

No. _____

**In The
Supreme Court of the United States**

MARCUS RASHAWN SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a 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

In the Eleventh Circuit, law established in a published, three-judge panel order issued pursuant to 28 U.S.C. § 2244(b) in the context of an application for leave to file second or successive § 2255 motion constitutes binding precedent for *all* subsequent Eleventh Circuit panels, including those reviewing a direct appeal or initial § 2255 motion. These published panel orders are decided on an emergency 30-day basis, without counseled briefing from either party, and without the opportunity for further review in this Court or the Eleventh Circuit. In Mr. Smith’s case, both the district court and the Eleventh Circuit determined that his *initial* 28 U.S.C. § 2255 motion was due to be denied based on the precedent announced in one such order.

The question presented is:

Does the Eleventh Circuit’s practice of applying published panel orders—issued in the context of an application for leave to file a second or successive § 2255 motion and decided in a truncated time frame without adversarial testing—as binding precedent in *all* subsequent appellate and collateral proceedings deprive inmates and criminal defendants of their right to due process, fundamental fairness, and meaningful review of the claims presented in their § 2255 motions and direct appeals?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Marcus Rashawn Smith*, No. 06-cr-21, U.S. District Court for the Middle District of Alabama. Judgment entered on Mar. 25, 2008.
- *Marcus Rashawn Smith v. United States*, No. 16-cv-394, U.S. District Court for the Middle District of Alabama. Judgment entered on Sep. 28, 2018.
- *Marcus Rashawn Smith v. United States*, No. 18-14937, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on Nov. 1, 2019.

TABLE OF CONTENTS

QUESTION PRESENTED.....	ii
LIST OF PARTIES.....	iii
RELATED CASES.....	iii
TABLE OF CONTENTS.....	iv
PETITION FOR A WRIT OF CERTIORARI.....	1
JURISDICTION.....	1
RELEVANT STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	11
I. As a result of <i>St. Hubert</i>, inmates in the Eleventh Circuit receive a more truncated form of judicial review than inmates in other Circuits.	11
II. The question presented is of exceptional importance and arises frequently in the lower courts.....	16
III. This case presents an ideal vehicle.....	167
IV. The Eleventh Circuit's application of the prior panel precedent rule violates due process.....	17
CONCLUSION.....	18
APPENDIX.....	

TABLE OF AUTHORITIES

Cases:

