NO. 19-7527

In The
Supreme Court of the United States

MARCUS RASHAWN SMITH,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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As Mr. Smith pointed out in his petition for a writ of certiorari, and as the government does not dispute, the result of *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018)—and its pronouncement that published panel orders issued in the context of an application for leave to file a second or successive 28 U.S.C. § 2255 motion must be applied as binding precedent in all subsequent appellate and collateral proceedings—is that inmates in the Eleventh Circuit receive a more truncated form of judicial review than inmates in any other Circuit. *See* BIO 1-3; Pet. 11-16. The government likewise does not contest that this question is of exceptional importance, and arises frequently in the lower courts. *See* Pet. 16.

Nevertheless, the government contends that Mr. Smith and countless others should not be troubled that their § 2255 motions were denied (or their convictions affirmed) based on precedent that was never subjected to the adversarial process, because the issue "does not warrant review." BIO 1. According to the government, the question presented is undeserving of further consideration, because *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016)—the published panel order foreclosing the claim presented in Mr. Smith's § 2255 motion—was "correctly" decided; and (2) Mr. Smith's constitutional due process argument "does not warrant review." BIO 1-2.

The government's first contention—that further review of the *St. Hubert* approach remains unwarranted because *In re Sams* was correctly decided—is nothing more than a thinly disguised merits argument which is irrelevant and premature at this juncture. BIO 2. Regardless of whether the Eleventh Circuit got it right or

wrong in *Sams*, it decided an issue of first impression, on an emergency thirty-day basis, without any adversarial testing whatsoever, and without any available avenue of review, and then made that decision precedent binding on all future cases decided in the Eleventh Circuit. *In re Williams*, 898 F.3d 1098, 1101 (11th Cir. 2018) (Wilson, J., specially concurring) (summarizing the myriad problems with the *St. Hubert* approach). No other Circuit deprives inmates of meaningful review of the claims presented in their initial § 2255 motions to such an extent. And at this point, only this Court can resolve what has now become an intractable difference between the Circuits.

The government's remaining argument is equally unavailing. Although the 11th Circuit is indeed free to fashion rules governing its own procedure, it may not do so in a manner that contravenes due process. The government's only response to Mr. Smith's procedural due process argument is that his claim is governed by *Medina v. California*, 505 U.S. 437 (1992), rather than *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). (BIO 1)(adopting pages 12-15 of government's BIO in *Mack v. United States*, No. 19-6355 (Apr. 10, 2020). However, this Court's precedent treats *Mathews* as the general rule governing "procedural due process inspection," and *Medina* as the limited exception for "assessing the validity of state procedural rules that are part of the criminal process," such as "allocations of burdens of proof and the type of evidence qualifying as admissible." *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (quotation omitted). Since Mr. Smith's case does not involve the validity of a state procedural rule, it follows that *Mathews* provides the appropriate framework

for assessing whether the Eleventh Circuit's application of the prior panel precedent rule violates due process. But regardless, the existence of this dispute simply underscores the need for this Court's guidance to ensure that due process rights are adequately protected in the Eleventh Circuit.

CONCLUSION

In light of the foregoing, and for the reasons set forth more fully in Mr. Smith's petition for a writ of certiorari, this Court should grant the petition and resolve the question presented: 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?

Respectfully submitted,

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