IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12893-J

IN RE: JOSE HERNANDEZ-MIRANDA,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before MARCUS, MARTIN, and JULIE CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Jose Hernandez-Miranda has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

BACKGROUND

Hernandez-Miranda seeks to file a second or successive § 2255 motion. Following a trial and conviction by jury, he was sentenced in 2003 to several terms of life imprisonment based on his murder of two victims targeted by a drug smuggling ring operating in Sebring, Florida: the Brown Boys. [PSR at ¶¶ 13–21] According to the description of the offense contained in the Presentence Investigative Report, Hernandez-Miranda, along with Cesar Lynch-May, were hired by a member of the smuggling ring to kill two brothers—Jesus and Omar Sanchez—who were runners for a methamphetamine supplier.

On the day of the murder, February 11, 1998, this member of the ring lured the Sanchez brothers to his home, after which Hernandez-Miranda and Lynch entered the home, shooting and killing the brothers. Hernandez-Miranda, Lynch, and other members of the ring buried the bodies in an orange grove, where the bodies were later found by authorities and discovered to have suffered multiple gunshot wounds. [*Id.* at ¶¶ 15, 19]

Subsequently, Hernandez-Miranda was named as a defendant in five counts of an eight-count superseding indictment. Two of the counts (Counts 6 and 8) charged him with a violation of 18 U.S.C. § 924(j)(1). That section provides that whoever, in the course of a violation of § 924(c), "causes the death of a person through the use of a firearm, shall—(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment, or any term of years or for life…." 18 U.S.C. § 924(j)(1). Section 924(c)(1)(A) proscribes the use or carrying of a firearm during or in relation to a crime of violence or a drug trafficking offense.

Count 6 charged that on February 11, 1998, Hernandez-Miranda, along with Lynch and the person who hired him (Louis Clemente) carried firearms during and in relation to a drug trafficking crime and, in the course of that conduct, "caused the death of Jesus Sanchez through the use of a firearm, with such death being murder as

defined in Title 18, United States Code, Section 1111," all of the above being in violation of § 924(j)(1).

Count 8 charged exactly the same conduct occurring on February 11, 1998, except that it refers to the death of Omar Sanchez. Hernandez-Miranda was convicted of both Counts 6 and 8.

He was also convicted of Counts 5 and 7, which charged him with a violation of 18 U.S.C. § 1959(a)(1). Section 1959(a)(1) proscribes "violent crimes in aid of racketeering activity." Paraphrased in pertinent part, this section provides that whoever murders another person, or attempts or conspires to do so, for the purpose of receiving money in payment for that act from an enterprise engaged in racketeering activity or for the purpose of gaining entrance to, or maintaining or increasing his position in, the enterprise, is guilty of § 1959(a)(1).

Count 5 charges that on February 11, 1998, Hernandez-Miranda, Lynch, and Clemente did, with premeditation, murder Jesus Sanchez, and that they did so in consideration for the promise to pay something of pecuniary value from the "Brown Boys" enterprise and for the purpose of maintaining and increasing a position in that racketeering enterprise. Count 7 charges exactly the same thing, except that it charges the murder of Omar Sanchez on February 11, 1998. Again, Hernandez-Miranda was convicted of both of these counts.

Hernandez-Miranda was also convicted of Count 1, which charged that from April 1995 through November 1998, the above three defendants, along with Hector Duval, conspired to possess with the intent to distribute methamphetamine and marijuana. Paragraphs 6–7 of the "Ways and Means" section alleged that the murder of two individuals to whom monies were owed for controlled substances was a "part" of the conspiracy, as was the subsequent secreting and burying of the body of the victims in an orange grove. Hernandez-Miranda was likewise convicted of this count of the indictment.

The district sentenced Hernandez-Miranda to a life sentence as to each of the five counts on which he was convicted. As to Counts 1, 5, and 7 (the drug conspiracy count and the two counts charging the commission of violent crimes in aid of racketeering activity), the court ran the life sentences concurrently with each other. As to Counts 6 and 8 (the two § 924(j) counts charging use of a firearm during a drug trafficking offense to commit murder), the court imposed each of those two life sentences to run consecutively to each other and to the other counts, as required by statute.

As to how the district court arrived at a life sentence for each of these counts, the two § 1959 counts—charging the commission of violent crimes on February 11, 1998 in aid of racketeering activity—carried a mandatory term of life imprisonment.