Browning v. United States, 241 F.3d 1262 (10th Cir. 2001) 14

Ezell v. United States, 778 F.3d 765 (9th Cir. 2015)..... 13

Grey-Bey v. United States, 201 F.3d 866 (7th Cir. 2000)..... 15

In re Baptiste, 828 F.3d 1337 (11th Cir. 2016) 14

In re Burgest, 829 F.3d 1285 (11th Cir. 2016) 15

In re Colon, 826 F.3d 1301 (11th Cir. 2016) 14

In re Hines, 824 F.3d 1334 (11th Cir. 2016) 8, 14

In re Hoffner, 870 F.3d 301 (3rd Cir. 2017) 13

In re Sams, 830 F.3d 1234 (11th Cir. 2016) *passim*

In re Siggers, 132 F.3d 333 (6th Cir. 1997) 13

In re Saint Fleur, 824 F.3d 1337 (11th Cir. 2016)..... 14, 16

In re Welch, 884 F.3d 1319 (11th Cir. 2018) 15

In re Williams, 898 F.3d 1098 (11th Cir. 2018) *passim*

Johnson v. United States, 135 S Ct. 2551 (2015) *passim*

Moore v. United States, 871 F.3d 72 (1st Cir. 2017) 13

Matthews v. Eldridge, 424 U.S. 319 (1976) 18

Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) 16

Sessions v. Dimaya, 138 S. Ct. 1204 (2018)10, 16

Walker V. United States, 900 F.3d 1012 (8th Cir. 2018)16

Welch v. United States, 136 S. Ct. 1257 (2016)3

United States v. Davis, 139 S. Ct. 231910

United States v. St. Hubert, 909 F. 3d 335 (11th Cir. 2018) 3

United States v. Washington, 890 F.3d 891 (10th Cir. 2018) 16

Statutes

18 U.S.C. § 922(g).....*passim*

18 U.S.C. § 924(c) *passim*

18 U.S.C. § 2113(a)..... *passim*

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 2255.....*passim*

28 U.S.C. § 2244(b)... .. *passim*

Federal R. Crim. P. 11(c)(1)(C) 5

PETITION FOR A WRIT OF CERTIORARI

Mr. Marcus Rashawn Smith respectfully requests that this Court grant 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 decision is unpublished. *Smith v. United States*, 2019 WL 5681213 (11th Cir. 2019) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's order denying Mr. Smith's 28 U.S.C. § 2255 motion is unpublished. *Smith v. United States*, 2018 WL 4677778 (M.D. Ala. 2018). The order is included in Petitioner's Appendix. Pet. App. 1b.

The district court's order granting Mr. Smith's application for a certificate of appealability is unreported, but reproduced in the Petitioner's Appendix. Pet. App. 1c.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on November 1, 2019. *See* Pet. App. 1a. No rehearing was sought, rendering the petition for writ of certiorari due on or before January 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in relevant part, that: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”

Section 2255(h)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

. . .

(2) 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. § 2255(h).

28 U.S.C. 2244(b)(4) provides:

(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.

28 U.S.C. § 2244(b)(4).

STATEMENT OF THE CASE

A. Legal Background.

In *Johnson v. United States*, 135 S. Ct. 2551, 2558-63 (2015), this Court held that the residual clause of the Armed Career Criminal Act (“ACCA”) is unconstitutionally vague because of the combined two-fold indeterminacy surrounding how to estimate the risk posed by a crime, and how much risk was required for a crime to qualify as a violent felony. The following term, this

Court held that *Johnson* announced a new, substantive rule of constitutional law that has retroactive effect to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

In the wake of *Johnson* and *Welch*, thousands of federal prisoners sought to file 28 U.S.C. § 2255 motions, seeking to vacate their ACCA-enhanced sentences—or their 18 U.S.C. § 924(c) convictions—based on *Johnson*. However, a federal prisoner who wishes to file a second or successive § 2255 motion is required, first, to move the court of appeals for an order authorizing the district court to consider such a motion. *See* 28 U.S.C. § 2255(h), *cross-referencing* 28 U.S.C. § 2244. The appellate court will grant such authorization only if the prisoner makes a *prima facie* showing that his proposed claim satisfies the requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C).

As explained more fully below, the procedure the Eleventh Circuit utilizes in ruling on these applications for leave to file a second or successive § 2255 motion is highly truncated in comparison to the normal adversarial process. Nevertheless, the Eleventh Circuit issued a flood of published panel orders, deciding *on the merits*—and sometimes as a matter of first impression—that certain offenses categorically qualified as “violent felonies” or “crimes of violence” for purposes of the ACCA or 18 U.S.C. § 924(c)(3). *See In re Williams*, 898 F.3d 1098, 1109 (11th Cir. 2018) (collecting cases).

The question then arose: did these published panel orders denying applications for leave to file a second or successive § 2255 motion have precedential value in subsequent cases involving a direct appeal or initial § 2255 motion? The Eleventh Circuit answered that question affirmatively in *United States v. St. Hubert*, holding that: “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.” 909 F.3d 335, 346 (11th Cir. 2018) (quotation and alteration omitted)

B. Facts and Procedural History.

In January 2006, a federal grand jury returned an indictment against Mr. Smith, charging him with: (1) bank robbery of a federally insured Banc Corp South bank on November 17, 2005, in violation of 18 U.S.C. §§ 2113(a), (d) (Count One); (2) on November 17, 2005, brandishing a firearm during and in relation to a “crime of violence”—bank robbery—in violation of 18 U.S.C. § 924(c)(1) (Count Two); (3) on November 17, 2005, possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Three); (4) bank robbery of a federally insured Banc Corp South bank on January 6, 2006, in violation of 18 U.S.C. § 2113(a), (d) (Count Four); (5) on January 6, 2006,

brandishing a firearm during and in relation to a “crime of violence”—bank robbery—in violation of 18 U.S.C. § 924(c)(1) (Count Five); and (6) on January 6, 2006, possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Six). Although Counts One and Four charged Mr. Smith with armed bank robbery under § 2113(d), neither count alleged that Mr. Smith assaulted any person, or put in jeopardy the life of any person by the use of a dangerous weapon or device.

