No. 18-7575

IN THE SUPREME COURT OF THE UNITED STATES

ALEXIS VALDES GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a three-judge panel of the court of appeals violated petitioner's rights under the Due Process Clause of the Fifth Amendment in giving precedential weight to a previously published decision of that court denying an application for leave to file a second or successive motion under 28 U.S.C. 2255.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 754 Fed. Appx. 915.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2018. A petition for rehearing was denied on January 2, 2019 (Pet. App. 39a). The petition for a writ of certiorari was filed on January 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii), and 846; and possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1; see Superseding Information 1-2. He was sentenced to 160 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner was a member of a drug-trafficking organization that distributed methamphetamine, cocaine, and heroin in Miami, Florida. Presentence Investigation Report (PSR) ¶ 7. On two occasions in 2015 and 2016, petitioner sold a total of 165 grams of methamphetamine to a confidential source, who paid a total of $4900 for the drugs. PSR ¶¶ 8-9, 28. In January 2016, petitioner, who had multiple prior felony convictions, also sold the confidential source a revolver and approximately 30 rounds of ammunition. PSR ¶¶ 16-17.

A grand jury in the Southern District of Florida charged petitioner with conspiring to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(viii), and 846; two counts of possessing with intent to distribute five grams or more of methamphetamine, in violation of

21 U.S.C. 841(a)(1) and (b)(1)(B)(viii), and 18 U.S.C. 2; and possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-4. Petitioner pleaded guilty, pursuant to an agreement, to conspiracy to possess with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii), and 846; and possession of a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Plea Agreement 1; Judgment 1.

2. The Probation Office classified petitioner as a career offender under Sentencing Guidelines § 4B1.1 (2016). PSR ¶ 72. Under Section 4B1.1, a defendant is subject to an enhanced advisory sentencing range as a "career offender" if (a) he was at least 18 years old at the time of the offense of conviction, (b) the offense of conviction is a felony "crime of violence" or "controlled substance offense," and (c) he has at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2016). Section 4B1.2(a) defines a "crime of violence" as any federal or state felony offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; or (2) "is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C.

§ 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." Sentencing Guidelines § 4B1.2(a) (2016).

In recommending the career-offender enhancement, the Probation Office determined that petitioner had two prior convictions for a crime of violence or a controlled substance offense: a 1997 Florida conviction for kidnapping and a 2010 Florida conviction for possessing with intent to sell, manufacture, or deliver cannabis and cocaine. PSR ¶¶ 72, 79, 85. With the career-offender enhancement, the Probation Office calculated an advisory Guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 72-75, 90, 127.

Petitioner objected to his classification as a career offender, arguing in part that his Florida kidnapping offense did not qualify as a crime of violence under the Sentencing Guidelines. D. Ct. Doc. 214, at 2-8 (Aug. 24, 2017) (citing United States v. Martinez-Romero, 817 F.3d 917, 920-924 (5th Cir. 2016)). In response, the government not only argued the issue as an original matter but also argued that petitioner's challenge to his Florida kidnapping conviction was governed by In re Burgest, 829 F.3d 1285 (11th Cir. 2016). D. Ct. Doc. 233, at 2-3 & n.1 (Sept. 21, 2017). In Burgest, a panel of the court of appeals denied a defendant's application for leave to file a second or successive motion to vacate, set aside, or correct his federal sentence under 28 U.S.C. 2255. 829 F.3d at 1286-1287. As relevant here, the court in

Burgest determined that the district court had correctly classified the defendant as a career offender under Sections 4B1.1 and 4B1.2(a) because his prior Florida convictions for manslaughter and kidnapping were "categorically crimes of violence." Burgest, 829 F.3d at 1287.

At sentencing in petitioner's case, the district court observed that "the Eleventh Circuit ha[d] pretty much ruled" on petitioner's legal challenges to the application of the career-offender enhancement. D. Ct. Doc. 304, at 23 (Oct. 12, 2017). Petitioner's counsel agreed, explaining that she was preserving those arguments for further review and asserting "a circuit split" regarding the status of Florida kidnapping under the Sentencing Guidelines. Ibid. Petitioner's counsel did not argue that treating Burgest as precedential authority would violate petitioner's rights under the Due Process Clause of the Fifth Amendment. Ibid. The court overruled petitioner's objections to the career-offender enhancement and adopted the Probation Office's Guidelines calculations. Ibid. After considering the parties' arguments and the sentencing factors set forth in 18 U.S.C. 3553(a), the court sentenced petitioner to 160 months of imprisonment, a term that was 102 months below the low end of petitioner's advisory Guidelines range. D. Ct. Doc. 304, at 97-98.

