No. 19-5451

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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The government does not dispute that the Eleventh Circuit's practice of reviewing the merits of an inmate's application for leave to file a second or successive 28 U.S.C. § 2255 motion is unusual. Nor does it dispute that this case is an excellent vehicle to resolve whether 28 U.S.C. § 2244(b)(3)(C) or the Constitution permit this practice. And it does not dispute that a ruling in Mr. Robinson's favor may afford him meaningful relief. The government simply believes Mr. Robinson is wrong on the merits. But most circuits to have addressed this issue agree with Mr. Robinson. Given that this is an exceptionally important issue and the government's only argument is an incorrect, merits-based argument, this Court should grant Mr. Robinson's petition and address the Eleventh Circuit's atypical practice.

I. The circuits are split about whether circuit courts may review the merits of an applicant's claim when determining whether the applicant has made a "prima facie showing" that he has satisfied § 2244(b)'s pre-filing requirements.

The government argues that Mr. Robinson does not identify a single circuit court that has adopted his position that circuit courts should not resolve open legal questions when ruling on applications for leave to file second or successive § 2255 motions. BIO at 7. But that is not true. The Third, Ninth, and Tenth Circuits have held that circuit courts should not assess the merits of an applicant's claim when deciding whether to grant the applicant leave to file a second or successive § 2255 motion. *See In re Hoffner*, 870 F.3d 301, 310 n.13 (3d Cir. 2017) ("[W]e do not follow the Eleventh Circuit, which—contrary to our precedent—resolved a merits question in the context of a motion to authorize a second or successive habeas petition."); *Henry*

v. Spearman, 899 F.3d 703, 708 (9th Cir. 2018) ("We review the State's contentions merely to determine whether relief is foreclosed by precedent or otherwise facially implausible, leaving the merits of the claim for the district court to address in the first instance."); *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (stating that § 2244(b)(3)(C) "does not direct the appellate court to engage in a preliminary merits assessment"); *see also In re Williams*, 898 F.3d 1098, 1106 (11th Cir. 2018) (Martin, J., specially concurring); *United States v. Peppers*, 899 F.3d 211, 223 (3d Cir. 2018) (citing *Hoffner*, 870 F.3d at 308); *In re Arnick*, 926 F.3d 787, 791 (5th Cir. 2016) (Elrod, J., dissenting).

The leading practice manuals also say as much. *See, e.g.*, BRIAN R. MEANS, FEDERAL HABEAS MANUEL § 11:85 (2019 ed.) ("If the petitioner seeks to file a second or successive petition based on a new rule of law made retroactive on collateral review by the Supreme Court, the appellate court does not conduct any assessment of the merits of the underlying claim, preliminary or otherwise." (citations omitted)); *see also In re Fleur*, 824 F.3d 1337, 1343 n.5 (11th Cir. 2016) (Martin, J., dissenting).

The government, on the other hand, identifies no court that does what the Eleventh Circuit does—decide the merits of open legal questions on applications for leave to file second or successive § 2255 motions, publish those orders, and then treat them as binding precedent in other direct appeals.

In addition to mistakenly arguing no precedent supports Mr. Robinson, the government erroneously argues that § 2244(b)(3)(C)'s text allows the Eleventh Circuit to resolve the merits of an applicant's claim when ruling on applications for leave to

file second or successive § 2255 motions. BIO at 7. But two circuits have now held that the text does not allow circuit courts to do that. *Hoffner*, 870 F.3d 301, 306–10; *Ochoa*, 485 F.3d at 541–44.

Under § 2244(b)(3)(C), a circuit court may grant an inmate permission to file a second or successive § 2255 motion "only if it determines that the application makes a prima facie showing that the application satisfies" § 2244(b)'s pre-filing requirements.[1] An inmate must satisfy three pre-filing requirements to obtain permission to file a second or successive § 2255 motion based on a qualifying, "new rule of constitutional law." *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (discussing 28 U.S.C. § 2244(b)(2)(A)). "First, the rule on which the claim relies must be a 'new rule' of constitutional law; second, the rule must have been 'made retroactive to cases on collateral review by the Supreme Court'; and third, the claim must have been 'previously unavailable.'" *Id.* The plain text of the "prima facie showing" requirement only allows circuit courts to make a preliminary assessment about whether these three requirements have been satisfied. It does not allow circuit courts to assess the strength of an applicant's case. *Ochoa*, 485 F.3d at 542.[2]

[1] The pre-filing requirements of a second or successive § 2255 motion depend on whether the inmate's claim is based on "newly discovered evidence" or a qualifying "new rule of constitutional law." 28 U.S.C. § 2255(h). This petition only addresses the circuit split about how circuits determine whether an inmate has made a "prima facie showing" that his claim is based on a qualifying new rule.

[2] In fact, by its plain text, the "prima facie standard" requires even less of an inquiry into the merits than the standard for obtaining a certificate of appealability. *See Fleur*, 824 F.3d at 1343 (Martin, J., dissenting).

