No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

JIMMY LEE BOSTON,

***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 A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

This petition presents the following questions:

I. Whether, categorically, a Florida conviction for principal to armed robbery, in violation of Fla. Stat. §§ 777.011 and 812.13, is a "violent felony" under the ACCA elements clause, 18 U.S.C. § 924(e)(2)(B)(i).

II. Whether the Eleventh Circuit violated 28 U.S.C. § 2244(b)(3)(c) and the due process clause by deciding open legal questions in applications for leave to file a second or successive § 2255 motion and treating those published orders as binding precedent in other appeals such as this one.

LIST OF PARTIES

Petitioner, Jimmy Lee Boston, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CASES **PAGE(S)**

STATUTES **PAGE(S)**

STATUTES **PAGE(S)**

PETITION FOR A WRIT OF CERTIORARI

Under Florida law, a person who aids or abets a robbery "is a principal." *See* Fla. Stat. §§ 777.011, 812.13. This is even though, by the Florida statute's own terms, an aider or abettor does not have to be "actually or constructively present at the commission of [the] offense." Fla. Stat. § 777.011. Jimmy Lee Boston's sentence was enhanced under the Armed Career Criminal Act (ACCA) due to Florida convictions for aiding and abetting robbery. He respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his 28 U.S.C. § 2255 motion on the issue of whether the enhancement of his sentence, based on Florida state court convictions for aiding and abetting robbery is unconstitutional in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson)* (holding that imposing an increased sentence under the residual clause of the ACCA violated due process).

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Boston's § 2255 motion to vacate in *Boston v. United States*, 939 F.3d 1266 (11th Cir. 2019) is provided in Appendix A-1. The district court order dismissing Mr. Boston's § 2255 motion to vacate sentence, *Boston v. United States*, 2017 WL 2834738 (M.D. Fla. June 30, 2017), is provided in Appendix A-2.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Boston's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under § 2255. The district court denied Mr. Boston's § 2255 motion on June 30, 2017. *See* Appendix A-2. Mr. Boston subsequently filed a notice of appeal and a motion for a certificate of appealability (COA) in the Eleventh Circuit, which was granted on January 11, 2018. The Eleventh Circuit Court of Appeals affirmed the denial of Mr. Boston's second or successive motion

in a published opinion. *See* Appendix A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

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

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> * * *
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(e)(2)(B)(i) provides in pertinent part:

> **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
>
> > **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

28 U.S.C. § 2244(b)(3) provides:

> (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.

28 U.S.C. § 2253(c) provides in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Fla. Stat. § 777.011 provides:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

STATEMENT OF THE CASE

On December 6, 2006, Mr. Boston was convicted by a jury for the offenses of felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) (count one), and possession of a firearm with an obliterated serial number, in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B) (count two).

On February 21, 2007, Mr. Boston was sentenced under the ACCA to 262 months' imprisonment on count one, and 60 months' imprisonment on count two, to run concurrently. He appealed his convictions, and his convictions were affirmed.

On June 25, 2016, after receiving leave to file a successive § 2255 motion to vacate his sentence, Mr. Boston filed the instant § 2255 motion, raising only one claim, that his ACCA sentence exceeded the lawful statutory maximum penalty for his offense and violated due process based on *Samuel Johnson*. The government conceded that Mr. Boston's former burglary and battery on a law enforcement officer convictions would not satisfy the ACCA's enumerated-offense or elements clauses, but maintained that Mr. Boston was still an armed career criminal based on his remaining convictions for Florida robbery and principal to armed robbery. *See also Boston v. United States*, 939 F.3d 1266, 1269 (11th Cir. 2019). The government argued for the first time that two of Mr. Boston's convictions, that it previously agreed were principal to armed robbery convictions were substantive robbery convictions, although they conceded the judgments describe the crimes as "principal to robbery with a firearm." But for ACCA enhancement, Mr. Boston, in custody on this indictment since July 17, 2006, would no longer be in prison.

