IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,

v.

FRANK H. BYNES, JR.

No. _____

Non-Argument Calendar

Pre-petition Motion For An Extension of Time to File Petition for Certiorari

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An Appeal, in a Criminal Case, from the Final Judgment of the United States Court of Appeals for the Eleventh Circuit

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RE: Eleventh Circuit Docket No. 20-10673

(1.7)

• Now Comes the Petitioner, pro se, Frank H. Bynes, Jr., in the above-styled matter, pursuant to 28 U.S.C.S 2101(c) and United States Supreme Court Rule ("U.S.S.C.R.") 30(2-3), to respect-fully move this Honorable Supreme Court for an extension of time to file a Petition for Certiorari with the Clerk of the Supreme Court of the United States. In support of this motion, Petitioner shows the Court as follows:

(1) On October 3, 2022, this Supreme Court remanded Petitioner's direct appeal to the Eleventh Circuit Appeals Court after granting Petitioner's first certiorari petition seeking review of Petitioner's convictions and sentence, in light of this Court's intervening ruling in Xiulu Ruan v. United States (142 U.S. 2370) and the retroactive applicability thereof, so as to direct the Eleventh Circuit's reconsideration. (See: Bynes v. U.S., 143 S.Ct. 91 (10/3/2022)).

(2) Subsequently, on remand, the Eleventh Circuit Court of Appeals purported to find cause and reinstated the

(2) (Continued)

convictions and sentence originally imposed upon Petitioner which this Supreme Court had former-ly vacated. (See: Byrnes v. U.S., 20-106-73 [at Doc. 106-1] (11th Cir., 11/20/2024)). (Exhibit A - Final Opinion of Eleventh Circuit Court of Appeals. Appeal No. 20-10673. Attached hereto and incorporated herein by reference).

(3) Per Petitioner's best recollection, on or about Dec-ember 15, 2024, Petitioner first learned of the Eleventh Circuit's said adverse appeal decision by virtue of Petitioner's receipt of correspondence from appointed Counsel (dated November 26, 2024) which advised of such opinion as well as of such Counsel's election to cease representation from any desired further appeals in the matter. (See: Exhi-bit B - letter from Appointed Counsel, dated 11/26/2024. Attached hereto and incorporated by such reference).

(4) In the interim period between the date Petitioner received said notice of the Eleventh Circuit's said

(4) (continued)

adverse decision and this date, Petitioner has been repeatedly and consistently been made subject to a variety of circumstances, beyond Petitioner's control as an inmate, which have substantially impeded Petitioner's ability to compose a competent and viable Petition for Certiorari for timely submission with this Court on or before the instant February 18, 2025 deadline prescribe by this Court's local rule, (U.S.S.C. L.R. 30 (2-3)).

(5) That said uncontrollable counteravailing circumstances inhibiting Petitioner, as described above, includes, but are not limited to:

(a) Prison staff shortages and legal research inaccess due to ~~multiple~~ successive federal work holidays;

(b) Computer equipment failure preventing legal research;

(c) personal physical incapacitation due to weather-related and chronic-care illness; and,

(d) lack of access to licensed trained counsel, or qualified and competent paralegal assistance.

(6) Despite Petitioner's best and diligent efforts to overcome and prevail against the said obstacles to comply with said February 18, 2025 deadline, Petitioner has now fallen precariously behind the time schedule and agenda Petitioner set to manage the task of comp-osing and filing such petition on time and now perceives the need to exercise an abundance of caution to avoid forfeiture of the right to petition this Court for review by seeking additional time, in advance, to allow Petitioner to obtain case files from former Counsel and to marshal other resources that are necessary to meet Petitioner's goal of compliance.

(7) Under the present circumstance, Petitioner believes and asserts that an additional one hundred and twenty (120) days from February 18, 2025, or until June , 2025, would be a sufficient amount of time to account for said past and possible unforeseeable future hindrances to permit Petitioner's composition and submission of a competent and timely pro se certiorari petition to address Petitioner's contentions sought for review in the Supreme Court of the United States, and humbly requests provision of such.

