NO. _____

# In The
# Supreme Court of the United States

JAMES STEINER,
*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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## QUESTIONS PRESENTED

I. In *Rosemond v. United States*, this Court held that the government establishes that a defendant aided and abetted an 18 U.S.C. § 924(c) offense only if it proves that "the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 572 U.S. 65, 67 (2014). The Eleventh Circuit agreed that the government presented no evidence showing that Mr. Steiner was aware of the firearms before his co-conspirators initially brandished them, but found that a jury could nevertheless infer that Mr. Steiner had a reasonable opportunity to quit the crime as a result of the amount of time that passed after he learned of the guns' presence. Can the 11th Circuit's holding be reconciled with *Rosemond*?

II. 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?

III. In *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016), the Eleventh Circuit held that a conviction for aiding abetting a crime of violence qualifies as a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A). Does this

holding—which is premised upon the determination that an aider and abettor of an offense necessarily commits all the elements of the principal offense—conflict with *Rosemond*?

## LIST OF PARTIES

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

## RELATED CASES

- *United States v. James Steiner*, No. 09-cr-113, U.S. District Court for the Middle District of Alabama. Judgment entered on June 25, 2010.
- *United States v. James Steiner,* U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on Sep. 7, 2011.
- *James Steiner v. United States*, No. 14-cv-1256, U.S. District Court for the Middle District of Alabama. Judgment entered on Nov. 14, 2017.
- *James Steiner v. United States*, No. 17-15555, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on Oct. 16, 2019. Rehearing denied on January 14, 2020.

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## PETITION FOR A WRIT OF CERTIORARI

Mr. James Steiner 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 below is published. *Steiner v. United States*, 940 F.3d 1282 (11th Cir. 2019). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's order denying Mr. Steiner's 28 U.S.C. § 2255 motion is unpublished. *Steiner v. United States*, 2017 WL 5465518 (M.D. Ala. 2017). The order is included in Petitioner's Appendix. Pet. App. 1b.

The district court's order granting Mr. Steiner'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 October 16, 2019. *See* Pet. App. 1a. Mr. Steiner timely filed a petition for rehearing and rehearing en banc, which the 11th Circuit denied on January 14, 2020. Due to public health concerns relating to the COVID-19 pandemic, this Court entered an order, extending the deadline to file the certiorari petition to 150 days from the date of the order denying rehearing. The petition is now due on June 12, 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."

18 U.S.C. § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or a "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). For purposes of § 924(c), "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). Additionally, the federal aiding and abetting statute, 18 U.S.C. § 2, provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, in punishable as a principal.

18 U.S.C. § 2.

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

In July 2009, a federal grand jury returned an indictment against Mr. Steiner, charging him with: one count of conspiracy to commit carjacking, in violation of 18 U.S.C. §§ 371, 2119 (Count One); one count of aiding and abetting a carjacking, in violation of 18 U.S.C. §§ 2119, 2 (Count Two); and one count of aiding and abetting the use of a firearm in furtherance of a crime of violence—as charged in Count Two—in violation of 18 U.S.C. §§ 924(c)(1)(A), 2 (Count Three). Notably, the indictment charged Mr. Steiner with violating § 2119 and § 924(c) under the federal aiding and abetting statute, 18 U.S.C. § 2.

At trial, the government sought to establish Mr. Steiner's role in the offense through the testimony of his codefendant, Jihad Walker. Of relevance to the instant proceedings, Mr. Walker testified that, on January 16, 2009, he was with his friends—Mr. Steiner, Mr. Ware, and Mr. Wilson—getting drunk

in celebration of his birthday. At some point in the evening, Mr. Ware suggested that the four men "go hit a lick." Mr. Walker understood the term "hit a lick" meant "to try to get some money" by attempting to "go rob someone." The four men agreed to go hit a lick without further planning, and without discussion of whether firearms would be used in the commission of the crime.