As to the § 924(j) convictions for carrying a firearm during a murder committed in connection with a drug trafficking offense, the Sentencing Guidelines called for an offense level of 43 for those convictions, as well as for the conviction on Count 1 (drug trafficking conspiracy). Ultimately, Hernandez-Miranda's final offense level was a 47. The Guidelines chart, however, tops out at an offense level 43, which requires a life sentence for such an offense level. Accordingly, the district court imposed a life sentence on each of those counts.

Finally, as with all sentences imposed after the effective date of the Sentencing Reform Act, these life sentences are not subject to parole.

DISCUSSION

Hernandez-Miranda contends that his sentences of life imprisonment violate the Eighth Amendment's prohibition on "cruel and unusual punishment." In identifying the new rule of constitutional law on which he relies to makes this claim in a second or successive § 2255 motion, he cites *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). Addressing the mandatory, non-parolable life sentence of a fourteen-year old who had committed murder, the Supreme Court in *Miller* held that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S. Ct. at 2469. In

Montgomery, the Supreme Court held that its decision in *Miller* announced a new substantive constitutional rule that was retroactive on collateral review.[1] *Montgomery*, 136 S. Ct. at 736.

Hernandez-Miranda asserts in his application that because the indictment charges conduct that occurred when he was a minor and because the federal sentencing system does not permit parole for a life sentence, *Miller* and *Montgomery* require that his multiple life sentences be vacated and he be re-sentenced. The problem with his argument—and it is a big problem—is that Hernandez-Miranda was not a minor when he committed the conduct giving rise to his convictions. He was an adult. That being so, neither *Miller* nor *Montgomery* provides a basis for vacating his sentences.

Specifically, Hernandez-Miranda was born on March 19, 1978, meaning that he turned eighteen on March 19, 1996. Yet, as set out above, Counts 6 and 8 charged him with committing the criminal conduct alleged in that count on February 11, 1998, when he was just a month shy of his twentieth birthday. Again, those counts charged use of a firearm to commit murder during a drug-trafficking offense,

[1] *Montgomery* also elaborated on the procedural and substantive ramifications of its decision. It noted that *Miller* did not outright ban the imposition of a life sentence on a juvenile who has committed a homicide. Rather, it required only that the sentencing court "follow a certain process—considering an offender's youth and attendant characteristics" before imposing that penalty. *Id.* at 734 (internal citation omitted). As for those courts to whom previously-imposed life sentences will be remanded based on *Miller*'s retroactivity, such a court may remedy a *Miller* violation by considering whether the offender should be entitled to parole. *Id.* at 736.

in violation of § 924(j). Because he was not a minor when he used a firearm to commit a premeditated murder, *Miller* offers him no help in vacating the consecutive life sentences imposed for those offenses.

Similarly, Counts 5 and 7 (the § 1959 counts) charged that on February 11, 1998, Hernandez-Miranda and his co-defendants premeditatedly murdered an individual and did so in consideration of a monetary payment by a racketeering enterprise, and for the purpose of maintaining or increasing status in the enterprise. Again, Hernandez-Miranda was almost twenty-years old on the date of the commission of this murder charged in the indictment, and so was not a minor. For the same reason then, *Miller* does not apply.

As to Count 1, the drug trafficking conspiracy for which Hernandez-Miranda received a concurrent life sentence, it is true that this count charged that the conspiracy began by April 1995 and ended in November 1998. Accordingly, during the eleven-month period of time from April 1995 to March 19, 1996, when Hernandez-Miranda turned eighteen, Hernandez-Miranda was a juvenile. For the remaining thirty-two month period—from March 1996 to the end of the conspiracy in November 1998—Hernandez-Miranda was, however, an adult. Thus, while in theory it is possible[2] that Hernandez-Miranda was a member of the drug conspiracy

[2] It is worth noting, however, that nothing in the record before us is consistent with such a theory.

at a time when he was a juvenile, there can be no doubt he was an adult in 1998 when he committed the two murders he was convicted of committing in furtherance of that conspiracy. Any analysis of the question whether *Miller* impacts Hernandez-Miranda's life sentence on the drug conspiracy count would therefore focus on the question whether a defendant who was clearly an adult when he committed an act in furtherance of the conspiracy can have that act—and his status as an adult conspirator—wiped clean by the fact that he may have also been a member of the conspiracy when he was a juvenile. Common sense, not to mention analogous case authority, would seem to answer "no" to that suggestion. *See United States v. Peeples*, 23 F.3d 370, 373 (11th Cir. 1994) (for purposes of determining whether the federal sentencing guidelines applied to a defendant charged in a conspiracy that began before the effective date of the Guidelines, but

