NO. _____

In The
Supreme Court of the United States

MILAS ANTWON GRANT, III,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CHRISTINE A. FREEMAN
EXECUTIVE DIRECTOR
MACKENZIE S. LUND
Counsel of Record
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, AL 36104
(334) 834-2099
Mackenzie_S_Lund@fd.org

November 25, 2020

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. Grant'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 several of these orders.

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. Milas Antwon Grant, III*, No. 13-cr-107, U.S. District Court for the Middle District of Alabama. Judgment entered on July 18, 2014.
- *Milas Antwon Grant, III v. United States*, No. 16-cv-517, U.S. District Court for the Middle District of Alabama. Judgment entered on Sep. 25, 2019.
- *Milas Antwon Grant, III v. United States*, No. 19-14746, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on July 2, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Milas Antwon Grant, III 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 unpublished. *Grant v. United States*, 816 Fed. App'x 407 (11th Cir. 2020) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's order denying Mr. Grant's 28 U.S.C. § 2255 motion is unpublished. *Grant v. United States*, 2019 WL 4686255 (M.D. Ala. 2019). The order is included in Petitioner's Appendix. Pet. App. 1b.

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

The report and recommendation of the magistrate judge, which recommended that Mr. Grant's § 2255 motion be denied, is unreported. *Grant v. United States*, 2018 WL 9684246 (M.D. Ala. 2018), *adopted by* 2019 WL 4686255. The recommendation is reproduced in the Petitioner's Appendix. Pet. App. 1d.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on July 2, 2020. *See* Pet. App. 1a. No rehearing was sought, rendering the petition for writ of

certiorari due on or before September 30, 2020. However, due to public health concerns relating to the COVID-19 pandemic, this Court entered an order, extending the deadline to file the petition to 150 days from the date of the lower court judgment. The certiorari petition is now due on November 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 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 July 2013, a federal grand jury returned an indictment against Mr. Milas Antwon Grant, III, charging him with: (1) aiding and abetting a Hobbs Act robbery at a Dollar General, in violation of 18 U.S.C. § 2 and 18 U.S.C.

§ 1951(a) (Count One); (2) aiding and abetting the discharge of a firearm in furtherance of the crime of violence charged in Count One, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 2 (Count Two); (3) aiding and abetting a Hobbs Act robbery at a Hobo Pantry, in violation of 18 U.S.C. § 2 and 18 U.S.C. § 1951(a) (Count Three); and (4) aiding and abetting the discharge of a firearm in furtherance of the crime of violence charged in Count Three, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 2 (Count Four). Notably, Count One charged Mr. Grant with violating § 1951(a) under the federal aiding and abetting statute, 18 U.S.C. § 2.

Subsequently, Mr. Grant agreed to plead guilty to Counts One, Two, and Three, and the government agreed to dismiss Count Four pursuant to a written Fed. R. Crim. P. 11(c)(1)(A) and (C) agreement. The agreement described the elements of Mr. Grant's Hobbs Act robbery offense as: (1) the defendant knowingly acquired someone else's personal property; (2) the defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and (3) the defendant's actions obstructed, delayed, or affected interstate commerce.

A magistrate judge accepted Mr. Grant's guilty plea, and adjudged him guilty. In June 2014, the district court sentenced Mr. Grant to 120 months' imprisonment as to Counts One and Three, to be served concurrently, and 120

months' imprisonment as to count Two, to be served consecutively. The court dismissed Count Four pursuant to the government's motion.

Mr. Grant declined to file a direct appeal.

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).

On June 27, 2016—within one year of *Johnson* for purposes of § 2255(f)(3)[1]—Mr. Grant timely filed his initial 28 U.S.C. § 2255 motion, seeking to vacate his § 924(c) conviction and his total sentence based on *Johnson*.

The government filed a response in opposition to Mr. Grant's § 2255 motion, arguing that: (1) Mr. Grant'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. Grant's *Johnson* claim was procedurally barred because he did not raise it in the trial court or on direct appeal; and (3) Mr. Grant'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, Hobbs Act robbery

[1] The one-year anniversary of *Johnson* occurred on June 26, 2016, which was a Sunday. As a result, a § 2255 motion relying on *Johnson* is timely under § 2255(f)(3) if filed on or before June 27, 2016. *See* Fed. R. Civ. P. 6(a)(1)(C).

continued to qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A).

On June 8, 2016, the Eleventh Circuit issued a published panel order—denying an application for leave to file second or successive § 2255 motions—and holding, for the first time, that a companion conviction for Hobbs Act robbery "clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." *In re Saint Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016). The Eleventh Circuit issued another such order on June 24, 2016, and held that a conviction for aiding and 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.'").

The Eleventh Circuit then decided *St. Hubert*, and held that published panel orders such as *Saint Fleur* and *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.

