

No. 17-6914

IN THE SUPREME COURT OF THE UNITED STATES

GENO T. JACKSON, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a three-judge panel of the court of appeals violated the Due Process Clause of the Fifth Amendment or deprived petitioner of his statutory right to appeal by concluding that it was bound to adhere to circuit precedent that petitioner contends was wrongly decided.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 696 Fed. Appx. 981.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2017. The petition for a writ of certiorari was filed November 22, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of unlawful possession of a firearm and ammunition after a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. Original Judgment 2-3. The court of appeals affirmed. 300 Fed. Appx. 869.

In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court granted the motion. D. Ct. Doc. 96 (Aug. 18, 2016). The court then resentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Am. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-2.

1. In 2005, law enforcement stopped a car occupied by petitioner and two other individuals for a traffic violation. Presentence Investigation Report (PSR) ¶ 8. When officers asked petitioner to step out of the car, he ran. PSR ¶ 9. During the resulting foot chase, petitioner produced a 9mm pistol. Ibid. Officers drew their weapons and ordered petitioner to drop the gun. Ibid. Petitioner refused and ran, discarding the gun as he did so. Ibid. Two officers eventually caught up to him and he violently resisted arrest. PSR ¶ 10. After the officers subdued

petitioner and placed him in handcuffs, they retrieved the gun and found that it was loaded and cocked. Ibid.

2. A grand jury returned an indictment charging petitioner with one count of unlawful possession of a firearm and ammunition after a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). A jury found petitioner guilty of that offense. PSR ¶ 4.

Under 18 U.S.C. 924(a)(2), the default term of imprisonment for a violation of Section 922(g)(1) is zero to ten years. The Armed Career Criminal Act of 1984 (ACCA) increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). Here, the district court concluded that petitioner was subject to the ACCA and sentenced him to 300 months of imprisonment. Original Judgment.

3. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. He argued that his ACCA-enhanced sentence was invalid after this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the ACCA is unconstitutionally vague. D. Ct. Doc. 91, at 5 (June 15, 2016). The government stipulated that, in light of Johnson, petitioner did not have three prior convictions for violent felonies under the ACCA. D. Ct. Doc. 95, ¶ 4 (Aug. 1, 2016). Petitioner and the government further stipulated that without the ACCA enhancement, petitioner had an advisory

Sentencing Guidelines range of 100 to 120 months, reflecting an offense level of 24 and a criminal history category of VI. Id. ¶ 11. Petitioner and the government jointly recommended that the district court resentence him to time served and three years of supervised release. Id. ¶ 13.

The district court granted petitioner's motion and vacated his sentence. D. Ct. Doc. 96 (Aug. 18, 2016). But the court declined to adopt the parties' recommendation that petitioner receive a time-served sentence and instead ordered a new sentencing hearing. Id. at 2 n.2.

4. The Probation Office prepared a revised presentence investigation report, calculating the same Guidelines range stipulated by petitioner and the government: 100 to 120 months, reflecting an offense level of 24 and a criminal history category of VI. D. Ct. Doc. 101, at 1-2 (Sept. 7, 2016).

The Probation Office's calculations reflected the application of Sentencing Guidelines § 2K2.1(a)(4)(A), which establishes a base offense level of 20 if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." As relevant here, a "crime of violence" includes any felony offense under state or federal law that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another," or "(2) is * * * aggravated assault."

Sentencing Guidelines § 4B1.2(a) (2016). The Probation Office determined that petitioner's prior Florida conviction for aggravated assault with a weapon triggered Section 2K2.1(a)(4)(A). D. Ct. Doc. 101, at 1 (Sept. 7, 2016); see PSR ¶ 39.