On June 30, 2017, adopting the governments' arguments, the district court denied the § 2555 motion finding that Mr. Boston's convictions for robbery and principal to robbery were all "violent felonies." The district court also denied Mr. Boston a COA. On August 28, 2017, Mr.

Boston filed a timely notice of appeal. Mr. Boston then moved the Eleventh Circuit Court of Appeals for a COA, who granted Mr. Boston a COA. The Eleventh Circuit then granted oral argument that was held on September 11, 2019, and then affirmed the denial of Mr. Boston's § 2255 motion to vacate on September 30, 2019 in a published decision.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S CATEGORICAL FINDING OF "AIDING AND ABETTING" LIABILITY FOR SENTENCING ENHANCEMENT UNDER THE ARMED CAREER CRIMINAL ACT (ACCA) IS A LEGAL FALLACY AND NOT SUPPORTED BY THE ACCA'S TEXT.

In denying Mr. Boston's § 2255 motion to vacate, the Eleventh Circuit erred when it further perpetrated the legal fallacy it created in *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (holding for the first time that aiding and abetting convictions fall under § 924(c)(3)(A)) when it applied its federal law holding as to Hobbs Act robbery as binding precedent when addressing Mr. Boston's state convictions for Florida principal (aiding and abetting) to robbery.[1] *Boston v. United States*, 939 F.3d 1266, 1270 (11th Cir. 2019). Citing 18 U.S.C. § 2's language that an aider and abettor "'is punishable as a principal,'" and a prior holding that "[u]nder § 2, the acts of the principal become those of the aider and abettor as a matter of law," which did not address 18 U.S.C. § 924(c)(3)'s elements clause, two of three judges in *Colon* concluded:

> [b]ecause an aider and abettor is *responsible* for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery *necessarily commits* all the elements of a principal Hobbs Act robbery. And because the substantive offense of Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," which this Court held to be the case in *In re Saint Fleur* [824 F.3d 1337 (2016)], then an aider and abettor of a Hobbs Act robbery necessarily commits a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Id. at 1305 (citing *United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003)) (emphasis added). However, this analysis is errant and insufficient, because it substitutes the categorical approach required to find a "crime of violence" under § 924(c)(3)(A) with a contextually-distinct

[1] Notable to Mr. Boston's second question presented in this petition, the Eleventh Circuit created this new binding circuit precedent in the context of in denying an application for leave to file a second or successive § 2255 motion.

conclusion that an aider or abettor is *punishable* or *responsible* for the acts of the substantive perpetrator.

For an offense to qualify under the 18 U.S.C. § 924(e)(2)(B)(i) elements clause, it must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* Whether aiding and abetting an offense qualifies as a "violent felony" under the elements clause is a question that must be answered categorically—that is, by reference to the elements of the aiding and abetting offense, and not the actual facts of the defendant's conduct. *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). A defendant "can be convicted as an aider and abettor [under 18 U.S.C. § 2] without proof that he participated in each and every element of the offense." *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014). Indeed, "[t]he quantity of assistance [is] immaterial, so long as the accomplice did something to aid the crime." *Id*. (internal quotation marks and citation omitted; emphasis in original). An aider and abettor does not have to personally use, attempt to use, or threaten violent physical force to be convicted of aiding and abetting robbery. And pursuant to this categorical approach, if aiding and abetting Hobbs Act robbery in *Colon*, or Florida aiding and abetting robbery in Mr. Boston's case, may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "violent felony" or "crime of violence" under the elements clause.[2]

Being *punishable* for an offense under § 2 does not mean that a jury found, or that a defendant pleaded to, the elements of that offense, such that one can conclude he or she necessarily committed an offense that comes within §§ 924(c)(3)(A) or 924(e)(2)(B)(i). *Shepard v. United*

[2] The term "physical force" means "violent force," "force that is capable of causing physical pain or injury to another person." *See Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