A magistrate judge issued a report and recommendation ("R&R"), recommending that Mr. Grant's § 2255 motion be denied, and his case dismissed with prejudice. Specifically, the magistrate judge determined that Mr. Grant 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 predicate offense continued to qualify as a "crime 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 Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *Saint Fleur*, 824 F.3d at 1340–41. The Eleventh Circuit has further held that where the companion substantive conviction qualifies as a crime of violence under the use-of-force clause in § 924(c)(3)(A), a conviction for aiding and abetting the companion substantive conviction equally qualifies as a crime of violence under the force clause. *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (aiding and abetting Hobbs Act robbery was crime of violence under 924(c)(3)(A)'s use-of-force clause [] because companion substantive conviction for Hobbs Act robbery was a crime of violence under the use-of-force clause).

As a result, the magistrate judge rejected Mr. Grant's *Johnson* claim based solely upon *Saint Fleur* and *Colon*—two published panel orders decided in the context of applications for leave to file a second or successive § 2255 motion.

Mr. Grant 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. Grant 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. Grant 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.

While Mr. Grant's objections were 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), "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).

On September 25, 2019, the district court overruled Mr. Grant's objections, adopted the R&R, and denied Mr. Grant's § 2255 motion, with prejudice and without discussion. The district court granted Mr. Grant a certificate of appealability ("COA") as to the following issue:

> Whether Mr. Grant's 18 U.S.C § 924(c) conviction is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and/ or *United States v. Davis*, 139 S. Ct. 2319 (2019).

Mr. Grant appealed, arguing that: (1) his underlying predicate conviction—for aiding and abetting a Hobbs Act robbery under 18 U.S.C. § 1951 and 18 U.S.C. § 2—did not categorically qualify as a "crime 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. Grant also reiterated his contention that it was inappropriate for published panel orders such as *Saint Fleur* and *Colon*—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.

Subsequently, the Eleventh Circuit affirmed the district court's denial of Mr. Grant's § 2255 motion. *Grant*, 816 Fed. App'x at 410. The Court of Appeals determined that Mr. Grant's *Johnson* claim failed on the merits, because, even though *Davis* invalidated the residual clause in § 924(c)(3)(B), his underlying predicate conviction continued to qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A). *Id.* at 409-10. The panel explained its conclusion as follows:

> Because aiding and abetting "is not a separate federal crime, but rather an alternative charge that permits one to be found guilty as a principal," we have held that aiding and abetting Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (quoting *United States v. Sosa*, 777 F.3d 1279, 1292 (11th Cir. 2015)). We stated that nothing in the text of § 924(c)(1) indicated that Congress intended for the statute to only apply to principals, and not to aiders and abettors. *Id.* Thus, we held that "an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery." *Id.*
>
> *In re Colon* was decided in the context of an application to file a successive § 2255 motion. *See id.* However, we have held 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." *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.

> Grant has not shown that he is entitled to relief under *Davis*. Because aiding and abetting § 1951(a) Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s elements clause, *In re Colon*, 826 F.3d at 1305, Grant's argument is foreclosed by our binding precedent. That *In re Colon* was decided in the successive application context does not lessen the precedential value of that decision. *See St. Hubert*, 909 F.3d at 346.

Id. In other words, the panel found itself bound to follow *St. Hubert*'s mandate that published panel orders such as *Colon* 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 counseled argument from the petitioner, and are always decided without oral argument and without an opposing brief from the government. *Id.* at 1102.

[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" 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

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* 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, 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.

In recognition of these circumstances, a three-judge panel of the Eleventh Circuit has explained the myriad problems with the *St. Hubert* approach: "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 Justice Sotomayor has commented, this perfunctory process not only makes for a "troubling tableau indeed," but raises serious questions regarding procedural due process. *St. Hubert v. United States*, 140 S. Ct. 1727, 1728 (2020) (Sotomayor, J., respecting the denial of certiorari) (finding the procedural due process issue unripe for review, but urging the Eleventh Circuit to "reconsider[] its practices to make them fairer, more transparent, and more deliberative").

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 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. Grant'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 because: (1) cumulatively, *In re Colon* and *In re Saint Fleur* establish that Mr. Grant's predicate conviction continues to qualify as a crime of violence for purposes of § 924(c)(3)(A); and (2) as a result of *St. Hubert*, these decisions constitute binding precedent, even though rendered in the context of applications to file second or successive § 2255 motions. Mr. Grant challenged this ruling both in the district court and on appeal, specifically emphasizing that it was inappropriate for published panel orders such as *Colon* and *Saint Fleur* 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 *Colon*, and upon *St. Hubert*'s extension of the prior panel precedent rule. *Grant*, 816 Fed. App'x at 409-10.

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 *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. Grant'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. Grant 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,

Christine Freeman, Executive Director
Mackenzie S. Lund, Assistant Federal Defender*
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353

*Counsel of Record