3. Petitioner appealed his sentence, arguing in part that his conviction for Florida kidnapping was not a crime of violence for purposes of Sentencing Guidelines § 4B1.1 (2016). Pet. C.A. Br. 7-10. In his reply brief, petitioner argued for the first time that "Burgest should not constitute binding precedent" because the court of appeals issued that decision in the context of an application for leave to file a second-or-successive motion under 28 U.S.C. 2255. Pet. C.A. Reply Br. 2. Petitioner did not contend that treating Burgest as precedential would violate his rights under the Due Process Clause. See id. at 1-6.

The court of appeals affirmed. Pet. App. 1a-7a. The court stated that, in light of Burgest, "the district court correctly concluded that [petitioner's] Florida kidnapping conviction qualified as a crime of violence under U.S.S.G. § 4B1.2(a)(2)." Id. at 7a. The court also rejected petitioner's contention that Burgest was not binding precedent. Id. at 6a. The court explained that it had recently 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 a second or successive § 2255 motion[]" was "binding precedent on all subsequent panels of this Court * * * unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." Ibid. (quoting United States v. St. Hubert, 883

F.3d 1319, 1329 (11th Cir.), cert. denied, 139 S. Ct. 246 (2018)) (internal citation and quotation marks omitted).

4. Petitioner filed a petition for rehearing en banc. Pet. App. 8a-38a. In that petition, petitioner argued for the first time that the court of appeals violated his "procedural due process rights" by giving Burgest "precedential effect" in his appeal. Id. at 12a; see id. at 21a, 28a-36a. Petitioner did not ask the en banc court to review whether his Florida kidnapping conviction qualified as a crime of violence under Section 4B1.2. See id. at 12a, 21a-36a. The court of appeals denied the petition. Id. at 39a.

ARGUMENT

Petitioner contends (Pet. 1-4, 11-25) that the court of appeals violated his right to procedural due process when it relied on its prior published decision in In re Burgest, 829 F.3d 1285 (11th Cir. 2016), in determining that Florida kidnapping qualifies as a crime of violence under Sentencing Guidelines § 4B1.2 (2016). According to petitioner, the Due Process Clause barred the court of appeals from assigning precedential weight to Burgest because that decision arose in the context of the denial of an application for leave to file a second-or-successive motion for postconviction relief under 28 U.S.C. 2255, in which the court employs streamlined procedures. The court of appeals did not address petitioner's constitutional claim, however, which is itself a sufficient reason

for this Court to deny review. Petitioner's due process claim also lacks merit, and petitioner identifies no court of appeals that would hold otherwise. In addition, this case would be a poor vehicle for reviewing the question presented because the court of appeals correctly determined that Florida kidnapping is a crime of violence. This Court has recently and repeatedly denied petitions for writs of certiorari challenging the practice of affording precedential weight to published decisions that deny applications for leave to file a second or successive Section 2255 motion.[1] It should follow the same course here.

1. Petitioner first raised his procedural due process challenge in his petition for rehearing en banc, and the court of appeals did not address that claim when it denied that petition. Pet. App. 39a. This Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and ordinarily does not address issues that were not passed upon in the court of appeals, ibid. That general rule should apply here; a challenge

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[1] See Cottman v. United States, 139 S. Ct. 1253 (2019) (No. 17-7563); Torres v. United States, 138 S. Ct. 1173 (2018) (No. 17-7514); Vasquez v. United States, 138 S. Ct. 286 (2017) (No. 17-5734); Golden v. United States, 138 S. Ct. 197 (2017) (No. 17-5050); Lee v. United States, 137 S. Ct. 2222 (2017) (No. 16-8776); Eubanks v. United States, 137 S. Ct. 2203 (2017) (No. 16-8893). The Court has also recently denied a petition for a writ of certiorari contending that a three-judge panel of the court of appeals violated the Due Process Clause by concluding that it was bound to adhere to circuit precedent that the petitioner in that case contended was wrongly decided. See Jackson v. United States, 138 S. Ct. 1326 (2018) (No. 17-6914).

to procedures employed by the court of appeals is precisely the kind of claim that should be addressed by that court in the first instance.

