (citations omitted); *see also id.* at 323 ("As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule to cases not yet final.")

Plainly, the Court in *Griffith* did ***not*** limit its retroactivity principle to procedurally-similar, "preserved error" cases. To the contrary, in definitively rejecting ***any*** exception to retroactivity for cases in which the new rule was a "clear break with the past" (a subset of cases which necessarily includes those in which a defendant failed to anticipate the "clear break," and thus, failed to preserve the "new law" claim in his Initial Brief) – and holding broadly instead that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to ***all cases, state or federal, pending***

on direct review or not yet final," 479 U.S. at 327, the Court plainly foreclosed any further exception to retroactivity – in particular the "issue abandonment" exception which the Eleventh Circuit newly created, and which now threatens to "swallow" the *Griffith* rule. As Judge Tjoflat has correctly perceived, the "upshot" of the Eleventh Circuit's "appellate procedural default" rule is "that a Supreme Court decision that [the court is] directed to apply retroactively to ***all*** cases still pending on direct review, *e.g., Descamps*, 570 U.S. __, 133 S.Ct. 2276; *Booker*, 125 S.Ct. at 769; *Griffith*, 479 U.S. at 328, 107 S.Ct. at 716, ***will not apply at all*** to cases on direct review like this one." *Vanorden*, 414 F.3d at 1328 (Tjoflat, J. specially concurring) (emphasis added).

While it is true that in *Shea* this Court noted that retroactive application of the newly-announced rule in *Edwards v. Arizona*, 451 U.S. 477 (1981) was "subject of course, to established principles of waiver, harmless error, and the like," 470 U.S. at 58 n. 4, and then in *Booker*, stated that it "expect[ed] reviewing courts to apply "ordinary prudential doctrines" . . . including "whether the issue was raised below and whether it fails the 'plain error' test," 125 S.Ct. at 769, neither "waiver" nor "abandonment" are apposite doctrines here. As other courts of appeals – and dissenting Judge Tjoflat – have correctly pointed out, this Court has carefully distinguished between the "waiver" of a right, and "forfeiture" of a right, explaining: "[F]orfeiture is the failure to make the timely assertion of a right, [while] waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 732 (1993). *See, e.g., United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997) (rejecting suggestion that claims based on *United States v. Gaudin*, 515 U.S. 506 (1995) had been waived where defendant failed to raise a *Gaudin*-type argument either at trial, or in his appellate brief filed 3 weeks before *Gaudin* decision; noting *Olano*'s distinction between "forfeiture" and "waiver," and holding that the defendant "could not have knowingly waived a

constitutional right that evolved after he filed his appellate brief because raising the issue would have been futile in light of then-applicable precedent"); *Levy*, 391 F.3d at 1341-1342 & nn. 10-12 (Tjoflat, J. dissenting from denial of rehearing *en banc*) ("it makes no sense to say that Levy 'waived' his *Blakely* claim, as no such 'known right' existed when Levy filed his brief;" *Olano* does not support classifying Levy's unknowing omission as a waiver" because defendant cannot "intentionally relinquish a right that has not yet evolved"); *Vanorden*, 414 F.3d at 1325-1326 (Tjoflat, J., specially concurring) (*Shea* is inapposite where, as here, the defendant has not done anything that can "plausibly construed as a "waiver;" while the defendant did forfeit a *Booker* claim "by failing to 'timely assert[]' it – which means that review in his case should be for plain error only – it is clear that he has not "waived" it. At the time the supposed waiver took place – when [the defendant's lawyer filed his initial brief] *Blakely* and *Booker* had not yet been decided, and this circuit and every other had squarely rejected *Blakely*/*Booker* type arguments. It, therefore, makes no sense to say that [the defendant] "intentional[ly] relinquish[ed]" a "known" Sixth Amendment right).