States, 544 U.S. 13, 21 (2005). "A crime cannot categorically be a 'crime of violence' if the statute of conviction punishes any conduct not encompassed by the statutory definition of a 'crime of violence.'" *United States v. Benally*, 843 F.3d 350, 352 (2016). Applying the categorical approach, the only relevant inquiry is whether the elements of §§ 924(c)(3)(A) or 924(e)(2)(B)(i) are necessarily satisfied by the modicum of proof needed to satisfy the elements of aiding and abetting a robbery. *Cf. United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049-50 (N.D. Cal. 2016) (considering elements needed to prove conspiracy to commit Hobbs Act Robbery to find it not a crime of violence under § 924(c)(3)(A), applying the categorical approach); *United States v. Innie*, 7 F.3d 840, 850 (9th Cir. 1993) (considering elements needed to prove accessory liability under § 3, to determine if § 16(a)'s force elements are necessarily satisfied, under categorical approach).

This is an important issue for this Court to resolve as at least three other circuit courts have since adopted essentially identical analysis as the majority in *Colon* to hold that a § 2 offense could be a "violent felony" or "crime of violence" under similar elements clauses. *United States v. Richardson*, 906 F.3d 417, 421 (6th Cir. 2018), *vacated on other grounds by Richardson v. United States*, 18-7036, Order (June 17, 2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 104–05, 109–10 (1st Cir. 2018); *United States v. Deiter*, 890 F.3d 1203, 1215–16 (10th Cir. 2018). Additionally, the Eighth Circuit recently found no relief was provided by the Supreme Court in *Davis* to its defendant, by stating only that "we treat an aider and abettor no differently than a principal." *Kidd v. United States*, 18-2465, 2019 WL 2864451, at *2 (8th Cir. July 3, 2019), citing § 2. None of these cases expressly applied the categorical approach to consider whether the "least egregious conduct" required to establish § 2 liability would also satisfy §§ 924(c)(3)(A) or

924(e)(2)(B)(i)'s elements clause. *See United States v. Gonzalez-Aparicio*, 663 F.3d 419, 425 (9th Cir. 2011).

Colon's dissent likewise raised the shortcomings of the majority's analysis stating, "[a]s best I can tell (though we have not had any briefing on this question, and I have not had much time to think through the issue), a defendant can be convicted of aiding and abetting a robbery without ever using, attempting to use, or threatening to use force." *Colon*, 826 F.3d at 1306 (Martin, J., dissenting). After noting the *Williams* case cited by the *Colon* majority was not helpful to the instant categorical inquiry, because it had addressed the distinct inquiry of whether a defendant who had committed Hobbs Act robbery as a principal had aided and abetted a co-defendant's use of force, Judge Martin explained why an aider or abettor to the robbery does not necessarily commit the crime-of-violence elements of § 924(c)(3)(A):

> 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. The law has long been clear that a defendant charged with aiding and abetting a crime is not required to aid and abet (let alone actually commit, attempt to commit, or threaten to commit) every element of the principal's crime. *See Rosemond*[, 572 U.S. at 74] ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor ***without proof that he participated in each and every element*** of the offense. In proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence—even if that aid relates to only one (or some) of a crime's phases or elements."…)

Colon, 826 F.3d at 1306-07 (emphasis in original).

Thus, Judge Martin identified the correct crux of the § 2 analysis when applying the categorical approach to a statute like § 924(c)(3): we do not ask how the defendant is punished or held responsible, but rather how that liability is established in the first place. Specifically, an aider

or abettor may be convicted of a crime, *without committing all of that crime's elements*. *Id.* at 1306-07. And it is only the statutory elements of an offense which can make it a "crime of violence." *See Benally*, 843 F.3d at 352. A conviction pursuant to § 2 inherently fails the distinct inquiry for determining whether that conviction is a "violent felony," as the aider and abettor did not *necessarily* "use" force, as required in §§ 924(c)(3)(A) or 924(e)(2)(B)(i), or *commit* an offense with those elements. *See United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018). Judge Martin went on to favorably compare the aiding and abetting issue with post-*Johnson* decisions finding that conspiracy and attempt offenses do not satisfy the force/elements clause, and stated, "I am not willing to assume, as the majority does here, that aiding and abetting crimes meet the "elements clause" definition simply because an aider and abettor "is punishable as a principal." *Colon*, 826 F.3d at 1307-08 (quoting § 2(a)).

