No. 23-6167

IN THE
Supreme Court of the United States

In re DWIGHT CARTER, SR.,
Petitioner.

REPLY BRIEF FOR PETITIONER

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April 25th, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Rule

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The question presented in this original habeas petition is whether the procedural bar in 28 U.S.C. § 2244(b)(1) applies only to state-prisoner habeas corpus applications filed under Section 2254—as the plain text states—or whether it also applies to federal-prisoner motions to vacate filed under Section 2255. Pet. i. The Government expressly agrees with Petitioner that Section 2244(b)(1) does not apply to Section 2255 motions filed by federal prisoners. And it agrees that the circuits are divided 6–3 on that question of federal habeas law. BIO 11–12; *see Bowe* BIO 9–13.

This Court recently denied an original habeas petition presenting that same question—with Justice Sotomayor, joined by Justice Jackson, authoring a statement respecting the denial. *In re Bowe*, 2024 WL 674656 (Feb. 20, 2024) (U.S. No. 22-7871). Following *Bowe*, there are now three Justices of this Court who have expressed the view that the question presented warrants review in light of the admitted circuit conflict and the Government's confession of error. *See Bowe*, 2024 WL674656, at *1 (Sotomayor, J., statement respecting the denial of the petition for a writ of habeas corpus) ("Justice Kavanaugh has previously expressed his desire for this Court to resolve this split. *Avery v. United States*, 140 S. Ct. 1080, 1081 (2020) (statement respecting denial of certiorari). I now join him.") (parallel citations omitted)).

However, as Justice Sotomayor correctly explained in *Bowe*, not a single certiorari petition presenting the question has reached the Court in the four years since Justice Kavanaugh's separate opinion in *Avery*, because "there are considerable structural barriers to this Court's ordinary review via certiorari." *Id*. Nonetheless,

she supported a denial in *Bowe* because, in her view, it was "questionable" whether the petitioner there could satisfy the "demanding standard" for granting an original habeas petition, since it was "not clear that, absent § 2244(b)(1)'s bar, the Eleventh Circuit would have certified his § 2255 motion." *Id*. at *2. She nonetheless "welcome[d] the invocation of this Court's original habeas jurisdiction in a future case where the petitioner may have meritorious § 2255 claims." *Id*. She further noted that "a court of appeals seeking clarity could certify the question to this Court," *id*., and she "encourage[d] the courts of appeals to reconsider this question en banc" where they had a prior holding (as opposed to dicta) resolving the issue, *id*. at *2 & n.*

* * *

1. In this case, the Eleventh Circuit applied its binding precedent on Section 2244(b)(1) to deny Petitioner's latest request to file a successive Section 2255 motion. Pet. App. A at 7 (citing *In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016)). That motion, based on *United States v. Davis*, 139 S. Ct. 2319 (2019), sought to challenge his Section 924(c) conviction carrying a *life* sentence. The Government does not dispute that the Eleventh Circuit relied *exclusively* on Section 2244(b)(1) to deny authorization. *See* BIO 11. And, again, it agrees that this was "erroneous." BIO 12.

Nonetheless, the Government argues that Petitioner cannot show "exceptional circumstances" warranting the exercise of the Court's discretionary powers. BIO 12. That is so, the Government asserts, because the Eleventh Circuit would have denied authorization even apart from Section 2244(b)(1). BIO 12–13 & n.2. But the Eleventh Circuit did not address the merits of Petitioner's latest request for authorization, and

that question is therefore not currently before the Court. Indeed, Petitioner has asked this Court to decide *only* the threshold legal question that the Eleventh Circuit actually addressed below—namely, whether the procedural bar in Section 2244(b)(1) applies to federal prisoners. If this Court agrees with the parties that it does not, then the Court could direct the court of appeals to reconsider Petitioner's request for authorization in the first instance—without applying Section 2244(b)(1). That is this Court's ordinary practice. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"). And there is no reason to depart from it here.