- Whereas, Petitioner here certifies and attests, under penalty of perjury, pursuant to 28 U.S.C. § 1746 and all relevant laws of the States of America United, that the above and within statements of fact are true; correct; based upon my own direct personal knowledge; and devoid of any unlawful or immoral or untoward intent or purpose, as signified by my own handwritten signature below.

- And, Whereas, Petitioner hereby, for cause as stated above and within, moves this Honorable Court for an additional time allotment of one hundred and twenty (120) days (or until ~~June~~ , 2025) to submit and file Petitioner's Petition for Certiorari, as measured from February 18, 2025, or provision of such amount of additional time as the Supreme Court may alternatively deem necessary or appropriate in it's esteemed discretion; and such other and further relief deemed proper.

- Petitioner humbly and respectfully Submits,

This 24 day of January 2025. /s/ Frank H. Byrnes Jr.

Frank H. Byrnes Jr.
(22607-021)

— Federal Correctional Complex, Coleman Low, P.O. Box 1031, Dorm A-2, Coleman, Florida 33521 —

Declaration of Service

I, Frank H. Byrnes, Jr., hereby declare and certify, under penalty of perjury, pursuant to 28 U.S.C. § 1746 and all relevant laws of the States of America United, that I have, on this date, duly sent notice of this filing to the following recipient(s) by placing the same in the United States Postal Service Inmate Mailbox at F.C.C. Coleman Low, in adequately secured packaging bearing sufficient pre-paid postage, and legibly and clearly addressed correctly to ensure prompt delivery to:

(1) Clerk of the United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

(2) United States Attorney General or his duly assigned Assistant United States Attorney (to wit:
P.O. Box 8970
Savannah, Georgia 31412

• This 24 day of January 2025. /s/ Frank H. Byrnes, Jr.
(Address As Above) (pro se)

Exhibit

A

2.

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-10673

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK H. BYNES, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia
D.C. Docket No. 4:18-cr-00153-LGW-CLR-1

Before JILL PRYOR, BRANCH, and LAGOA, Circuit Judges.

PER CURIAM:

This appeal is back before this Court on remand from the United States Supreme Court. On October 10, 2019, a jury found Frank Bynes, Jr., guilty of 13 counts of knowingly and intentionally dispensing controlled substances by issuing prescriptions not for legitimate medical purposes and not in the usual course of professional practice, in violation of 21 U.S.C. § 841(a)(1), and 3 counts of healthcare fraud under 18 U.S.C. § 1347. The district court sentenced Bynes to a total term of 240 months' imprisonment. Bynes appealed his sentence and this Court affirmed his convictions and sentences. Bynes then filed a petition for writ of certiorari. The Supreme Court granted Bynes's petition, vacated his judgment, and remanded the case to this Court for further consideration in light of *Xiulu Ruan v. United States (Ruan II)*, 597 U.S. 450 (2022).

I.

Frank Bynes, Jr., a veteran of the Air Force, is a doctor in internal medicine who graduated from medical school in 1977. In 2008, he joined Curtis Cooper Health Care in Savannah, Georgia, where he took care of indigent patients. To earn additional income, Bynes also began treating indigent patients at a clinic named "Measurements, Balance & Attitude" on a part-time basis. In February 2017, Bynes left those roles and began seeing patients at the "Georgia Laboratory Diagnostics" clinic. On September 21, 2017, the Drug Enforcement Agency ("DEA") executed a search warrant

on Georgia Laboratory Diagnostics and raided Bynes's office. Bynes surrendered his medical license that same day.

On June 6, 2018, the United States filed a 48-count indictment against Bynes in the Southern District of Georgia. The government filed a 17-count superseding indictment on April 3, 2019. Counts 1 through 14 of the superseding indictment charged that, between August 17, 2015, and September 7, 2017, Bynes knowingly and intentionally dispensed controlled substances by issuing prescriptions not for a legitimate medical purpose and not in the usual course of professional practice, in violation of 21 U.S.C. § 841(a)(1). Counts 15 through 17 alleged that Bynes committed healthcare fraud in violation of 18 U.S.C. § 1347 by submitting false and fraudulent claims to Medicare, Tricare, and Medicaid, including claims for controlled substances that Bynes knew "were not issued for a legitimate medical purpose by an authorized individual practitioner acting in the usual course of professional practice and, therefore, were ineligible for reimbursement."

Before trial, the parties agreed on proposed jury instructions and filed their proposed instructions jointly. The parties jointly requested the following instruction for Counts 1 through 14, which was later given to the jury:

> A physician may be convicted of a violation of Title 21, United States Code, Section 841(a)(1) when he dispenses a Controlled Substance either outside the usual course of professional practice or without a legitimate medical purpose.

> Whether the Defendant acted outside the usual course of professional practice is to be judged objectively by reference to standards of medical practice generally recognized and accepted in the United States. Therefore, whether the Defendant had a good faith belief that he dispensed a controlled substance in the usual course of his professional practice is irrelevant.
>
> However, whether the Defendant acted without a legitimate medical purpose depends on the Defendant's subjective belief about whether he was dispensing the controlled substance for a legitimate medical purpose. Therefore, in order for the Government to establish that the Defendant was acting without legitimate medical purpose, the Government must prove beyond a reasonable doubt that the Defendant did not subjectively believe that he was dispensing the controlled substance for a legitimate medical purpose. Good faith in this context means good intentions and the honest exercise of good professional judgment as to a patient's medical needs. Good faith connotes an observance of conduct in accordance with what the physician believes to be proper medical practice. In determining whether the Defendant acted in good faith in the course of medical practice, you may consider all of the evidence in the case that relates to that conduct.

The case proceeded to trial, and Bynes, the defense's sole witness, testified for nearly a day. The jury found Bynes guilty of all counts except Count 11. The district court sentenced Bynes to

a term of 240 months' imprisonment as to each of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14, and to terms of 120 months as to each of Counts 15, 16, and 17, all to be served concurrently for a total term of 240 months' imprisonment. The district court also ordered Bynes to pay $615,145.06 in restitution.

Following an appeal, a panel of this Court affirmed Bynes's convictions and sentences based on an independent examination of the entire record. Bynes filed a petition for writ of certiorari with the Supreme Court, which the Court granted in light of its recent decision in *Ruan II*. The Supreme Court vacated this Court's judgment and remanded the case for further consideration in light of *Ruan II*.

This appeal follows.

II.

When a party does not object to a jury instruction before the district court, this Court will review that instruction for plain error. *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). Plain error occurs in a criminal appeal if (1) there was error, (2) that was plain, (3) that affected the defendant's substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *United States v. Duldulao*, 87 F.4th 1239, 1251–52 (11th Cir. 2023) (quoting *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010)).

"Error is plain when, at the time of appellate review, it is obvious or clear under current law, even if the law at the time of the trial was settled to the contrary." *United States v. Jimenez*, 564

F.3d 1280, 1286 n.2 (11th Cir. 2009) (internal quotations omitted); *see also Henderson v. United States*, 568 U.S. 266, 279 (2013) (explaining that regardless of "whether a legal question was settled or unsettled at the time of trial," the second prong of the plain-error test is satisfied if an error is plain "at the time of appellate consideration" (internal quotations omitted)).

III.

On appeal, Bynes presents one argument—whether the district court committed plain error when it instructed the jury on the requirements for a conviction under 21 U.S.C. § 841(a)(1). Specifically, Bynes argues that the district court plainly erred when it told the jury that "[w]hether the defendant acted outside the usual course of professional practice is to be judged objectively by reference to standards of medical practice generally recognized and accepted in the United States." While Bynes acknowledges that he did not object to this instruction in the district court, he contends that the instruction was nevertheless erroneous in light of the Supreme Court's ruling in *Ruan II*, which was decided after Bynes's trial and conviction (and our initial affirmance). And he argues that the district court's erroneous instruction prejudiced his substantial rights because, given the evidence of his subjective belief presented at trial, there is a "reasonable probability that the jury would have found [him] not guilty of the Section 841(a)(1) charges." In addition, "because the Government's theory of health care fraud depended upon Section 841 convictions under Counts 2, 6, and 8," Bynes argues, "there is also a reasonable probability that a jury would have found [him] not guilty of the health care fraud charges

asserted pursuant to 18 U.S.C. § 1347 in Counts 15 through 17." Bynes, therefore, asks us to vacate all of his convictions.

Under 21 U.S.C. § 841(a)(1), it is a federal crime for any person, "[e]xcept as authorized," to "knowingly or intentionally . . . manufacture, distribute, or dispense" a controlled substance. Registered doctors may, of course, prescribe controlled substances to their patients. *Ruan II*, 597 U.S. at 454. However, a doctor violates § 841(a)(1) "when he distributes or dispenses a controlled substance either not for a legitimate medical purpose or outside the usual course of professional practice." *Duldulao*, 87 F.4th at 1251 (citing 21 C.F.R. § 1306.04(a)).

In *Ruan II*, the Supreme Court held that the *mens rea* requirement of § 841(a)(1)—"knowingly or intentionally"—applies equally to the "except as authorized" portion of the provision, meaning that "the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." 597 U.S. at 454. The Supreme Court also rejected the United States's argument that a doctor can violate § 841(a)(1) when he makes "no *objectively* reasonable attempt to conform his conduct to something that his fellow doctors would view as medical care." *Id.* at 465 (emphasis added). This standard, the Court explained, would improperly "turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, not on the mental state of the defendant himself or herself." *Id.* at 465.

On remand, this Court ruled that "what matters" under *Ruan II* "is the defendant's subjective *mens rea*." *United States v. Xiulu Ruan (Ruan III)*, 56 F.4th 1291, 1296 (11th Cir. 2023). Relevant to this appeal, this Court held that a defendant's subjective intent also governs the "usual course of professional practice prong" of 21 C.F.R. § 1306.04(a), which is an implementing regulation of the statute. *Id.* at 1297. We reaffirmed that ruling in *Heaton*, where we held that a jury instruction was erroneous under *Ruan II* because it allowed the jury to convict the defendant doctor without considering whether he subjectively knew that his prescriptions had been issued outside the usual course of professional practice. *See United States v. Heaton*, 59 F.4th 1226, 1241–44 (11th Cir. 2023). In other words, to obtain a conviction under § 841(a)(1), the government must prove that the defendant "subjectively knew that his conduct fell outside the usual course of professional conduct." *Id.* at 1247.

Bynes argues—and the government agrees—that the district court's § 841 jury instruction was plain error. Remember, the district court instructed the jury that "[w]hether the defendant acted outside the usual course of professional practice is to be judged objectively." The United States concedes that "[t]hat instruction was erroneous" under *Ruan II*, *Ruan III*, and *Heaton*. "Moreover, the error was obvious because Supreme Court precedent establishes it." We agree: Our post-*Ruan-II* precedents hold that an instruction telling the jury that the "usual course of professional practice" prong must be evaluated using an objective standard is plainly erroneous under *Ruan II*. *See Ruan III*, 56 F.4th at 1297; *Heaton*, 59 F.4th at 1241.

The only question, then, is whether Bynes can meet his burden to show a reasonable probability that, having been given the correct instruction, the jury would have acquitted him. Under the plain-error test, did the district court's plain error affect Bynes's substantial rights in a manner that seriously affected the fairness, integrity, or public reputation of judicial proceedings? *Duldulao*, 87 F.4th at 1251–52.