At sentencing, and without objection from petitioner, the district court adopted the Guidelines range calculated by the Probation Office. Sent. Tr. 3-4. Consulting the factors under 18 U.S.C. 3553(a), the court noted petitioner's "troublesome" criminal history; his violent interaction with law enforcement officers in this case, which fit "a pattern * * * repeated throughout his presentence report"; and "his history with anger management" and "substance abuse." Sent. Tr. 18-19. The court sentenced petitioner to 120 months of imprisonment. Id. at. 24.

5. The court of appeals affirmed in an unpublished per curiam opinion, rejecting petitioner's contention that his Florida aggravated-assault conviction was not a "crime of violence" under Sentencing Guidelines § 4B1.2(a). Pet. App. 1-2. The court followed its decision in Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328 (11th Cir.), cert. denied, 133 S. Ct. 2873 (2013), abrogated on other grounds, United States v. Hill, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015), which held that a conviction under Florida's aggravated-assault statute "will always include as an element the threatened use of physical force against the person of another" for purposes of the ACCA's definition of "violent felony."

Pet. App. 1 (quoting Turner, 709 F.3d at 1338) (alteration omitted). The court stated that Turner's holding "applies" to the "elements clause" in Sentencing Guidelines § 4B1.2(a)(1), which similarly defines a "crime of violence" to include a prior conviction for a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Ibid.

The court of appeals rejected petitioner's contention that Turner had been abrogated by this Court's decisions in Mathis v. United States, 136 S. Ct. 2243 (2016), and Descamps v. United States, 570 U.S. 254 (2013). Pet. App. 1. The court noted that it had recently confirmed that "Turner remains binding precedent." Id. at 2 (citing United States v. Golden, 854 F.3d 1256, 1256-1257 (11th Cir.), cert. denied, 138 S. Ct. 197 (2017)).

ARGUMENT

Petitioner contends (Pet. 7-16) that, by adhering to the rule that a three-judge panel generally may not overrule circuit precedent, the court of appeals violated the Due Process Clause of the Fifth Amendment and deprived him of his statutory right to appeal his sentence. Those contentions lack merit and do not implicate any circuit conflict warranting this Court's intervention. This Court recently denied a petition for a writ of certiorari raising a similar question. Orozco-Madrigal v. United States, No. 17-6802 (Feb. 20, 2018). The same result is warranted

here. Indeed, even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it for several reasons. The petition for a writ of certiorari should be denied.

1. The Eleventh Circuit, like every other court of appeals, generally requires three-judge panels to follow prior published decisions by other panels. See, e.g., United States v. Archer, 531 F.3d 1347, 1352 (2008) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc."); see also 13 Charles Alan Wright et al., Federal Practice and Procedure § 3506, at 37 (3d ed. 2008). That rule of horizontal stare decisis ensures the stability and predictability of circuit law and avoids the disruption and inefficiency that would result if panels were required or permitted to consider afresh every legal question presented in each appeal.

Petitioner asserts (Pet. 14-16) that the panel violated the Due Process Clause of the Fifth Amendment and deprived him of his right to appeal his sentence under 18 U.S.C. 3742 by concluding that it was bound to adhere to the Eleventh Circuit's decision in Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, cert. denied, 133 S. Ct. 2873 (2013), abrogated on other grounds, United States v. Hill, 799 F.3d 1318, 1321 n.1 (11th Cir. 2015). According to petitioner (Pet. 15), principles of due process and Section 3742

entitled him to "a meaningful appeal," which he appears to define as an appeal in which the panel considered his arguments free from the constraints of circuit precedent -- or, at minimum, free from the constraints of circuit precedent that did not address the specific arguments that petitioner wished to advance.