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In describing Hernandez-Miranda's conduct, the PSR mentions no involvement by Hernandez-Miranda in the underlying conspiracy and criminal enterprise before February 1998, when, as an adult, he murdered two individuals on behalf of the enterprise. Moreover, in his first § 2255 motion challenging his involvement in the underlying drug conspiracy and racketeering enterprise, Hernandez-Miranda affirmatively asserts that he was never alleged to have had any involvement in the drug conspiracy from 1996–98, nor did he have any involvement, and that he never resided in any of the cities in which the drug traffickers distributed their drugs. See Br., Case No. 8:05-cv-1121 (M.D.Fla.), Doc. No. 2 at 15 ("At no time during the trial proceeding did any witness testify to the petitioner having any involvement with the possession and distribution of drugs….Additionally, no witness testified to the petitioner being involved in the present case for any purpose outside of allegedly being involved in the murder of the Sanchez Brothers. See Trial Testimony of Shawn Creamer, Shawn Hendricks, and Hector Duran. (emphasis added) (trial transcript citations omitted). See also *id.* at 20 ("the petitioner was never alleged to have been involved with any drug dealing associated with the Clementes and others.") Hernandez-Miranda doubles down on this assertion of his non-involvement in any of the charged drug activities occurring between 1996 and 1998 in his own sworn affidavit. (*Id.* at Doc. 2-2 at ¶¶ 2–4).

ended after that date, the ending date of the indictment is not dispositive, but instead one should determine what was actually proved as to the particular individual). Here, what was proved as to Hernandez-Miranda was that at a time when he was an adult, he murdered two people, in furtherance of the conspiracy.

Moreover, given our well-settled precedent on the concurrent sentence doctrine, we need not decide here whether Hernandez-Miranda has made a *prima facie* case that *Miller* potentially affects his life sentence on this sole drug conspiracy charge. Specifically, we have held under the "concurrent sentence doctrine" that, if a defendant has concurrent sentences on multiple counts of conviction and one count is found to be invalid, an appellate court need not consider the validity of the other counts unless the defendant would suffer "adverse collateral consequences from the unreviewed conviction." *United States v. Bradley*, 644 F.3d 1213, 1293 (11th Cir. 2011) (quotations omitted) (decided on direct appeal). Additionally, we have held, in the § 2255(e) savings-clause context, that a defendant cannot successfully challenge his detention under the savings clause where his erroneous ACCA sentence exceeds the statutory maximum on only one count of conviction because "if a prisoner is serving multiple sentences, his detention may be legal even if one of his sentences is not." *Brown v. Warden, FCC Coleman-Low*, 817 F.3d 1278, 1284-85 (11th Cir. 2016). In *United States v. Pacchioli*, a direct appeal case, we

held, in the alternative, that any error in sentencing as a result of multiplicitous counts was harmless where the arguably multiplicitous counts resulted in concurrent sentences. 718 F.3d 1294, 1308 (11th Cir. 2013). Finally, the former Fifth Circuit affirmed the denial of an initial § 2255 motion to vacate based on the concurrent sentence doctrine where the defendant attacked the validity of only one judgment of conviction, for which he was sentenced concurrently with his sentences for other violations. *Streator v. United States*, 431 F.2d 567, 568 (5th Cir. 1970). *See also In re Williams*, Nos. 16-13013, 16-13232, manuscript op. at 9-11 (11th Cir. June 24, 2016) (rejecting an application to file a second and successive § 2255 motion based on the Supreme Court's decision in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015) based on the concurrent sentence doctrine).

Applying the concurrent sentence doctrine here, Hernandez-Miranda received four life sentences on the § 924(j) and § 1959 counts: none of which are subject to challenge under *Miller*. Thus, even stretching to assume that Hernandez-Miranda has made a *prima facie* case that he could succeed on a *Miller* challenge to the drug conspiracy count, any such success there would not affect or lessen the life sentences that he is still required to serve on four other counts that are not conceivably affected by *Miller*. Accordingly, for all the above reasons, we conclude that

Hernandez-Miranda's application to file a second or successive § 2255 motion should be **DENIED.**

MARTIN, Circuit Judge, dissenting:

Miller v. Alabama, __ U.S. __, 122 S. Ct. 2455 (2012), held that the Eighth Amendment prohibits sentencing a juvenile to "life in prison without parole absent consideration of the juvenile's special circumstances." Montgomery v. Louisiana, __ U.S. __, __, 136 S. Ct. 718, 725 (2016). Jose Hernandez-Miranda was 17 and thus a juvenile when he joined a conspiracy for which he was later sentenced to life without parole. The majority "assume[s]" that this sentence may be cruel and unusual in violation of the Eighth Amendment. But it rules that this Eighth Amendment violation would be harmless on account of sentences Mr. Hernandez-Miranda received for other crimes. The majority says for that reason that Mr. Hernandez-Miranda can't even file a § 2255 motion to raise his Miller claim. This court has never before held that a Miller violation can be harmless in this way. As far as I am aware, neither has any other court. Nor am I aware of jurisprudence providing that *any* cruel and unusual punishment can be harmless. In addition to all this, the majority decides this important and difficult question based solely on a standard application form that Mr. Hernandez-Miranda filled out pro se. I respectfully dissent.

I.

Until last Friday afternoon (and today is Tuesday) this court never barred a prisoner from filing a § 2255 motion based on the idea that the prisoner's sentences for other crimes made the constitutional defect in one sentence harmless. See In re Williams, Nos. 16-13013, 16-13232, 2016 WL 3460899, at *5 (11th Cir. June 24, 2016) (recognizing that this court has never before "applied harmless error or the concurrent sentence doctrine in the context of an application to file a second or successive § 2255 motion"). Both Williams and Mr. Hernandez-Miranda's case were decided just weeks after they were filed, without any input or advocacy from lawyers and without the deliberation that goes into a normal appeal. Such complex questions of law should not be decided in this way. All Congress authorized us to do with applications for permission to file § 2255 motions is "certif[y]" if the applicant made "a prima facie showing" that his motion will "contain . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. §§ 2244(b)(3)(C), 2255(h). The Supreme Court has made the rule announced in Miller retroactive to cases on collateral review. See Montgomery, 136 S. Ct. at 736. The majority assumes that Mr. Hernandez-Miranda's sentence violates Miller. I would end the inquiry there and allow Mr. Hernandez-Miranda to file his motion.

Instead, the majority looks to the so-called "concurrent sentence doctrine," which "provides that, if a defendant is given concurrent sentences on several counts and the conviction on one count is found to be valid, an appellate court need not consider the validity of the convictions on the other counts." United States v. Fuentes–Jimenez, 750 F.2d 1495, 1497 (11th Cir.1985) (per curiam). Our court's precedent has long been clear that "the merits" of the § 2255 motion a prisoner seeks to file "are not relevant to whether [he] can obtain permission to bring a second or successive § 2255 motion to vacate." In re Joshua, 224 F.3d 1281, 1282 n.2 (11th Cir. 2000) (per curiam).[1] In the short time I've had to reflect on this case, I can't think of a more merits based determination than whether the constitutional defect in a prison sentence was harmless due to the effect of other, entirely distinct sentences.

Even if we were allowed to decide at this early stage whether the "concurrent sentence doctrine" applies here, I doubt it does. We have not seen any briefing on this issue nor had the opportunity to deliberate about it. However,

[1] Other courts agree that permission to file a second or successive § 2255 petition requires no inquiry into the merits of a proposed claim. See, e.g., Ochoa v. Sirmons, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam) ("This statutory mandate does not direct the appellate court to engage in a preliminary merits assessment. Rather, it focuses our inquiry solely on the conditions specified in § 2244(b) that justify raising a new habeas claim."); Goldblum v. Klem, 510 F.3d 204, 219 n.9 (3d Cir. 2007) ("'[S]ufficient showing of possible merit' in this context does not refer to the merits of the claims asserted in the petition." (quoting 28 U.S.C. § 2244(b)(2)) (alteration in original)). So do the leading practice manuals. See, e.g., Means, Federal Habeas Manual § 11:85, at 1307 (2015 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)); Hertz & Liebman, 2 Federal Habeas Corpus Practice & Procedure § 28.3[d], at 1717 (7th ed. 2015) (explaining that "lack of merit" is "irrelevant" at the § 2244(b) authorization stage).