Subsequently, Mr. Smith agreed to plead guilty to the indictment pursuant to a written Fed. R. Crim. P. 11(c)(1)(C) agreement. Notably, the agreement provided that Mr. Smith was pleading guilty to standard bank robbery under § 2113(a), not armed bank robbery under § 2113(d). Accordingly, the agreement described the statutory elements of Mr. Smith’s bank robbery offenses as: (1) that the defendant took from the person, money, then in the possession of a federally insured bank; (2) that the defendant took such money by means of force or violence or intimidation; and (3) that the defendant did so knowingly and willfully. The agreement further provided that the statutory maximum penalty for Mr. Smith’s bank robbery offenses was 20 years’ imprisonment.¹

¹ The statutory maximum penalty for armed bank robbery under § 2113(d) is 25 years. In contrast, a conviction for unarmed bank robbery under § 2113(a) carries a statutory maximum penalty of 20 years.

At Mr. Smith's change of plea hearing, the magistrate judge advised Mr. Smith as follows with respect to the statutory elements of Counts One and Four:

The elements of these offenses which the government would have to prove in your case beyond a reasonable doubt are, for the offenses under 18 U.S.C., Section 2113(a): first, that you took from a person money then in the possession of a federally insured bank; second, that you took such money by means of force or violence or intimidation; and third, that you did so knowingly and willfully.

Mr. Smith agreed—and the magistrate judge advised—that the statutory maximum penalty applicable to each of Mr. Smith's bank robbery offenses was 20 years' imprisonment. The magistrate judge accepted Mr. Smith's guilty plea, and adjudged him guilty.

In March 2008, the district court sentenced Mr. Smith to: 46 months' imprisonment as to each of Counts One, Three, Four, and Six, to be served concurrently; 84 months' imprisonment as to Count Two (the first § 924(c) offense), to be served consecutively; and 300 months' imprisonment as to Count Five (the other, stacked § 924(c) offense), to be served consecutively.

Mr. Smith declined to file a direct appeal.

Subsequently, on June 26, 2015, the Supreme Court decided *Johnson v. United States*, and held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague because of the uncertainty surrounding how to estimate the risk posed by a crime, and how much risk was required for a crime to qualify as a violent felony. 135 S. Ct. 2551, 2558-63 (2015).

Less than a year later, on May 31, 2016, Mr. Smith timely filed an initial *pro se* 28 U.S.C. § 2255 motion, seeking to vacate his two § 924(c) convictions and his total sentence based on *Johnson*. In this motion, Mr. Smith argued that: (1) the residual clause in § 924(c)(3)(B) was unconstitutionally vague following *Johnson*; and (2) his underlying predicate convictions did not qualify as “crimes of violence” under the elements clause in § 924(c)(3)(A).

The government filed a response in opposition to Mr. Smith’s § 2255 motion, arguing that: (1) Mr. Smith’s § 2255 motion was untimely, because it was neither governed by *Johnson* nor filed within one year of the date that his convictions became final; (2) Mr. Smith’s *Johnson* claim was procedurally barred because he did not raise it in the trial court or on direct appeal; and (3) Mr. Smith’s claim failed on the merits, because *Johnson* had no impact on the residual clause in § 924(c)(3)(B), and, even if it did, bank robbery continued to qualify as a “crime of violence” under the elements clause in § 924(c)(3)(A).

On July 26, 2016, the Eleventh Circuit issued a published panel order—denying an application for leave to file a second or successive § 2255 motion—and holding, for the first time, that “a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause.” *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016). The Eleventh Circuit then decided *St. Hubert*, and held that published panel orders such as *In re Sams* were entitled to full precedential value, even on direct appeal or in initial collateral proceedings. *United States*

v. St. Hubert, 883, F.3d 1319, 1329 (11th Cir. 2018), *opinion vacated and superseded by St. Hubert*, 909 F.3d 335.