Along with the text, the statutory authorization process shows that Congress did not want circuit courts engaging in merits assessments when determining whether applicants have made a prima facie showing that they have satisfied the pre-filing requirements. *See id.*; *Hoffner*, 870 F.3d at 307–08. When a circuit court considers an inmate's application for leave to file a second or successive § 2255 motion, it typically rules on the application within 30 days based solely on a constrained form filled out by a pro se inmate. 28 U.S.C. § 2244(b)(3)(D). Moreover, applicants denied permission to file a second or successive § 2255 motion cannot seek rehearing in the circuit court or appeal the denial to this Court. 28 U.S.C. § 2244(b)(3)(E). "These parameters indicate a streamlined procedure with a narrow focus on a fixed set of pre-specified and easily assessed criteria, which would be disrupted by engaging the manifold merits issues raised by potentially complex, fact-bound constitutional claims." *Ochoa*, 485 F.3d at 542. Section 2244 also distributes judicial responsibility between the appellate and district courts, with the appellate court making a preliminary assessment of whether a claim is the type of claim permitted by the statute, and the district court adjudicating the claim in the first instance. *Id.*; *see also* 28 U.S.C. § 2244(b)(4) (directing the district court to also determine whether the claim satisfies the pre-filing requirements). This statutory context shows that circuit courts "'do not have to engage in . . . difficult legal analysis' in [their] gatekeeping role." *Hoffner*, 870 F.3d at 308 (quoting *Tyler*, 533 U.S. at 664).

Thus, both § 2244(b)(3)(C)'s plain text and statutory context support Mr. Robinson's position that a merits assessment is not part of the circuit court's prima facie review when determining whether an applicant's claim satisfies § 2244's pre-filing requirements.

II. The Eleventh Circuit violated Mr. Robinson's right to due process by treating an improperly issued order on an application for leave to file a second or successive § 2255 motion as binding precedent in his appeal.

The Eleventh Circuit also violated Mr. Robinson's procedural due process rights by affording published orders on applications for leave to file second or successive § 2255 motions, like *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), precedential effect in his appeal. As explained in Mr. Robinson's petition, this due process argument is expounded on in *Gonzalez v. United States*, Case No. 18-7575. Pet. at 10–11. Mr. Robinson continues to adopt and incorporate the arguments set forth by the petitioner in *Gonzalez*. *Id.*

III. This case is an excellent vehicle.

The government does not dispute that Mr. Robinson's case presents an excellent vehicle for the Court to resolve these exceptionally important issues. Indeed, the Eleventh Circuit often violates § 2244(b)(3)(C), issuing precedential decisions that affect hundreds of people. As discussed, § 2244(b)(3)(C) directs circuit courts to determine only whether an application makes a "prima facie showing" of the pre-filing requirements. The Eleventh Circuit, however, "routinely exceed[s] [this] statutory mandate" and has issued "hundreds of rulings on the merits" of open legal questions. *United States v. St. Hubert*, 918 F.3d 1174, 1206–07 (11th Cir. 2019)

(Marin, J., dissenting for the denial of rehearing en banc). Indeed, rather than limit itself to the "prima facie showing" required by § 2244(b)(3)(C), the Eleventh Circuit combs through sealed records from the prisoner's underlying criminal proceedings to determine whether the prisoner would win if given permission to file a second or successive § 2255 motion. *Id.* This case presents an excellent opportunity to address the Eleventh Circuit's atypical practice.

Mr. Robinson's case also presents a good vehicle because his underlying claim has split the circuits. If Mr. Robinson were convicted in the Seventh Circuit or incarcerated in the Fourth Circuit, he would have obtained relief on his claim that the mandatory career-offender residual clause is void for vagueness under *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See Cross v. United States*, 892 F.3d 288 (7th Cir. 2018); *Lester v. Flournoy*, 909 F.3d 708 (4th Cir. 2018). In the Third Circuit, an inmate raising such a claim would have at least been granted leave to file a second or successive § 2255 motion. *Hoffner*, 870 F.3d at 312. But the Eleventh Circuit will not even do that. Instead, without briefing or oral argument, it published an order on a pro se application for leave to file a second or successive § 2255 motion, holding that *Johnson* does not apply to the mandatory guidelines. *In re Griffin*, 823 F.3d at 1354–56. The Eleventh Circuit then used that order to deny Mr. Robinson relief in his appeal.[3]

[3] If Mr. Robinson prevailed on his *Johnson* claim, the district court would likely grant him meaningful relief. Indeed, his guidelines range would be far lower, and the district court would likely impose a lower sentence. To be sure, when the district court sentenced Mr. Robinson, his enhanced guidelines range was the same as his unenhanced guidelines range. Pet. at 3–4. But if the district court resentenced Mr.

The Eleventh Circuit's practice is not only an outlier, it has caused deep divisions in the Eleventh Circuit. *Compare St. Hubert*, 918 F.3d at 1174 (Tjoflat, J., dissenting from the denial of rehearing en banc) (accusing Judges Wilson and Martin of "unfounded attacks on the integrity of the Court as an institution"), *with id.* at 1199 (Wilson, J., dissenting from the denial of rehearing en banc) (responding to Judge Tjoflat and stating that it is one thing to have impassioned, collegial disagreement, but it is another thing to turn that disagreement into a sweeping charge). It is understandable why this issue has caused such deep divisions—it is a profoundly important issue. Because Mr. Robinson's petition presents an indisputably good vehicle to address the Eleventh Circuit's atypical practice, Mr. Robinson respectfully requests that this Court grant his petition.

Robinson today without the enhancement, his guidelines range would be far lower because of intervening, retroactive amendments to the sentencing guidelines. *Id.*; *see also United States v. Tidwell*, 827 F.3d 761, 764 n.3 (8th Cir. 2016) (stating the current version of the sentencing guidelines applies at a resentencing hearing after a § 2255 motion is granted). The government does not dispute that Mr. Robinson's guidelines range would be lower if the district court resentenced him today.

CONCLUSION

The petition for a writ of certiorari should be granted.

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