No. 19 - _____

**IN THE SUPREME COURT OF THE UNITED STATES**
**October Term, 2019**

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DONTE DESHAWN ALSTON,
Petitioner

-v-

UNITED STATES OF AMERICA,
Respondent.

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**On Petition for a Writ of Certiorari**
**To the United States Court of Appeals**
**For the Eleventh Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

I. Whether the Eleventh Circuit's Prior-Precedent Rule violates due process when the precedent is based on a second or successive 28 U.S.C. § 2255 application usually filed *pro se*, that must be decided without meaningful briefing, without a record, without oral argument and within 30 days of filing?

In the Eleventh Circuit, a prisoner must file an application with the Court of Appeals for permission to pursue a second or successive habeas or 2255 petition. Many of these applications are filed *pro se*. In the Eleventh Circuit, the petitioner must use a designated application form and cannot add attachments to it. The form has room for between 40 and 100 words of argument. Unlike many other circuits, the Eleventh Circuit treats a thirty day deadline for resolving such applications as mandatory. The government is not permitted to respond, and there is no avenue to appeal the denial of such application.

Nevertheless, the Eleventh Circuit publishes many of its decisions ruling on these applications, and those published rulings are binding on

future merits panels deciding direct appeals and appeals of rulings on initial 2255 proceedings.

Decisions granting or denying petitions to file second or successive (SOS) habeas petitions should not be binding on merits panels pursuant to the prior-panel-precedent rule, because it violates due process and fundamental fairness. The rule is applied very differently from the practice of other circuits. It is also controversial within the Circuit. *See In re Octavious Williams*, 898 F.3d 1098 (11th Cir. 2018) (Judges Wilson, Martin and Jill Pryor, concurring). This Court should grant certiorari to determine the constitutionality of the Eleventh Circuit's prior-precedent rule as applied to orders on petitions to file SOS applications because it effectively denies due process and access to the courts to persons like Mr. Alston, whose direct appeal was summarily denied because the Eleventh Circuit treated a published SOS order as binding precedent on his direct appeal.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Donte Deshawn Alston respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

## OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is unpublished and is included in the addendum to this petition. *See* Attached Appendix A; --- Fed.Appx. ---, 2019 WL 5957206 (11th Cir. 2019).

## JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on November 13, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of criminal and civil cases from the courts of appeals.

## STATUTORY PROVISIONS INVOLVED

The Fifth Amendment Due Process Clause states:

> . . . nor be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

Section 2244 of Title 28 provides:

**(a)** No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
**(b)(1)** A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
**(2)** A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
**(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
**(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
**(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
**(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.
**(c)** In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C. § 2244(a) – (c).

Section 924(c)(3) of Title 18 provides that:

**(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(c)(3).

The Eleventh Circuit Rules provide that:

> (a) Form. An applicant seeking leave to file a second or successive habeas corpus petition or motion to vacate, set aside or correct sentence should use the appropriate form provided by the clerk of this court. In a death sentence case, the use of the form is optional.

11th Cir. Rule 22-3(a).

## STATEMENT OF FACTS

In 2017, Mr. Alston was indicted for two crimes: armed bank robbery, in violation of sections 2113(a) and (d) of Title 18, and brandishing a handgun during a crime of violence, in violation of section 924(c)(1)(A)(ii) of Title 18. Mr. Alston plead guilty to both counts. The district court imposed a sentence of 37 months as to Count One and 84 months as to Count Two for a total term of imprisonment of 121 months. Doc. 40. The district court also sentenced Mr. Alston to 3 years supervised release, to run concurrent on each count, and imposed a $200 special assessment.

Throughout the litigation, Mr. Alston argued that armed bank robbery did not qualify as a "crime of violence" under 18 U.S.C. § 924(c)'s Residual and Element Clauses. Mr. Alston prevailed on the Residual Clause claim, following this Court's decision in *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019).

