

OCTOBER TERM, 2019

IN THE SUPREME COURT OF THE UNITED STATES

Eric Mack, 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 BRIEF FOR PETITIONER

CHRISTINE A. FREEMAN
Executive Director
SANDI Y. IRWIN*
Federal Defenders,
Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: 334.834.2099
Facsimile: 334-834-0353
Sandi_Irwin@fd.org

*Counsel of Record for Petitioner

April 23, 2020

QUESTION PRESENTED

Whether a defendant's right to Due Process in his initial § 2255 proceeding is violated by the Eleventh Circuit's rule assigning precedential effect to an order denying a pro se petitioner's application for authorization to file a second or successive § 2255 motion.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTORITIES	iii
LIST OF PARTIES	iv
RELATED CASES	iv
REPLY BRIEF FOR PETITIONER	1
ARGUMENT	1
CONCLUSION	3

TABLE OF AUTHORITIES

<i>Cutter v. Wilkinson</i> , 544 U.S. 709, 718 n.7 (2005).....	2
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	1
<i>Medina v. California</i> , 505 U.S. 437 (1997).....	1
Statutes and Rules	
28 U.S.C. § 2255.....	<i>passim</i>

LIST OF PARTIES

There are no parties to this proceeding other than those listed in the caption.

RELATED CASES

- *Eric Mack v. United States*, No. 19-11138, U.S. Court of Appeals for the Eleventh Circuit. Judgement entered on May 22, 2019.
- *Eric Mack v. United States*, No. 2:16-CV-487, U.S. District Court for the Middle District of Alabama. Judgment entered on Jan. 14, 2019.
- *United States v. Eric Mack*, No. 2:13-cr-072-02, U.S. District Court for the Middle District of Alabama. Judgment entered on December 12, 2014.

REPLY BRIEF FOR PETITIONER

Eric Mack requests this Court grant certiorari to examine whether the Eleventh Circuit violated due process when it declined merits review of an original motion under 28 U.S.C. § 2255 by giving orders denying pro se applications for second or successive § 2255 motions precedential effect. The orders denying applications for second or successive § 2255 motions had been issued without full merits briefing and without any practicable mechanism for review.

ARGUMENT

The government's arguments in its brief in opposition convey tacit agreement that this issue is ripe for review. The government first argues that Eleventh Circuit "should be the one to decide in the first instance whether or to what extent due-process principles should affect its approach." (Resp't Br. in Opp'n 12). This suggestion that the fox be left to guard the henhouse makes little sense absent an assumption that the Eleventh Circuit disregards whether its own practices offend due process unless specifically requested to apply due process. It does, however, admit the need for Mr. Mack's due process challenge to be addressed. This Court should do so.

The government's second argument rests in large part upon its assertion that *Medina v. California*, 505 U.S. 437 (1997), provides the appropriate framework in which the Court should examine due process in this context, not *Mathews v. Eldridge*, 424 U.S. 319 (1976). This dispute regarding the applicable law highlights the need for this Court's guidance to ensure that a defendant's due process rights are

adequately protected when the court of appeals considers an initial § 2255 motion.

Finally, the government's remaining argument that "even if the court of appeals were foreclosed from affording binding precedential effect to its earlier published decisions . . . petitioner still could not demonstrate his entitlement to post-conviction relief" is a desperate and dangerous attempt to obscure the constitutional violation at issue. Whether the underlying claim has merit should be left to the court of appeal to decide because "[t]his Court is one 'of review, not of first view,'" (Resp't Br. in Opp'n 10 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005))). That the Eleventh Circuit failed to make that determination in the first instance is the direct result of the due process violation that Mr. Mack asks this Court to address.

CONCLUSION

Because Mr. Mack and the government both demonstrate the need for a determination of whether a defendant's right to due process is violated by the Eleventh's Circuit's rule assigning precedential effect to an order denying a pro se petitioner's application for authorization to file a second or successive § 2255 motion to preclude merits review of an initial § 2255 motion, the Court should grant the petition for a writ of certiorari.

DATED this 23th day of April, 2020.

Respectfully submitted,

CHRISTINE A. FREEMAN
Executive Director
SANDI Y. IRWIN*
Assistant Federal Defender
Federal Defenders,
Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: 334.834.2099
Facsimile: 334-834-0353
Sandi_Irwin@fd.org

*Counsel of Record for Petitioner