No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re TODD BRITTON-HARR,

Petitioner.

APPENDIX TO
PETITION FOR AN EXTRAORDINARY
WRIT OF HABEAS CORPUS

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-13950-A

IN RE: TODD BRITTON-HARR,

Petitioner.

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h)

Before: WILSON, MARTIN and ROSENBAUM, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Todd Britton-Harr has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization

may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (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). "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." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made *a prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In March 2018, Britton-Harr filed an application to file a second or successive § 2255 motion, seeking to raise one claim based on newly discovered evidence. He alleged the following. The government had presented evidence at his criminal trial that he, acting as the real estate agent and power of attorney for his stepmother, Karyn J. Britton ("Karyn"), made a false statement on Karyn's loan application for a condominium unit.

When he was released from prison in February 2017, he began investigating his case and contacted Gary Owens, whose signature appeared on the loan application that the government presented at trial. He showed Owens the application, and Owens stated that the signature on the loan application was not his and had been forged.

Britton-Harr argued that Owens's statement that the loan application had been forged was newly discovered evidence, because the government had relied on a false document to obtain his conviction. We denied his application, finding that he had not explained how the forged loan application would demonstrate his factual innocence of making a false statement, as he did not allege that the entire loan application was forged or that his signature on behalf of Karyn was forged.

In his instant application, Britton-Harr indicates that he wishes to raise one claim in a second or successive § 2255 motion. He alleges the same facts that he alleged in his prior application. He states that he presumes that his prior application was denied because Owens had not signed an affidavit swearing that the signature on Karyn's application was not his. He states

that Owens has now signed such an affidavit. He argues that, in light of Owens's affidavit, no reasonable factfinder would have found him guilty because the government presented evidence that Owens had signed the application.

Because we are bound by circuit precedent, we

must dismiss a claim that has been presented in a prior application to file a second or successive § 2255 motion. *See In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016). We believe *Baptiste*, however, has no basis in the text of the habeas statute. First:

> *Baptiste* was construing 28 U.S.C. § 2244(b)(1), which says any "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Of course, [] § 2255 motions . . . are filed by federal prisoners [and] § 2255 motions are certainly not brought "under section 2254," which governs petitions filed by state prisoners. But the *Baptiste* panel ruled that even though § 2244(b)(1) does

> not mention § 2255 motions, it applies to them anyway, since "it would be odd [] if Congress had intended to allow federal prisoners" to do something state prisoners can't do.

In re Clayton, 829 F.3d 1254, 1266 (11th Cir. 2016) (Martin, J., concurring).

Beyond that,

> *Baptiste* is inconsistent with the statute in a second way. The text of the habeas statute shows that it requires courts to dismiss only claims that were already presented in an actual § 2255 motion, as opposed to a mere request for certification of a successive § 2255 motion. Both § 2244 and § 2254 distinguish between "applications" (which are the § 2254

> petitions and § 2255 motions filed in district courts) and "motions" (which are the earlier request for certification filed in a court of appeals). *Baptiste* assumes that "motion" and "application" mean the same thing, even though Congress carefully distinguished the two. When Congress uses different words in this way, courts must presume those words mean different things.

In re Anderson, 829 F.3d 1290, 1296 (11th Cir. 2016) (Martin, J., dissenting).

Baptiste's problems do not end there. *See In re Jones*, 830 F.3d 1295, 1297 (11th Cir. 2016)

(Rosenbaum and Jill Pryor, J.J., concurring) (raising concerns about *Baptiste*'s policy implications and its interpretation of the law-of-the-case doctrine).

For all these reasons, we are concerned that *Baptiste* is blocking relief to prisoners who ask us to take a second look at their case after we got it wrong the first time. Nevertheless *Baptiste* is binding precedent in this circuit, so we must conclude that Britton-Harr will not be allowed to present his case to a district court for an examination of whether his sentence is legal.

Bound by *Baptiste*, we lack jurisdiction to consider the merits of Britton-Harr's claim, because it is the same claim that was raised and denied in his March 2018 application to file a second or successive § 2255 motion. *See Baptiste*, 828 F.3d at 1339. A claim is "the same" where the basic gravamen of the argument

is the same, even where new supporting evidence or legal arguments are added. *Id*. We lack jurisdiction to consider the merits of any repetitious claim. *In re Bradford*, 830 F.3d 1273, 1277-79 (11th Cir. 2016).

The gravamen of both of Britton-Harr's claims are the same, as they both argue that the apparent false signature on Karyn's loan application is newly discovered evidence under § 2255(h). *See id.* Thus, we lack jurisdiction to consider the merits of Britton-Harr's present claim, despite the addition of Owens's affidavit to the instant application. *See id.*; *Bradford*, 830 F.3d at 1277-79.

Accordingly, because we lack jurisdiction to consider the merits of the sole claim that Britton-Harr raises, his application for leave to file a second or successive motion is hereby DISMISSED.