our precedent has long been clear that the "concurrent sentence doctrine" "is not a jurisdictional bar to review, but a tool of judicial convenience, exercised at the court's discretion." Fuentes-Jimenez, 750 F.2d at 1497. The Supreme Court has also suggested that the doctrine's only "continuing validity" is as a "rule of judicial convenience." Benton v. Maryland, 395 U.S. 784, 791, 89 S. Ct. 2056, 2061 (1969). Benton also observed that no precedent gave a "satisfactory explanation for the concurrent sentence doctrine." Id. at 790, 89 S. Ct. at 2060. And it warned that "whatever the underlying justifications for the doctrine, it seems clear to us that it cannot be taken to state a jurisdictional rule." Id. at 789–90, 89 S. Ct. at 2060. Most courts responded to Benton by either eliminating the "concurrent sentence doctrine" altogether or narrowing its scope.[2] And though we are among the few courts that still apply the doctrine, we have always done so solely "a tool of judicial convenience." Fuentes-Jimenez, 750 F.2d at 1497. Until today, we have never used this tool of judicial convenience to ignore one of the Eighth Amendment's categorical bans on cruel and unusual penalties. Judicial

[2] See Griffin, 1 Federal Criminal Appeals § 3:56 ("It is fair to say that in most circuits, except perhaps for the Fifth, application of the doctrine has always been the exception rather than the rule. Indeed, the Sixth, Ninth, and Tenth Circuits have explicitly rejected the doctrine. And while the Fifth, District of Columbia, and Seventh Circuits do rely on the doctrine in some cases, they avoid any possibility of collateral consequences resulting from nonreview by summarily vacating the judgments as to which concurrent sentences have been imposed, with remand to the district court for resentence upon them, rather than affirming them without review." (footnote omitted)). Benton also "expressed concern about the due process implications of applying the doctrine." Id. Certainly those due process concerns are especially acute here, where the doctrine is applied without giving the prisoner any opportunity to explain his claim.

convenience should not bar Mr. Hernandez-Miranda from even filing his Eighth Amendment claim.[3]

Beyond this, our precedent is also clear that the "concurrent sentence doctrine" does "not apply" in cases where "the defendant would suffer 'adverse collateral consequences from the unreviewed conviction.'" Fuentes–Jimenez, 750 F.2d at 1497. I recognize that Mr. Hernandez-Miranda's pro se application form does not plead the "adverse collateral consequences" of his sentence, other than to say his sentence is cruel and unusual. Even so, I don't think it proper to assume at the "prima facie showing" stage that he will never be able to prove such consequences. As a general matter, the order penned by the majority overlooks "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." Benton, 395 U.S. at 790, 89 S. Ct. at 2060 (quoting Sibron v. New York, 392 U.S. 40, 55, 88 S. Ct. 1889, 1899 (1968)).

Also, the "adverse consequences" of a penalty that violates the Eighth Amendment seem far more than "collateral." A cruel and unusual sentence is an affront to civilization. It violates "the evolving standards of decency that mark the progress of a maturing society." Miller, 132 S. Ct. at 2478 (quotation omitted). For this reason, the United States may not want to oppose Mr.

[3] Because Mr. Hernandez-Miranda is a federal rather than state prisoner, this is his only forum for enforcing his Eighth Amendment right. No comity interest applies here. No other court has heard Hernandez-Miranda's Miller claim. The majority order likely means no court will.

Hernandez-Miranda's Eighth Amendment claim. But we can't know the government's at this permission-to-file stage, when "the government may not even know about Mr. [Hernandez-Miranda's] application." In re Jackson, No. 16-13536, 2016 WL 3457659, at *3 (11th Cir. June 24, 2016).[4] There may be less abstract "adverse consequences" here too. As another court observed over sixty years ago, "it is well understood that a multiplicity of sentences impairs a prisoner's opportunities for pardon." Hibdon v. United States, 204 F.2d 834, 839 (6th Cir. 1953). Of course, an adversarial presentation of the issue may show that our order causes Mr. Hernandez-Miranda no adverse consequences at all. But I don't think the court should assume the answer to that question at this gatekeeping stage.

II.

Aside from the theoretical debate about whether and how Mr. Hernandez-Miranda could prove "adverse collateral consequences" here, there are two practical reasons why that question is not relevant at this stage. First, as I mentioned, this court never applied the "concurrent sentence doctrine" to a § 2255 case until a few days ago. That was weeks after Mr. Hernandez-Miranda filed his

[4] In Montgomery, the United States appeared "by special leave of the Court" and asked the Court to hold that Miller applied retroactively. See Montgomery, 136 S. Ct. at 725. Montgomery is the only case I am aware of in which the United States presented oral argument in support of a habeas petitioner before the Supreme Court. I would grant Mr. Hernandez-Miranda's application to give the government an opportunity to tell us its position on a potential Miller violation in this case.

