No. _____

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Eric Mack, Petitioner,

v.

United States of America, Respondent.

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016), the courts of appeals were flooded with applications for leave to file second or successive habeas corpus petitions or motions to vacate, on the basis that a new rule of constitutional law was announced in *Johnson* and made retroactive in *Welch*. Many of these were submitted by pro se federal prisoners on the required and restrictive form. Often, no briefing was submitted by the government in opposition. No oral arguments were held. Panels often decided applications based on fewer than 100 words by a pro se inmate. In order to comply with statutory time limits, panel members at times reviewed 40 to 50 such applications daily.

Exceeding their gatekeeping role under 28 U.S.C. § 2255(h)—which requires only that the court of appeals certify whether an application has made a prima facie showing that a second or successive habeas petition or motion would raise a claim that relied upon *Johnson*—Eleventh Circuit panels issued published orders holding, for the first time, that a particular offense qualifies as a "crime of violence" or a "violent felony."[1] By statute, applicants for permission to file a successive § 2255

[1] *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) (holding that federal armed bank robbery is a "crime of violence" under § 924 (c)(3)(A)); *In re Saint Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016) (holding that Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A)); *In re Colon*, 826 f.3d 1301, 1305 (11th Cir. 2016) (holding that aiding and abetting Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A)); *In re Smith*, 829 F.3d 1276, 1280–81 (11th Cir. 2016) (holding that federal carjacking is a "crime of violence" under § 924(c)(3)(A); *In re Watt*, 829 F.3d 1287, 1289–90 (holding that aiding and abetting assault of federal postal employee is a "crime of violence" under § 924(c)(3)(A)); *In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016) (holding that federal unarmed bank robbery is a "crime of violence" under § 924(c)(3)(A); *In re Hunt*, 835 F.3d 1277, 1277 (11th Cir. 2016)

motion cannot seek review of denial or their application, by appeal or by writ of certiorari to the Supreme Court. *See* 28 U.S.C. § 2244(b)(3)(E). Nevertheless, the Eleventh Circuit subsequently held that these published panel orders—made in a compressed time period, without the benefit of adversarial participation, and without a complete record—are binding and preclusive under its prior panel precedent rule, even on direct appeal or in initial § 2255 proceedings. Two of these orders were used to deny Mr. Eric Mack full merits review of his initial motion pursuant to § 2255. App. A; App. C.

The question presented is:

Whether a defendant's right to Due Process in his initial § 2255 proceeding is violated by the Eleventh Circuit's rule assigning precedential effect to an order denying a pro se petitioner's application for authorization to file a second or successive § 2255 motion.

(holding that federal armed bank robbery is a "crime of violence" under § 924(c)(3)(A)); *In re Robinson*, 822 F.3d 1196, 1197 (11th Cir. 2016) (holding that Florida robbery is a "violent felony" under § 924(e)); *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016) (holding that Florida armed robber is a "violent felony" under § 924(e)); *In re Hires*, 825 F.3d 1297, 1301–02 (11th Cir. 2016) (holding that Florida robbery and aggravated assault are "violent felonies" and the sale of cocaine is a "serious drug offense" under § 924(e)); *In re Rogers*, 825 F.3d 1335, 1340–41 (11th Cir. 2016) (holding that Florida aggravated assault and aggravated battery are "violent felonies" under § 924(e)); *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016) (holding that Florida armed robbery is a "violent felony" under § 924(e)); *In re Griffin*, 823 F.3d 1350, 1354–56 (11th Cir. 2016) (holding that the Sentencing "Guidelines—whether mandatory or advisory—cannot be challenged as unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge."); *In re Burgest*, 829 F.3d 1285, 1287 (11th Cir. 2016) (holding that Florida manslaughter and kidnapping are "crimes of violence" as used in U.S.S.G. § 4B1.2)).

LIST OF PARTIES

There are no parties to this proceeding other than those listed in the caption.

RELATED CASES

- *Eric Mack v. United States*, No. 19-11138, U.S. Court of Appeals for the Eleventh Circuit. Judgement entered on May 22, 2019.
- *Eric Mack v. United States*, No. 2:16-CV-487, U.S. District Court for the Middle District of Alabama. Judgment entered on Jan. 14, 2019.
- *United States v. Eric Mack*, No. 2:13-cr-072-02, U.S. District Court for the Middle District of Alabama. Judgment entered on December 12, 2014.