The four men decided to travel in Mr. Walker's black Blazer, with Mr. Steiner driving. Before they left, Mr. Ware loaded two firearms—a pistol and an "Army gun"—into the Blazer. Mr. Ware did not "try and hide" the guns from Mr. Steiner, Mr. Wilson, or Mr. Walker. There was no testimony that Mr. Steiner observed the guns being moved, and no other evidence concerning Mr. Steiner's advance knowledge that firearms would be used in the commission of any crime.

Mr. Walker testified that the four men set off in the Blazer, with Mr. Steiner driving, Mr. Walker in the passenger seat, and Mr. Ware and Mr. Wilson in the back. After driving around for a while, the men identified a white Chevrolet Impala as their target, or "lick." Mr. Ware instructed Mr. Steiner to drive in front of the Impala, and then slam on the brakes. Mr. Steiner complied, causing the Impala to hit the tail of the Blazer. The collision caused the Impala to stop, and then back up into a ditch. Mr. Ware and Mr. Wilson jumped out of the backseat with the two firearms, and began firing into the air.

The driver of the Impala, Megan Patterson, testified that she knew something bad was going to happen after she hit the Blazer, so she put the Impala in reverse and attempted to back away. As soon she began backing up, four men jumped out of the Blazer, and two of them—Mr. Ware and Mr. Wilson—began shooting. Ms. Patterson ducked, reversed into a ditch, and hit a tree, immobilizing the Impala. The two passengers in the backseat of her car—S.H. and S.R.—ran off into the nearby woods, and Mr. Ware and Mr. Wilson fired their weapons after them, in the direction of the woods.

Ms. Patterson further testified that, after S.H. and S.R. ran off, the four men approached the Impala, where Ms. Patterson and her other passenger, Melissa Nolan, remained. The men asked Ms. Patterson and Ms. Nolan for their money and purses, and then returned to their Blazer. However, the men were unable to get the Blazer started, so they asked Ms. Patterson to relinquish the keys to the Impala instead. The men endeavored to push the Impala out of the ditch, but were interrupted by a passing motorist, Corey Burkett. Ms. Patterson attempted to signal for help, whereupon Mr. Ware or Mr. Wilson, or both, began firing at Mr. Burkett's vehicle. Mr. Burkett fled, and the four men asked Ms. Patterson to steer her car out of the ditch, while they pushed. One of the armed men, Mr. Ware or Mr. Wilson, stated that he would hurt Ms. Nolan if Ms. Patterson tried anything. Eventually, the Impala was extricated from the ditch. The four men attempted once more to fix the immobilized Blazer, before giving up and leaving in Ms. Patterson's Impala.

Mr. Walker testified that the four men left the scene of the carjacking in the stolen Impala, with Mr. Steiner driving. A police car began following them, at which point Mr. Steiner slowed the car down and was "fixing to tell them what happened." Mr. Ware and Mr. Wilson pressured Mr. Steiner to keep going, and Mr. Steiner complied, driving at speeds of "more than a hundred." The four men escaped from the police, and abandoned the Impala.

Mr. Walker testified, unequivocally, that Mr. Wilson and Mr. Ware wielded the two guns; Mr. Steiner was, at all relevant times, the driver.

Ultimately, the jury convicted Mr. Steiner of all three counts. The district court sentenced Mr. Steiner to: 75 months' imprisonment as to each of Counts One and Two, to be served concurrently; and 120 months' imprisonment as to Count Three, to be served consecutively.

Mr. Steiner appealed, arguing, *inter alia*, that there was insufficient evidence to support his § 924(c) conviction. *United States v. Ware*, 440 F. App'x 745, 748 (11th Cir. 2011) (unpublished). The Eleventh Circuit rejected this argument based upon its prior precedent interpreting § 924(c) and the federal aiding and abetting statute. *Id.* Specifically, the Court explained that "[t]o prove aiding and abetting a § 924(c) offense, the government must show that the substantive offense of carrying or using a firearm in relation to a crime of violence was committed, that the defendant associated himself with the criminal venture, and that he committed some act that furthered the crime."