Mr. Alston also argued that armed bank robbery did not qualify as a crime of violence under 924(c)'s Elements Clause. *See* 18 U.S.C. § 924(c)(3)(A). As to this second argument, the Eleventh Circuit denied relief stating that it was bound by binding precedent. *United States v. Alston* --- Fed.Appx ---, 2019 WL 5957206, at *1 (11th Cir. 2019). The binding precedent cited by the Eleventh Circuit panel was not the result of a fully litigated direct appeal, nor a fully litigated initial habeas petition under 28 U.S.C. § 2255. Instead, the binding precedent relied upon by the Eleventh Circuit was the result of a published opinion disposing of a petition to file a second or successive habeas petition (SOS petition). *Alston*, --- Appx. ---, 2019 WL 5957206 at *1. In denying relief, the panel found that based on this binding precedent rule, armed bank robbery was a crime of violence under the Elements Clause of section 924(c). *Id.* (citing *In re Hines*, 824 F.3d 1334 (11th Cir. 2016)).

## REASONS FOR GRANTING THE PETITION

### I. The Eleventh Circuit's Prior-Precedent Rule, violates due process when the precedent is based on second or successive applications usually filed by inmates proceeding *pro se*, that must be decided without meaningful briefing, without a record, without oral argument and within 30 days of filing.

This case deals with the precedential value of an Order issued as a result of an SOS application. An SOS application is a special kind of filing with its own rules. 28 U.S.C. § 2244(b). It is filed using the Eleventh Circuit's mandatory standardized fill-in–the–blanks form.[1] Many applications, as the application *In re Hines*, are filed *pro se*. In most cases, there is no briefing, by either the inmate or the government. The appellate court is required to decide the application within 30 days. 28 U.S.C. § 2244(b)(3)(D); *see In re McCall*, 826 F.3d 1308, 1311 (11th Cir. 2016) (Martin, J., concurring) (Orders "are typically based on nothing more than a form filled out by a prisoner, with no involvement from a lawyer").

Judge Ed Carnes of the Eleventh Circuit has described the process:

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[1] The form is available at: http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/2244%28b%29_Second_or_Successive_Application_Final_JUN19.pdf.

> When we make that prima facie decision we do so based only on the petitioner's submission. We do not hear from the government. We usually do not have access to the whole record. And we often do not have the time necessary to decide anything beyond the prima facie question because we must comply with the statutory deadline. See § 2244(b)(3)(D) (requiring a decision within 30 days after the motion is filed). Even if we had submissions from both sides, had the whole record before us, and had time to examine it and reach a considered decision on whether the new claim actually can be squeezed within the narrow exceptions of § 2244(b)(2), the statute does not allow us to make that decision at the permission to proceed stage. It restricts us to deciding whether the petitioner has made out a prima facie case of compliance with the § 2244(b) requirements.

*Jordan v. Sec'y Dep't of Corr.*, 485 F.3d 1351, 1357 (11th Cir. 2007).

So, it is not surprising that the Eleventh Circuit's orders on the SOS applications have been inconsistent and questioned for their legal correctness and thoroughness. Despite these problems, and without a thorough due process analysis, the Eleventh Circuit has found that the prior panel precedent rule applies to cases decided in the context of an SOS application. *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). Ironically, *Lambrix* itself is an SOS order.

Like a game of Jenga, which creates a taller and unstable structure as the game progresses, SOS orders stack one on top of another, creating binding precedent not supported by the adversary process. At

least in the Jenga game, the player can take his or her time deciding which block to remove. When dealing with SOS applications, the courts do not have that luxury, and must reach a decision within 30 days.

Many litigants in the Eleventh Circuit are affected by this expedited Jenga game. Orders published in the context of SOS applications are binding. Eleventh Circuit panels are then bound by these decisions, even on direct appeal, and even when the litigant can show that the "binding precedent" is based on outdated circuit law.

