No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL LAWRENCE ROBINSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

---

PETITION FOR WRIT OF CERTIORARI

Donna Lee Elm
Federal Defender

Rosemary Cakmis
Senior Litigator

Conrad Kahn, Counsel of Record
Federal Defender Attorney
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
Email: Conrad_Kahn@fd.org

QUESTIONS PRESENTED

28 U.S.C. § 2244(b) provides the procedures by which inmates request, and federal appellate courts grant, permission to file second or successive 28 U.S.C. § 2255 motions. Under § 2244(b)(3)(C), an appellate court may grant an inmate permission to file such a motion only if the inmate makes a "prima facie showing" the he satisfies the requirements of that subsection. And under § 2244(b)(3)(E), these determinations are essentially appeal proof—they cannot be reconsidered en banc or by this Court.

Typically, appellate courts rule on these applications within 30 days based solely on a constrained form filled out by a *pro se* inmate. And usually, that is not a problem because these courts are simply determining whether an inmate has made a "prima facie showing." The Eleventh Circuit, however, is unusual in how they rule on these applications. Instead of simply determining whether an inmate has made a "prima facie showing," the Eleventh Circuit routinely uses this process to issue published rulings on the merits of open legal questions (SOS orders). What's more, the en banc Eleventh Circuit, in a deeply contentious and fractured opinion, held that such orders are binding in all later appeals. *United States v. St. Hubert*, 918 F.3d 1174 (2019) (en banc). The Eleventh Circuit's use of this process is highly unusual and deeply consequential. It affects hundreds of individuals now and into the future. Given the en banc court's recent decision in *St. Hubert*, this petition present two questions about this process.

First, does the Eleventh Circuit exceed its statutory mandate under § 2244(b)(3)(C) to determine only whether an inmate has made a "prima facie

showing" when it issues SOS orders to resolve the merits of open legal questions and treat those orders as binding precedent in later appeals?

And second, did the Eleventh Circuit violate Mr. Robinson's constitutional right to due process by treating an improperly issued SOS order as binding precedent in his appeal?[1]

[1] The second, Due Process question presented here is presented in at least three other cases pending before this Court. *Gonzalez v. United States*, Case No. 18-7575; *Williams v. United States*, Case No. 18-6172; *St. Hubert v. United States*, Case No. 19-5267. But the first, statutory question is presented only here. As explained below, this case is an excellent vehicle for resolving this issue for at least two reasons. First, this petition allows the Court to dispose of this issue on statutory grounds, thereby avoiding the thorny Due Process issue. *See Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) ("It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."). And second, there is a circuit split on the merits of Mr. Robinson's claim, meaning the Court's resolution of this issue may lead to Mr. Robinson obtaining meaningful relief.

LIST OF PARTIES

Petitioner, Michael Lawrence Robinson, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Michael Lawrence Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's unpublished opinion affirming the denial of Mr. Robinson's motion to vacate his sentence under 28 U.S.C. § 2255 is in Appendix A. The district court order denying Mr. Robinson's § 2255 motion is in Appendix B.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Robinson's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. On June 22, 2016, the district court denied Mr. Robinson's § 2255 motion. Appendix B. Mr. Robinson filed a notice of appeal, and the district court later granted him a certificate of appealability (COA). On May 10, 2019, the Eleventh Circuit affirmed the denial of Mr. Robinson's § 2255 motion. Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

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.

The Armed Career Criminal Act (ACCA) defines a "violent felony" to include any felony "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to*

another." 18 U.S.C. § 924(e)(2)(B)(ii). The italicized language is the "residual clause."

At the time of Mr. Robinson's sentencing, the Career Offender provision of the Sentencing Guidelines contained an identical residual clause, defining a "crime of violence" to include any felony "that is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2) (2001).

Finally, 28 U.S.C. § 2244(b)(3), the statute governing the procedures for seeking permission to file a second or successive § 2255 motion, provides:

> **(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> **(B)** A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> **(C)** The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> **(D)** The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> **(E)** The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2244(b)(3).

STATEMENT OF THE CASE

In 2001, Mr. Robinson pled guilty to possession with intent to distribute cocaine base (count three) and carrying a firearm during and in relation to a drug trafficking offense (count four), and the district court sentenced him to 228 months' imprisonment—168 months' imprisonment on count 3 and 60 months' imprisonment on count four, to run consecutively.[2] The PSR, which the district court adopted without change, found that Mr. Robinson qualified as a career offender under USSG § 4B1.2 based on two Florida convictions: (1) a 1995 conviction for possession of cocaine with intent to sell and sale of cocaine; and (2) a 1997 conviction for escape. Although the district court found Mr. Robinson qualified as a career offender, the enhancement made no material difference because his unenhanced guideline range was the same as his career offender guideline range.[3] Mr. Robinson did not appeal his conviction or sentence.