Petitioner's contention lacks merit. This Court has held that, in some circumstances, it violates the Due Process Clause to treat a judgment in earlier litigation as binding on nonparties as a matter of claim or issue preclusion. See Taylor v. Sturgell, 553 U.S. 880, 896-898 (2008). But in so doing, the Court has carefully distinguished the application of those preclusion doctrines (which may raise due process concerns) from the application of ordinary principles of "stare decisis" (which does not). Id. at 903; see South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-168 (1999). So long as a defendant follows the proper procedures, Section 3742 gives him the right to appeal his sentence and have the court of appeals consider any claim that his sentence is inconsistent with applicable law. But under well-established principles of stare decisis, the applicable law for district courts and three-judge panels includes circuit precedent. And just as a court of appeals does not violate due process by adhering to a decision of this Court, a district court or a three-judge panel does not violate due process by adhering to circuit precedent. A defendant who believes that the governing precedent

was wrongly decided is free to challenge it before the en banc court of appeals or this Court.

2. Petitioner contends (Pet. 9-14) that the Eleventh Circuit's decision implicates two distinct circuit conflicts. But petitioner exaggerates the extent to which circuit practices diverge. And petitioner does not identify the existence of any conflict on the question presented, because he does not cite any decision, by any court, adopting his view that either the Due Process Clause or Section 3742 compels a more flexible approach to circuit precedent. Instead, any divergence in circuit practice simply reflects differing allocations of authority between three-judge panels and the en banc court. Differing approaches to such a matter of internal circuit procedure do not warrant this Court's review.

a. Petitioner first notes (Pet. 7) that that the Eleventh Circuit has held that a three-judge panel is bound to follow a published decision of a prior panel even if that decision "overlooked Supreme Court precedent." United States v. Fritts, 841 F.3d 937, 942 (2016), cert. denied, 137 S. Ct. 2264 (2017). Petitioner argues (Pet. 9-10) that other circuits follow a different rule. Petitioner is correct that panels of the Fifth, Sixth, and Federal Circuits have concluded they may reject circuit precedent "in the unusual situation where binding circuit precedent overlooked earlier Supreme Court authority." Northeast

Ohio Coal. for the Homeless v. Husted, 831 F.3d 686, 720 (6th Cir. 2016); see Atlantic Thermoplastics Co. v. Faytex Corp., 970 F.2d 834, 838 n.2 (Fed. Cir. 1992); Wilson v. Taylor, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981). But petitioner errs in asserting (Pet. 9-10) that the First Circuit follows the same rule. Instead, the decision he cites concluded that the relevant portion of the prior panel's decision was "dicta," and thus did not qualify as circuit precedent at all. United States v. Starks, 861 F.3d 306, 323 (1st Cir. 2017).

In any event, it is far from clear that the court of appeals decision in this case implicates any disagreement about the binding effect of circuit precedent that overlooked a relevant decision of this Court. The panel described petitioner's argument to be "that Turner has been undermined to the point of abrogation" by subsequent decisions -- not that Turner wrongly overlooked existing authority from this Court at the time it was decided. Pet. App. 1; see p. 16, infra.

b. Petitioner also asserts (Pet. 10-13) that the courts of appeals apply different rules governing the circumstances in which a three-judge panel may depart from circuit precedent based on an intervening decision of this Court. But although the courts of appeals have sometimes used different verbal formulations, petitioner has not shown that those formulations differ in substance.

The Eleventh Circuit has stated that a three-judge panel is “required to depart from [circuit precedent] if an intervening Supreme Court decision actually overrule[s] or conflict[s] with it.” In re Provenzano, 215 F.3d 1233, 1235, cert. denied, 530 U.S. 1256 (2000). The court has used different formulations to describe the required conflict. For example, it has stated that the intervening decision of this Court must be “clearly on point,” Garrett v. University of Ala. at Birmingham Bd. of Tr., 344 F.3d 1288, 1292 (2003), but it has also declined to apply circuit precedent because one of this Court’s decisions had “cast[] doubt on [its] continued viability.” Nicholson v. Shafe, 558 F.3d 1266, 1274 (2009).

Petitioner asserts that other courts of appeals have adopted more flexible standards, but does not cite any decision recognizing a disagreement on this question. And most of the decisions petitioner cites employ similar formulations, asking whether intervening authority from this Court conflicts with, undermines, invalidates, or is irreconcilable with circuit precedent.¹ Those

¹ See In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 155 (2d Cir. 2015) (“conflict, incompatibility, or ‘inconsistency’”) (brackets and citation omitted), cert. granted, No. 16-499 (argued Oct. 11, 2017); Union of Needletrades, Indus., & Textile Employees v. INS, 336 F.3d 200, 210 (2d Cir. 2003) (“casts doubt on”); Wojchowski v. Danes, 498 F.3d 99, 106 (2d Cir. 2007) (same); United States v. Winston, 850 F.3d 677, 863 (4th Cir. 2017) (“clearly undermined”) (citation omitted); United States v. Elbe, 774 F.3d 885, 891 (6th Cir. 2014) (“inconsistent”) (citation omitted), cert. denied, 135 S. Ct. 1573 (2015); United

formulations do not meaningfully differ from the Eleventh Circuit's standard, and petitioner provides no reason to think that they yield substantively different results.

Petitioner also observes (Pet. 11) that the First Circuit authorizes three-judge panels to depart from circuit precedent in "those relatively rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." United States v. Pires, 642 F.3d 1, 9 (1st Cir. 2011) (citation omitted); see United States v. Guzman, 419 F.3d 27, 31 (1st Cir. 2005) (characterizing this exception as "hen's-teeth rare"), cert. denied, 546 U.S. 1200 (2006). But before a three-judge panel invokes that exception, it must circulate a copy of the proposed opinion to all of the court's active judges, who can object to the disposition. See, e.g., Crowe v. Bolduc, 365 F.3d 86, 89 n.1 (1st Cir. 2004); Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124 n.4 (1st Cir. 1992). As petitioner observes (Pet. 11), the Second Circuit has a similar process. See McCullough v.

States v. Anderson, 771 F.3d 1064, 1067 (8th Cir. 2014) ("cast into doubt"), cert. denied, 135 S. Ct. 1575 (2015); United States v. Williams, 537 F.3d 969, 975 (8th Cir. 2008) (same); Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) ("clearly irreconcilable"); United States v. Brooks, 751 F.3d 1204, 1209 (10th Cir. 2014) ("contradicts or invalidates") (emphasis omitted); Troy v. Samson Mfg. Corp., 758 F.3d 1322, 1326 (Fed. Cir. 2014) ("clearly irreconcilable") (citation omitted).

World Wrestling Entmt., Inc., 838 F.3d 201, 210 & n.2 (2016). Decisions employing such informal en banc procedures are not relevant here because they require the involvement of the full court of appeals. The Eleventh Circuit rule that petitioner challenges, in contrast, addresses the circumstances under which a three-judge panel may depart from circuit precedent without the full court's participation.

c. Even if petitioner were correct about the extent to which the courts of appeals have adopted different practices governing the circumstances under which a three-judge panel may depart from circuit precedent, this Court's intervention would not be required. If such differences reflected a disagreement among the circuits on the proper interpretation of a provision of the Constitution, a federal statute, or one of the Federal Rules of Appellate Procedure, then this Court's review might be warranted in an appropriate case. See Sup. Ct. R. 10; cf. Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326, 327 (1941) (resolving a circuit conflict over the circuit courts' statutory authority to sit en banc). But petitioner does not contend that the asserted differences in circuit practice at issue here are based on any disagreement about such a governing question of law. Instead, those differences appear to reflect only the circuits' differing judgments about the appropriate allocation of authority between three-judge panels and the en banc court.

That question about the allocation of authority within a court of appeals does not require a uniform answer in all circuits. To the contrary, as this Court has recognized, the “courts of appeals have significant authority to fashion rules to govern their own procedures.” Cardinal Chem. Co. v. Morton Int’l, Inc., 508 U.S. 83, 99 (1993). Under Federal Rule of Appellate Procedure 47, the courts of appeals may adopt differing local rules and internal operating procedures so long as those rules and procedures are consistent with applicable federal law, and “may regulate practice in a particular case in any manner consistent with federal law, [the Federal Rules of Appellate Procedure], and local rules of the circuit.” Fed. R. App. P. 47(b). Courts of appeals have exercised that authority to establish -- by local rule, internal operating procedure, or judicial decision -- somewhat different practices for en banc review. For example, as noted earlier, some circuits have developed so-called “informal en banc” procedures that allow a three-judge panel to “circulate[] all or part of an opinion to the full court with an explanation that the opinion takes an action that would ordinarily require the court to convene en banc.”² Similarly, while other circuits provide for en banc review by all

² Amy E. Sloan, The Dog That Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals, 78 Fordham L. Rev. 713, 725 (2009); see *id.* at 726-738 (explaining that the Third, Ninth, Eleventh, and Federal Circuits do not have an informal en banc procedure and that the remaining circuits differ in the frequency and circumstances of its use).

active judges, the Ninth Circuit's rules allow for review by a limited en banc panel of eleven judges. 9th Cir. R. 35-3. Petitioner does not dispute that courts of appeals may permissibly make such differing judgments as a general matter, and he identifies no sound reason why they may not also make different judgments about the circumstances under which en banc review is required to revisit circuit precedent.

3. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it for at least three reasons.

First, petitioner did not raise his due-process and right-to-appeal arguments below. He conceded before the panel that "binding Eleventh Circuit precedent" foreclosed his argument, Pet. C.A. Reply Br. 1, and he did not contend that the Eleventh Circuit's rule governing circuit precedent violated his rights. Petitioner also did not seek to challenge that rule by filing a petition for rehearing en banc. The court of appeals thus had no opportunity to address petitioner's current contentions that the court's rule violates due process and deprives defendants of their right to appeal.

This Court is "a court of review, not of first view." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). The Court's "traditional rule" thus "precludes a grant of certiorari" where, as here, "the question presented was not pressed or passed upon

below.’” United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner identifies no sound reason to depart from that rule in this case. And it would be particularly unusual for this Court to take up the question presented in this case, because petitioner has not identified any decision, by any court, considering arguments he now advances.

Second, this case does not cleanly present the question on which petitioner contends the circuits are divided -- whether and under what circumstances a panel may depart from circuit precedent based on an overlooked or intervening decision of this Court. Petitioner has argued (e.g., Pet. 5-6) that the Eleventh Circuit’s decision in Turner is inconsistent with the general principles reflected in a variety of this Court’s decisions applying the categorical approach. But the critical premise of his argument is the contention (Pet. 5) that Turner overlooked “state law” interpreting the mens rea requirement for the Florida offense of aggravated assault. Cf. United States v. Golden, 854 F.3d 1256, 1258 (11th Cir. 2017) (J. Pryor, J., concurring in the result) (arguing that Turner “assumed based on the wording of the Florida statute that the offense of aggravated assault necessarily involves an intentional act,” when “Florida caselaw” shows that “the State may secure a conviction * * * by offering proof of less than intentional conduct, including recklessness”).

Third, petitioner would not be entitled to relief even if he prevailed on the question presented. Petitioner failed to object to the district court's calculation of his Guidelines range, including its decision to classify his Florida conviction for aggravated assault as a "crime of violence" under Guidelines § 4B1.2(a). Sent. Tr. 3-4. Petitioner therefore recognized on appeal that his underlying claim was reviewable only for "plain error." Pet. C.A. Br. 7; Pet. C.A. Reply Br. 1; see Fed. R. Crim. P. 52(b). He did not argue that the district court's asserted error was "clear or obvious," Puckett v. United States, 556 U.S. 129, 134 (2009). Accordingly, even if petitioner were correct that panels of the Eleventh Circuit should have greater freedom to revisit circuit precedent, the plain-error posture still would have made this case an unsuitable vehicle for a panel to reconsider Turner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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