Application of that rule is particularly appropriate here because, within the last two months, five members of the court of appeals below have expressed concerns about that court's practice of publishing and giving precedential weight to certain orders issued by three-judge panels on applications for leave to file second-or-successive Section 2255 motions. See United States v. St. Hubert, 918 F.3d 1174, 1190-1192 (Jordan, J., concurring in the denial of rehearing en banc); id. at 1197-1199 (Wilson, J., dissenting, joined by Martin and J. Pryor, JJ., and joined in relevant part by Rosenbaum, J.). Meanwhile, five other members of the court have defended the practice. See id. at 1174-1183 (Tjoflat, J., concurring in the denial of rehearing en banc, joined by E. Carnes, C.J., and W. Pryor, Newsom, and Branch, JJ.); id. at 1183-1190 (W. Pryor, J., respecting the denial of rehearing en banc). In that recent discussion, however, no member of the court of appeals addressed the possible application of the Due Process Clause. See id. at 1174-1213. Given the court of appeals' active internal debate about the proper treatment of its published orders on applications for leave to file second-or-successive Section 2255 motions, that court should decide in the first instance

whether or to what extent due-process principles should affect its approach.

2. In any event, petitioner's due process claim lacks merit. Petitioner contends (Pet. 20-25) that the court of appeals violated his right to procedural due process by treating Burgest as binding precedent in his case. Petitioner's objection to Burgest stems from his criticism of the court of appeals' streamlined procedures for applications for leave to file second-or-successive Section 2255 motions. As this Court has recognized, however, "[t]he courts of appeals have significant authority to fashion rules to govern their own procedures." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993); see Ortega-Rodriguez v. United States, 507 U.S. 234, 251 n.24 (1993) (observing that courts of appeals may "vary considerably" in their procedural rules). Under Federal Rule of Appellate Procedure 47, the courts of appeals may adopt differing local rules and internal operating procedures so long as those rules and procedures are consistent with applicable federal law, and "may regulate practice in a particular case in any manner consistent with federal law, [the Federal Rules of Appellate Procedure], and local rules of the circuit." Fed. R. App. P. 47(b).

Petitioner does not assert that the court of appeals' streamlined procedures are contrary to any law or violate the constitutional rights of applicants for leave to file second-or-

successive Section 2255 motions. Instead, petitioner appears to argue (Pet. 2-7, 11-18) that the court of appeals' streamlined procedures are ill-advised, prevent the court from "meaningfully considering" the applicants' arguments, and result in three-judge panels discretionarily deciding to publish particular decisions in that context without assuring themselves that they have fully thought the relevant issue through. Petitioner's due process claim thus rests on the novel premise that the Due Process Clause precludes a court of appeals from giving precedential effect to a prior decision that resulted from procedures that are lawful but, according to petitioner, likely to lead to "mistaken rulings" that panels then elect to publish. Pet. 21. In Medina v. California, 505 U.S. 437 (1992), however, the Court recognized that "[i]n the field of criminal law, * * * the Due Process Clause has limited operation" "beyond the specific guarantees enumerated in the Bill of Rights." Id. at 443 (brackets and internal quotation marks omitted). Only criminal procedural rules that "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" deprive a defendant of due process. Id. at 446 (citing Patterson v. New York, 432 U.S. 197, 202 (1977)).

Petitioner's due process claim does not satisfy that exacting standard. This Court has held that, in some circumstances, it violates the Due Process Clause to treat a judgment in earlier

litigation as binding on nonparties as a matter of claim or issue preclusion. See Taylor v. Sturgell, 553 U.S. 880, 896-898 (2008). But in doing so, the Court has distinguished the application of those preclusion doctrines (which may raise due process concerns) from the application of ordinary principles of "stare decisis" (which does not). Id. at 903; see South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-168 (1999). So long as a defendant follows the proper procedures, he has the right to appeal his sentence under 18 U.S.C. 3742 and have the court of appeals consider any claim that his sentence is inconsistent with applicable law. But under well-established principles of stare decisis, the applicable law for district courts and three-judge panels includes circuit precedent. And just as a court of appeals does not violate due process by adhering to a decision of this Court, a district court or a three-judge panel does not violate due process by adhering to circuit precedent. A defendant who believes that the governing precedent was wrongly decided is free to challenge it before the en banc court of appeals or this Court.