While the Eleventh Circuit majority charged Judge Tjoflat with "misunderstand[ing]" and "confus[ing] the issue" by invoking the *Olano* distinction, because the "appellate procedural default" rule is "but a logical extension of [this] Court's decision in *Shea*," *Levy*, 391 F.3d at 1335, it is rather the Eleventh Circuit majority that has "confused" the significance of *Shea*. Notably, this Court decided *Shea* two years before *Griffith*, and in footnote 4 in *Shea*, merely addressed whether for retroactivity purposes, defendants ***on collateral review*** should be treated differently from those raising claims on direct review. 470 U.S. at 60-61. In reaffirming "Justice Harlan's reasoning – that principled decisionmaking and fairness to similarly situated petitioners require application of a new rule to all cases pending on direct review;" in drawing the retroactivity "dividing line" at the "finality

of a conviction;" in adopting Justice Powell's rationale that differential treatment on direct and collateral review makes sense because the "costs" of applying a new decision on collateral review "outweigh the benefits;'" but indeed, in making clear that a court on collateral review must nonetheless apply a new decision retroactively if it was not applied (as it should have been) on direct appeal, because even "cases on collateral review ordinarily should be considered in light of the law as it stood when the conviction became final," *id.* at 58-59 & n. 4 (citations omitted), the Court set forth ***no principle*** that could "logically" be "extended" into an absolute, across-the-board procedural bar of newly-available claims on direct appeal. To the contrary, the Court's reasoning in *Shea* necessarily precludes such an absolute rule. And so does *Booker*.

In expressing its "expectation" that the lower courts would apply "ordinary prudential doctrines," the *Booker* Court was not coining a new term or phrase. To the contrary, throughout its jurisprudence, this Court has consistently used "prudential doctrine" to refer to discretionarily-applied rules – and to distinguish such rules from other rules (like the Eleventh Circuit's "appellate procedural default" rule) that are "absolute," or effectively "jurisdictional." *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (holding that courts are not absolutely bound by the "prudential doctrine" of third-party standing); *United Food and Commercial Workers Union Local l751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996) (noting distinction between bars to review that are "absolute" and bars that are merely "prudential"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 89 (1996) (Stevens, J. dissenting) (distinguishing between bars to review that are merely "prudential" and bars that are jurisdictional and limit the authority of the Court); *see also Pasquantino v. United States*, 544 U.S. 349, 125 S.Ct. 1776, 1783 n. 5 (2005) (Ginsburg, J. dissenting) (distinguishing a "prudential" rule from a "jurisdictional" rule). As Judge Tjoflat has

correctly asserted, the Eleventh Circuit's rule is neither "prudential" nor "ordinary." It is, in fact, a quite "***extra*** ordinary rule." *Vanorden*, 414 F.3d at 1325.

The Eleventh Circuit's "appellate procedural default" rule directly conflicts with the very precedents of this Court which the Eleventh Circuit claims are "consistent with" and support its rule. Under such circumstances, review by certiorari is clearly warranted. Sup. Ct. R. 10(c).

II. The Eleventh Circuit's "Appellate Procedural Default" Rule Conflicts With the Approach Taken by *All* of the Other Circuits to Constitutional Claims Which Were Not Raised in the Appellant's Opening Brief, But Are Newly-Available As a Result of an Intervening Decision of This Court

In ignoring the controlling precedent of this Court, applying an absolute "procedural bar" to new constitutional claims based upon intervening decisions of this Court, and holding, ***categorically***, that issues not raised in an opening brief are forever waived, and may not be reviewed even for "plain error" – the Eleventh Circuit stands completely alone among the circuits. Notably, in the aftermath of *Blakely* and *Booker*, ***every circuit*** in this country specifically considered the appropriateness of reviewing new constitutional claims based upon the intervening decisions of this Court, and ***no circuit*** – other than the Eleventh – applied a rigid "procedural default" rule, presumed "abandonment" of these newly-available claims, or denied a criminal defendant the right to "plain error" review of such claims, simply because the issue was not preserved in a pre-*Blakely/Booker* opening brief on appeal.

Rather, where a new *Booker* issue had been identified prior to the issuance of the circuit court's opinion, the Third Circuit granted the defendant an automatic remand for a full resentencing in accordance with *Booker*,[1] the Second, Seventh, and Ninth Circuits granted the defendant a

[1]*United States v. Davis*, 407 F.3d 162, 165-166 (3rd Cir. 2005) (*en banc*) (in recognition that "*Booker* applies to all cases pending on direct review," and that "many of the directs appeals [in pre-

"limited remand" to the district court as an aid to the circuit court's own "plain error" review,[2] the First Circuit actually granted the defendant "preserved error" review (if the new issue was raised in a supplemental brief),[3] while all of the other circuits assured the defendant – at the very least –

Booker cases] will call for plain error analysis," "presuming" prejudice sufficient to satisfy the "plain error" standard ***wherever*** the defendant was sentenced under the mandatory Guideline regime, and remanding for resentencing ***in any and every case*** in which the defendant states he wishes to challenge his sentence under *Booker*; "This approach ensure[s] that each defendant to whom *Booker* applies is sentenced accordingly," and "results in uniform treatment of post-*Booker* defendants on direct appeal, fostering certainty in the administration of justice and efficient use of judicial resources.").