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PETITION FOR WRIT OF CERTIORARI

Eric Mack respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished order denying Mr. Mack's motion for a certificate of appealability is reproduced as Appendix A. The district court's order denying Mr. Mack's motion for a certificate of appealability is reproduced as Appendix B. The district court's order dismissing Mr. Mack's 28 U.S.C. § 2255 motion is reproduced as Appendix C.

JURISDICTION

The Eleventh Circuit issued its order on May 22, 2019. Appendix A. On August 15, 2019, Justice Thomas extended the time for the filing of a petition for writ of certiorari to October 19, 2019, which was a Saturday. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law . . . ." U.S. Const. amend. V.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2255(h)(2)

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2244(b)

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

STATEMENT OF THE CASE

Eric Mack pleaded guilty in 2014 to brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Under his plea agreement, a separate charge of aiding and abetting a Hobbs Act robbery, in violation of 18 U.S.C. § 1951, was dismissed but served as the predicate crime of violence for the § 924(c) conviction. The district court sentenced Mr. Mack to 96 months' incarceration, followed by five years of supervised release. Mr. Mack did not appeal his conviction or sentence.

On June 24, 2016, Mr. Mack moved to vacate his sentence in an initial pro se 28 U.S.C. § 2255 motion based upon this Court's holding in *Johnson*, that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. 135 S. Ct. at 2558–63. Mr. Mack argued that the residual clause in § 924(c), which was used to determine the minimum applicable sentence, was similarly unconstitutionally vague.

Without holding an evidentiary hearing, the district court dismissed Mr. Mack's initial § 2255 motion with prejudice and denied a certificate of appealability, writing that "[b]inding Eleventh Circuit precedent has established that aiding and abetting a Hobbs Act robbery is categorically a crime of violence." App. C at 3. That precedent, according to the district court, was established by two published orders denying pro se applications for authorization to file a second or successive § 2255 motion: *In re Saint Fleur*, 624 F.3d 1337 (11th Cir. 2016), and *In re Colon*, 826 F.3d 1301 (11th Cir. 2016). Each application was submitted to the Eleventh Circuit on a six-page form. Each application stated the ground upon which the defendant was seeking permission to file his successive § 2255 motion in a space on the form that permits less than two lines to state the ground and five lines to detail the factual support for the ground. Neither defendant in these two cases had been permitted further briefing. In neither case was an attorney permitted to supplement the form application. In neither case was the government asked to reply, nor did the government file a response. In neither case was oral argument held. And each case was decided in 30 days or fewer. In *Saint Fleur*, the Court of Appeals held that Hobbs Act robbery categorically qualifies as a crime of violence under the elements clause in § 924(c)(3)(A), and therefore the residual clause of § 924(c) was not implicated in the defendant's conviction or sentence. 824 F.3d at 1340–41. In *Colon*, the Court of Appeals held, in a split decision, that aiding and abetting a Hobbs Act robbery is a crime of violence under the elements clause of § 924(c). 826 F.3d at 1305.

Mr. Mack applied to the Eleventh Circuit for a certificate of appealability. The Eleventh Circuit denied his motion, relying upon the divided panel order issued in *Colon*. App. A at 2.

REASONS FOR GRANTING THE PETITION

Mr. Eric Mack was denied full merits review of his initial § 2255 motion because the Eleventh Circuit assigned precedential effect to orders resulting from its unique and flawed process of adjudicating successive applications. Non-capital applicants seeking authorization to file a second or successive § 2255 motion are required to use a specific form that prohibits additional briefing or attachments, and which provides extremely limited space upon which a defendant may state the claims he would bring in that successive motion. *In re Williams*, 898 F.3d 1098, 1101 (11th Cir. 2018) (Wilson, J., concurring). No opposing brief is submitted by the government and no oral argument is heard, eviscerating the adversarial process which undergirds the criminal justice system. *Id.* The Court of Appeals rarely has access to the entire record and typically makes a determination based only on the form application submitted by a pro se inmate. *Id.* Under 28 U.S.C. § 2244(b)(3)(D), these applications are to be decided within 30 days of filing, which in practice leaves panels only two to three weeks to rule on an application. *United States v. St. Hubert*, 918 F.3d 1174, 1191 (11th Cir. 2018) (Jordan, J., concurring in the denial of rehearing *en banc*). Only the Eleventh Circuit considers this 30-day time limit mandatory.