The Eleventh Circuit is an outlier, all by itself at the Jenga table. All other circuits have outlined a procedure that allows prior panel precedent to be reviewed on the basis of an intervening Supreme Court precedent. Other circuits have recognized that as an inferior court in the federal hierarchy, circuit courts are "compelled to apply the law announced by the Supreme Court as [they] find it on the date of [their] decision. *United States v. Tann*, 577 F.3d. 533, 541 (3d Cir. 2009); *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010). ("[W]e must – as a lower federal court – apply all pertinent Supreme Court precedent' including precedent that overrules *** Circuit decisions." (alterations in original (internal citation omitted)).

This flawed system lead the Eleventh Circuit, relying *In re Hines* to conclude that armed bank robbery is a crime of violence for purposes of Section 924(c)(3)(A). The *In re Hines* the panel noted in a single sentence that:

> [a] conviction for armed bank robbery clearly meets the requirement for an underlying felony offense, as set forth 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.

*In re Hines*, 824 F.3d at 1337. Mr. Hines, of course, had no ability to seek *en banc* review or to file a petition for writ of certiorari. Instead, a one sentence ruling on his under 100 word, *pro se* argument doomed all subsequent claims by any other litigant.

Two years later, the Eleventh Circuit expressly held that published SOS orders constitute binding precedent, even in cases on direct appeal. *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018) ("*St. Hubert II*"). Yet, in *St. Hubert*, the panel did not address the many procedural safeguards missing in the SOS application process: the absence of legal briefing, the absence of legal representation and the absence of time for a court to thoroughly consider legal issues that ultimately bind all litigants.

After the *St. Hubert II* decision, the Eleventh Circuit denied rehearing *en banc*. *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. 2019), but several members of the Court dissented.

In her dissent, Circuit Judge Beverly Martin explained her concerns with the procedure followed by the Eleventh Circuit as it relates to the binding nature of published SOS applications:

> [The process followed by the Eleventh Circuit][s]tands in stark contrast to the practices of other circuits which often hear oral argument and read particularized government briefs, and which consider the statutory thirty-day time limit to be optional. And, likely recognizing the unenviable process that generates these second or successive orders, all other circuits publish substantially fewer orders than we do.

*United States v. St. Hubert,* 918 F.3d 1174, 1198-99 (Judge Beverly Martin dissenting).

The procedure followed by the Eleventh Circuit when dealing with published decisions in an SOS scenario is very different from the procedure followed in cases involving a direct appeal. In a direct appeal, there are no time constraints, the court has the luxury of briefing by both sides, and there is often legal argument before the issuing of a published opinion. Of course, parties may appeal merit decisions to the Supreme Court and may ask for panel or *en banc* rehearing, whether such orders

should be published, and if they are, whether those published orders should have precedential value in cases on direct appeal.

The Eleventh Circuit is alone in taking this extreme position. Each of the appellate circuits, with the exception of the Eleventh Circuit, have developed a rule that allows a panel to review a prior panel's precedent when there is an intervening Supreme Court case that would render the prior precedent clearly erroneous. Because of the Eleventh Circuit's expanded view of the prior precedence rule, numerous cases where defendants can demonstrate directly applicable intervening Supreme Court precedent are affirmed on the basis of outdated law.

The procedure followed by the Eleventh Circuit is currently being challenged in at least two petitions for a writ of certiorari pending before this Court. *See St. Hubert v. United States*, Case No. 19-5267 and *Sherman Williams v. United States*, Case No. 18-6172. More recently, in the *Williams* case, Judge Wilson summarized:

> At its core, the right to due process reflects a fundamental value in our American constitutional system. *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S. Ct. 780, 784 (1971). Due process is the cornerstone of that system. And "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process

> must be given a meaningful opportunity to be heard. *Id*. at 377.
>
> As this Court has "emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433, 102 S. Ct. 1148, 1156 (1982). But through its rules, the Eleventh Circuit denies the meaningful right to be heard and to have a case judged on the merits when it publishes orders denying petitions for second or successive (SOS) habeas petitions and binds all future panels with that unreviewable holding, even in cases involving direct appeals.