On August 8, 2018, a magistrate judge issued a report and recommendation (“R&R”), recommending that Mr. Smith’s § 2255 motion be denied, and his case dismissed with prejudice. Specifically, the magistrate judge determined that Mr. Smith was not entitled to relief on the merits of his *Johnson* claim, because, irrespective of whether *Johnson* invalidated the residual clause in § 924(c)(3)(B), his underlying bank robbery convictions continued to qualify as a “crimes of violence” under the elements clause in § 924(c)(3)(A). The entirety of the magistrate judge’s explanation for this conclusion was as follows:

The Eleventh Circuit has held that 18 U.S.C. § 2113 armed bank robbery is categorically a crime of violence under § 924(c)(3)(A)’s use-of-force clause. *In re Hines*, 824 F.3d 1334, 1336–37 (11th Cir. 2016) (“[Petitioner’s] § 924(c) conviction on Count 2 was explicitly based on his companion Count 1 conviction for armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d). And a conviction for armed bank robbery clearly meets the requirement for an underlying felony offense, as set out in § 924(c)(3)(A), which requires the underlying offense to include as an element, ‘the use, attempted use, or threatened use of physical force against the person or property of another.’”); *see also Sams*, 830 F.3d at 1239 (holding expressly that “a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause”).

As a result, the magistrate judge rejected Mr. Smith’s *Johnson* claim based solely upon *Hines* and *Sams*—two published panel orders decided in the context of applications for leave to file a second or successive § 2255 motion. According to the magistrate judge, these two published panel orders

constituted binding “Eleventh Circuit precedent,” foreclosing Mr. Smith’s arguments and mandating the conclusion that his § 924(c) convictions were unaffected by *Johnson*.

Mr. Smith filed objections to the R&R, challenging the magistrate judge’s conclusion that he was not entitled to relief on the merits of his *Johnson* claim. Mr. Smith acknowledged the Eleventh Circuit’s decision in *St. Hubert*, but argued that *St. Hubert* was wrongly decided because it was inappropriate for published panel orders denying an application for leave to file a second or successive § 2255 motion under §§ 2244(b)(3)(A) and 2255(h)(2) to be applied as binding precedent in a case involving an *initial* § 2255 motion. Mr. Smith pointed out the significant legal and pragmatic concerns associated with applying these published panel orders as binding precedent across the board, and he argued that this practice deprived him of his right to due process, fundamental fairness, and meaningful review of the claims presented in his § 2255 motion.

On September 28, 2018, the district court entered an order denying Mr. Smith’s § 2255 motion. The court modified the magistrate judge’s recommendation to indicate that Mr. Smith was convicted of standard bank robbery under § 2113(a) rather than armed bank robbery under § 2113(d). The court then overruled Mr. Smith’s objections, adopted the modified R&R, and dismissed the case with prejudice. The district court’s only explanation for this conclusion was that: (1) *In re Sams*, 830 F.3d 1234 (11th Cir. 2016) held that a

conviction for standard bank robbery under § 2113(a) falls within the scope of the § 924(c)(3)(A) elements clause; and (2) “*Sams* controls here.” The district court granted Mr. Smith a certificate of appealability (“COA”) as to the following issue:

Whether Mr. Smith’s two 18 U.S.C. § 924(c) convictions are unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc)?

Mr. Smith appealed, arguing that: (1) his underlying predicate convictions—for bank robbery under § 2113(a)—did not categorically qualify as “crimes of violence” under the elements clause in § 924(c)(3)(A); and (2) the residual clause in § 924(c)(3)(B) was unconstitutionally vague. Mr. Smith also reiterated his contention that it was inappropriate for published panel orders such as *In re Sams*—decided on an emergency 30-day basis, without counseled briefing from either party—to be applied as binding precedent foreclosing merits review of the claim presented in his § 2255 motion.

While Mr. Smith’s appeal was pending, this Court decided *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), and confirmed that the residual clause in § 924(c)(3)(B) was unconstitutionally vague.

Subsequently, the Eleventh Circuit affirmed the district court’s denial of Mr. Smith’s § 2255 motion. The Court of Appeals acknowledged this Court’s intervening decision in *Davis*, but held that its “prior precedent, which we are bound to follow, precludes Smith’s claim that his bank robbery convictions do

not qualify as ‘crimes of violence’ under § 924(c).” The Court explained its conclusion as follows:

In *In re Sams*, we denied an application for leave to file a second or successive § 2255 motion to challenge a § 924(c) conviction after Johnson, holding that a standard bank robbery conviction under § 2113(a) by force and violence or by intimidation categorically qualified as a crime of violence under § 924(c)(3)(A). *In re Sams*, 830 F.3d at 1239. “[L]aw 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 panels of this Court, including those reviewing appeals and collateral attacks.” *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *abrogated in part on other grounds by Davis*, 139 S. Ct. at 2324, 2336.

In short, the panel found itself bound to follow *St. Hubert’s* mandate that published panel orders such as *In re Sams* are to be applied as binding precedent in all subsequent Eleventh Circuit cases, regardless of context.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. **As a result of *St. Hubert*, inmates in the Eleventh Circuit receive a more truncated form of judicial review than inmates in other Circuits.**

As already discussed, the Eleventh Circuit held in *St. Hubert* that: “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 are binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, unless and until they are 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 (quotations and alterations omitted).

As several judges of the Eleventh Circuit have noted, there are significant legal and pragmatic concerns associated with applying these published panel orders as binding precedent across the board, irrespective of context. *See United States v. St. Hubert*, 2019 WL 1262257 (11th Cir. 2019) (Wilson, J., dissenting from the denial of rehearing en banc); (J. Pryor, J., dissenting from the denial of rehearing en banc); (Martin, J., dissenting from the denial of rehearing en banc); *see also In re: Williams*, 898 F.3d 1098, 1104 (11th Cir. 2018) (Wilson, J., specially concurring).

First and foremost, the Eleventh Circuit requires any non-capital application seeking leave to file a second or successive § 2255 motion to be submitted pursuant to a standardized form. *See* 11th Cir. R. 22-3(a); *see also Williams*, 898 F.3d at 1104. These forms are almost always filled out by a *pro se* prisoner, who is given a 2.5" x 5.25" space in which to explain why his claim relies upon a “new rule of constitutional law.” *Id.* at 1101. Even if the applicant feels that he needs additional space to explain the complexities of his legal claim, the form expressly prohibits the submission of additional briefing or attachment.² As a result, these applications are usually decided without

² Specifically, Instruction (4) on the first page of the form provides that:

Additional pages are not permitted except with respect to identifying additional grounds for relief and facts on which you rely to support those grounds. To raise any additional claims, use the “Additional Claim”

counseled argument from the petitioner, and are always decided without oral argument and without an opposing brief from the government. *Id.* at 1102.

Moreover, in the two years following *Johnson*, the Eleventh Circuit issued more than 3,588 orders on second or successive applications. *Williams*, 898 F.3d at 1104. In each of these cases, the Court considered itself bound to issue a ruling within 30 days, “no matter what” the unique circumstances of the case. *Id.* at 1103 (citing *In re Henry*, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014)); *see also see also* 28 U.S.C. § 2244(b)(3)(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). The Court adhered to this deadline, even if it did not have access to the whole record. *Williams*, 898 F.3d at 1102. Notably, no other Circuit considers itself so strictly bound by this deadline. *See Moore v. United States*, 871 F.3d 72, 77–78 (1st Cir. 2017); *Johnson v. United States*, 623 F.3d 41, 43 n.3 (2d Cir. 2010); *In re Hoffner*, 870 F.3d 301, 307 n.11 (3d Cir. 2017); *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003); *In re Siggers*, 132 F.3d 333, 335 (6th Cir. 1997); *Gray-Bey v. United States*, 201 F.3d 866, 867 (7th Cir. 2000); *Ezell v. United States*, 778 F.3d 762,

pages attached at the end of this application, which may be copied as necessary. DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC., EXCEPT IN CAPITAL CASES.

The form is accessible at:

http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Form2255APP_FEB17.pdf

765 (9th Cir. 2015); *Browning v. United States*, 241 F.3d 1262, 1263 (10th Cir. 2001).

Worse still, any mistakes made in such an order, published or unpublished, are effectively made unreviewable by operation of 28 U.S.C. § 2244(b)(3)(E). *Id.* at 1104; *see also* 28 U.S.C. § 2244(b)(3)(E) (mandating that the “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”). And unlike other Circuits, the Eleventh Circuit has added to this procedural hurdle by holding that it is “require[d] to dismiss a claim that has been presented in a prior application” for leave to file a second or successive § 2255 motion—even if the applicant files the second application because the Court got it wrong the first time. *See In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016).