For an error to have affected a defendant's substantial rights, it "almost always requires that the error 'must have affected the outcome of the district court proceedings.'" *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005) (quoting *United States v. Cotton*, 535 U.S. 625, 632 (2002)). "This means that to establish prejudice on plain error, the defendant must show there is a reasonable probability that, but for the error, a different outcome would have occurred; and a reasonable probability is a probability 'sufficient to undermine confidence in the outcome.'" *United States v. Margarita Garcia*, 906 F.3d 1255, 1267 (11th Cir. 2018) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). The defendant bears the burden of showing prejudice, and this burden is a high one. *Rodriguez*, 398 F.3d at 1299. In the context of a jury instruction, a defendant seeking to show that an instructional error affected his substantial rights "must show that the error was *probably responsible* for an incorrect verdict." *United States v. Iriele*, 977 F.3d 1155, 1179 (11th Cir. 2020) (emphasis added & internal quotations omitted).

Here, we conclude that Bynes has not met his burden under the third prong of the plain-error test because he has not shown

that the outcome would have been different had the district court instructed the jury to evaluate the "usual course of professional practice" prong on a subjective standard rather than an objective standard. In *Ruan II*, the Supreme Court held that although the "except as authorized" portion § 841(a)(1) turns on a defendant's subjective intent, the government can still "prove knowledge of a lack of authorization through circumstantial evidence." *Ruan II*, 597 U.S. at 467. For example, in *Heaton*, this Court held that there was "no basis in th[e] trial record for concluding that the jury would have acquitted Heaton had it been properly instructed," 59 F.4th at 1244–45, because the government had "presented overwhelming evidence that Heaton subjectively knew his conduct fell outside the usual course of his professional practice," *id.* at 1242. For example, testimony at trial revealed that Heaton regularly failed to obtain prior medical records relating to pain complaints, did not conduct credible physical examinations, and did not properly document the prescriptions that he issued to patients. *Id.* at 1243. Heaton also prescribed medication to a patient with whom he was having a sexual relationship. *Id.* In light of this evidence, this Court found no reason to conclude that the jury would have acquitted Heaton had it been properly instructed. *Id.* at 1244–45.

So too here. At trial, the government presented strong circumstantial evidence that Bynes subjectively knew that his prescriptions were issued outside the usual norms of professional conduct. For example, Robert Gibbons, who works for the Office of the Inspector General for the U.S. Department of Health and

Human Services, testified that out of 14,879 physicians who filled prescriptions under Medicaid Part D between September 30, 2015, and September 30, 2017, Bynes filled *the most* oxycodone prescriptions on the same day as an alprazolam or Xanax of any of those doctors. For comparison, more than 12,000 of those 14,879 doctors *never* filled a prescription of oxycodone and alprazolam on the same day. The government also provided evidence that Bynes prescribed astronomical, abnormal amounts of oxycodone in the relevant time period. Special Agent Troy Smith testified that during the month of August 2017, Bynes prescribed 6,600 dosage units of oxycodone from just one pharmacy, which was "more oxycodone than the next 41 prescribers combined." Similarly, at another pharmacy that same month, Bynes prescribed a staggering 10,680 dosage units of oxycodone, while the next highest prescriber filled only 1,230 units. At that pharmacy too, Bynes "prescribed more oxycodone than the next 38 individual practitioners" combined. One nurse who worked with Bynes stated that Bynes's patients looked "strung out" and "disheveled," and he described how Bynes "would stay late" because "most of the patients" would leave enraged if they could not get pain medication.

Additionally, the government's expert witness on pain management, Dr. Gene Kennedy, reviewed the files for each of the patients named in Counts 1 through 14 of the superseding indictment and testified that the medications prescribed by Bynes were "provided outside the course of acceptable medical practice" and "were not for legitimate medical purpose." He came to this conclusion in part because Bynes was having sex with his patients. According to

Dr. Kennedy, Georgia prohibits a doctor from having sexual contact with a patient because it "destroys the doctor's objectivity," and "in cases with scheduled medication, . . . it's difficult to ever demonstrate that scheduled medications are not being prescribed specifically in pursuit of a sexual relationship." Dr. Kennedy also testified that Bynes issued prescriptions without checking pharmacy reports and without obtaining drug screens or medical records from patients.