Despite the limitations inherent in the process as implemented by the Eleventh Circuit, panels of that court have published orders on review of applications to file second or successive §2255 motions based on *Johnson* that resolved "the important and often difficult question of whether certain offenses are 'crimes of violence' or 'violent felonies' under the elements clauses of § 924(c)(3)(A), (e)(2)(B)(i), or United States Sentencing Guidelines § 4B1.2(a)." *St. Hubert*, 918 F.3d at 1207 (Martin, J., dissenting from the denial of rehearing *en banc*) (internal brackets omitted)). Petitioners are precluded from appealing these decisions to the Supreme Court or petitioning the Court of Appeals for rehearing *en banc*. 28 U.S.C. § 2244(b)(3)(E). And the Eleventh Circuit has "institutionalized these appeal-proof panel opinions as the precedent of [the] Circuit." *St. Hubert*, 918 F.3d at 1207 (Martin, J., dissenting).

The impact of these hasty determinations will be suffered by inmates sentenced in the Eleventh Circuit ad infinitum. By according panel orders on application to file a successive § 2255 motion precedential force and preclusive effect in direct appeal and initial § 2255 proceedings, the Eleventh Circuit has stripped all future inmate-litigants with similar claims of their right to due process.

I. Eleventh Circuit application of its prior panel precedent rule to orders denying successive § 2255 applications violated Mr. Mack's right to due process

The Due Process Clause provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The core of

due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). By reaching "beyond the question of whether an inmate's request to file a § 2255 motion contains a new rule and whether he has made a prima facie showing" to instead address the merits of his claim," the Eleventh Circuit denies applicants a meaningful opportunity to be heard on that claim. *St. Hubert*, 918 F.3d at 1206 (Martin, J., dissenting).

Pro se non-capital applications seeking authorization to file a second or successive § 2255 motion must be submitted on a highly constrained form that often results in a claim and the factual support for that claim being expressed in fewer than 100 words. *Williams*, 898 F.3d at 1101 (Wilson, J., concurring). "This form prohibits petitioners from additional briefing or attachments." *Id.* The Eleventh Circuit has acknowledged that its required application "lacks a meaningful opportunity to brief the merits of [a defendant's] case." *St. Hubert*, 918 F.3d at 1203 (quoting *In re Stoney Lester*, No. 16-11730-A, slip op. (11th Cir. 2016)). Despite this tacit admission that the core of due process is not afforded to inmates seeking permission to file a successive § 2255 motion challenging the legality of their detention, Eleventh Circuit panels have issued published orders denying authorization on the basis that the underlying claim would fail on the merits. And the court has multiplied its denial of due process by using such orders to preclude review of claims presented by defendants on direct or initial collateral appeal.

This Court identified in *Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976), three factors that must be balanced when analyzing a due process claim: "the private interest affected; the risk of erroneous deprivation of that interest through the procedures used; and the governmental interest at stake." *Nelson v. Colorado*, 137 S. Ct. 1240, 1251 (2017). All three factors weigh heavily in favor of Mr. Mack and similarly situated defendants.

A. The private interest affected is Mr. Mack's liberty

At issue is Mr. Mack's liberty, a fundamental right specifically enumerated in the Due Process Clause. Mr. Mack was sentenced to 96 months of imprisonment, followed by 5 years of supervised release. While all criminal punishments implicate a defendant's private interests in personal freedom and property, no others "approximate in severity the loss of liberty that a prison term entails. . . . [I]ncarceration is an intrinsically different form of punishment." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (internal citations and quotation marks omitted). Supervised release too, like probation, is "a significant infringement of personal freedom, though "certainly less onerous a restraint than jail itself." *Frank v. United States*, 395 U.S. 147, 151 (1969). Because Mr. Mack's conviction and sentence relied upon the definition of a "crime of violence" in §924(c)(3)(B), a determination that the predicate offense of aiding and abetting a Hobbs Act robbery did not constitute a crime of violence would invalidate his entire sentence.