The relevant question is whether a defendant convicted of robbery as an aider and abettor has necessarily committed an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." §§ 924(c)(3)(A) and 924(e)(2)(B)(i); *see also Davis*, 903 F.3d at 485; *Innie*, 7 F.3d at 850. Whether a defendant is *punishable* for that offense is not the inquiry. Nor should being deemed *responsible* for the offense equate to *commission* of an offense which contains more elements than that necessary to establish said responsibility.

Yet, the Eleventh Circuit's merely extended its fallacy in *Colon* to Mr. Boston's Florida aiding and abetting robbery convictions, never considering the elements or the least culpable act, instead summarily holding that: "Our precedent in *Colon* forecloses Boston's argument." *Id.* at 1270. Again, instead of comparing the elements as required for the statutory ACCA enhancement pursuant to § 924(e)(2)(B)(i), the Eleventh Circuit compared the like-rationales in the federal and

Florida courts behind punishing aiders and abettors, and based on that, summarily denied Mr. Boston relief stating: "Because principals are identically situated under Florida law, it follows that they are identically situated under the Armed Career Criminal Act as they have all committed an offense that 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" *Id.* at 1272. However, a proper comparison of the elements and least culpable act for Florida aiding and abetting robbery at the time of Mr. Boston's offenses would have resulted in a finding that the convictions do not qualify for enhancement under § 924(e)(2)(B)(i). *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)) ("We must presume that the conviction rested upon nothing more than the least of the acts criminalized . . . .").

At the time of Mr. Boston's offenses, the least culpable act for aiding and abetting robbery in Florida was knowing a crime would occur, intending to share in expected benefit, and saying something to encourage the offense (or attempt). *See* Florida Standard Jury Instructions in Criminal Cases (1987 ed.) (reporting element as the defendant "intended to participate actively or *by sharing in an expected benefit*") (emphasis supplied); *C.P.P. v. State*, 479 So. 2d 858, 859 (Fla. 1st DCA 1985) (stating "the state had to show that he (1) assisted the actual perpetrators by doing *or saying something* that caused, encouraged, assisted or incited the perpetrators to actually commit the crime.") (emphasis supplied). Moreover, in a number of instances, Florida itself treats aiders and abettors differently. The Florida Supreme Court "explicitly rejected the idea that a defendant could be subject to reclassification under subsection 775.087(1) as a principal, i.e., where the defendant did not personally possess the weapon used during the commission of the offense." *Connolly v. State*, 172 So. 3d 893, 934 (Fla. 2015) (Wells, Salter, Fernandez, Logue, and Scales, JJ., concurring) citing *State v. Rodriguez*, 602 So. 2d 1270 (Fla. 1992); *see also* Fla. Stat. §§ 931.701(2)(a) and 831.033.

The binding *Colon* rationale is wholly inconsistent with the required elements-based limitation of the ACCA in § 924(e)(2)(B)(i). As described by the concurrence in Mr. Boston's decision:

> *Colon* takes a legal fiction—that one who aids and abets a robbery by, say, driving a getaway car, is deemed to have committed the robbery itself—and transforms it into a reality—that a getaway car driver actually committed a crime involving the element of force. That transformation isn't grounded in ACCA's text. ACCA uses the term "violent felony," the ordinary meaning of which "suggests a category of violent, *active* crimes." *Johnson v. United States*, 559 U.S. 133, 140, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010) (emphasis added) (internal quotation marks omitted). A person who merely aids and abets a crime by definition plays a less active role in the crime than the principal. And whereas ACCA expressly includes in its "violent felony" definition offenses that require attempted or threatened force (in addition to the actual use of force), it does not expressly include aiding or abetting a person who uses, attempts to use, or threatens to use force. In short, Congress could have written ACCA to explicitly encompass offenders who aid or abet violent acts, but it did not.[2] *Cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so. If ... Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not." (citations omitted)).
>
> A person who aids or abets another in committing armed robbery *may* use, attempt to use, or threaten to use physical force, or he may only be a getaway driver. Transforming that role in a crime into one that *necessarily* involves the use, attempted use, or threatened use of physical force contradicts ACCA's text.