In sum, the government presented more than enough circumstantial evidence at trial to prove to the jury that Bynes knew that his prescriptions were outside the usual course of professional practice. Even so, the burden of persuasion is not on the government, and Bynes has failed to prove that the jury would have come out any differently had the jury members been instructed to consider the "within the usual course of professional practice" prong using a subjective standard. In light of all the circumstantial evidence suggesting that Bynes was aware that his operation was abnormal in the course of professional practice, we conclude that he has not shown a reasonable probability that the incorrect *Ruan II* instruction was "probably responsible" for his guilty verdicts. *Iriele*, 977 F.3d at 1179 (internal quotations omitted).[1]

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[1] In its brief, the government initially argued that Bynes could not challenge his convictions based on an erroneous jury instruction because Bynes "requested that exact instruction" at trial and thus "invited the error." This Court has since rejected that argument in *Duldulao*, 87 F.4th 1239, which the government acknowledges in a letter of supplemental authority. Because the

We thus affirm Bynes's convictions and sentence.

AFFIRMED.

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government acknowledges that this argument was rejected by *Duldulao*, we need not consider it here.

Exhibit

B

ALSTON & BIRD

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Jay Repko Direct Dial: 404-881-7683 Email: jay.repko@alston.com

November 26, 2024

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

VIA U.S. MAIL

Dr. Frank H. Bynes
Register No. 22607-021
FCI Coleman Low – Inmate Legal Mail
Federal Correctional Institution
P.O. Box 1031
Coleman, FL 33521

Re: *United States of America v. Frank H. Bynes, Jr.*
Eleventh Circuit Case No. 20-10673-GG

Dear Dr. Bynes:

On November 20, 2024, the United States Court of Appeals for the Eleventh Circuit affirmed your convictions and sentence. In light of this decision, and the considerations discussed below, our representation of you has now concluded.

I. The Eleventh Circuit's Decision

In its decision (a copy of which is enclosed), the Eleventh Circuit agreed with us that the jury instructions in your case were plainly erroneous because they instructed the jury that "[w]hether the defendant acted outside the usual course of professional practice is to be judged objectively." *See* Op. at 8. According to the Eleventh Circuit, the district court should have instructed the jury that, in order to find that you "acted outside the usual course of professional practice" in violation of 21 U.S.C. § 841(a)(1), the jury must find that you "*subjectively knew* that [your] conduct fell outside the usual course of professional conduct." *See id.* (emphasis added). Notwithstanding this error and our arguments that it was harmful, the Eleventh Circuit concluded that this error did not require setting aside your convictions and sentence because there was not a "reasonable probability" that the incorrect instruction was "probably responsible" for the underlying guilty verdicts. *See id.* at 12; *see also id.* ("[T]he government presented more than enough circumstantial evidence at trial to prove to the jury that Bynes [subjectively] knew that his prescriptions were outside the usual course of professional practice.").

II. Petitions for Rehearing

Also enclosed is a copy of the "Memorandum to Counsel or Parties" that the Eleventh Circuit issued along with its decision. In that Memorandum, you will see references to two kinds of petitions that may be filed in some circumstances to seek "rehearing" (or reconsideration) of a decision. The first is a *petition for panel rehearing*, through which a party can ask the same panel of judges that issued the decision in his case to rehear (or reconsider) it. The second is a *petition for rehearing en banc*, through which a party can ask all of the Eleventh Circuit's twelve active judges to rehear (or reconsider) the decisions. These petitions would be due in your case no later than December 11, 2024, which is 21 days after the November 20, 2024 decision.[1]

That said, we see no grounds for filing any petition for rehearing in your case. As noted above, the Eleventh Circuit concluded that the erroneous jury instruction did not require setting aside your convictions and sentence because the evidence did not show a "reasonable probability" that the incorrect instruction was "probably responsible" for the underlying guilty verdicts. *See* Op. at 12. To obtain a different outcome, you would have to persuade the Eleventh Circuit that the evidence did in fact show such a "reasonable probability." That is, however, exactly what we argued already in our brief, and under the Eleventh Circuit rules, a motion for rehearing cannot be based on a "reargument of the issues previously presented."[2] We also see no basis for a petition for rehearing en banc.[3]