application. This court has not historically punished pro se litigants for failing to anticipate and preempt a doctrine that they never could have known applied to their cases. If this was a normal appeal and a decision like Williams was issued during pendency of the appeal, we might have ordered the litigants to brief whether Williams affected his case. Mr. Hernandez-Miranda has had no such opportunity. For the same reason, I disagree with the majority statement that this case is governed by "our well-settled precedent on the concurrent sentence doctrine." Until a few day ago, our court never held that prisoners can't claim a "sentence was imposed in violation of the Constitution" if the sentence for another crime makes the violation harmless. 28 U.S.C. § 2255(a); see Williams, 2016 WL 3460899, at *5 ("[W]e have not directly applied harmless error or the concurrent sentence doctrine in the context of an application to file a second or successive § 2255 motion.").

I agree with the majority that Brown v. Warden, FCC Coleman-Low, 817 F.3d 1278 (11th Cir. 2016) "held, in the § 2255(e) savings-clause context, that a defendant cannot successfully challenge his detention under the savings clause where his erroneous ACCA sentence exceeds the statutory maximum." But Brown seems irrelevant here. Brown denied a § 2241 petition, not a § 2255 motion. We grant § 2241 petitions only if the prisoner was not otherwise able "to

test the legality of his detention." Bryant v. Warden, FCC Coleman–Medium, 738 F.3d 1253, 1283 (11th Cir. 2013) (quoting 28 U.S.C. § 2255(e)). Mr. Hernandez-Miranda is not testing "the legality of his detention." His motion to vacate his sentence tests the legality of his *sentence*. And § 2255(a) says a federal prisoner "may move to vacate" his sentence based on § 2255 if "the *sentence* was imposed in violation of the Constitution." 28 U.S.C. § 2225(a) (emphasis added). A sentence may be illegal even if the prisoner's detention is otherwise legal. The special requirements for § 2241 petitions do not apply to § 2255 motions. Also, Brown denied a claim that a sentence violated the correct interpretation of a statute. Today's order may be the first case to uphold a cruel and unusual sentence based on the "concurrent sentence doctrine."

The second reason I would not penalize Mr. Hernandez-Miranda for failing to overcome the "concurrent sentence doctrine" is that our court's rules essentially required him to ignore that issue in his pleadings. At this point, "the sole document" we have before us in Mr. Hernandez-Miranda's case is "the standard form that Rule 22-3 of our court's rules require applicants to use when seeking permission to file their § 2255 motion." In re Jackson, No. 16-13536, 2016 WL 3457659, at *5 (11th Cir. June 24, 2016). Nothing in this form, which can be seen at http://goo.gl/E9M1Xp, allowed Mr. Hernandez-Miranda to address the

"concurrent sentence doctrine," or even hinted at a reason why he should. Instead, Mr. Hernandez-Miranda had exactly two lines to "[s]tate concisely every ground on which you now claim that you are being held unlawfully." "The form also warns: 'All questions must be answered concisely in the proper space on the form.' And it says: 'Do not submit separate petitions, motions, briefs, arguments, etc.'" Jackson, 2016 WL 3457659, at *5.

Even if the "concurrent sentence doctrine" does apply to a case like this, I disagree with the majority's application of it here, where it penalizes a pro se litigant for failing to overcome that doctrine at the permission-to-file stage even though: (1) he had no warning that this doctrine applied to his case; (2) our court's rules prevented him from addressing the doctrine; and (3) our precedent is clear that "the merits" of the successive § 2255 motion that a prisoner has asked to file "are not relevant to whether [the prisoner] can obtain permission to bring a second or successive § 2255 motion to vacate." Joshua, 224 F.3d at 1282 n.2.

III.

If this order granted Mr. Hernandez-Miranda's application, the district court could hear from lawyers on both sides and decide in the first instance whether Mr. Hernandez-Miranda's "sentence was imposed in violation of the Constitution," 28 U.S.C. § 2255(a), or whether (as the majority holds) judicial inconvenience makes

the violation too meritless to even file a § 2255 motion. Whatever the district court decided, we would then review the decision on appeal, based on briefing of this particular question. If we made the wrong decision, the Supreme Court could review it. None of this process is possible when we deny permission to file a § 2255 motion. The "denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

The majority denies Mr. Hernandez-Miranda permission to even file a § 2255 motion based on what has been characterized as "a tool of judicial convenience." Fuentes-Jimenez, 750 F.2d at 1497. Federal judges are rarely authorized to make legal decisions that are not subject to review. In the few circumstances for which Congress has given us this authority, we ought to wield it with more caution. I respectfully dissent.