2. To be sure, this case in an extraordinary writ, and therefore Petitioner "must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). There is no dispute that Petitioner cannot obtain adequate relief in any other form or forum. The only dispute is whether there are "exceptional circumstances" warranting the exercise of the Court's discretionary powers. There are indeed. As Justice Sotomayor recently explained, this Court will not otherwise be able to resolve the question presented due to the "considerable structural barriers to this Court's ordinary review via certiorari." *Bowe*, 2024 WL 674656, at *1. As she explained, the statutory bar on certiorari petitions in Section 2244(b)(3)(E), coupled with the Government's concession, will insulate from certiorari review the Section 2244(b)(1) question dividing the circuits. *See id*. These circumstances are truly exceptional; it does not appear that similar circumstances have ever before conspired to block the Court from resolving a circuit conflict.

As a result, an original habeas petition is the only vehicle through which this Court could realistically resolve the conflict. Justice Sotomayor did refer to the possibility of a certified question. *Id*. at *2. But Petitioner already tried that: he asked the Eleventh Circuit to certify the question, and it summarily denied his request. Pet. App. A at 8 n.2. That dismissive treatment is unsurprising. This Court has not answered a certified question since 1981, and it summarily dismissed the certificate the last time a court of appeals issued one. *United States v. Seale*, 558 U.S. 985 (2009). There is no basis to expect one of only three remaining circuits to certify this question.

The upshot is that, if the Court does not resolve that question via an original habeas petition, it is unclear how the question would *ever* be resolved. Such inaction would be untenable: it would cement the disparity about which federal prisoners may get into federal court to vindicate weighty constitutional claims challenging the validity of convictions, as well as life and even capital sentences. The happenstance of geography should not determine whether such serious claims may be adjudicated.

Declining to exercise the Court's original habeas jurisdiction to resolve this otherwise unreviewable conflict would also revive the Article III "Exceptions Clause" problem that this Court avoided in *Felker v. Turpin*, 518 U.S. 651 (1996). This Court recognized that Section 2244(b)(3)(E) deprived the Court of "authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in

violation of Article III, § 2." *Id.* at 661–62; *see id.* at 667 & n.2 (Souter, J., concurring). In other words, the Court avoided the Article III Exceptions Clause problem precisely because it retained authority to entertain original habeas petitions. But if the Court refuses to ever actually *invoke* that authority—including to resolve circuit splits that cannot otherwise be resolved—that refusal would inevitably invite serious Article III challenges to the statutory bar on certiorari petitions in Section 2244(b)(3)(E).

3. Justice Sotomayor's statement respecting denial in *Bowe* appeared to assume that "exceptional circumstances" required the petitioner to show that his underlying claim would prevail. But such a showing should not be required where, as here, the exceptional circumstances relate not to the petitioner's individual claim but rather to this Court's role in the constitutional order. After all, one of the Court's main roles is to resolve circuit conflicts about the meaning of federal statutes. In that regard, the Court routinely grants certiorari to decide threshold legal questions that have divided the circuits, even if the petitioner's underlying claim might not prevail. There is no reason why that same practice should not apply in this context. Indeed, and as *Felker* makes clear, "original" habeas petitions actually invoke this Court's *appellate* jurisdiction. So, again, were this Court to conclude that the Eleventh Circuit erroneously applied Section 2244(b)(1), the Court could simply direct the court of appeals to reconsider his request for authorization without Section 2244(b)(1)'s bar.

That modest remedy would comport with the "equitable principles [that] have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quotations omitted). Indeed, "[t]he habeas statute . . . directs

federal courts to 'dispose of habeas petitions as law and justice require.'" *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (quoting 28 U.S.C. § 2243) (brackets omitted). And "[t]his Court has interpreted that" statute "as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations," *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), including "the orderly administration of criminal justice," *Munaf*, 553 U.S. at 693; *see, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) ("In construing § 2243 and its predecessors, this Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court."). Thus, this Court could grant review here for the limited purpose of resolving the threshold legal question presented. And if the Court agrees with the parties on that question, then the Court could fashion an appropriate remedy by directing the court of appeals to reconsider Petitioner's authorization request without the Section 2244(b)(1) bar. Nothing would require the Court to go further or do more.[*]

4. Finally, and although not before the Court, the Government fails to support its assertion that the Eleventh Circuit would (let alone should) deny Petitioner authorization notwithstanding the procedural bar in Section 2244(b)(1).

a. As the Government observes (BIO 10), two members of the Eleventh Circuit previously stated that they would have indeed granted Petitioner authorization were it not for that court's binding precedent on Section 2244(b)(1). Pet.

[*] Of course, to the extent the Court has concerns about remedy, it could direct the parties to brief that question in addition to the Section 2244(b)(1) question presented.

App. C at 3–8 (Martin, J., concurring in judgment); *id*. at 9 (Jordan, J., concurring in the judgment). On top of that, and as Judge Martin explained, three different Eleventh Circuit judges granted authorization to one of Petitioner's co-defendants who brought "precisely the same *Davis* claim . . . on materially indistinguishable facts. This means that this Court has issued diametrically opposing orders on identical claims concerning precisely the same factual circumstances. It also means that, as of today, five judges of this court agree that the *Davis* claim Mr. Carter raises in his application is one that should entitle him to file a second or successive § 2255 petition. Nonetheless, our decision in *Baptiste* will produce the anomalous result that Mr. Carter is barred from having his petition heard in the District Court." *Id*. at 7–8.

b. The Government's contrary argument proceeds on the assumption that Petitioner's Section 924(c) conviction was predicated on the completed Hobbs Act robbery offense in Count One rather than the Hobbs Act conspiracy offense in Count Two (which all agree is not a "crime of violence" post-*Davis*). But, as Judge Martin has repeatedly explained, a close review of the verdict form in this case reflects that the Section 924(c) conviction could have just as easily been predicated on Hobbs Act conspiracy. And, under this Court's precedent, reviewing courts must assume that the jury relied on that invalid theory—especially at the authorization stage, where only a "prima facie" showing is required. *See* Pet. App. B at 9–13 (Martin, J., dissenting); Pet. App. C at 3–6 (Martin, J., concurring in judgment). That is the approach that this Court has long taken when reviewing a general verdict that could

have been predicated on an invalid theory of liability. *See Zant v. Stephens*, 462 U.S. 862, 880–82 (1983) (discussing *Stromberg v. California*, 283 U.S. 359 (1931)).

c. In any event, even if the Section 924(c) conviction *was* predicated on Hobbs Act robbery, whether that latter offense remains a "crime of violence" is now very much a live issue. The Government emphasizes that the Eleventh Circuit has previously held that it is, but that holding has been called into serious doubt by *United States v. Taylor*, 142 S. Ct. 2015 (2022). While *Taylor* held that *attempted* Hobbs Act robbery is not a "crime of violence," *Taylor* abrogated the reasoning upon which the Eleventh Circuit had relied for completed Hobbs Act robbery. The Eleventh Circuit had required defendants to point to an actual case demonstrating that the Hobbs Act was overbroad. *United States v. St. Hubert*, 909 F.3d 335, 350 (11th Cir. 2018). But *Taylor* clarified that there is no such requirement. 142 S. Ct. at 2024–25.

Recognizing that *Taylor* abrogated *St. Hubert*, one district court in the Eleventh Circuit has since held that Hobbs Act robbery is overbroad. It explained that the Eleventh Circuit's unique pattern instruction for Hobbs Act robbery—given in this case too, Dist. Ct. No. 09-cr-20470, ECF No. 362 at 87 (S.D. Fla.)—reflects that the elements of the offense encompassed threats to "intangible" forms of property and fear of "financial loss." *See United States v. Louis*, No. 21-cr-20252, ECF No. 185 at 2 (S.D. Fla. Feb. 27, 2023). The Government voluntarily dismissed its appeal of that ruling. And neither the Eleventh Circuit nor this Court has addressed that compelling overbreadth argument post-*Taylor*. Yet the Eleventh Circuit's erroneous application of Section 2244(b)(1) bars Petitioner from even presenting such a claim.

CONCLUSION

The Court should set this case for briefing and argument.

Respectfully submitted,

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