III. Petition for Writ of Certiorari

Filing a petition for review by the United States Supreme Court—known as a petition for a writ of certiorari—is another option that parties sometimes consider when the Eleventh Circuit renders an unfavorable decision, and a party need not file a petition for

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[1] *See* 11th Cir. R. 35-2 ("A petition for en banc rehearing must be filed within 21 days of entry of judgment . . . . Judgment is entered on the opinion filing date."); 11th Cir. R. 40-3 ("A petition for rehearing must be filed within 21 days of entry of judgment . . . . Judgment is entered on the opinion filing date.").

[2] *See* FRAP 40, 11th Cir. I.O.P. 3 (stating that a petition for panel rehearing "is *not* to be used for reargument of the issues previously presented or to attack the court's non-argument calendar procedures").

[3] In particular, the Eleventh Circuit's decision in this case does not appear to conflict with any prior decision of the Supreme Court or the Eleventh Circuit, and the decision—which was based on a review of the particular evidence presented in your case—cannot reasonably be characterized as implicating a question of exceptional importance. *See* FRAP 35(b)(1) (stating that a petition for panel rehearing en banc must begin with a statement that either (A) "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions" or (B) "the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue").

panel rehearing or a petition for panel rehearing en banc in order to proceed with a petition for a writ of certiorari.

Here, if you were to consider filing a petition for a writ of certiorari without first filing a petition for panel rehearing or a petition for panel rehearing en banc, the petition for a writ of certiorari would have to be filed with the United States Supreme Court no later than February 18, 2025, which is 90 days after the Eleventh Circuit's decision in your case.[4] On the other hand, if you were to consider filing a petition for a writ of certiorari *after* filing a petition for panel rehearing or a petition for panel rehearing en banc, the petition for a writ of certiorari would have to be filed with the United States Supreme Court within 90 days of the Eleventh Circuit's denial of the petition or the Eleventh Circuit's subsequent entry of judgment.[5]

That said, we see no grounds for filing a petition for writ of certiorari in your case, as none of the reasons that the Supreme Court typically considers for granting such a petition exist here.[6]

IV. Conclusion

In sum, while a petition for panel hearing, a petition for panel rehearing en banc, and a petition for a writ of certiorari are possible next steps in your case, we do not believe

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[4] *See* Supreme Court Rule 13(1) ("Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.").

[5] *See* Supreme Cour Rule 13(3) ("But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.").

[6] Under Supreme Court Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons," and listed below are the "character of reasons the Court considers" in deciding a petition:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

sufficient grounds exist for any of these petitions. Additionally, the scope of our representation was limited to representing you in the Eleventh Circuit (by submitting briefing on our behalf and representing you at any oral argument) and not to any additional proceedings.[7] As a result, if you wish to pursue a petition for rehearing or a petition for a writ of certiorari, you will need to obtain new counsel—or proceed *pro se* (without counsel)—to do so.[8] To the extent you obtain new counsel, we will be happy to provide electronic copies of the filings from your appeal for his or her review and use moving forward.

If you have any questions or concerns, please let me know. I wish you the very best.

Sincerely,

/s/ Jay Repko

Jay Repko

Enclosures

cc: Keith Blackwell

[7] A copy of our engagement letter is also enclosed, along with a copy of Addendum Four. Section (f)(5) of Addendum Four governs the scope of our representation with respect to the above-referenced petitions.

[8] Section (f)(4) of Addendum Four provides that, "if [you] wish[] to appeal to the court of appeals or file a petition for a writ of certiorari with the Supreme Court, the right exists under the [Criminal Justice] Act to do so without prepayment of fees and costs or giving security therefor and without filing the affidavit of financial inability to pay such costs required by 28 U.S.C. § 1915(a)."