No. 19-7148

IN THE
Supreme Court of the United States

JIMMY LEE BOSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY ARGUMENTS

I. THE ELEVENTH CIRCUIT'S HOLDING ABOUT "AIDING AND ABETTING" LIABILITY UNDER THE ARMED CAREER CRIMINAL ACT (ACCA) IS BASED ON A LEGAL FALLACY AND UNSUPPORTED BY THE ACCA'S TEXT.

In denying Mr. Boston's § 2255 motion to vacate, the Eleventh Circuit erred when it further perpetrated the legal fallacy it created in *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (holding that aiding and abetting convictions fall under § 924(c)(3)(A)). There, the Eleventh Circuit applied its federal law holding on Hobbs Act robbery as binding precedent when addressing Mr. Boston's state convictions for Florida principal (aiding and abetting) to armed robbery. *Boston v. United States*, 939 F.3d 1266, 1270 (11th Cir. 2019).[1]

In its brief in opposition, the government does not respond to Mr. Boston's arguments that *Colon* erred by substituting the categorical approach required to find a "crime of violence" under § 924(c)(3)(A) with a contextually-distinct conclusion that an aider or abettor is *punishable* or *responsible* for the acts of the substantive perpetrator. *See generally* BIO. Nor does the government respond about the error of extending this fallacy to Mr. Boston's state offense, Florida aiding and abetting armed robbery. *Id.*

[1] As noted in Mr. Boston's petition, the Eleventh Circuit issued *Colon* in the context of in denying an application for leave to file a second or successive § 2255 motion—an impermissible practice that is unique to the Eleventh Circuit and addressed in the second question in this petition. *See* Pet. at 7.

The Eleventh Circuit's simplistic approach is errant. The Eleventh Circuit failed to, and must, use the categorical approach. That is, the court must consider and determine whether a perpetrator may commit Florida aiding and abetting armed robbery without "the use, attempted use, or threatened use of physical force," to find that it qualifies as a "violent felony" under the elements clause. In accord with *Shepard v. United States*, 544 U.S. 13, 21 (2005), a statutory determination that an defendant is *punishable* for aiding and abetting an offense under § 2 does not mean that a jury found, or that a defendant pleaded to, the elements of that substantive offense, such that one can conclude he or she necessarily committed an offense that comes within § 924(e)(2)(B)(i). This is because the elements a jury must find for aiding and abetting liability may differ from those a jury must find for liability for the substantive offense, which is the case for Mr. Boston's offense of aiding and abetting Florida armed robbery.

Yet the government incorrectly relies on *In re Colon* and summarily asserts in its two paragraph reply to this issue that because this Court found that Florida armed robbery categorically qualifies as a "violent felony" in *Stokeling v. United States*, 139 S. Ct. 544 (2019), aiding and abetting Florida armed robbery accordingly qualifies as a "violent felony." BIO at 1-2. And the government does not address the Mr. Boston's substantive arguments that it does not in his petition.

Regardless, this remains an important issue because several other circuits have essentially adopted *In re Colon*'s analysis. *United States v. Richardson*, 906 F.3d 417, 421 (6th

Cir. 2018), *vacated on other grounds by Richardson v. United States*, 18-7036, Order (June 17, 2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 104–05, 109–10 (1st Cir. 2018); *United States v. Deiter*, 890 F.3d 1203, 1215–16 (10th Cir. 2018). None of these cases expressly applied the categorical approach to consider whether the "least egregious conduct" required to establish § 2 liability would also satisfy §§ 924(c)(3)(A) or 924(e)(2)(B)(i)'s elements clause. *See United States v. Gonzalez-Aparicio*, 663 F.3d 419, 425 (9th Cir. 2011).

The proper inquiry is whether a defendant convicted of robbery as an aider and abettor has necessarily committed an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." §§ 924(c)(3)(A) and 924(e)(2)(B)(i); *see also United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018); *United States v. Innie*, 7 F.3d 840, 850 (9th Cir. 1993). It is not whether a defendant is *punishable* for that offense, but how that liability is established in the first place. Being deemed *responsible* for the offense does not equate to a defendant's *commission* of the offense.