*Id.* (quoting *United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003)). The Court affirmed Mr. Steiner's convictions and total sentence in 2011.

Subsequently, in March 2014, this Court decided *Rosemond v. United States*, and held that the government establishes that a defendant aided and abetted a § 924(c) offense only if it proves that "the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." 572 U.S. at 67.

Less than a year later, Mr. Steiner filed the instant 28 U.S.C. § 2255 motion, seeking to vacate his § 924(c) conviction based on *Rosemond*. Of relevance to the instant certiorari petition, Mr. Steiner argued that he was actually innocent of Count Three following *Rosemond* because he did not have advance knowledge that his coconspirators were going to use a gun in the commission of the carjacking.

While Mr. Steiner's § 2255 motion was pending in the district court, this Court decided *Johnson v. United States*, and held that the residual clause of the Armed Career Criminal Act ("ACCA") 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).

Shortly thereafter, Mr. Steiner amended his § 2255 motion to raise a *Johnson* claim. Specifically, Mr. Steiner argued that he was actually innocent

of Count Three because, following *Johnson*, his underlying predicate conviction—for aiding and abetting a carjacking—no longer qualified as a "crime of violence" for purposes of § 924(c)(3).

On June 24, 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 conviction for aiding a betting a crime of violence qualifies as a crime of violence for purposes of § 924(c)(3)(A). *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) ("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' . . . 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.'").

In November 2017, the district court denied Mr. Steiner's § 2255 motion with prejudice. The district court explained that Mr. Steiner's *Rosemond* claim was untimely under § 2255(f), because "*Rosemond* did not announce a 'new rule'" with retroactive application on collateral review. *Steiner*, 2017 WL 5465518 at *2. The district court also determined, in the alternative, that Mr. Steiner's *Rosemond* claim failed on the merits, because: (1) on direct appeal, the "Eleventh Circuit specifically noted that [Mr.] Steiner was 'aware' that his codefendant placed guns into the vehicle that Steiner drove on the way to the carjacking"; and (2) "Steiner's continued participation in the carjacking after

his codefendants fired their weapons at the victims' car is sufficient under *Rosemond* to establish that he had advance knowledge that his cohorts would use a firearm to accomplish the crime." *Id.* at *3.

Finally, the district court determined that Mr. Steiner was not entitled to relief on the merits of his *Johnson* claim, because "[t]here is now no question that, in this circuit, § 924(c)(3)(B) is not unconstitutionally vague under the Supreme Court's decision in *Johnson*." *Id.* at *4 (citing *Ovalles v. United States,* 861 F.3d 1257 (11th Cir. 2017)). The court also concluded that, "even if *Johnson* mandated that § 924(c)(3)(B) was unconstitutionally vague, Steiner's conviction could be upheld under § 924(c)(3)(A) (the 'force clause') as well because the carjacking involved the use of force." *Id.*

Mr. Steiner filed a notice of appeal and a motion for a certificate of appealability ("COA"). With respect to Mr. Steiner's *Johnson* and *Rosemond* claims, the district court granted a COA on the following issues:

> (1) whether petitioner's constitutional challenge under *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014) is timely and meritorious; and
>
> (2) whether petitioner's conviction for aiding and abetting a § 924(c) violation is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015);

In his briefing to the Eleventh Circuit, Mr. Steiner challenged the district court's adverse ruling on his *Johnson* and *Rosemond* claims.

The Eleventh Circuit then decided *St. Hubert*, and held that published panel orders such as *In re Colon* 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.