Boston, 939 F.3d at 1273-74 (Jill Pryor, J., concurring) (footnote omitted) (emphasis in original). Additionally, the *Boston* concurrence stated that, "I believe *Colon*'s rule does not comport with ACCA's intent, written into the text of § 924, to punish more harshly offenders with a history of violent criminal conduct. *See* 18 U.S.C. §§ 924(a)(2), (e)(1). For these reasons, I believe that *Colon* was wrongly decided." *Boston*, 939 F.3d at 1274 (Jill Pryor, J., concurring) (footnote omitted). Under the proper post-*Johnson*, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v.*

Davis, 139 S. Ct. 2319 (2019) analysis, Mr. Boston's Florida aiding and abetting robbery convictions do not qualify under § 924(e)(2)(B)(i), and the Eleventh Circuit erred.

II. THE ELEVENTH CIRCUIT VIOLATED 28 U.S.C. § 2244(B)(3)(C) AND THE DUE PROCESS CLAUSE BY DECIDING OPEN LEGAL QUESTIONS IN APPLICATIONS FOR LEAVE TO FILE A SECOND OR SUCCESSIVE § 2255 MOTION AND TREATING THOSE PUBLISHED ORDERS AS BINDING PRECEDENT IN OTHER APPEALS SUCH AS THIS ONE.

When an inmate asks for permission to file a second or successive § 2255 motion, the Eleventh Circuit must rule on the request within 30 days. 28 U.S.C. § 2244(b)(3)(D). The petition is usually based solely on the prisoner's application, which is written on an extremely constraining form. *See* 11th Cir. R. 22-3(a).[3] Nothing else is filed. The government files nothing and there is no oral argument. More notable, perhaps, is that the orders on these applications cannot be appealed to this Court or be the subject of a petition for rehearing in the Eleventh Circuit. 28 U.S.C. § 2244(b)(3)(E). And these orders, when published, are binding on all Eleventh Circuit panels going forward. *United States v. St. Hubert*, 918 F.3d 1174 (2019) (en banc). [4]

The Eleventh Circuit erred by treating *Colon* —an SOS order—as binding precedent in Mr. Boston's appeal for at least two reasons: (1) in issuing *Colon*, the Eleventh Circuit exceeded its statutory mandate under § 2244(b)(3)(C) to simply determine whether an applicant has made a "prima facie showing" that he has met the requirements of the statute; and (2) allowing such an order to bind Mr. Boston's panel violated his constitutional right to due process.

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[3] "Few prisoners manage to squeeze more than 100 words into the permitted space. Some have attorneys, but they are subject to the same restrictive form as are pro se litigants." *St. Hubert*, 918 F.3d at 1174 (Wilson, J., dissenting from the denial of rehearing en banc).

[4] In the past 5 years, the Eleventh Circuit has used this process more and more without reservation. *See St. Hubert*, 918 F.3d at 1192 (Jordan, J., concurring in the denial of rehearing en banc) (stating that in the last 5 years, the Eleventh Circuit "lead[s] the county by a significant margin in the number of published [SOS] orders . . . .").