The SOS decision-making process is not conducive to making well-reasoned, precedential decisions. Most petitions are filed *pro se*, without the benefit of counsel. This prevents full review by a merits panel with briefing of all arguments in favor of both sides of the question with the "guiding hand of counsel." *Luis v. United States*, __ U.S. __, 136 S. Ct. 1083, 1088 (2016). Indeed, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 797 (1963). Furthermore, the SOS order that binds future merits panels is also unreviewable. *In re Octavious Williams*, 898 F.3d 1098, 1102 (11th Cir. 2018) (Wilson, J., concurring).

> All of our sister circuits that have definitively spoken on the matter do *not* consider themselves constrained by the thirty-

> day time limit for deciding a second or successive petition.... In line with this, judges in this Circuit consider themselves bound by the thirty-day limit, and we dispose of "virtually every one of the thousands" of applications under §§ 2244 and 2255 "(at least 99.9% of them)" within thirty days. *See also In re Henry*, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014) ("[T]his Court necessarily must apply § 2244(b)(2) under a tight time limit in all cases, since the statute expressly requires us to resolve this application within 30 days, *no matter the case*." (emphasis added)). This extremely compressed timeline can lead to odd results that we would likely not accept in a merits appeal. *See, e.g.*, *In re Sapp*, 827 F.3d 1334 (11th Cir. 2016) (per curiam) (published, unsigned panel order followed by a three-judge special concurrence); *see also, e.g.*, *In re Armstrong*, No. 18-10948 (11th Cir. Apr. 3, 2018) (per curiam) (unsigned panel order followed by three single-judge special concurrences).
>
> Third, even in non-death cases, many other circuits often consider briefing from the government before issuing a published order; some also entertain oral argument from both parties. We never grant oral argument in non-death second or successive petitions. And, having reviewed the thirty-nine non-death published second or successive orders for which docket information is readily available, I was unable to locate *any* docket on which the United States filed an individualized brief prior to the published order's issuance.

*In re Williams*, 898 F.3d at 1102–04.

Not only does the Eleventh Circuit alone follow this stringent procedure with no opportunity for reasoned briefing, largely *pro se* litigants, and no opportunity for review, it also binds future merits panels at a rate not seen in any other circuit.

> [P]rocedurally speaking, we have the worst of three worlds in this Circuit. We publish the most orders; we adhere to a tight timeline that the other circuits have disclaimed; and we, unlike most circuits, do not ever hear from the government before making our decision. But, despite these shortcomings, published panel orders not only now bind all panels of this court—they are also unreviewable.

*In re Williams*, 898 F.3d at 1104.

As a result of the Eleventh Circuit's own rules and limitations, imposed by no other circuit, the panel here denied Mr. Alston due process and meaningful review of his case. The court addressed his constitutional and statutory challenge to the validity of his armed bank robbery conviction with the conclusory holding that armed bank robbery "clearly meets the requirement" of a 924(c) predicate with just a single cite to *In re Hines*, 824 F.3d 1334 (11th Cir. 2016).

Mr. Alston was denied due process, access to the courts and meaningful review because of this conclusory holding, followed only by the Eleventh Circuit. Because the Eleventh Circuit's prior-precedent rule, as applied to published orders on SOS applications is so different in practice than that of any of the other circuits, this Court should grant certiorari to resolve the question of whether publishing, as binding precedent, unreviewable orders on largely uncounseled petitions for

second or successive habeas petitions, on forms limiting argument to 100 words or less, violates the due process rights of defendants seeking full merits review on direct appeal or initial habeas review.

## CONCLUSION

Wherefore, Mr. Alston respectfully requests that this Court grant the writ.

This 11th day of February, 2020.

Respectfully Submitted,

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