Also while Mr. Steiner's appeal was pending, this Court decided *United States v. Davis*, 139 S. Ct. 2319, 2330, 2336 (2019), and confirmed that the residual clause in § 924(c)(3)(B), "carrie[d] the same categorical-approach command as § 16(b)," and was therefore doomed to the same unconstitutional fate as the statutes at issue in *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Following oral argument, the Eleventh Circuit rejected Mr. Steiner's arguments, and affirmed the district court's denial of his § 2255 motion. *Steiner*, 940 F.3d at 1294. With respect to Mr. Steiner's *Rosemond* claim, the panel agreed that *Rosemond* announced "a new substantive rule that applies retroactively on collateral review." *Id.* at 1289-92. Nevertheless, the panel held that Mr. Steiner's *Rosemond* claim failed on the merits, because "a reasonable trier of fact could have found beyond a reasonable doubt that Steiner had advance knowledge that his co-conspirators would use or carry a firearm during and in relation to the carjacking." *Id.* at 1291. The panel agreed with Mr. Steiner that "[t]he government presented no evidence directly showing that the group agreed to or discussed bringing firearms to commit the robbery, that the guns were located in a part of the Blazer where Steiner would likely see them, or that Steiner was otherwise aware of the guns before his co-

conspirators initially brandished and fired them." *Id.* However, the panel explained that, under *Rosemond*, a jury could infer a defendant's advance knowledge from the defendant's actions after the crime was underway, and in this case, "Steiner's continued participation in the offense after Wilson and Ware first fired the guns supports finding that he had advanced knowledge." *Id.* The panel elaborated on its conclusion as follows:

> Here, Steiner had limited options for extracting himself from the situation, given that the Blazer was immobilized on a secluded road near the woods when his co-conspirators first fired the guns. Nonetheless, the robbery-turned-carjacking spanned a significant amount of time. The men had time to step away for a discussion about taking the Impala, during which Nolan had time to call her mom. They had time to begin removing the car from the ditch, stop and hide in the woods from Burkett, and return to the Impala and free it from the ditch. Additionally, two people from the victim's car successfully escaped into the very woods in which Steiner hid from Burkett. Based on this evidence, a reasonable jury could infer that Steiner still had an opportunity to "quit the crime" after he learned of the guns' presence.

*Id.* at 1291-92. Accordingly, the panel concluded that there was sufficient evidence supporting Mr. Steiner's conviction for aiding and abetting a § 924(c) offense. *Id* at 1292.

The panel also determined that Mr. Steiner's *Johnson* claim failed on the merits, because, even though *Davis* invalidated the residual clause in § 924(c)(3)(B), his underlying predicate conviction—for aiding and abetting a carjacking—continued to qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A). *Id.* at 1292-93. The entirety of the panel's explanation for this conclusion was as follows:

> We have previously held that carjacking qualifies as a crime of violence under § 924(c)(3)(A) . . . And we have also held that a conviction for aiding and abetting a crime of violence qualifies as a crime of violence for purposes of § 924(c)(3)(A). *In re Colon*, 826 F.3d at 1305; *see also United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018) (holding that decisions issued in the context of applications for leave to file a second or successive § 2255 motion are binding precedent on all subsequent panels of this Court), It follows, then, that aiding and abetting a carjacking is a crime of violence under the elements clause of § 924(c)(3)(A). Accordingly, we find no error in the district court's denial of Steiner's *Davis* claim.

*Id.* at 1293 (citations omitted). In short, the panel found itself bound to follow *St. Hubert*'s mandate that published panel orders such as *In re Colon* are to be applied as binding precedent in all subsequent Eleventh Circuit cases, regardless of context.

Mr. Steiner filed a petition for rehearing and rehearing en banc, which the Eleventh Circuit denied on January 14, 2020.

This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE WRIT

### I. The Eleventh Circuit's rejection of Mr. Steiner's *Rosemond* claim is contrary to—or misapprehends a crucial aspect of—*Rosemond* itself.