B. The risk of erroneous deprivation of Mr. Mack's liberty is great

The Eleventh Circuit risks erroneously depriving Mr. Mack of his liberty in two significant ways: (1) through the process it used to address applications for successive § 2255 motions under *Johnson*; and (2) by giving precedential and preclusive effect to published orders denying applications to file successive § 2255 motions, even on direct appeal or initial § 2255 motions.

1. Eleventh Circuit review of applications to file second or successive petitions under *Johnson* entailed substantial risk of erroneously depriving defendants of their liberty

The unique procedure adopted by the Eleventh Circuit in adjudicating second or successive applications based on *Johnson* creates a substantial risk of erroneous deprivation of liberty. When an inmate sentenced in the Eleventh Circuit seeks permission to file a second or successive habeas petition, the Court of Appeals "must grant or deny the request on an emergency thirty-day basis." *St. Hubert*, 918 F.3d at 1198 (Wilson, J., dissenting). This time limit alone may "deprive litigants of a meaningful opportunity to be heard." *Miller v. French*, 530 U.S. 327, 350 (2000). At a minimum, the "extremely compressed timeline can lead to odd results that [the Court of Appeals] would likely not accept in a merits appeal." *Williams*, 898 F.3d at 1103 (Wilson, J., concurring).

That rushed decision is "based on the prisoner's application, which is written with a pen or typewriter on an extremely constraining form." *Id.*; *see* 11th Cir. R. 22-3(a). "This form prohibits petitioners from additional briefing or attachments, and requires all argument to take place 'concisely in the proper space on the form.'"

Williams, 898 F.3d at 1101 (Wilson, J., concurring). The current version of the form—which varies from the form utilized in many of the 2016 applications in that it grants additional space to address each claim—"provides a 1' x 5.25" space in which to state a 'ground on which you now claim that you are being held unlawfully.' It then provides a 7.25"x 5.25" space in which to 'summarize briefly the facts supporting [this] ground.'" [2] *Id.* A defendant must make his legal arguments "to assert that a claim 'rel[ies] on a new rule of constitutional law.'" in "a 2.5" x 5.25" space. *Id.* (internal quotation marks omitted). "Few prisoners manage to squeeze more than 100 words into the permitted space." *St. Hubert*, 918 F.3d at 1198 (Wilson, J., dissenting). Even if an attorney has been retained, "they are subject to the same restrictive form as are pro se litigants. Nothing else is filed on [the] docket." *Id.* It strains credulity to suppose that any claim for habeas relief could be considered "meaningfully" presented or reviewed when stated in a mere 100 words or fewer.

Moreover, the "government never files a responsive pleading, and [the Eleventh Circuit] never grants oral argument." *Id.* By making a precedential determination on a form pleading by a pro se petitioner, without the benefit of briefing by the government, the Eleventh Circuit abandons the adversarial process upon which our common law system relies. "This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful

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[2] United States Court Of Appeals Eleventh Circuit Application for Leave to File a Second or Successive Habeas Corpus Petition 28 U.S.C. § 2244(B) By a Prisoner in State Custody, *available at* http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/2244%28b%29_Second_or_Successive_Application_Final_JUN19.pdf.

statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal citation and quotation marks omitted)). Thus, not only is the defendant handicapped by the process implemented by the Eleventh Circuit, so too is the panel reviewing an application. As Justice Gorsuch wrote in *Sessions v. Dimaya*, "the crucible of adversarial testing is crucial to sound judicial decision making. We rely on it to yield insights (or reveal pitfalls) we cannot muster guided only by our own lights," 138 S. Ct. 1204, 1232–33 (2018) (Gorsuch, J., concurring).

"Most troublingly, the orders that come out of this lackluster process are unappealable." *St. Hubert*, 918 F.3d at 1198 (Wilson, J., dissenting). Decisions that are made within 30 days upon extremely limited information from a pro se applicant, without a complete record, without adversarial pleading, and without oral argument may keep a defendant incarcerated, but he has no recourse to the Court of Appeals or this Court. "Thus, if [the Eleventh Circuit] makes a mistake in a published panel order—which seems quite likely, given the rushed, information-devoid, nonadversarial nature of the proceeding—the best a petitioner can hope for is that someone on the court notices and sua sponte requests a poll for rehearing *en banc*, following an unknown, rarely-tested procedure to do so." *Williams*, 898 F.3d at 1104 (Wilson, J., concurring).