Although the career offender designation did not change Mr. Robinson's guideline range at the time of sentencing, the finding impeded his later efforts to receive sentence reductions under 18 U.S.C. § 3582(c)(2) and Guideline Amendments 750 and 782.

---

[2] The district court ordered these terms of imprisonment to run consecutive to an undischarged term of imprisonment Mr. Robinson was serving in state court.

[3] Mr. Robinson's guideline range on count three was 151 to 188 months, and the district court sentenced him to 168 months' imprisonment on that count. Count four required a mandatory consecutive term of 60 months' imprisonment, which the district court imposed.

On May 27, 2016, Mr. Robinson moved to vacate his sentence under § 2255, arguing that his career-offender sentence was unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied the motion, stating that Mr. Robinson "was not sentenced as a career offender" and "his unenhanced guidelines sentence would be the same even if one disregarded his status as a career offender. . . ." Appendix B.

Mr. Robinson moved for reconsideration, explaining that the district court did sentence him as a career offender, and while the designation did not change his guideline range at sentencing, without it, he would be eligible for a sentence reduction under Amendment 782. Mr. Robinson also requested that the district court stay his case pending this Court's decision in *Beckles v. United States*, 136 S. Ct. 2510 (2016). *Id.*[4] The district court denied the motion, stating that if it sentenced Mr. Robinson today, he would receive the same sentence, and that it was bound to follow the Eleventh Circuit's decision in *United States v. Matchett*, 802 F.3d 1183 (11th Cir. 2015), which held that § 4B1.2(a)(2)'s residual clause is not unconstitutionally vague. However, after Mr. Robinson filed a notice of appeal, the district court granted him a COA on whether USSG § 4B1.2's residual clause is unconstitutional in light of *Johnson*.

[4] Before filing the motion for reconsideration and to stay the proceedings, Mr. Robinson filed a *pro se* motion for reconsideration, notice of appeal, and motion for a COA. The district court allowed Mr. Robinson to withdraw these documents, and file a counseled motion to reconsider and stay the proceedings. The Eleventh Circuit also granted Mr. Robinson's motion to voluntarily dismiss his premature, *pro se* appeal.

After Mr. Robinson filed his notice of appeal, this Court decided *Beckles*, holding that the advisory guidelines are not subject to due process vagueness challenges. 137 S. Ct. 886, 980 (2017). The district court, however, sentenced Mr. Robinson before this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), when the guidelines were mandatory. Thus, Mr. Robinson argued that the *mandatory* career offender residual clause is unconstitutionally vague. He acknowledge the Eleventh Circuit's contrary decision in *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), which held the mandatory guidelines are also not subject to vagueness challenges, but he argued *Griffin* was not an impediment for two reasons. First, Mr. Robinson argued that *Griffin*, which was issued in the unique context of an application for leave to file a second or successive § 2255 motion, is not binding because such orders cannot be binding outside that context. And second, Mr. Robinson argued that even if such orders can be binding outside that context, *Griffin* was not binding because this Court's reasoning in *Beckles* abrogated *Griffin*.

The Eleventh Circuit rejected Mr. Robinson's arguments and held that *Griffin* foreclosed his challenge. Appendix A. Notably, the Eleventh Circuit relied on *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), which held published SOS orders are binding on direct appeal. *Id.* The Eleventh Circuit also held that *Beckles*' reasoning did not abrogate *Griffin* because *Beckles* did not squarely address the mandatory guidelines question. *Id.*[5]

[5] The government also raised several other arguments in support of the district court's judgment, but the Eleventh Circuit found it unnecessary to consider them. Appendix A.

Notably, on March 19, 2019, the Eleventh Circuit declined to rehear *St. Hubert* en banc. *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. 2019). The decision, however, produced deeply fractured opinions on whether SOS orders should be binding in all later appeals. Indeed, four judges expressed the belief that such orders should not be. *See id.* at 1197 (Wilson, J., dissenting from the denial of rehearing en banc) ("What particularly troubles me, however, is the panel's reaffirmation of its rule that published panel orders from the second or successive context bind all panels of this Court, even those deciding fully briefed and argued merits appeals."); *id.* at 1210 (Martin, J., dissenting from the denial of rehearing en banc) ("Congress gave us a gatekeeping function. We've used it to lock the gate and throw away the key."); *id.* at 1210 (Jill Pryor, J., dissenting from the denial of rehearing en banc) ("The institutional (and, possibly, constitutional) problems with treating published panel orders as binding on all subsequent panels are significant . . . ."). And a fifth judge expressed deep concern with the proliferation of these orders by the Eleventh Circuit in recent years. *Id.* at 1191 (Jordan, J., concurring in the denial of rehearing en banc) ("[W]e should exercise more caution in deciding to publish an order disposing of an application, particularly on substantive issues of first impression.").

REASONS FOR GRANTING THE WRIT

When an inmate asks for permission to file a second or successive § 2255 motion, the Eleventh Circuit must rule on the request within 30 days. 28 U.S.C. § 2244(b)(3)(D). The petition is usually based solely on the prisoner's application,

which is written on an extremely constraining form. *See* 11th Cir. R. 22-3(a).[6] Nothing else is filed. The government files nothing and there is no oral argument. More notable, perhaps, is that the orders on these applications cannot be appealed to this Court or be the subject of a petition for rehearing in the Eleventh Circuit. 28 U.S.C. § 2244(b)(3)(E). And now, in light of *St. Hubert*, these orders, when published, are binding on all Eleventh Circuit panels going forward.[7]

The Eleventh Circuit erred by treating *Griffin*—an SOS order—as binding precedent in Mr. Robinson's appeal for at least two reasons: (1) in issuing *Griffin*, the Eleventh Circuit exceeded its statutory mandate under § 2244(b)(3)(C) to simply determine whether an applicant has made a "prima facie showing" that he has met the requirements of the statute; and (2) allowing such an order to bind Mr. Robinson's panel violated his constitutional right to due process.

The Eleventh Circuit's adoption of atypical procedural practices is nothing new. Indeed, members of this Court have recently cautioned the Eleventh Circuit from adopting such atypical practices. *Joseph v. United States*, 135 S. Ct. 705, 706 (2014) (Kagan, J., statement respecting the denial of certiorari) (addressing the Eleventh Circuit's unusual practice of not allowing parties to file supplemental briefs

---

[6] "Few prisoners manage to squeeze more than 100 words into the permitted space. Some have attorneys, but they are subject to the same restrictive form as are pro se litigants." *St. Hubert*, 918 F.3d at 1174 (Wilson, J., dissenting from the denial of rehearing en banc).

[7] In the past 5 years, the Eleventh Circuit has used this process more and more without reservation. *See St. Hubert*, 918 F.3d at 1192 (Jordan, J., concurring in the denial of rehearing en banc) (stating that in the last 5 years, the Eleventh Circuit "lead[s] the county by a significant margin in the number of published [SOS] orders . . . .").

as a matter of course when this Court issues a decision that upsets precedent relevant to a pending case). To be fair, in *Joseph*, this Court abstained from immediately intervening to allow the Eleventh Circuit an opportunity to correct its own procedural rules. *Id.* at 707. And the Eleventh Circuit took this Court's advice to heart. *United States v. Durham*, 795 F.3d 1329 (11th Cir. 2015) (en banc). Here, however, the Eleventh Circuit's en banc decision in *St. Hubert* has made it clear—the Eleventh Circuit is not changing course.

The Eleventh Circuit's practice of treating SOS orders as binding in all later appeals has far-reaching consequences that affects scores of inmates now and into the future. Whether federal law and the constitution allow this highly controversial practice is a question of exceptional importance. And given how unusual and consequential this practice is, this Court should provide its blessing before this practice is allowed to continue unabated.

I. The Eleventh Circuit exceeded its statutory mandate under 28 U.S.C. § 2244(b)(3)(C) by issuing an SOS order analyzing the merits of an open legal question and treating that order as binding precedent in Mr. Robinson's appeal.

As explained above, the procedure by which inmates are granted permission to file second or successive § 2255 motions is, by statute, strictly circumscribed. Notably, in reviewing these applications, appellate courts must determine only whether an inmate has made a "prima facie showing" that he meets the statutory requirements, and the court's determination is generally not subject to further review, not even in this Court. *See* 28 U.S.C. § 2244(b)(3)(C), (E). To be sure, if an inmate's claim is foreclosed by precedent, his application should be denied. But the Eleventh Circuit has used the limited authority provided by § 2244 to issue published orders on open merits questions and then use those orders as binding precedent in later appeals. But under the statute, the proper procedure is for these questions to go to the district court for consideration in the first instance.

As stated, § 2244(b)(3)(C) provides appellate courts with limited authority to determine whether an inmate has made a "prima facie showing" that he meets the requirements of the statute. Making such a showing does not require an inmate to show that he will ultimately prevail, only that he may prevail and his claim should be further explored by the district court. It certainly does not involve a full blown merits analysis of a claim. And other circuits have said as much. *See In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017); *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007); *see also Hoffner*, 870 F.3d at 310 n.13 (criticizing the Eleventh Circuit's

decision in *Griffin* for "resolv[ing] a merits question in the context of a motion to authorize a second or successive habeas petition.").

The Eleventh Circuit exceeds § 2244(b)(3)(C)'s mandate routinely, reaching the merits of open questions and using those orders as binding precedent in later appeals. What's particularly troubling is that these orders are generally appeal-proof. And in *St. Hubert*, the en banc Eleventh Circuit institutionalized this process.