In *Rosemond*, this Court addressed the elements that the government must prove in order to obtain a conviction for aiding and abetting a § 924(c) offense. *Rosemond*, 134 S. Ct. at 1243. The Court held that the government makes its case only if it proves "that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the commission of the offense." *Id.*

The Court explained that § 924(c) was, fundamentally, a "combination crime," that "punishes the temporal and relational conjunction of two separate acts": the drug crime (or crime of violence), and the use of a firearm. *Id.* at 1248. Thus, "an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime. And under that rule, a defendant may be convicted of aiding and abetting a § 924(c) violation only if his intent reaches beyond a simple drug sale, to an armed one." *Id.* Therefore, in order to be guilty of aiding and abetting a § 924(c) violation, "the defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed moral) choice)." *Id.* at 1249. The Court elaborated further on when a defendant has "advance" knowledge of a firearm: "when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun." *Id.*

As previously noted, the Eleventh Circuit acknowledged *Rosemond*'s holding—that advance knowledge is not present when a defendant only learns of a gun's presence when he no longer has a "realistic opportunity to quit the crime"—and agreed that "Steiner had limited options for extracting himself from the situation given that the Blazer was immobilized on a secluded road

near the woods when his co-conspirators first fired the guns." *Id.* at 1292. However, the panel determined that, because the "robbery-turned carjacking spanned a significant amount of time"—during which two of the victims escaped and Mr. Steiner and his codefendants struggled to remove the Impala from a ditch—a "reasonable jury could infer that Steiner still had an opportunity to 'quit the crime' after he learned of the guns' presence." *Id.*

This conclusion overlooks the fact that the entirety of the criminal endeavor took place within a relatively brief, easily identifiable time period. Specifically, one of the police dispatchers working on the evening of January 16, 2009 testified that she received the first 911 call from S.H. at 11:23 PM. S.H. placed this call immediately after exiting the Impala and running into the woods. By approximately 11:52 PM, Mr. Steiner and his codefendants had left Bates Cutoff Road in the stolen Impala, with Officer Brandon Thomas in hot pursuit. At this point, Mr. Steiner slowed the car down—and was prepared "to tell them what happened"—but was pressured out of it by the two gunmen, Mr. Ware and Mr. Wilson. By 12:05 AM, the police chase had concluded entirely, and Mr. Walker called 911 to report his Blazer stolen.

As is apparent from the record, around 30 minutes passed from the first 911 call at 11:23 PM to the conclusion of the police chase at some point between 11:52 PM and 12:05 AM. Thus, effectively, the Eleventh Circuit holds that the evidence is legally sufficient to establish advance knowledge so long as 30 minutes elapsed from the start of the criminal activity to its conclusion.

Establishing such a bright line temporal rule is unsound, unwise, and outside the purview of the appellate court in the context of a sufficiency of the evidence challenge.

Moreover, the panel's conclusion either misapprehends—or is contrary to—a crucial aspect of *Rosemond*'s holding. Specifically, in *Rosemond*, this Court clarified that, "when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun." 134 S. Ct. at 1249.

Notably, in reaching this conclusion, this Court specifically rejected the government's argument that advance knowledge exists "whenever the accomplice, having learned of the firearm, continues any act of assisting the drug transaction":

> The Government would convict the accomplice of aiding and abetting a § 924(c) offense if he assists in completing the deal without incident, rather than running away or otherwise aborting the sale. But behaving as the Government suggests might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid that danger. In such a circumstance, a jury is entitled to find that the defendant intended only a drug sale—that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun. A defendant manifests that greater intent, and incurs the greater liability of § 924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it.

*Id.* at 1251.

This Court remanded in *Rosemond*, and the same result should control here. Although Mr. Steiner would have become aware of the firearms when his codefendants started firing, at that point he could not have run away or confronted his coconspirators without increasing the risk of gun violence and harm to the victims. Under the circumstances of this case—where the Blazer was immobilized, and the codefendants had already demonstrated that they would respond to any attempted escape with gunfire—completing the carjacking and distancing himself and his codefendants from the victims was the best way for Mr. Steiner to avert further violence. In short, the Eleventh Circuit's opinion overlooks or misapprehends this aspect of *Rosemond*: by the time firearms appeared on the scene, it was too late for the unarmed Mr. Steiner to run away or confront his armed codefendants without increasing the risk of harm to everyone involved.

Accordingly, the Eleventh Circuit's decision below opinion overlooks legally operative facts and conflicts with a crucial aspect of *Rosemond*.