This procedure used by the Eleventh Circuit "stands in stark contrast to the practices of the other circuits, which often hear oral argument and read particularized government briefs, and which consider the statutory thirty-day time limit to be

optional." *St. Hubert*, 918 F.3d at 1198 (Wilson, J., dissenting). It also "differs greatly" from the procedure used to hear merits appeals, which has "no time constraints," involves "government briefing," can include oral argument, and provides the panel with a full record. *Id.*

2. The Eleventh Circuit compounded the risk of erroneous deprivation of liberty by giving orders on applications for successive petitions under *Johnson* precedential effect on *all* subsequent panels

The Eleventh Circuit follows a judicially-created prior panel precedent rule that makes all published orders binding precedent on future panels. *See United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018). This is true even with regard to published orders made under the flawed scheme for reviewing successive § 2255 applications. In 2018, the Eleventh Circuit expressly held that orders published by three-judge panels denying applications for authorization to file successive § 2255 motions were binding precedent, even on direct appeal or initial § 2255 proceedings.

> Lest there be any doubt, we now hold in this direct appeal that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, "unless and until [it is] overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*."

St. Hubert, 909 F.3d at 346 (emphasis in the original). In so holding, the Eleventh Circuit abused the doctrine of *stare decisis* to the detriment of untold numbers of defendants sentenced within the district.

In bestowing precedential force to orders on applications for successive § 2255 motions, the Eleventh Circuit has stretched *stare decisis* beyond the doctrine's intent. Not only are subsequent panels divested of the power to overrule a successive § 2255 order, so too is the *en banc* court and this Court for all practical purposes because § 2244 forbids an applicant to appeal or seek certiorari. Only by hearing an appeal in a case such as this, where a successive § 2255 application order has been used to deny an inmate meaningful review of his original § 2255 motion or direct appeal, can this Court overturn these otherwise invulnerable judgments.

By giving preclusive effect to published panel orders on successive § 2255 applications on direct appeal and initial § 2255 proceedings, the Court of Appeals prohibits the district court and the Eleventh Circuit "from giving inmates the type of merits review of their sentences that inmates routinely receive in other Circuit[s]. *Williams*, 898 F.3d at 1110 (Martin, J., concurring). Because the district court felt "compelled, based on binding precedent, to reject [Mr. Mack's] argument that the *St. Fleur* and *Colon* holdings that determined that aiding and abetting a Hobbs Act robbery is a crime of violence should not apply to the instant case," it dismissed his initial § 2255 motion without a robust merits review. App. C. at 4–5.

In *In re Saint Fleur*, a three-judge panel determined that Hobbs Act robbery categorically qualifies as a crime of violence for the purposes of 18 U.S.C. § 924(c). 824 F.3d at 1341. The motions panel that issued this decision did so thirty days after it received Mr. Saint Fleur's application. *Williams*, 898 F.3d at 1100. (Wilson, J.,

concurring). Mr. Saint Fleur's entire argument was typed out in "forty-three words, with citations to two Supreme Court cases. . . . [T]he government did not file a response. In fact, nothing else was filed on [the] docket," before the application was denied. *Id.* And Mr. Saint Fleur was statutorily prohibited from appealing the denial to the Eleventh Circuit or to this Court. 28 U.S.C. § 2244(b)(3)(E). One *Saint Fleur* panel member opined that a merits review based upon "nothing more than a form filled out by a prisoner[, w]ithout any briefing or other argument made by a lawyer" left the panel "ill equipped to decide the merits of the claim," particularly within thirty days. *Saint Fleur*, 824 F.3d at 1341 (Martin, J., concurring).

The second order relied upon by the district court to deny Mr. Mack's initial § 2255 motion was issued in *In re Colon*. Two judges, "relying upon *In re Saint Fleur*, found that aiding and abetting Hobbs Act robbery also 'clearly qualifies' as a crime of violence under the use-of-force clause." *Williams*, 898 F.3d at 1100 (Wilson, J., concurring) (quoting *Colon*, 826 F.3d at 1305). That order was issued a mere sixteen days after *Saint Fleur*. *Compare Saint Fleur*, 824 F.3d at 1337 (issued on June 8, 2016) *with Colon*, 826 F.3d at 1301 (issued on June 24, 2016). The dissenting panel member admitted "we have not had any briefing on the question [whether aiding and abetting meets the elements clause definition], and I have not had much time to think through the issue." *Colon*, 826 F. 3d at 1306. Even a cursory examination of the case, however, led the same panel member to opine:

> It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's

> contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Colon's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the "elements clause" definition.