The Eleventh Circuit's adoption of atypical procedural practices is nothing new. Indeed, members of this Court have recently cautioned the Eleventh Circuit from adopting such atypical practices. *Joseph v. United States*, 135 S. Ct. 705, 706 (2014) (Kagan, J., statement respecting the denial of certiorari) (addressing the Eleventh Circuit's unusual practice of not allowing parties to file supplemental briefs as a matter of course when this Court issues a decision that upsets precedent relevant to a pending case). To be fair, in *Joseph*, this Court abstained from immediately intervening to allow the Eleventh Circuit an opportunity to correct its own procedural rules. *Id.* at 707. And the Eleventh Circuit took this Court's advice to heart. *United States v. Durham*, 795 F.3d 1329 (11th Cir. 2015) (en banc). However, the Eleventh Circuit's en banc decision in *St. Hubert* has made it clear that the Eleventh Circuit is not changing course.

The Eleventh Circuit's practice of treating SOS orders as binding in all later appeals has far-reaching consequences that affects scores of inmates now and into the future. Whether federal law and the constitution allow this highly controversial practice is a question of exceptional importance. And given how unusual and consequential this practice is, this Court should resolve this issue before this practice is allowed to continue unabated.

A. THE ELEVENTH CIRCUIT EXCEEDED ITS STATUTORY MANDATE UNDER 28 U.S.C. § 2244(B)(3)(C) BY ISSUING AN SOS ORDER ANALYZING THE MERITS OF AN OPEN LEGAL QUESTION AND TREATING THAT ORDER AS BINDING PRECEDENT IN MR. BOSTON'S APPEAL.

As explained above, the procedure by which inmates are granted permission to file second or successive § 2255 motions is, by statute, strictly circumscribed. Notably, in reviewing these applications, appellate courts must determine only whether an inmate has made a "prima facie showing" that he meets the statutory requirements, and the court's determination is generally not subject to further review, not even in this Court. *See* 28 U.S.C. § 2244(b)(3)(C), (E). To be sure, if an inmate's claim is foreclosed by precedent, his application should be denied. But the

Eleventh Circuit has used the limited authority provided by § 2244 to issue published orders on open merits questions and then use those orders as binding precedent in later appeals. But under the statute, the proper procedure is for these questions to go to the district court for consideration in the first instance.

As stated, § 2244(b)(3)(C) provides appellate courts with limited authority to determine whether an inmate has made a "prima facie showing" that he meets the requirements of the statute. Making such a showing does not require an inmate to show that he will ultimately prevail, only that he may prevail and his claim should be further explored by the district court. It certainly does not involve a full blown merits analysis of a claim. And other circuits have said as much. *See In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017); *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007); *see also Hoffner*, 870 F.3d at 310 n.13 (criticizing the Eleventh Circuit's decision in *Griffin* for "resolv[ing] a merits question in the context of a motion to authorize a second or successive habeas petition.").

The Eleventh Circuit exceeds § 2244(b)(3)(C)'s mandate routinely, reaching the merits of open questions and using those orders as binding precedent in later appeals. What is particularly troubling is that these orders are generally appeal-proof. And in *St. Hubert*, the en banc Eleventh Circuit institutionalized this process.

These merits decisions are important and should be subject to the same robust process ordinarily undertaken on appellate review. Simply put, the § 2255 authorization procedure does not allow for such merits determinations. Because the Eleventh Circuit exceeded its statutory mandate in *Colon* (not to mention several other cases), Colon cannot be binding in Mr. Boston's appeal. This issue has caused deep, contentious divisions in the Eleventh Circuit, and this Court's intervention is needed.

B. THE ELEVENTH CIRCUIT VIOLATED MR. BOSTON'S RIGHT TO DUE PROCESS BY TREATING AN IMPROPERLY ISSUED SOS ORDER AS BINDING PRECEDENT IN HIS APPEAL.

By affording decisions like Colon precedential effect in Mr. Boston's appeal, the Eleventh Circuit violated Mr. Boston's procedural due process rights—both under the framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and under this Court's issue-preclusion precedents. This due process argument is set forth in greater detail in *Gonzalez v. United States*, Case No. 18-7575. Rather than repeat those arguments, Mr. Boston adopts and incorporates them here.

CONCLUSION

Mr. Boston respectfully seeks this Court's review. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX