No. 19-5451

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LAWRENCE ROBINSON, 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 court of appeals may give precedential weight to a published decision of that court denying an application for leave to file a second or successive motion under 28 U.S.C. 2255.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Robinson, No. 99-cr-48 (Nov. 27, 2001)

Robinson v. United States, No. 16-cv-363 (June 22, 2016)

United States Court of Appeals (11th Cir.):

Robinson v. United States, No. 16-16114 (May 10, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not published in the Federal Reporter but is reprinted at 773 Fed. Appx. 520. The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2019. The petition for a writ of certiorari was filed on August 2, 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 Middle District of Florida, petitioner was convicted on one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of carrying a firearm during and in relation to the commission of a drug trafficking offense, in violation of 18 U.S.C. 924(c). Pet. App. B1. He was sentenced to 228 months of imprisonment, to be followed by three years of supervised release. See id. at B2. Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. B1. The district court denied that motion. See id. at B1-B3. The court of appeals affirmed. Id. at A1-A3.

1. Following a November 1999 traffic stop of petitioner's car in Marion County, Florida, officers arrested petitioner after finding more than 120 grams of cocaine base, thousands of dollars in cash, and a loaded nine-millimeter pistol. Presentence Investigation Report (PSR) ¶ 6. Petitioner pleaded guilty to one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of carrying a firearm during and in relation to the commission of a drug trafficking offense, in violation of 18 U.S.C. 924(c).

The Probation Office classified petitioner as a "career offender" under Sentencing Guidelines § 4B1.1 (2001), based on his "two prior felony convictions of either a crime of violence or a

controlled substance offense," ibid. -- namely, a 1995 Florida drug conviction and, as relevant here, a 1995 Florida conviction for escape, which the Probation Office determined was a "crime of violence." See PSR ¶¶ 23-24, 37-38. The then-mandatory guidelines defined a "crime of violence" to include, among other things, any state offense punishable by more than one year of imprisonment that "involves conduct that presents a serious potential risk of physical injury to another." Sentencing Guidelines § 4B1.2(a) (2001).

Classifying petitioner as a career offender did not affect his guidelines range because the offense level dictated by the career-offender provision, see Sentencing Guidelines § 4B1.1(C) (2001), was the same as the base offense level dictated by the drug quantity, see id. § 2D1.1(a)(3) and (c)(4); PSR ¶ 18. The Probation Office recommended a guidelines range of 151 to 188 months of imprisonment on the drug offense, PSR ¶ 67, and observed that the firearms offense carried a mandatory consecutive term of at least five years of imprisonment, PSR ¶¶ 66, 68. The district court adopted the Probation Office's recommendations, including the career-offender designation, and sentenced petitioner to 168 months of imprisonment on the drug offense and a consecutive term of five years of imprisonment on the firearm offense, to be followed by three years of supervised release. See Pet. App. A1-A2. Petitioner did not appeal his convictions or sentence.

2. In 2016, petitioner moved to vacate his sentence under 28 U.S.C. 2255, arguing that he should not have been sentenced as a career offender because his 1995 Florida escape conviction was not a crime of violence in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). Johnson held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA) -- which defines "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B) -- is unconstitutionally vague. Johnson, 135 S. Ct. at 2563. Petitioner argued that because the language in Sentencing Guidelines § 4B1.1(C) (2001) is identical to the ACCA's residual clause, the guidelines provision also was unconstitutionally vague. See D. Ct. Doc. 1, at 17-18 (May 27, 2016).

The district court denied petitioner's motion, observing that his "unenhanced Guidelines sentence would be the same even if one disregarded his status as a career offender." Pet. App. B2. The court also denied petitioner's subsequent motion for reconsideration, explaining that if petitioner "should be resentenced today he would receive the same sentence." D. Ct. Doc. 18, at 1 (Sept. 19, 2016). But the court granted petitioner's unopposed request for a certificate of appealability on whether Florida escape is a "crime of violence" under the guidelines in light of this Court's decision in Johnson, supra. D. Ct. Doc. 23 (Oct. 4, 2016).

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A3. On appeal, petitioner acknowledged that the court already had held in In re Griffin, 823 F.3d 1350 (11th Cir. 2016), that Section 4B1.1 of the mandatory Sentencing Guidelines was not unconstitutionally vague in light of Johnson. Pet. C.A. Br. 5. Petitioner contended that Griffin had "no precedential value" because it had been decided in the context of a prisoner's application for leave to file a second or successive motion under Section 2255, Pet. C.A. Br. 11-13, and that in any event Griffin had been abrogated by this Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017), see Pet. C.A. Br. 6-11.

The court of appeals rejected those contentions. The court explained that it already "ha[d] rejected the argument that published orders deciding requests for authorization to file a second or successive § 2255 motion, like Griffin, do not bind panels outside the second or successive context." Pet. App. A2 (citing United States v. St. Hubert, 909 F.3d 335, 346 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019) (No. 18-8025), petition for cert. pending, No. 19-5267 (filed July 18, 2019)). The court further explained that Beckles, which had rejected a vagueness challenge to the residual clause in the context of the advisory Sentencing Guidelines, "did not abrogate Griffin because Beckles did not decide or squarely address whether due process vagueness principles apply to the mandatory guidelines," and that "[b]ecause

Beckles is not 'squarely on point' and does not directly conflict with Griffin, we remain bound by Griffin." Pet. App. A2-A3.

ARGUMENT

Petitioner contends (Pet. 9-10) that the court of appeals exceeded its statutory authority under 28 U.S.C. 2244(b)(3)(C) by issuing a published decision "analyzing the merits of an open legal question" in In re Griffin, 823 F.3d 1350 (11th Cir. 2016), and by then relying on that decision as binding precedent here. Pet. 9 (emphasis omitted). Petitioner further contends (Pet. 10-11) that the court's reliance on Griffin as binding precedent violates due process. Those contentions lack merit, and the decision below does not conflict with any decision of this Court or another court of appeals. 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 second or successive Section 2255 motions. E.g., Cottman v. United States, 139 S. Ct. 1253 (2019) (No. 17-7563); Allen v. United States, 138 S. Ct. 2024 (2018) (No. 17-5684); Torres v. United States, 138 S. Ct. 1173 (2018) (No. 17-7514); Vazquez 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). It should follow the same course here.

1. A federal prisoner may file a second or successive collateral attack under 28 U.S.C. 2255 only if he obtains authorization from a three-judge panel of the court of appeals certifying that the motion contains "newly discovered evidence" strongly indicative of innocence or relies on a "new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable." 28 U.S.C. 2255(h); see 28 U.S.C. 2244(b)(3)(B). The court of appeals may grant such authorization "only if it determines that the application makes a prima facie showing that the application satisfies th[ose] requirements." 28 U.S.C. 2244(b)(3)(C).

Petitioner contends (Pet. 9-10) that 28 U.S.C. 2244(b)(3)(C) prohibits courts of appeals from issuing "published orders on open merits questions" when determining whether an applicant has made the requisite prima facie showing. Pet. 9. That contention is incorrect, and petitioner does not identify any court of appeals that has adopted that position. Nothing in the text of Section 2244(b)(3)(C) limits the ability of federal appellate courts to decide legal issues when making prima facie determinations. And that provision does not address whether a court of appeals may choose to publish its opinion in such a case -- a choice squarely within the court's "significant authority to fashion rules to govern [its] 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); Thomas v. Arn, 474 U.S. 140, 146-147 (1985).

Petitioner observes (Pet. 9) that determining whether an applicant has made a prima facie showing does not require a "full blown merits analysis of a claim." But that does not mean a court is prohibited from addressing and answering legal questions that may arise in the course of analyzing the prima facie issue. A prima facie showing in this context means a "sufficient showing of possible merit to warrant a fuller exploration by the district court." Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997). Determining whether an application has "possible merit" requires first determining the legal principles that apply to the prisoner's claims. For that reason, "[t]here is nothing remotely strange about [a] partial overlap between a threshold inquiry and the merits." United States v. St. Hubert, 918 F.3d 1174, 1188 (11th Cir. 2018) (W. Pryor, J., respecting the denial of rehearing en banc).

Moreover, petitioner acknowledges (Pet. 9) that "if an inmate's claim is foreclosed by precedent, his application should be denied." Petitioner's position, therefore, would in effect restrict courts of appeals to applying only settled precedent when determining whether a prisoner has made the requisite prima facie showing. Yet petitioner identifies no statutory text supporting such a restriction. Congress has included such restrictions elsewhere in the postconviction statutes, as for instance in the

provision requiring state prisoners to demonstrate that a claim adjudicated on the merits "resulted in a decision that was contrary to * * * clearly established Federal law." 28 U.S.C. 2254(d)(1). That it did not include that kind of restriction in Section 2244(b)(3)(C) strongly counsels against reading one into that provision. Cf. Department of Homeland Security v. MacLean, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.").

2. Petitioner further contends (Pet. 10-11) that the court of appeals violated due process by assigning precedential weight to Griffin because that decision arose in the context of the denial of an application for leave to file a second or successive Section 2255 motion. At least three other pending petitions for writs of certiorari raise a similar issue. See St. Hubert v. United States, No. 19-5267 (filed July 18, 2019); Gonzalez v. United States, No. 18-7575 (filed Jan. 18, 2019); Williams v. United States, No. 18-6172 (filed Sept. 18, 2018).

Petitioner states (Pet. 11) that he "adopts and incorporates" the arguments set forth in the petition for a writ of certiorari filed in Gonzalez, supra (No. 18-7575). For the reasons set forth in the government's brief in opposition to certiorari in that case, a copy of which is being sent to petitioner, review of petitioner's due process claim is not warranted.

3. Finally, petitioner observes (Pet. 11) that whether Section 4B1.1 of the then-mandatory Sentencing Guidelines is unconstitutionally vague under Johnson is the subject of a circuit conflict. But that question is not among the questions presented in the petition for a writ of certiorari, see Pet. i-ii, and so is not properly before the Court here. In any event, this Court has recently and repeatedly denied petitions for writs of certiorari raising that issue. E.g., Brown v. United States, 139 S. Ct. 14 (2018) (No. 17-9276); see, e.g., id. at 14 n.1 (Sotomayor, J., dissenting from denial of certiorari) (listing cases); Gov't Mem. in Opp. at 2, Brown, supra (No. 17-9276) (listing more cases). Petitioner identifies no reason to follow a different course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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