[2]*United States v. Crosby*, 397 F.3d 103, 118-120 (2nd Cir. 2005) (*Booker/Fanfan* "must be applied" to cases pending on direct review, "just as the Supreme Court itself applied *Booker/Fanfan* to the pending appeals of Booker and Fanfan" – citing *Griffith v. Kentucky*; if the Guidelines were applied in mandatory fashion, case should be remanded to district court to consider whether the original sentence would have been non-trivially different under the post-*Booker/Fanfan* regime; such procedure will aid the appellate court's "plain error" review); *United States v. Pree*, 408 F.3d 855, 874-875 (7th Cir. 2005) (rejecting suggestion that a defendant could have "waived" a *Booker* claim by failing to raise it in a pre-*Booker* Initial Brief; explaining that "in light of the sea change in federal sentencing law" wrought by *Booker*, "we believe it unfair to characterize Ms. Pree as having waived a challenge to the validity of her sentence;" inviting supplemental briefing as to *Booker*'s application to the case, and addressing the new *Booker* claim under "plain error" standard; issuing "limited remand" to district court to determine whether original sentence would have been imposed under advisory guideline scheme); *United States v. Ameline*, 409 F.3d 1073, 1076-1077, 1086 (9th Cir. 2005) (*en banc*) (while *Blakely/Booker* issue had not been raised in the defendant's opening brief, concluding "as did the three-judge panel [which addressed the *Blakely* issue *sua sponte*], that it is nonetheless appropriate to permit him to raise those issues;" adopting "limited remand procedure articulated by the Second Circuit in *Crosby* to assess the existence of plain error in pre-*Booker* sentencing appeals").

[3]*United States v. Vasquez*, 407 F.3d 476, 487-490 (1st Cir. 2005) (court had discretion to consider new issues after briefing "under exceptional circumstances," and "substantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* was "exceptional circumstance" permitting new issues to be raised in supplemental briefing; rejecting government's claim that defendant waived issue by failing to raise it in initial brief; reviewing claim raised for the first time in a supplemental brief under the "preserved error/harmless error" standard).

review under the "plain error" standard.[4]

In sum, ***none*** of the circuits – other than the Eleventh – categorically refused to conduct ***any*** form of merits review (under the "plain error" standard), simply because a *Booker*-type issue was not raised in the appellant's initial brief. And every one of the other circuits that have faced this issue in the aftermath of *Descamps* has given defendants at least ***some form of appellate review*** of the merits of a newly-asserted *Descamps* claim. *See United States v. Anderson*, 745 F.3d 593, 594, 598 (1st Cir. 2014) (court ordered supplemental briefing so it could address the impact of *Descamps* on the merits); *United States v. Blair*, 734 F.3d 218, 223 (3d Cir. 2013) (*Descamps* claim properly raised by defendant who filed motion for supplemental briefing, court then ordered government to respond and ultimately decided *Descamps* issue on the merits under a plenary standard of review); *United States v. Bankhead*, 746 F.3d 323, 325 (8th Cir. 2014) (court reversed case based on