Despite the limitations inherent in this truncated, non-adversarial procedure, the Eleventh Circuit began using these published panel orders to decide, on the merits, that certain crimes qualified as “crimes or violence” or “violent felonies.” *See, e.g., In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) (per curiam) (bank robbery in violation of 18 U.S.C. § 2113(a), (d)); *In re Saint Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016) (Hobbs Act robbery); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (aiding-and-abetting Hobbs Act robbery); *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016) (carjacking in violation of 18 U.S.C. § 2119); *In re Watt*, 829 F.3d 1287, 1290 (11th Cir. 2016) (aiding-and-

abetting assaulting a postal employee); *Sams*, 830 F.3d at 1239 (bank robbery in violation of 18 U.S.C. § 2113(a)); *In re Burgest*, 829 F.3d 1285, 1287 (11th Cir. 2016) (Florida manslaughter and kidnapping); *In re Welch*, 884 F.3d 1319 (11th Cir. 2018) (Alabama first degree robbery and first degree assault). Some of these orders were decided over dissents, and others decided issues of first impression. *See Williams*, 989 F.3d at 1098 & n.4 (collecting cases). And in all of these orders, the Court exceeded its gatekeeping function under §§ 2255(h)(2), 2244(b)(3), which, properly conceived, focuses not on whether a proposed § 2255 motion, if authorized, would ultimately succeed, but rather, “whether the petitioner has made out a prima facie case of compliance with the § 2244(b) requirements.” *Williams*, 898 F.3d at 1101.

As a specially concurring, three-judge panel of the Eleventh Circuit has succinctly explained: “after *St. Hubert*, published panel orders—typically decided on an emergency thirty-day basis, with under 100 words of argument (often written by a pro se prisoner), without any adversarial testing whatsoever, and without any available avenue of review—bind all future panels of this court.” *Williams*, 898 F.3d at 1101.

As a result of *St. Hubert*, courts in the Eleventh Circuit are now denying § 2255 motions and affirming convictions based on precedent *that was never subjected to the full adversarial process*. There is no way around it: inmates and defendants in the Eleventh Circuit receive a more truncated form of judicial review than inmates in other circuits.

Thus, this practice both pretermits the adversarial process, and insulates erroneous precedent from review. As Justice Gorsuch noted in *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.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1232-33 (2018) (Gorsuch, J., concurring) (quotation omitted). Applying published panel orders as binding precedent in initial § 2255 proceedings is unsound, unfair, and unconstitutional. As a result of *St. Hubert*, all courts in the Eleventh Circuit court “are prohibited from giving inmates the type of merits review of their sentences that inmates routinely receive in other Circuit[s].” *In re Williams*, 898 F.3d 1098, 1110 (11th Cir. 2018) (Martin, J., specially concurring).

II. The question presented is of exceptional importance and arises frequently in the lower courts.

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 11th Circuit] 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 orders determining that certain offenses qualify as “crimes of violence” or “violent felonies” may have a lasting and boundless impact, as “[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).

III. This case presents an ideal vehicle.

Mr. Smith’s case presents an ideal vehicle to resolve this issue, because it is pellucidly clear from the record that the district court denied his § 2255 motion based solely on: (1) the Eleventh Circuit’s holding, in *Sams*, that a conviction for standard bank robbery under § 2113(a) falls within the scope of the § 924(c)(3)(A) elements clause; and (2) its conclusion that “*Sams* controls here.” Mr. Smith challenged this ruling both in the district court and on appeal, specifically emphasizing that was inappropriate for a published panel orders such as *Sams* to be applied as binding precedent in a case involving an *initial* § 2255 motion. The Eleventh Circuit then affirmed the district court’s decision based exclusively upon *Sams* and upon *St. Hubert’s* extension of the prior panel precedent rule.

Therefore, the question presented is squarely at issue under the facts of this case.

IV. The Eleventh Circuit’s application of the prior panel precedent rule violates 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. In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court identified three factors that must be balanced when analyzing a procedural due process claim: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

The private interest at issue in this case is especially great, as it implicates Mr. Smith's liberty. The risk of error is likewise especially high, as the procedures utilized by the Eleventh Circuit in this case will result in the unchallenged, *per curiam* affirmance of countless appeals based on precedent that was never subjected to the adversarial gauntlet. And, the process that Mr. Smith seeks is not at all burdensome: he simply desires that the Eleventh Circuit decide his case based on precedent that was subject to full adversarial testing.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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