Id. (emphasis in the original). "Outside of the second or successive application setting, [ ] Court rules would ordinarily require an oral argument panel to consider a topic upon which the panel could not reach unanimity," but no such argument was heard in the *Colon* case. *St. Hubert*, 918 F.3d at 1207 (Martin, J., dissenting). Denying Colon an opportunity to fully present his claim to either the Court of Appeals or the district court, which "has the benefit of submissions from both sides, has access to the record, has an opportunity to inquire into the evidence, and usually has time to make and explain a decision . . . ," created a substantial risk that the merits decision reached in his case subjected him to longer incarceration and consequent loss of liberty. Relying upon that same order to deny Mr. Mack an opportunity to have his original § 2255 motion considered by the district court created a comparable risk that Mr. Mack was also subject to longer incarceration and consequent loss of liberty.

C. The governmental interest at stake would not be compromised by affording Mr. Mack a meaningful opportunity to be heard

Here, the public's "overriding interest that 'justice shall be done" is best served by protecting Mr. Mack's right to due process. *United States v. Agurs*, 427 U.S. 97, 111 (1976). Allowing Mr. Mack's habeas appeal to be adjudicated on the merits would afford the government confidence that justice has been done, regardless of the outcome.

What Mr. Mack seeks, meaningful review of his § 2255 claim that his sentence no longer comports with the constitution, is not overly burdensome as it is no more than what is required by § 2255 itself. 28 U.S.C. § 2255(b) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing theron, determine the issues and make findings of fact and conclusions of law with respect thereto.").

II. The violation of Due Process suffered by Mr. Mack is suffered by incalculable defendants in the Eleventh Circuit

Eleventh Circuit application of its prior panel precedent rule is never mandatory. Expanding it to allow orders made in a context that impedes thorough analysis and compliance with an applicant's due process rights to all appeals tramples the constitutional rights of untold defendants. *St. Hubert*, 918 F.3d at 1210 (Martin, J., dissenting) ("Nothing in the limited § 2255 authorization procedure was designed for resolving whether a given offense qualifies as a crime of violence or violent felony. Th[e Court of Appeals] unnecessarily and rashly addressed these issues and, in so doing, exceeded its statutory mandate. As a result, prisoners sentenced in Alabama, Florida and Georgia may be serving illegal sentences for which they have no remedy."). While the Court of Appeals understandably seeks to promote "efficiency, finality and consistency," it cannot be permitted to do so at the peril of individuals' interest in liberty. *In re Lambrix*, 776 F.3d 789, 794 (2015) (per curiam).

This is an issue of widespread importance. Between 2013 and 2018, the Eleventh Circuit "lead the country by a significant margin in the number of published orders issued under §§ 2244(b)(2)–(3) and 2255(h). In that five year-year period, ending April 1, 2018, [the Court of Appeals] published 45 such orders, while all of the other circuits combined [ ] published 80 orders." *St. Hubert*, 918 F.3d at 1192 (Jordan, J., concurring). In 2016 alone, the Eleventh Circuit issued orders on 2,282 applications for leave to file successive § 2255 motions, *Saint Fleur*, 824 F.3d at 1344 (Martin, J., concurring), and published 35 of those, *St. Hubert*, 918 F.3d at 1192 (Jordan, J., concurring). Each of those 35 published orders can be used to preclude defendants in the Eleventh Circuit from receiving a full and fair evaluation of the merits of their direct or initial habeas appeals. In particular, the 14 orders determining whether certain offenses are "crimes of violence" or "violent felonies" under the elements clauses of § 924(c)(3)(A), (e)(2)(B)(i), or United States Sentencing Guidelines § 4B1.2(a) may have lasting and boundless impact because the "[d]istrict courts within [the Eleventh C]ircuit lead the pack in imposing sentences under these enhancement statutes." *Id.* at 1212–13 (Martin, J., dissenting). The Eleventh Circuit should not be permitted to nullify the due process rights of these myriad individuals.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

DATED this 21st day of October, 2019.

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