---

[4] *United States v. Washington*, 398 F.3d 306, 312 n. 7 (4th Cir. 2005) (the ordinary rule that appellate contentions not raised in an opening brief are waived would ***not*** be applied in *Booker* cases; "the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review,' Breyer Opinion at 25;" reviewing newly-asserted claim for "plain error"); *United States v. Taylor*, 409 F.3d 675, 677 (5th Cir. 2005) (*Blakely/Booker* challenge raised before decision issued on direct appeal would be reviewed for "plain error"); *United States v. Oliver*, 397 F.3d 369, 377-388 & n. 1 (6th Cir. 2005) (new *Blakely*/*Booker* issues not raised in original round of briefing, properly raised in Rule 28(j) letter; "We read the Supreme Court's decision in *Booker* as encouraging us to review cases like Oliver's which are currently pending on direct appeal for 'plain error;'" imposition of sentence in violation of Sixth Amendment affects substantial rights and requires resentencing); *United States v. Cramer*, 396 F.3d 960, 962 n. 3 (8th Cir. Feb. 3, 2005) (*Blakely* claim is "properly rais[ed]" by seeking permission to file a supplemental brief, but not in Rule 28(j) letter), *vacated and substituted by*, *United States v. Cramer*, 414 F.3d 983, 985-986 (8th Cir. July 21, 2005) (deciding to address – under the "plain error" standard – even a *Blakely* claim raised in a Rule 28(j) letter); *United States v. Clifton*, 406 F.3d 1173, 1175 n. 1, 1181 (10th Cir. 2005) (new *Blakely* issue is properly raised post-briefing in a supplemental brief; reviewing such claim for "plain error"); *United States v. Smith*, 401 F.3d 497 (D.C. Cir. 2005) (reviewing for "plain error" the constitutionality of the defendant's sentence in light of *Booker*, although the defendant had failed to raise a Sixth Amendment challenge in the district court ***or*** on appeal, but rather, raised it for the first time on rehearing).

Descamps issue raised for first time in defendant's out-of-time reply brief, after which court ordered government to respond, and government agreed that remand was appropriate); *United States v. Olsson*, 742 F.3d 885, 855-56 (8th Cir. 2013) (after Supreme Court remanded case pursuant to a GVR in light of *Descamps,* court considered *Descamps* issue on the merits (without supplemental briefs) and found that Missouri burglary statute mirrored generic burglary, thus remaining a predicate for ACCA enhancement); *United States v. Tucker*, 740 F.3d 1177, 1180, 1182 (court reversed case based on *Descamps* issue after supplemental briefing on rehearing); *United States v. Cabrera-Gutierrez*, __ F.3d __, 2014 WL 998173 (9th Cir. 2013); *United States v. Edwards*, 734 F.3d 850, 854 (9th Cir. 2013) (court ordered supplemental briefing so it could address the impact of *Descamps* on the merits, government conceded that remand was appropriate, and thereafter court reversed case and remanded for resentencing without the ACCA enhancement); *United States v. Flores-Cordero*, 723 F.3d 1085, 1089 (9th Cir. 2013) (court ordered supplemental briefing so it could address the impact of *Descamps* on the merits, government requested remand so district court could apply modified categorical approach, but court determined predicate offense was indivisible and remanded case for resentencing without 2L1.2 enhancement).

It is *only* in the Eleventh Circuit that Mr. Joseph and other similarly-situated defendants have been categorically precluded from receiving ***any review whatsoever*** of newly-available *Descamps* claims.

The circuit conflict on this issue has remained entirely one-sided for over ten years now. And for over ten years, it has resulted in the consistent denial to Eleventh Circuit defendants, of rights consistently granted to similarly-situated defendants everywhere else in the country. Accordingly, it necessitates review – and resolution – by this Court. Sup. Ct. Rule 10(a).

III. The Urgent Need for This Court's Intervention

When this stark circuit conflict began to manifest itself early in the wake of *Apprendi*,[5] Eleventh Circuit litigants still remained hopeful that their appellate court would see the error in its "procedural default" rule, correct itself, and eventually bring itself into line with the decisions of this Court and the other circuits. However, now that almost ***fifteen years*** have passed since the Eleventh Circuit first "invented" its "appellate procedural default" rule in *Nealy*, it is obvious that the Eleventh Circuit will ***not*** self-correct. For years, Eleventh Circuit defendants sought – and were consistently denied – rehearing *en banc* on the issue.[6] Dissenting Judges Tjoflat and Barkett were the "lone voices in the wilderness," unable – even with their cogent reasoning – to sway the majority of their court. And notably, as indicated by the decision below and scores of similar Eleventh Circuit decisions, the Eleventh Circuit has continued to disregard *Griffith*.

In *Higdon*, the Eleventh Circuit noted that this Court had issued its "standard" GVR order ***even*** in cases in which the lower court had expressly applied its "procedural default" rule, *see Higdon*, 418 F.3d at 1141 n. 7 (and cases cited therein) – and inferred from that practice, that the "standard" orders "do not affect application of our prudential rules." *Id.* Presumably, however, in

---

[5] *See, e.g., United States v. Collazo-Aponte*, 281 F.3d 320 (1st Cir. 2002) (upon GVR from this Court for "further consideration in light of *Apprendi*," reviewing *Apprendi* claim for "plain error" notwithstanding that defendant had raised no similar claim in appellate briefs); *United States v. Knight*, 50 Fed. App. 565, 2002 WL 31429873 (3rd Cir. 2002) (same); *United States v. Carrington*, 301 F.3d 204 (4th Cir. 2002) (same); *United States v. Randle*, 304 F.3d 373 (5th Cir. 2002) (same); *United States v. Humphrey*, 56 Fed. Appx. 690, 2003 WL 202166 (6th Cir. 2003); *United States v. Hughes*, 5 Fed. Appx. 507, 2001 WL 201952 (7th Cir. 2001) (same); *United States v. Valensia*, 299 F.3d 1068 (9th Cir. 2002) (same); *United States v. Jackson*, 240 F.3d 1245, 1247-48 & n. 3 (10th Cir. 2001) (same).

[6] *See, e.g., United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001); *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004); *United States v. Dockery*, ___ F.3d ___ (11th Cir. May 9, 2005) (Table, No. 03-16388-II); *United States v. Higdon*, 418 F.3d 1136 (11th Cir. 2005).

issuing the standard GVR orders in *Dockery* and *Levy*, this Court was still holding out "hope" that the Eleventh Circuit would see its error, and relax its rule.[7] Now, however, there is no basis for such "hope"– and it would likely be futile for this Court to issue its standard GVR order in this case.

At this juncture, the Court must take different action – positive action. For indeed, the Eleventh Circuit has only become *more* rigid, and *more* entrenched in its "appellate procedural default" rule in the years since *Booker*. In the decisions upon remand in *Higdon* and *Levy*, for instance, the Eleventh Circuit cited as new support for its rule, a footnote in this Court's decision in *Pasquantino v. United States*, 544 U.S. 349, 125 S.Ct. 1766 (2005), where the Court stated that it would "decline" to address a *Blakely* argument that the petitioners did not raise "before the Court of Appeals ***or in their petition for certiorari***." *Id.* at 1782 n. 14 (emphasis added). While the very fact that ***this Court*** deems an issue timely raised if included in the certiorari petition would seem to undercut any tenable suggestion of an insurmountable "procedural default" before an appellate court, the Eleventh Circuit drew the opposite conclusion – equating its own "power" to "foreclose" issues, to that of this Court, stating:

> It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why this Court should be powerless to apply its prudential rule to foreclose defendant Levy's untimely *Blakely*, now *Booker*, claim.

Levy, 416 F.3d at 1277; *see also Higdon*, 418 F.3d at 1140-1141 ("Lest there be any doubt about the

---

[7]Notably, prior to the decision upon remand in Mr. Vanorden's case, the Eleventh Circuit ***had*** in fact addressed a claim of *Booker* error in at least two cases where the issue was ***not*** raised in the defendant's opening brief. *See, e.g., United States v. Dacus*, 408 F.3d 686, 687 (11th Cir. 2005) (government conceded the error); *United States v. Lefebvre*, 132 Fed. Appx. 251, 2005 WL 1163626 (11th Cir. May 18, 2005) (upon GVR order "for further consideration in light of *Booker*," reviewing *Booker* claim raised for the first time on certiorari under "plain error" standard; denying relief because claim failed third prong of "plain error" test; no mention of "appellate procedural default" rule).

constitutionality of this Court's approach, the Supreme Court has applied its own prudential rules [in *Pasquantino*] to foreclose the ability of defendants to raise *Blakely* claims; noting the Court's standard GVR orders "do not affect application of our prudential rules). "Energized" by its misreading of *Pasquantino* as new support for an absolute rule of "procedural default" at the circuit level, the Eleventh Circuit is ***not*** about to "self-correct" – unless specifically ordered to do so by this Court.