Petitioner does not attempt to meet the standard articulated in Medina. Instead, petitioner contends (Pet. 20-22) that this Court should consider his due process claim under the standard for addressing procedural due process challenges announced in Mathews v. Eldridge, 424 U.S. 319 (1976), which devised a balancing test to determine whether a recipient of social-security benefits has

a right to an evidentiary hearing before those benefits were terminated. Mathews does not provide the appropriate framework for evaluating petitioner's due process claim, however, because petitioner's claim challenges the court of appeals' procedures for deciding criminal cases, not an interference with property rights. See Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017) ("Medina provides the appropriate framework for assessing the validity of state procedural rules that are part of the criminal process.") (citation and internal quotation marks omitted); see also Medina, 505 U.S. at 443. Petitioner identifies no decision of this Court or of any other circuit that would support requiring a court of appeals, as a constitutional matter, to assign less or no precedential weight to published opinions issued by full panels of judges where streamlined procedures were used to resolve the case.[2]

3. Finally, further review is not warranted because the court of appeals correctly determined that petitioner's prior conviction for Florida kidnapping is a crime of violence under the enumerated-offenses clause of Sentencing Guidelines § 4B1.2(a) (2016), which specifies that "kidnapping" is a crime of violence.

To determine whether a prior conviction constitutes a crime of violence under the enumerated-offenses clause, a court

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[2] In particular, no court has cited, much less adopted, the due-process analysis set forth in the law-review article that petitioner describes at length. Pet. 22-24 (citing Amy Coney Barrett, Stare Decisis and Due Process, 74 U. Colo. L. Rev. 1011 (2003)).

generally applies the "categorical approach," which involves comparing the elements of the offense of conviction to the elements of the "generic offense" enumerated in the Guidelines (here, kidnapping). Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); see Taylor v. United States, 495 U.S. 575, 602 (1990). If the offense of conviction consists of elements that are the same as, or narrower than, the generic offense, the prior offense categorically qualifies as a crime of violence. Mathis, 136 S. Ct. at 2248; see Taylor, 495 U.S. at 602 (explaining that the state offense of conviction qualifies if it "substantially corresponds" to the generic offense).

Florida's kidnapping statute defines kidnapping to mean (1) "forcibly, secretly, or by threat" (2) "confining, abducting, or imprisoning another person against her or his will and without lawful authority" (3) "with intent to" "[h]old for ransom or reward or as a shield or hostage," "[c]ommit or facilitate commission of any felony," "[i]nflict bodily harm upon or to terrorize the victim or another person," or "[i]nterfere with the performance of any governmental or political function." Fla. Stat. § 787.01(1)(a) (1997). That definition substantially corresponds to several courts of appeals' descriptions of the elements of generic kidnapping. See United States v. Flores-Granados, 783 F.3d 487, 493-494 (4th Cir.), cert. denied, 136 S. Ct. 224 (2015); United States v. Soto-Sanchez, 623 F.3d 317, 323 (6th Cir. 2010); United

States v. De Jesus Ventura, 565 F.3d 870, 876-878 (D.C. Cir. 2009); see also United States v. Jenkins, 680 F.3d 101, 108-109 (1st Cir. 2012) (finding "no reason to doubt the soundness of the De Jesus Ventura analysis") (Souter, J.).

In addition to the court of appeals below, the Fourth, Sixth, and D.C. Circuits have indicated that the Florida kidnapping offense at issue here qualifies as "kidnapping" for purposes of the Sentencing Guidelines. See Flores-Granados, 783 F.3d at 494 & n.2, 497 & n.9; Soto-Sanchez, 623 F.3d at 322; De Jesus Ventura, 565 F.3d at 876 & n.5. Although the Fifth Circuit has reached a different conclusion, see United States v. Martinez-Romero, 817 F.3d 917, 920-924 (2016) (per curiam), the petition for a writ of certiorari does not defend the Fifth Circuit's analysis, and petitioner acknowledges (Pet. 25) that the status of Florida kidnapping under Sentencing Guidelines § 4B1.2(a) (2016) "did not satisfy the stringent criteria for en banc review" and "is not a viable candidate for this Court's review." Petitioner has thus offered no basis for concluding that the Eleventh Circuit would grant him relief from his career-offender enhancement even if Burgest were not binding precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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