## II. As a result of *St. Hubert*, inmates in the Eleventh Circuit receive a more truncated form of judicial review than inmates in other Circuits, and they are deprived of their right to due process, fundamental fairness, and meaningful review of the claims presented in their § 2255 motions.

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.[1] As a result, these applications are usually decided without 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,

[1] 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" 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 at 1305 (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).

Mr. Steiner's case presents an ideal vehicle to resolve this issue, because it is pellucidly clear from the record that the Eleventh Circuit affirmed the district court's rejection of his *Johnson* claim based on: (1) the Eleventh Circuit's holding, in *Colon,* that a conviction for aiding a betting a crime of violence qualifies as a crime of violence for purposes of § 924(c)(3)(A); and (2) its conclusion that, as a result of *St. Hubert*, "our precedent in *In re Colon* binds us." *Steiner*, 940 F.3d at 1292. Mr. Steiner challenged this ruling both in the district court and on appeal, specifically emphasizing that it was inappropriate for published panel orders such as *Colon* to be applied as binding precedent in a case involving an *initial* § 2255 motion. *See id.* at 1293 n.4 The Eleventh

Circuit then affirmed the district court's decision based upon *Colon* 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.

Additionally, 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 *Matthews 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. Steiner'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. Steiner 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.

## III. The Eleventh Circuit's rejection of Mr. Steiner's *Johnson* claim is contrary to *Rosemond*.

As previously noted, the Eleventh Circuit has determined—in a published panel order denying application for leave to file a second or successive § 2255 motion under § 2255(h)(2)—that: "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 . . . 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.'" *In re Colon*, 826 F.3d at 1305. However, in reaching this conclusion, the *Colon* panel relied upon—and expressly tied its reasoning to—*United States v. Williams*, 334 F.3d 1228, 1232 (11th Cir. 2003), and the proposition that "[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*." *Colon*, 826 F. 3d at 1305 (emphasis added).

This interpretation of the federal aiding and abetting statute is directly contrary to *Rosemond*, which specifically noted that "a defendant can be convicted as an aider and abetter *without proof that he participated in each and every element of the offense*." *Rosemond*, 134 S. Ct. at 1246. (emphasis

added). Effectively, the panel opinion in *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." *Boston v. United States*, 939 F.3d 1266, 1273 (11th Cir. 2019) (J. Pryor, J., concurring). This "transformation" finds no support in the statutory text of § 924(c). *Id.* Although the § 924(c)(3)(A) elements clause includes both the "threatened" and "attempted" use of force, the statutory text makes no reference to "aiding and abetting" the use of force by another person. *Id.*; *see also* 18 U.S.C. § 924(c)(3)(A)(requiring a "crime of violence" to have "as an element the use, attempted use, or threatened use of physical force").

Moreover, in determining whether an offense qualifies as a "crime of violence" under the elements clause in § 924(c)(3)(A), courts must employ the categorical approach, and examine the *elements* of the offense, not the actual facts of the defendant's conduct. *United States v. McGuire*, 706 F. 3d 1333, 1336 (11th Cir. 2013).

"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." *Colon*, 826 F.3d at 1306-07 (Martin, J., dissenting) (citing *Rosemond*). Indeed, "[i]n 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*." *Rosemond*, 572 U.S. at 73 (emphasis added) (citation omitted). Thus, "[a] strategy of 'you take that element, I'll take this one' would free neither [the principal nor the abettor] from liability." *Id.* at 74. Accordingly, even when a *principal's* crime involves an element of force, there is no authority for demanding that the abettor's affirmative act go toward that violent element. *See Colon*, 826 F.3d at 1307 (Martin, J., dissenting). Accordingly, Mr. Steiner's conviction for aiding and abetting a carjacking does not *categorically* involve as an element "the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The Eleventh Circuit's holding to the contrary conflicts with this Court's decision in *Rosemond*, and this Court's review is required to ensure that the Eleventh Circuit gives full force and effect to *Rosemond.*

## CONCLUSION

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

Respectfully submitted,

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