While this Court may have previously "hoped" that the Eleventh Circuit – as a matter of "prudence" – would relax its "procedural default" rule to prevent a manifest injustice in a particularly deserving case, the Eleventh Circuit dispelled any possible hope in that regard by its decision in *United States v. Borden*, 421 F.3d 1202, 1206 n. 1 (11th Cir. 2005). In *Borden*, the Eleventh Circuit recognized that the defendants could "readily satisfy" the stringent "plain error" standard for reversal announced in *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005). But, notwithstanding even a clear recognition of "plain error," a substantial effect on the defendant's substantial rights, ***and manifest injustice***, *see, e.g., United States v. Rodriguez*, 406 F.3d 1261, 1262 (11th Cir. April 19, 2005) (Carnes, J. concurring in denial of rehearing *en banc*) (where the third prong of the "plain error" test is met, the fourth prong is met as well), the Eleventh Circuit nonetheless found "itself "***unable*** to entertain the Bordens' *Booker* claim" because the issue had not been raised in the original briefing, and "the court has opted to apply [its "procedural default"] rule uniformly and equally to all cases." *Borden, id. (*emphasis added). Concurring in that manifestly ***unjust*** result with a noted "lack of enthusiasm," Circuit Judge Hill apologized for the inflexibility of his circuit's "procedural default" rule, and criticized its rigid adherence to prior wrongly-decided decisions in the name of *stare decisis*, stating:

> I should like to think that a court would want to correct an erroneous sentence of incarceration – if an efficient and prudential method could be devised to do so. We must feel that we cannot. Yet, the other circuits in this country seem to be doing so – and surviving!
>
> We hold steadfastly to our precedent. That is worthwhile conduct and procedure. *Stare decisis* is an important doctrine. But I trust that, from time to time, it might be tempered with *fiat justitia ruat coelum* [Let justice be done though the heavens will fall].

Id. at n. 1 (Hill, J., concurring).

Since *Borden*, it has been clear to Eleventh Circuit litigants that the Eleventh Circuit will not ***ever*** – in ***any*** case – "temper" its purportedly "prudential" rule with the interests of "justice." Indeed, in finding itself "unable" to relax its rule even for a "manifest injustice," or a case like Mr. Joseph's where the government had not yet filed its Answer Brief, had not been prejudiced in any manner, and explicitly *agreed* that Mr. Joseph should have the opportunity to brief a newly-available constitutional challenge to the harsh Career Offender enhancement, the Eleventh Circuit has categorically refused to exercise the discretion that Rule 52(b) demands in every appellate case. Under the "guise" of a mere "prudential rule," what the Eleventh Circuit has erected is in effect, an "***extra***ordinary," absolute, jurisdictional bar to review and relief for Eleventh Circuit defendants. Such a rule "removes" the "essential attributes of judicial power" from the court, and thus ***cannot*** – under any circumstances – be deemed a proper exercise of the court's "supervisory power." *See Thomas v. Arn*, 474 U.S. 140, 148-154-155 (1985) ("Even a sensible and efficient use of the supervisory power" is invalid if it conflicts with statutory provisions; noting that Sixth Circuit's "nonjurisdictional" waiver rule had "not removed the essential attributes of the judicial power," because "the Court of Appeals may excuse the default in the interests of justice").

This "misuse" by the Eleventh Circuit of its "supervisory power" cries out so clearly for this

Court's intervention and correction, because of the "actual inequity" it has produced. Had Mr. Joseph been prosecuted in any other circuit in this country, he would have had an avenue for further appellate review, while in the Eleventh Circuit he has ***no avenue***. With *Nealy*, *Ardley*, *Dockery*, *Levy*, and *Hembree* on the books in the Eleventh Circuit, Mr. Joseph is at a complete "dead end" – stuck with his improperly-enhanced sentence when he does *not*, under current law, qualify as a Career Offender. That this is "harsh" and "unfair" is a gross understatement. Justice dependent upon "locale" is ***unequal*** justice – violative of the most fundamental concepts of due process and equal protection of our laws. While this Court tried to prevent such "actual inequity" in *Griffith*, by "instructing the lower courts to apply the new rule retroactively to [***all***] cases not yet final," 479 U.S. at 326-327, 323, and the message in *Griffith* – explicitly reaffirmed in *Booker* – could not have been more clear, the Eleventh Circuit has wilfully chosen to ignore the broad mandate of *Griffith*; misapply language from *Shea*; and remain an intransigent "minority of one," *Levy*, 391 F.3d at 1345 (Tjoflat, J. dissenting from denial of rehearing *en banc*), "equally" and "uniformly" denying Eleventh Circuit litigants rights consistently granted identically-situated litigants in every other circuit court in this country.