These merits decisions are important and should be subject to the same robust process ordinarily undertaken on appellate review. Simply put, the § 2255 authorization procedure does not allow for such merits determinations. Because the Eleventh Circuit exceeded its statutory mandate in *Griffin* (not to mention several other cases), *Griffin* cannot be binding in Mr. Robinson's appeal. This issue has caused deep, contentious divisions in the Eleventh Circuit, and this Court's intervention is needed.

II. The Eleventh Circuit violated Mr. Robinson's right to due process by treating an improperly issued SOS order as binding precedent in his appeal.

By affording decisions like *Griffin* precedential effect in Mr. Robinson's appeal, the Eleventh Circuit violated Mr. Robinson's procedural due process rights—both under the framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and under this Court's issue-preclusion precedents. This due process argument is set forth in greater detail in *Gonzalez v. United States*, Case No. 18-7575, which has been

rescheduled for this Court's October 1, 2019 conference. Rather than repeat those arguments, Mr. Robinson adopts and incorporates them here.[8]

III. The decision below is wrong.

Whether *Johnson* applies to the mandatory guidelines is a question that has divided the circuits. *Compare Griffin*, 823 F.3d at 1354 (holding *Johnson* does not apply to the mandatory guidelines), *with United States v. Cross*, 892 F.3d 288, 306–07 (7th Cir. 2018) (holding *Johnson* applies to the mandatory guidelines). *See also Brown v. United States*, 139 S. Ct. 14, 15 (2018) (Sotomayor, J., dissenting from denial of certiorari). But unlike *Griffin*, the other circuits to rule on this issue did so under the normal, robust procedures typically accompanying appellate review. If Mr. Robinson were allowed to brief and argue the merits of this issue, he, like the defendant in *Cross*, would likely be able to demonstrate his entitlement to relief because *Johnson* renders the mandatory career offender residual clause unconstitutionally vague.

In *Beckles*, this Court reasoned the advisory guidelines are not subject to vagueness challenges precisely because they are advisory. In other words, they do not "fix the permissible range of sentences," but merely guide the exercise of sentencing discretion under 18 U.S.C. § 3553(a). 137 S. Ct. at 892, 894. *Beckles*'

[8] This petition, however, includes the additional statutory question discussed above, which, if resolved in Mr. Robinson's favor, would allow this Court to avoid this thorny Due Process question. For that reason, and because the merits of Mr. Robinson's underlying claim about *Johnson*'s effect on the mandatory guidelines is the subject of a circuit split, Mr. Robinson respectfully suggests that his case presents an ideal vehicle for the Court to resolve this exceptionally important issue.

reasoning compels the opposite outcome for the pre-*Booker*, mandatory guidelines. While the advisory Guidelines do not "fix the permissible range of sentences," *id.* at 892, the mandatory Guidelines did precisely that, *id.* at 903 n.4 (Sotomayor, J., concurring in the judgment). Indeed, *Beckles* itself distinguished the mandatory Guidelines from the advisory Guidelines, recognizing that the former were "binding on district courts" and "constrain[ed] [their] discretion." *Id.* at 894. Indeed, the landmark decision in *Booker* made that clear. Because the mandatory residual clause in § 4B1.2(a)(2) is identical to the residual clause invalidated in *Johnson*, it too must be declared void for vagueness.

The Eleventh Circuit's contrary reasoning and conclusion in *Griffin* cannot be reconciled with *Beckles*. At no time did *In re Griffin* acknowledge the binding nature of the mandatory Guidelines, let alone ask whether they fixed the range of permissible sentences, the key "inquiry" under *Beckles*. Instead, it focused on the fact that the Guidelines did not define illegal conduct, which is not relevant under *Beckles*. It repeatedly overlooked or conflated the key distinction between advisory and mandatory Guidelines, a distinction that *Beckles* reaffirmed and emphasized. And it did not properly analyze whether the mandatory Guidelines implicated the notice and arbitrary enforcement concerns underlying the vagueness doctrine. Had it done so, it would have reached the same conclusion as the Seventh Circuit in *Cross*.

This case reveals only one way in which the Eleventh Circuit's unorthodox use of SOS orders leads to troublesome results. But one does not have to struggle to

imagine others. This case affords the Court an ideal opportunity to review the Eleventh Circuit's unusual use of these orders.

CONCLUSION

For the above reasons, Mr. Robinson respectfully requests that this Court grant his petition.

Respectfully submitted,

Donna Lee Elm
Federal Defender

Rosemary Cakmis
Senior Litigator

/s/ Conrad Kahn
Conrad Kahn
Federal Defender Attorney
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone 407-648-6338
Facsimile 407-648-6095
Email: Conrad_Kahn@fd.org
Counsel of Record for Petitioner