The government incorrectly asserts that "petitioner appears to recognize (Pet.14-15) that resolution of the [issue on whether aiding and abetting Hobbs Act robbery satisfies the ACCA elements clause] in that context would apply here as well." BIO at 2 n.1. First, as explained the Eleventh Circuit's analysis about aiding and abetting Hobbs Act robbery is analytically flawed. Second, Mr. Boston never conceded the resolution of aiding and abetting Hobbs Act robbery controls his case. To the contrary, as Mr. Boston

argued below and in his petition, aiding and abetting federal Hobbs Act robbery and aiding and abetting Florida state armed robbery are different—their elements are different and the least culpable act is different. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). Thus, while resolution of the elements clause issue with federal aiding and abetting Hobbs Act robbery should result in reversal because the lower court errantly found it to be binding precedent,[2] it would not resolve the elements clause issue with Florida state aiding and abetting armed robbery offense. Thus, the government's argument about "[e]very court of appeals to have considered" the federal aiding and abetting Hobbs Act robbery offense is unpersuasive, because no court other court of appeals has considered Florida aiding and abetting armed robbery, and in its brief in opposition, the government never addressed the elements of that state offense or its least culpable means under the categorical approach. *See* BIO at 2.

Yet it was this precisely this fallacy in *In re Colon* that the Eleventh Circuit extended to Mr. Boston's Florida aiding and abetting armed robbery convictions. A proper comparison of the elements and least culpable act for Florida aiding and abetting armed robbery at the time of Mr. Boston's offenses would have led to a finding that the convictions do not qualify for enhancement under § 924(e)(2)(B)(i). *See Moncrieffe*, 133 S. Ct. at 1684. The Eleventh Circuit's decision in *In re Colon* is inconsistent with the required

[2] As the Eleventh Circuit stated in determining *Boston*, "Our precedent in *Colon* forecloses Boston's argument." *Boston*, 939 F.3d at 1270.

elements-based limitation of §§ 924(c)(3)(A) or 924(e)(2)(B)(i). As the concurring opinion in Mr. Boston's published opinion determined, "*Colon* was wrongly decided." *Boston*, 939 F.3d at 1274 (Jill Pryor, J., concurring).

II. THE ELEVENTH CIRCUIT VIOLATED 28 U.S.C. § 2244(b)(3)(C) AND THE DUE PROCESS CLAUSE BY DECIDING OPEN LEGAL QUESTIONS IN APPLICATIONS FOR LEAVE TO FILE A SECOND OR SUCCESSIVE § 2255 MOTION AND TREATING THOSE PUBLISHED ORDERS AS BINDING PRECEDENT IN OTHER APPEALS SUCH AS THIS ONE.

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 § 2255 motion is unusual. The government instead argues this Court "ordinarily does not address issues that were not pressed or passed upon in the decision below." BIO at 3 citing *United States v. Williams*, 504 U.S. 36, 41 (1992).

But most circuits to have addressed this issue agree with Mr. Boston. And given that this is an exceptionally important issue and the government's argument in the BIO it references is to an incorrect, merits-based argument, this Court should grant Mr. Boston's petition and address the Eleventh Circuit's atypical practice. *See* BIO at 3 (citing *Robinson v. United States*, No. 19-5451 (Dec. 4, 2019) and *Valdes Gonzalez v. United States*, No. 18-7575 (May 6, 2019)).

A. 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.

In *Robinson*, the government argues Mr. Robinson did 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 3 (incorporating *Robinson* 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 301, 308 (3d Cir. 2017)); *In re Arnick*, 826 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 St. Fleur*, 824 F.3d 1337, 1343 n.5 (11th Cir. 2016) (Martin, J., dissenting).

The government, on the other hand, identified 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 argued 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. *See Robinson* BIO at 7. But two circuits have now held that the text does not allow circuit courts to do that. *Hoffner*, 870 F.3d at 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.[3] 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.[4]

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

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[3] 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.

[4] 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 In re St. Fleur*, 824 F.3d at 1343 (Martin, J., dissenting).

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 v. Cain*, 533 U.S. 656, 664 (2001)).

Thus, both § 2244(b)(3)(C)'s plain text and statutory context support Mr. Boston'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.

B. The Eleventh Circuit violated Mr. Boston'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. Boston's procedural due process rights by affording published orders on applications for leave to file second or successive § 2255 motions, like *In re Colon*, 826 F.3d 1301, precedential effect in his appeal. As explained in Mr. Boston's petition, this due process argument is expounded on in *Gonzalez v. United States*, Case No. 18-7575. Pet. at 17. Mr. Boston continues to adopt and incorporate the arguments set forth by the petitioner in *Gonzalez. Id.*

C. This case is an excellent vehicle.

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) (Martin, 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.

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 St. Hubert*, 918 F.3d 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. Mr. Boston respectfully requests that this Court grant his petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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