This has ***not*** been a post-*Booker* "transitional" problem. The conflicts between the Eleventh Circuit and this Court, and between the Eleventh Circuit and the other circuit courts, have ***neither*** disappeared ***nor*** lessened after the *Booker* pipeline cases were resolved. To the contrary, such conflicts have widened and proliferated precisely because the Eleventh Circuit was clear that it would apply its "procedural default" rule beyond the *Apprendi-Blakely-Booker* context, to bar ***not only*** criminal defendants, ***but also*** the government, and civil litigants from ***ever*** taking advantage of a new rule of law established by this Court during the pendency of a direct appeal. *See Levy*, 379

F.3d at 1244 (the issue-abandonment rule applies "to all appellants, whether the government or the defendant); *Higdon,* 418 F.3d at 1137, 1139 (procedural default rule is applied evenly and uniformly to all "litigants"); *Borden,* 421 F.3d at 1206 n. 1 (11th Cir. Aug. 25, 2005) ("This court has opted to apply this rule uniformly and equally to all cases"). Ultimately, as Judge Tjoflat correctly perceived years ago, the Eleventh Circuit's rule has required not only criminal defense attorneys, but government attorneys and civil attorneys as well to raise every conceivable claim for relief (even if frivolous under existing precedent) – greatly burdening the already-overburdened Eleventh Circuit with patently frivolous claims. *See Levy,* 391 F.3d at 1350 (Tjoflat, J., dissenting from denial of rehearing *en banc*) ("the position we have adopted will result in 'counsel's inevitably making a long and virtually useless laundry list' of appellate arguments that are plainly unsuppported, or even foreclosed, by precedent"). As such, and contrary to the Eleventh Circuit's rationalizations, its "appellate procedural default" rule is neither "workable" nor "prudent." It has undermined – rather than furthered – the stated goal of "judicial economy" within the Eleventh Circuit itself, and ultimately, strains the resources of this Court as well.

In the tri-fold interests of consistency, justice, and judicial economy, therefore, Mr. Joseph urges this Court to grant the writ of certiorari, vacate the decision below, and affirmatively reject the Eleventh Circuit's inflexible "appellate procedural default" rule, under which that court is *precluded* from considering the merits of a claim based upon an intervening decision of this Court – even under plain error review, and even with the government's agreement – simply because a similar claim was not raised in the appellant's initial brief. At minimum, to render the Eleventh Circuit's procedure consistent with *Griffith*, the Court should reject application of any "appellate procedural default" in ***criminal*** cases.

If, however, the Court is unwilling to grant plenary review of the Question Presented for Review in this petition, the Court could and should – simply and summarily – grant certiorari, vacate the decision below, and remand Mr. Joseph's case to the Eleventh Circuit with the following ***specific instruction*** (or some equivalent):

> The petition for writ of certiorari to the Eleventh Circuit is granted. The case is remanded to the Eleventh Circuit to conduct plain error review of the petitioner's enhanced Career Offender sentence in light of *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (June 20,2013).

While admittedly, drafting the "standard" GVR order in this fashion would not resolve the greater circuit conflict, it might at least pre-empt an argument by the Eleventh Circuit on remand that the language of the "GVR" order does not compel a merits review, and it would afford due process and equal protection to Mr. Joseph – assuring the efficacy of the mandate of *Griffith* in his case. *See Griffith*, 479 U.S. at 323 ("practical" reasons compel courts of appeals to apply new rules to pending cases; otherwise this Court would have the overwhelming task of affording merits review in all cases affected by the new rule). Finally, in assuring the consistency of Mr. Joseph's case with the post-*Booker* and post-*Descamps* decisions of the other circuits, drafting the "standard" GVR order in that manner here will also serve the Sentencing Reform Act's goal of avoiding unwarranted sentencing disparities.

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,

MICHAEL CARUSO
Federal Public Defender

By: _____
BRENDA G. BRYN
Assistant Federal Public Defender
Counsel for Petitioner

Ft. Lauderdale, Florida
June 18, 2014